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**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15581**

**In the matter of:**

**TODD NEWMAN,**

**Respondent.**

## RESPONDENT TODD NEWMAN'S PETITION FOR RECONSIDERATION

Upon the accompanying memorandum of points and authorities and papers filed in support hereof, Respondent Todd Newman respectfully petitions the Securities and Exchange Commission for reconsideration in the above-captioned administrative proceeding.

Dated: New York, New York
December 24, 2014

Respectfully submitted,

SHEARMAN & STERLING LLP

By: John A. Nathanson / by A.Z.L.
Stephen Fishbein
[redacted]

*Attorneys for Respondent Todd Newman*

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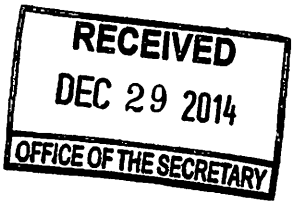


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**In the matter of:**

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**Respondent.**

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# MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR RECONSIDERATION

SHEARMAN & STERLING LLP
Stephen Fishbein
John A. Nathanson
[redacted]

*Attorneys for Respondent Todd Newman*

Dated: December 24, 2014

## PRELIMINARY STATEMENT

Todd Newman hereby petitions the Securities and Exchange Commission (the "Commission") for reconsideration of the industry bar imposed by Chief Administrative Law Judge Brenda P. Murray on March 24, 2014 in this matter. The Division of Enforcement of the Securities and Exchange Commission (the "Division") sought and received the industry bar solely based on Mr. Newman's conviction for insider trading in *United States v. Newman, et al.*, S-12-cr-121 (RJS) (S.D.N.Y.), and a judgment entered in *SEC v. Adondakis, et al.*, 12-cv-0409 (SAS) (S.D.N.Y.), which itself was solely based on Mr. Newman's conviction. Mr. Newman's conviction was vacated in a judgment entered on December 10, 2014 by the Court of Appeals for the Second Circuit. The judgment against Mr. Newman, and the resulting injunction, in the civil matter was vacated on December 23, 2014. As a result, there is no basis for the industry bar, and it should be removed. The Division has agreed that it will not oppose this relief.

## STATEMENT OF FACTS

**Mr. Newman's Criminal Case**

Following a five-week trial, Mr. Newman was convicted on December 17, 2012 of four counts of securities fraud in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, as well as one count of conspiracy to commit securities fraud. These convictions were predicated on Mr. Newman's alleged 2008 insider trading in the securities of Dell, Inc. and NVIDIA Corporation.

Following sentencing, a judgment of conviction was entered against Mr. Newman on May 9, 2013. Mr. Newman appealed his conviction on various grounds. In an opinion and judgment entered on December 10, 2014, the Court of Appeals for the Second Circuit vacated Mr. Newman's conviction and remanded the case to the District Court to dismiss the indictment

with prejudice. (*United States v. Newman*, No. 13-1837-cr (L) (2d Cir. Dec. 10, 2014) (Dkt. No. 262-1) ("Opinion") (attached hereto as Exhibit A).) The Court of Appeals held that the District Court had erred when it failed to instruct the jury that, to sustain an insider trading conviction, the Government must prove that a tippee "knew the [alleged material inside] information was confidential and divulged for personal benefit . . . ." (Opinion at 18.) The Court, proceeding to review the sufficiency of the evidence elicited at trial, found that "the Government's evidence of any personal benefit received by the insiders was insufficient to establish tipper liability from which . . . Newman's purported tippee liability would derive." (Opinion at 20.) The Court further found that, "[e]ven assuming that the scant evidence was sufficient to permit the inference of a personal benefit," the Government had "presented absolutely no testimony or any other evidence that Newman . . . knew that . . . insiders received any benefit in exchange for such disclosures, or even that Newman . . . consciously avoided learning of these facts." (Opinion at 24.)

**The SEC's Civil Injunctive Action Against Mr. Newman**

On September 16, 2013, the Division moved the District Court to enter summary judgment against Mr. Newman in *SEC v. Adondakis, et al.*, 12-cv-0409 (SAS), and to order civil injunctive relief. The Division's motion was based solely on the collateral estoppel effect of Mr. Newman's criminal conviction. (Letter from Daniel R. Marcus, Senior Counsel, United States Securities and Exchange Commission, to Hon. Harold Baer, Jr., United States District Court Judge (Sept. 16, 2013) ("SEC Letter") (attached hereto as Exhibit B).) Mr. Newman agreed not to oppose the Division's motion based solely on Mr. Newman's acknowledgement of the collateral estoppel effect of his criminal conviction. (SEC Letter at 2.) Indeed, the Division in its letter motion wrote, "[t]he parties agree that in the event a defendant's criminal conviction is

overturned on appeal, collateral estoppel would no longer apply as to that defendant and that the defendant could then move the Court to vacate the partial judgment. The SEC would not oppose such a motion." (*Id.*) The Court subsequently entered a judgment on October 4, 2013 against Mr. Newman, permanently enjoining him 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. The judgment specifically sets forth Mr. Newman's agreement not to oppose entry of summary judgment solely on the basis of the collateral estoppel effect of the conviction. (Judgment as to Defendant Todd Newman at 1, *SEC v. Adondakis*, 12-cv-0409 (SAS) (S.D.N.Y. Oct. 4, 2013) (attached hereto as Exhibit C).)

On December 22, 2014, Mr. Newman moved the District Court to vacate the partial summary judgment and, on December 23, 2014, the District Court vacated the partial summary judgment and the resulting injunction against Mr. Newman. (Order, *SEC v. Adondakis*, 12-cv-0409 (SAS) (S.D.N.Y. Dec. 23, 2014) (attached hereto as Exhibit D).)

**The Administrative Proceedings Against Mr. Newman**

On October 21, 2013, the Commission issued an Order Instituting Proceedings ("OIP"), citing Mr. Newman's conviction and the civil injunction. (Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940 and Notice of Hearing, *In the Matter of Todd Newman*, Admin. Pro. No. 3-15581 (Oct. 21, 2013); *see also* Initial Decision at 1, *In the Matter of Todd Newman*, Admin. Pro. No. 3-15581 (ALJ Feb. 10, 2014) ("Initial Decision") (attached hereto as Exhibit E) ("This proceeding is based on both the criminal conviction and the civil injunction.").) On November 6, 2013, Chief ALJ Murray granted the Division's request for leave to file a motion for summary disposition, and waived Mr. Newman's requirement to file an Answer to the OIP. On November 22, 2013, the Division

moved for summary disposition, citing Mr. Newman's conviction. (Memorandum of Points and Authorities in Support of the Division of Enforcement's Motion for Summary Disposition Against Respondent Todd Newman at 1-2, *In the Matter of Todd Newman*, Admin. Pro. No. 3-15581 (Nov. 22, 2013).) On December 13, 2013, Mr. Newman responded to the Division's motion. Mr. Newman acknowledged that he had "agreed not to oppose a permanent bar based solely on his criminal conviction" and "the imposition of a civil injunction resulting from the collateral estoppel effect of that conviction." (Memorandum of Points and Authorities in Response to the Division of Enforcement's Motion for Summary Disposition Against Respondent Todd Newman at 4, *In the Matter of Todd Newman*, Admin. Pro. No. 3-15581 (Dec. 13, 2013).) Mr. Newman suggested, however, that any decision on the summary disposition be postponed until after the Second Circuit had ruled on his then-pending appeal. (*Id.* at 4-5.)

On February 10, 2014, Chief ALJ Murray issued an initial decision granting the Division's motion and ordering a permanent industry bar. (Initial Decision at 5.) In doing so, Chief ALJ Murray wrote that "the focus of this proceeding is Newman's conviction and injunction and their public-interest implications," and found that the conviction "shows egregious, wrongful behavior." (*Id.*) Chief ALJ Murray then cited Mr. Newman's fifty-four month sentence and the imposition of a fine and forfeiture to "buttress the egregiousness of his actions." (*Id.*) In a footnote, Chief ALJ Murray held that "Newman's criminal appeal does not warrant delaying the issuance of an Initial Decision. If the statutory basis for the collateral bars is no longer present, the remedy is to petition the Commission for reconsideration of this action." (*Id.* n.7.) A final decision was issued on March 24, 2014.

## ARGUMENT

Chief ALJ Murray's findings in support of her decision to order a permanent bar against Mr. Newman, other than Mr. Newman's acknowledgment that at the time of the alleged conduct he was a portfolio manager at a registered investment adviser, stemmed solely from Mr. Newman's conviction and the civil injunction that itself resulted solely from that conviction. (*Id.* at 5.) Chief ALJ Murray did not hold an evidentiary hearing or make any independent findings of fact. In her conclusions, Chief ALJ Murray wrote that "Section 203(f) of the Advisers Act permits the Commission to impose sanctions against Newman because: 1) he has been both a) convicted of securities fraud and conspiracy to commit securities fraud, and b) enjoined from violating the securities statutes, within ten years of issuance of the OIP; 2) at the time of his misconduct he was associated with an investment adviser; and 3) . . . it is the public interest to do so." (*Id.* (citing 15 U.S.C. § 80b-3(f)).)

Consistent with Chief ALJ Murray's conclusions, Section 203(f) permits imposition of sanctions only when certain predicates are present. In this case, those predicates were Mr. Newman's conviction and the resulting civil injunction based solely on the collateral estoppel effect of the conviction. Mr. Newman's conviction and civil injunction have now been vacated. As a result, there is no longer any statutory predicate for the bar imposed by Chief ALJ Murray. (Chief ALJ Murray's conclusion that it was in the public interest to bar Mr. Newman was premised on the conviction and resulting sentence.) As Chief ALJ Murray wrote, the remedy for a bar that has been imposed based on a predicate that no longer exists is the instant petition. (*Id.* n.7 (citing *Jon Edelman*, 52 S.E.C. 789, 790 (1996)); *see also* Order Following Prehearing Conference, *In the Matter of Michael S. Steinberg*, Admin Pro. No. 3-15925 (ALJ June 30, 2014) (citing *Jon Edelman*, 52 S.E.C. 789, 790 (1996); *Charles Phillip Elliott*, 50 S.E.C. 1273, 1277

n.17 (1992), *aff'd*, 36 F.3d 86 (11th Cir. 1994); Gary L. Jackson, 48 S.E.C. 435, 438 n.3 (1986)).)

## CONCLUSION

Mr. Newman was permanently barred from the securities industry based on a conviction and civil injunction which have now been vacated. As a result there is no statutory predicate supporting his bar. Mr. Newman therefore is entitled to have the bar removed, and the Division of Enforcement has agreed not to oppose this petition to affect that result.

Moreover, to the extent that the bar that is now in effect will continue to be reflected on Mr. Newman's record with the Commission or the Financial Industry Regulatory Authority ("FINRA"), Mr. Newman hereby petitions the Commission to expunge the fact that a bar was at one time imposed on him. Because there is (and, as the Second Circuit found, was) no basis for Mr. Newman's conviction, there was no basis for the bar in the first instance. Mr. Newman should not have his record tainted by reference to a bar, even if later removed, that should not have been imposed.

Dated: New York, New York
December 24, 2014

Respectfully submitted,

SHEARMAN & STERLING LLP

By: John A. Nathanson / by A.Z.L

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Tel: 212-848-4000

*Attorneys for Respondent Todd Newman*

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



**ADMINISTRATIVE PROCEEDING**
**File No. 3-15581**

| | |
|---|---|
| **In the matter of:** | |
| **TODD NEWMAN,** | |
| **Respondent.** | |

## DECLARATION OF JOHN A. NATHANSON

I, John A. Nathanson, 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 a partner at the firm of Shearman & Sterling LLP in New York, New York. I make this declaration in support of Respondent Todd Newman's Petition for Reconsideration.

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

Exhibit A: Second Circuit opinion filed December 10, 2014 in *United States v. Newman*, No. 13-1837-cr (2d Cir.).

Exhibit B: Letter dated September 16, 2013 from Daniel R. Marcus, Senior Counsel, Securities and Exchange Commission, to Judge Harold Baer, Jr., United States District Judge.

Exhibit C: Judgment in a civil case as to Defendant Todd Newman entered

October 4, 2013 in *SEC v. Adondakis, et al.*, No. 12-cv-0409 (SAS) (S.D.N.Y.).

Exhibit D: Order entered December 23, 2014 in *SEC v. Adondakis, et al.*, No. 12-cv-0409 (SAS) (S.D.N.Y.).

Exhibit E: Initial Decision entered on February 10, 2014 in *In the Matter of Todd Newman*, Admin. Pro. No. 3-15581 (SEC).

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

Executed on December 24, 2014
New York, New York

John A. Nathanson / by A.Z.L.
John A. Nathanson

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# EXHIBIT A

13-1837-cr (L)
*United States v. Newman and Chiasson*

# In the
# United States Court of Appeals
## For the Second Circuit

August Term, 2013

Nos. 13-1837-cr (L), 13-1917-cr (con)

UNITED STATES OF AMERICA,
*Appellee,*

*v.*

TODD NEWMAN, ANTHONY CHIASSON,
*Defendants-Appellants,*

JON HORVATH, DANNY KUO, HYUNG G. LIM, MICHAEL STEINBERG,
*Defendants.*[1]

Appeal from the United States District Court
for the Southern District of New York.
No. 12 CR 121(RJS) — Richard J. Sullivan, *Judge.*

Argued: April 22, 2014
Decided: December 10, 2014

[1] The Clerk of Court is directed to amend the caption as set forth above.

Before: WINTER, PARKER, and HALL, *Circuit Judges.*

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Defendants-appellants 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 (Richard J. Sullivan, *J.*) following a six-week jury trial on charges of conspiracy to commit insider trading and insider trading in violation of 18 U.S.C. § 371, sections 10(b) and 32 of the Securities Exchange Act of 1934, SEC Rules 10b-5 and 10b5-2, and 18 U.S.C. § 2. Because the Government failed to present sufficient evidence that the defendants willfully engaged in substantive insider trading or a conspiracy to commit insider trading in violation of the federal securities laws, we reverse Newman and Chiasson's convictions and remand with instructions to dismiss the indictment as it pertains to them with prejudice.

---

STEPHEN FISHBEIN (John A. Nathanson, Jason M. Swergold, *on the brief*), Shearman & Sterling LLP, New York, NY, *for Defendant-Appellant Todd Newman.*

MARK F. POMERANTZ (Matthew J. Carhart; Alexandra A.E. Shapiro, Daniel J. O'Neill, Jeremy Licht, Shapiro, Arato & Isserles LLP, New York, NY; Gregory R. Morvillo, Morvillo LLP, New York, NY *on the brief*), Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY, *for Defendant-Appellant Anthony Chiasson.*

ANTONIA M. APPS (Richard C. Tarlowe, Micah W.J. Smith, Brent S. Wible, *on the brief*), Assistant

United States Attorneys *for* Preet Bharara, United States Attorney, Southern District of New York, New York, NY, *for Appellee.*

Ira M. Feinberg, Jordan L. Estes, Hagan Scotten, Hogan Lovells US LLP, New York, NY; Joshua L. Dratel, Law Offices of Joshua L. Dratel, P.C., New York, NY, *for Amicus Curiae National Association of Criminal Defense Lawyers.*

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BARRINGTON D. PARKER, *Circuit Judge*:

Defendants-appellants 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 (Richard J. Sullivan, *J.*) following a six-week jury trial on charges of securities fraud in violation of sections 10(b) and 32 of the Securities Exchange Act of 1934 (the "1934 Act"), 48 Stat. 891, 904 (codified as amended at 15 U.S.C. §§ 78j(b), 78ff), Securities and Exchange Commission (SEC) Rules 10b-5 and 10b5-2 (codified at 17 C.F.R. §§ 240.10b-5, 240.10b5-2), and 18 U.S.C. § 2, and conspiracy to commit securities fraud in violation of 18 U.S.C. § 371.

The Government alleged that a cohort of analysts at various hedge funds and investment firms obtained material, nonpublic information from employees of publicly traded technology companies, shared it amongst each other, and subsequently passed this information to the portfolio managers at their respective companies. The Government charged Newman, a portfolio manager at Diamondback Capital Management, LLC ("Diamondback"), and Chiasson, a portfolio manager at Level

Global Investors, L.P. ("Level Global"), with willfully participating in this insider trading scheme by trading in securities based on the inside information illicitly obtained by this group of analysts. On appeal, Newman and Chiasson challenge the sufficiency of the evidence as to several elements of the offense, and further argue that the district court erred in failing to instruct the jury that it must find that a tippee knew that the insider disclosed confidential information in exchange for a personal benefit.

We agree that the jury instruction was erroneous because we conclude that, in order to sustain a conviction for insider trading, the Government must prove beyond a reasonable doubt that the tippee knew that an insider disclosed confidential information *and* that he did so in exchange for a personal benefit. Moreover, we hold that the evidence was insufficient to sustain a guilty verdict against Newman and Chiasson for two reasons. *First*, the Government's evidence of any personal benefit received by the alleged insiders was insufficient to establish the tipper liability from which defendants' purported tippee liability would derive. *Second*, even assuming that the scant evidence offered on the issue of personal benefit was sufficient, which we conclude it was not, the Government presented no evidence that Newman and Chiasson knew that they were trading on information obtained from insiders in violation of those insiders' fiduciary duties.

Accordingly, we reverse the convictions of Newman and Chiasson on all counts and remand with instructions to dismiss the indictment as it pertains to them with prejudice.

## BACKGROUND

This case arises from the Government's ongoing investigation into suspected insider trading activity at hedge funds. On January 18, 2012, the Government unsealed charges against Newman,

Chiasson, and several other investment professionals. On February 7, 2012, a grand jury returned an indictment. On August 28, 2012, a twelve-count Superseding Indictment S2 12 Cr. 121 (RJS) (the "Indictment") was filed. Count One of the Indictment charged Newman, Chiasson, and a co-defendant with conspiracy to commit securities fraud, in violation of 18 U.S.C. § 371. Each of Counts Two through Five charged Newman and each of Counts Six through Ten charged Chiasson with securities fraud, in violation of sections 10(b) and 32 of the 1934 Act, SEC Rules 10b-5 and 105b-2, and 18 U.S.C. § 2. A co-defendant was charged with securities fraud in Counts Eleven and Twelve.

At trial, the Government presented evidence that a group of financial analysts exchanged information they obtained from company insiders, both directly and more often indirectly. Specifically, the Government alleged that these analysts received information from insiders at Dell and NVIDIA disclosing those companies' earnings numbers before they were publicly released in Dell's May 2008 and August 2008 earnings announcements and NVIDIA's May 2008 earnings announcement. These analysts then passed the inside information to their portfolio managers, including Newman and Chiasson, who, in turn, executed trades in Dell and NVIDIA stock, earning approximately $4 million and $68 million, respectively, in profits for their respective funds.

Newman and Chiasson were several steps removed from the corporate insiders and there was no evidence that either was aware of the source of the inside information. With respect to the Dell tipping chain, the evidence established that Rob Ray of Dell's investor relations department tipped information regarding Dell's consolidated earnings numbers to Sandy Goyal, an analyst at Neuberger Berman. Goyal in turn gave the information to Diamondback analyst Jesse Tortora. Tortora in turn relayed the

information to his manager Newman as well as to other analysts including Level Global analyst Spyridon "Sam" Adondakis. Adondakis then passed along the Dell information to Chiasson, making Newman and Chiasson three and four levels removed from the inside tipper, respectively.

With respect to the NVIDIA tipping chain, the evidence established that Chris Choi of NVIDIA's finance unit tipped inside information to Hyung Lim, a former executive at technology companies Broadcom Corp. and Altera Corp., whom Choi knew from church. Lim passed the information to co-defendant Danny Kuo, an analyst at Whittier Trust. Kuo circulated the information to the group of analyst friends, including Tortora and Adondakis, who in turn gave the information to Newman and Chiasson, making Newman and Chiasson four levels removed from the inside tippers.

Although Ray and Choi have yet to be charged administratively, civilly, or criminally for insider trading or any other wrongdoing, the Government charged that Newman and Chiasson were criminally liable for insider trading because, as sophisticated traders, they must have known that information was disclosed by insiders in breach of a fiduciary duty, and not for any legitimate corporate purpose.

At the close of evidence, Newman and Chiasson moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29. They argued that there was no evidence that the corporate insiders provided inside information in exchange for a personal benefit which is required to establish tipper liability under *Dirks v. S.E.C.*, 463 U.S. 646 (1983). Because a tippee's liability derives from the liability of the tipper, Newman and Chiasson argued that they could not be found guilty of insider trading. Newman and Chiasson also argued that, even if the corporate

insiders had received a personal benefit in exchange for the inside information, there was no evidence that they knew about any such benefit. Absent such knowledge, appellants argued, they were not aware of, or participants in, the tippers' fraudulent breaches of fiduciary duties to Dell or NVIDIA, and could not be convicted of insider trading under *Dirks*. In the alternative, appellants requested that the court instruct the jury that it must find that Newman and Chiasson knew that the corporate insiders had disclosed confidential information for personal benefit in order to find them guilty.

The district court reserved decision on the Rule 29 motions. With respect to the appellants' requested jury charge, while the district court acknowledged that their position was "supportable certainly by the language of *Dirks*," Tr. 3595:10-12, it ultimately found that it was constrained by this Court's decision in *S.E.C. v. Obus*, 693 F.3d 276 (2d Cir. 2012), which listed the elements of tippee liability without enumerating knowledge of a personal benefit received by the insider as a separate element. Tr. 3604:3-3605:5. Accordingly, the district court did not give Newman and Chiasson's proposed jury instruction. Instead, the district court gave the following instructions on the tippers' intent and the personal benefit requirement:

> Now, if you find that Mr. Ray and/or Mr. Choi had a fiduciary or other relationship of trust and confidence with their employers, then you must next consider whether the [G]overnment 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.

On the issue of the appellants' knowledge, the district court instructed the jury:

> To meet its burden, the [G]overnment 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 it was originally disclosed by the insider in violation of a duty of confidentiality.

Tr. 4033:14-22.

On December 17, 2012, the jury returned a verdict of guilty on all counts. The district court subsequently denied the appellants' Rule 29 motions.

On May 2, 2013, the district court sentenced Newman to an aggregate term of 54 months' imprisonment, to be followed by one year of supervised release, imposed a $500 mandatory special assessment, and ordered Newman to pay a $1 million fine and to forfeit $737,724. On May 13, 2013, the district court sentenced Chiasson to an aggregate term of 78 months' imprisonment, to be followed by one year of supervised release, imposed a $600 mandatory special assessment, and ordered him to pay a $5 million fine and forfeiture in an amount not to exceed $2 million.[2] This appeal followed.

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[2] The district court subsequently set the forfeiture amount at $1,382,217.

## DISCUSSION

Newman and Chiasson raise a number of arguments on appeal. Because we conclude that the jury instructions were erroneous and that there was insufficient evidence to support the convictions, we address only the arguments relevant to these issues. We review jury instructions *de novo* with regard to whether the jury was misled or inadequately informed about the applicable law. *See United States v. Moran-Toala*, 726 F.3d 334, 344 (2d Cir. 2013).

### I. The Law of Insider Trading

Section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b), prohibits the use "in connection with the purchase or sale of any security . . . [of] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe . . . ." Although Section 10(b) was designed as a catch-all clause to prevent fraudulent practices, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 202-06 (1976), neither the statute nor the regulations issued pursuant to it, including Rule 10b-5, expressly prohibit insider trading. Rather, the unlawfulness of insider trading is predicated on the notion that insider trading is a type of securities fraud proscribed by Section 10(b) and Rule 10b-5. *See Chiarella v. United States*, 445 U.S. 222, 226-30 (1980).

#### A. The "Classical" and "Misappropriation" Theories of Insider Trading

The classical theory holds that a corporate insider (such as an officer or director) violates Section 10(b) and Rule 10b-5 by trading in the corporation's securities on the basis of material, nonpublic information about the corporation. *Id.* at 230. Under this theory, there is a special "relationship of trust and confidence between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position within that

corporation." *Id.* at 228. As a result of this relationship, corporate insiders that possess material, nonpublic information have "a duty to disclose [or to abstain from trading] because of the 'necessity of preventing a corporate insider from . . . tak[ing] unfair advantage of . . . uninformed . . . stockholders.'" *Id.* at 228-29 (citation omitted).

In accepting this theory of insider trading, the Supreme Court explicitly rejected the notion of "a general duty between all participants in market transactions to forgo actions based on material, nonpublic information." *Id.* at 233. Instead, the Court limited the scope of insider trading liability to situations where the insider had "a duty to disclose arising from a relationship of trust and confidence between parties to a transaction," such as that between corporate officers and shareholders. *Id.* at 230.

An alternative, but overlapping, theory of insider trading liability, commonly called the "misappropriation" theory, expands the scope of insider trading liability to certain other "outsiders," who do not have any fiduciary or other relationship to a corporation or its shareholders. Liability may attach where an "outsider" possesses material non-public information about a corporation and another person uses that information to trade in breach of a duty owed to the owner. *United States v. O'Hagan*, 521 U.S. 642, 652-53 (1997); *United States v. Libera*, 989 F.2d 596, 599-600 (2d Cir. 1993). In other words, such conduct violates Section 10(b) because the misappropriator engages in deception by pretending "loyalty to the principal while secretly converting the principal's information for personal gain." *Obus*, 693 F.3d at 285 (citations omitted).

B. Tipping Liability

The insider trading case law, however, is not confined to insiders or misappropriators who trade for their own accounts. *Id.* at 285. Courts have expanded insider trading liability to reach situations where the insider or misappropriator in possession of

material nonpublic information (the "tipper") does not himself trade but discloses the information to an outsider (a "tippee") who then trades on the basis of the information before it is publicly disclosed. *See Dirks*, 463 U.S. at 659. The elements of tipping liability are the same, regardless of whether the tipper's duty arises under the "classical" or the "misappropriation" theory. *Obus*, 693 F.3d at 285-86.

In *Dirks*, the Supreme Court addressed the liability of a tippee analyst who received material, nonpublic information about possible fraud at an insurance company from one of the insurance company's former officers. *Dirks*, 463 U.S. at 648-49. The analyst relayed the information to some of his clients who were investors in the insurance company, and some of them, in turn, sold their shares based on the analyst's tip. *Id.* The SEC charged the analyst Dirks with aiding and abetting securities fraud by relaying confidential and material inside information to people who traded the stock.

In reviewing the appeal, the Court articulated the general principle of tipping liability: "Not only are insiders forbidden by their fiduciary relationship from personally using undisclosed corporate information to their advantage, but they may not give such information to an outsider for the same improper purpose of exploiting the information for their personal gain." *Id.* at 659 (citation omitted). The test for determining whether the corporate insider has breached his fiduciary duty "is whether the insider personally will benefit, directly or indirectly, from his disclosure. Absent some personal gain, *there has been no breach of duty* . . . ." *Id.* at 662 (emphasis added).

The Supreme Court rejected the SEC's theory that a recipient of confidential information (i.e. the "tippee") must refrain from trading "whenever he receives inside information from an insider." *Id.* at 655. Instead, the Court held that "[t]he tippee's duty to

disclose or abstain is derivative from that of the insider's duty." *Id.* at 659. Because the *tipper's* breach of fiduciary duty requires that he "personally will benefit, directly or indirectly, from his disclosure," *id.* at 662, a tippee may not be held liable in the absence of such benefit. Moreover, the Supreme Court held that a tippee may be found liable "only when the insider has breached his fiduciary duty . . . *and* the tippee knows or should know that there has been a breach." *Id.* at 660 (emphasis added). In *Dirks*, the corporate insider provided the confidential information in order to expose a fraud in the company and not for any personal benefit, and thus, the Court found that the insider had not breached his duty to the company's shareholders and that Dirks could not be held liable as tippee.

E. *Mens Rea*

Liability for securities fraud also requires proof that the defendant acted with scienter, which is defined as "a mental state embracing intent to deceive, manipulate or defraud." *Hochfelder*, 425 U.S. at 193 n.12. In order to establish a criminal violation of the securities laws, the Government must show that the defendant acted "willfully." 15 U.S.C. § 78ff(a). We have defined willfulness in this context "as a realization on the defendant's part that he was doing a wrongful act under the securities laws." *United States v. Cassese*, 428 F.3d 92, 98 (2d Cir. 2005) (internal quotation marks and citations omitted); *see also United States v. Dixon*, 536 F.2d 1388, 1395 (2d Cir. 1976) (holding that to establish willfulness, the Government must "establish a realization on the defendant's part that he was doing a wrongful act . . . under the securities laws" and that such an act "involve[d] a significant risk of effecting the violation that occurred.") (quotation omitted).

II. The Requirements of Tippee Liability

The Government concedes that tippee liability requires proof of a personal benefit to the insider. Gov't Br. 56. However, the

Government argues that it was not required to prove that Newman and Chiasson knew that the insiders at Dell and NVIDIA received a personal benefit in order to be found guilty of insider trading. Instead, the Government contends, consistent with the district court's instruction, that it merely needed to prove that the "defendants traded on material, nonpublic information they knew insiders had disclosed in breach of a duty of confidentiality . . . ." Gov't Br. 58.

In support of this position, the Government cites *Dirks* for the proposition that the Supreme Court only required that the "tippee know that the tipper disclosed information in *breach of a duty*." *Id.* at 40 (citing *Dirks*, 463 U.S. at 660) (emphasis added). In addition, the Government relies on dicta in a number of our decisions post-*Dirks*, in which we have described the elements of tippee liability without specifically stating that the Government must prove that the tippee knew that the corporate insider who disclosed confidential information did so for his own personal benefit. *Id.* at 41-44 (citing, *inter alia*, *United States v. Jiau*, 734 F.3d 147, 152-53 (2d Cir. 2013); *Obus*, 693 F.3d at 289; *S.E.C. v. Warde*, 151 F.3d 42, 48-49 (2d Cir. 1998)). By selectively parsing this dictum, the Government seeks to revive the absolute bar on tippee trading that the Supreme Court explicitly rejected in *Dirks*.

Although this Court has been accused of being "somewhat Delphic" in our discussion of what is required to demonstrate tippee liability, *United States v. Whitman*, 904 F. Supp. 2d 363, 371 n.6 (S.D.N.Y. 2012), the Supreme Court was quite clear in *Dirks*. *First*, the tippee's liability derives *only* from the tipper's breach of a fiduciary duty, *not* from trading on material, non-public information. *See Chiarella*, 445 U.S. at 233 (noting that there is no "general duty between all participants in market transactions to forgo actions based on material, nonpublic information"). *Second*, the corporate insider has committed no breach of fiduciary duty

unless he receives a personal benefit in exchange for the disclosure. *Third*, even in the presence of a tipper's breach, a tippee is liable only if he knows or should have known of the breach.

While we have not yet been presented with the question of whether the tippee's knowledge of a tipper's breach requires knowledge of the tipper's personal benefit, the answer follows naturally from *Dirks*. *Dirks* counsels us that the exchange of confidential information for personal benefit is not separate from an insider's fiduciary breach; it *is* the fiduciary breach that triggers liability for securities fraud under Rule 10b-5. For purposes of insider trading liability, the insider's disclosure of confidential information, standing alone, is not a breach. Thus, without establishing that the tippee knows of the personal benefit received by the insider in exchange for the disclosure, the Government cannot meet its burden of showing that the tippee knew of a breach.

The Government's overreliance on our prior dicta merely highlights the doctrinal novelty of its recent insider trading prosecutions, which are increasingly targeted at remote tippees many levels removed from corporate insiders. By contrast, our prior cases generally involved tippees who directly participated in the tipper's breach (and therefore had knowledge of the tipper's disclosure for personal benefit) or tippees who were explicitly apprised of the tipper's gain by an intermediary tippee. *See, e.g.*, *Jiau*, 734 F.3d at 150 ("To provide an incentive, Jiau promised the tippers insider information for their own private trading."); *United States v. Falcone*, 257 F.3d 226, 235 (2d Cir. 2001) (affirming conviction of remote tipper where intermediary tippee paid the inside tipper and had told remote tippee "the details of the scheme"); *Warde*, 151 F.3d at 49 (tipper and tippee engaged in parallel trading of the inside information and "discussed not only the inside information, but also the best way to profit from it"); *United States v. Mylett*, 97 F.3d 663 (2d Cir. 1996) (tippee acquired

inside information directly from his insider friend). We note that the Government has not cited, nor have we found, a single case in which tippees as remote as Newman and Chiasson have been held criminally liable for insider trading.

*Jiau* illustrates the importance of this distinction quite clearly. In *Jiau*, the panel was presented with the question of whether the evidence at trial was sufficient to prove that the tippers personally benefitted from their disclosure of insider information. In that context, we summarized the elements of criminal liability as follows:

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

*Jiau*, 734 F.3d at 152-53 (citing *Dirks*, 463 U.S. at 659-64; *Obus*, 693 F. 3d at 289). The Government relies on this language to argue that *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. Gov't Br. 43. However, we reject the Government's position that our cursory recitation of the elements in *Jiau* suggests that criminal liability may be imposed on a defendant based only on knowledge of a breach of a duty of confidentiality. In *Jiau*, the defendant knew about the benefit because she provided it. For that reason, we had no need to reach the question of whether knowledge of a breach requires that a tippee know that a personal benefit was provided to the tipper.

In light of *Dirks*, we find no support for the Government's contention that knowledge of a breach of the duty of confidentiality

without knowledge of the personal benefit is sufficient to impose criminal liability. Although the Government might like the law to be different, nothing in the law requires a symmetry of information in the nation's securities markets. The Supreme Court explicitly repudiated this premise not only in *Dirks*, but in a predecessor case, *Chiarella v. United States*. In *Chiarella*, the Supreme Court rejected this Circuit's conclusion that "the federal securities laws have created a system providing equal access to information necessary for reasoned and intelligent investment decisions . . . . because [material non-public] information gives certain buyers or sellers an unfair advantage over less informed buyers and sellers." 445 U.S. at 232. The Supreme Court emphasized that "[t]his reasoning suffers from [a] defect. . . . [because] not every instance of financial unfairness constitutes fraudulent activity under § 10(b)." *Id.* *See also United States v. Chestman*, 947 F.2d 551, 578 (2d Cir. 1991) (Winter, J., concurring) ("[The policy rationale [for prohibiting insider trading] stops well short of prohibiting all trading on material nonpublic information. Efficient capital markets depend on the protection of property rights in information. However, they also require that persons who acquire and act on information about companies be able to profit from the information they generate . . . ."). Thus, in both *Chiarella* and *Dirks*, the Supreme Court affirmatively established that insider trading liability is based on breaches of fiduciary duty, not on informational asymmetries. This is a critical limitation on insider trading liability that protects a corporation's interests in confidentiality while promoting efficiency in the nation's securities markets.

As noted above, *Dirks* clearly defines a breach of fiduciary duty as a breach of the duty of confidentiality in exchange for a personal benefit. *See Dirks*, 463 U.S. at 662. Accordingly, we conclude that a tippee's knowledge of the insider's breach necessarily requires knowledge that the insider disclosed

confidential information in exchange for personal benefit. In reaching this conclusion, we join every other district court to our knowledge – apart from Judge Sullivan[3] – that has confronted this question. *Compare United States v. Rengan Rajaratnam*, No. 13-211 (S.D.N.Y. July 1, 2014) (Buchwald, *J.*); *United States v. Martoma*, No. 12-973 (S.D.N.Y. Feb. 4, 2014) (Gardephe, *J.*); *United States v. Whitman*, 904 F. Supp. 2d 363, 371 (S.D.N.Y. 2012) (Rakoff, *J.*); *United States v. Raj Rajaratnam*, 802 F. Supp. 2d 491, 499 (S.D.N.Y. 2011) (Holwell, *J.*); *State Teachers Retirement Bd. v. Fluor Corp.*, 592 F. Supp. 592, 594 (S.D.N.Y. 1984) (Sweet, *J.*),[4] *with United States v. Steinberg*, No. 12-121, 2014 WL 2011685 at *5 (S.D.N.Y. May 15, 2014) (Sullivan, *J.*), and *United States v. Newman*, No. 12-121 (S.D.N.Y. Dec. 6, 2012) (Sullivan, *J.*).[5]

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[3] Although the Government argues that district court decisions in *S.E.C. v. Thrasher*, 152 F. Supp. 2d 291 (S.D.N.Y. 2001) and *S.E.C. v. Musella*, 678 F. Supp. 1060 (S.D.N.Y. 1988) support their position, these cases merely stand for the unremarkable proposition that a tippee does not need to know the details of the insider's disclosure of information. The district courts determined that the tippee did not have to know for certain how information was disclosed, *Thrasher*, 152 F. Supp. 2d at 304-05, nor the identity of the insiders, *Musella*, 678 F. Supp. at 1062-63. This is not inconsistent with a requirement that a defendant tippee understands that some benefit is being provided in return for the information.

[4] *See also United States v. Santoro*, 647 F. Supp. 153, 170-71 (E.D.N.Y. 1986) ("An allegation that the tippee knew of the tipper's breach necessarily charges that the tippee knew that the tipper was acting for personal gain.") *rev'd on other grounds sub nom. United States v. Davidoff*, 845 F.2d 1151 (2d Cir. 1988); *Hernandez v. United States*, 450 F. Supp. 2d 1112, 1118 (C.D. Cal. 2006) ("[U]nder the standard set forth in *Dirks*" a tippee can be liable under Section 10(b) and Rule 10(b)-5 "if the tippee had knowledge of the insider-tipper's personal gain.").

[5] We note that Judge Sullivan had an opportunity to address the issue in *Steinberg* only because the Government chose to charge Matthew Steinberg in the same criminal case as Newman and Chiasson by filing a superseding indictment. Notably, the Government superseded to add Steinberg on March 29, 2013, after the conclusion of the *Newman* trial, after Judge Sullivan refused to give the defendants' requested charge on scienter now at issue on this appeal, and at a time when there was no possibility of a joint trial with the *Newman* defendants.

Our conclusion also comports with well-settled principles of substantive criminal law. As the Supreme Court explained in *Staples v. United States*, 511 U.S. 600, 605 (1994), under the common law, *mens rea*, which requires that the defendant know the facts that make his conduct illegal, is a necessary element in every crime. Such a requirement is particularly appropriate in insider trading cases where we have acknowledged "it is easy to imagine a . . . trader who receives a tip and is unaware that his conduct was illegal and therefore wrongful." *United States v. Kaiser*, 609 F.3d 556, 569 (2d Cir. 2010). This is also a statutory requirement, because only "willful" violations are subject to criminal provision. *See United States v. Temple*, 447 F.3d 130, 137 (2d Cir. 2006) ("'Willful' repeatedly has been defined in the criminal context as intentional, purposeful, and voluntary, as distinguished from accidental or negligent").

In sum, we hold that to sustain an insider trading conviction against a tippee, the Government must prove each of the following elements beyond a reasonable doubt: that (1) the corporate insider was entrusted with a fiduciary duty; (2) the corporate insider breached his fiduciary duty by (a) disclosing confidential information to a tippee (b) in exchange for a personal benefit; (3) the tippee knew of the tipper's breach, that is, he knew the information was confidential and divulged for personal benefit; and (4) the tippee still used that information to trade in a security or tip another individual for personal benefit. *See Jiau*, 734 F.3d at 152-53; *Dirks*, 463 U.S. at 659-64.

In view of this conclusion, we find, reviewing the charge as a whole, *United States v. Mitchell*, 328 F.3d 77, 82 (2d Cir. 2003), that the district court's instruction failed to accurately advise the jury of the law. The district court charged the jury that the Government had to prove: (1) that the insiders had a "fiduciary or other relationship of trust and confidence" with their corporations; (2) that they "breached that duty of trust and confidence by disclosing material,

nonpublic information"; (3) that they "personally benefited in some way" from the disclosure; (4) "that the defendant . . . knew the information he obtained had been disclosed in breach of a duty"; and (5) that the defendant used the information to purchase a security. Under these instructions, a reasonable juror might have concluded that a defendant could be criminally liable for insider trading merely if such defendant knew that an insider had divulged information that was required to be kept confidential. But a breach of the duty of confidentiality is not fraudulent unless the tipper acts for personal benefit, that is to say, there is no breach unless the tipper "is in effect selling the information to its recipient for cash, reciprocal information, or other things of value for himself. . . ." *Dirks*, 463 U.S. at 664 (quotation omitted). Thus, the district court was required to instruct the jury that the Government had to prove beyond a reasonable doubt that Newman and Chiasson knew that the tippers received a personal benefit for their disclosure.

The Government argues that any possible instructional error was harmless because the jury could have found that Newman and Chiasson inferred from the circumstances that some benefit was provided to (or anticipated by) the insiders. Gov't Br. 60. We disagree.

An instructional error is harmless only if the Government demonstrates that it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error[.]" *Neder v. United States*, 527 U.S. 1, 17-18 (1999); *accord Moran-Toala*, 726 F.3d at 345; *United States v. Quattrone*, 441 F.3d 153, 180 (2d Cir. 2006). The harmless error inquiry requires us to view whether the evidence introduced was "uncontested and supported by overwhelming evidence" such that it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder*, 527 U.S. at 18. Here both Chiasson and Newman contested their knowledge of any benefit received by the

tippers and, in fact, elicited evidence sufficient to support a contrary finding. Moreover, we conclude that the Government's evidence of any personal benefit received by the insiders was insufficient to establish tipper liability from which Chiasson and Newman's purported tippee liability would derive.

III. Insufficiency of the Evidence

As a general matter, a defendant challenging the sufficiency of the evidence bears a heavy burden, as the standard of review is exceedingly deferential. *United States v. Coplan*, 703 F.3d 46, 62 (2d Cir. 2012). Specifically, we "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." *Id.* (citing *United States v. Chavez*, 549 F.3d 119, 124 (2d Cir. 2008)). Although sufficiency review is *de novo*, we will uphold the judgments of conviction if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (citing *United States v. Yannotti*, 541 F.3d 112, 120 (2d Cir. 2008) (emphasis omitted); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). This standard of review draws no distinction between direct and circumstantial evidence. The Government is entitled to prove its case solely through circumstantial evidence, provided, of course, that the Government still demonstrates each element of the charged offense beyond a reasonable doubt. *United States v. Lorenzo*, 534 F.3d 153, 159 (2d Cir. 2008).

However, if the evidence "is nonexistent or so meager," *United States v. Guadagna*, 183 F.3d 122, 130 (2d Cir. 1999), such that it "gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, then a reasonable jury must necessarily entertain a reasonable doubt," *Cassese*, 428 F.3d at 99. Because few events in the life of an individual are more important than a criminal

conviction, we continue to consider the "beyond a reasonable doubt" requirement with utmost seriousness. *Cassese*, 428 F.3d at 102. Here, we find that the Government's evidence failed to reach that threshold, even when viewed in the light most favorable to it.

The circumstantial evidence in this case was simply too thin to warrant the inference that the corporate insiders received any personal benefit in exchange for their tips. As to the Dell tips, the Government established that Goyal and Ray were not "close" friends, but had known each other for years, having both attended business school and worked at Dell together. Further, Ray, who wanted to become a Wall Street analyst like Goyal, sought career advice and assistance from Goyal. The evidence further showed that Goyal advised Ray on a range of topics, from discussing the qualifying examination in order to become a financial analyst to editing Ray's résumé and sending it to a Wall Street recruiter, and that some of this assistance began before Ray began to provide tips about Dell's earnings. The evidence also established that Lim and Choi were "family friends" that had met through church and occasionally socialized together. The Government argues that these facts were sufficient to prove that the tippers derived some benefit from the tip. We disagree. If this was a "benefit," practically anything would qualify.

We have observed that "[p]ersonal benefit is broadly defined to include not only pecuniary gain, but also, *inter alia*, any reputational benefit that will translate into future earnings and the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend." *Jiau*, 734 F. 3d at 153 (internal citations, alterations, and quotation marks deleted). This standard, although permissive, does not suggest that the Government may prove the receipt of a personal benefit by the mere fact of a friendship, particularly of a casual or social nature. If that were true, and the Government was allowed to meet its burden by

proving that two individuals were alumni of the same school or attended the same church, the personal benefit requirement would be a nullity. To the extent *Dirks* suggests that a personal benefit may be inferred from a personal relationship between the tipper and tippee, where the tippee's trades "resemble trading by the insider himself followed by a gift of the profits to the recipient," *see* 643 U.S. at 664, we hold that such an inference is impermissible in the absence of proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature. In other words, as Judge Walker noted in *Jiau*, this requires evidence of "a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the [latter]." *Jiau*, 734 F. 3d at 153.

While our case law at times emphasizes language from *Dirks* indicating that the tipper's gain need not be *immediately* pecuniary, it does not erode the fundamental insight that, in order to form the basis for a fraudulent breach, the personal benefit received in exchange for confidential information must be of some consequence. For example, in *Jiau*, we noted that at least one of the corporate insiders received something more than the ephemeral benefit of the "value[] [of] [Jiau's] friendship" because he also obtained access to an investment club where stock tips and insight were routinely discussed. *Id.* Thus, by joining the investment club, the tipper entered into a relationship of *quid quo pro* with Jiau, and therefore had the opportunity to access information that could yield future pecuniary gain. *Id; see also SEC v. Yun*, 327 F.3d 1263, 1280 (11th Cir. 2003) (finding evidence of personal benefit where tipper and tippee worked closely together in real estate deals and commonly split commissions on various real estate transactions); *SEC v. Sargent*, 229 F.3d 68, 77 (1st Cir. 2000) (finding evidence of personal benefit when

the tipper passed information to a friend who referred others to the tipper for dental work).

Here the "career advice" that Goyal gave Ray, the Dell tipper, was little more than the encouragement one would generally expect of a fellow alumnus or casual acquaintance. *See, e.g.*, J. A. 2080 (offering "minor suggestions" on a resume), J.A. 2082 (offering advice prior to an informational interview). Crucially, Goyal testified that he would have given Ray advice without receiving information because he routinely did so for industry colleagues. Although the Government argues that the jury could have reasonably inferred from the evidence that Ray and Goyal swapped career advice for inside information, Ray himself disavowed that any such *quid pro quo* existed. Further, the evidence showed Goyal began giving Ray "career advice" over a year before Ray began providing any insider information. Tr. 1514. Thus, it would not be possible under the circumstances for a jury in a criminal trial to find beyond a reasonable doubt that Ray received a personal benefit in exchange for the disclosure of confidential information. *See, e.g.*, *United States v. D'Amato*, 39 F.3d 1249, 1256 (2d Cir. 1994) (evidence must be sufficient to "reasonably infer" guilt).

The evidence of personal benefit was even more scant in the NVIDIA chain. Choi and Lim were merely casual acquaintances. The evidence did not establish a history of loans or personal favors between the two. During cross examination, Lim testified that he did not provide anything of value to Choi in exchange for the information. Tr. 3067-68. Lim further testified that Choi did not know that Lim was trading NVIDIA stock (and in fact for the relevant period Lim did not trade stock), thus undermining any inference that Choi intended to make a "gift" of the profits earned on any transaction based on confidential information.

Even assuming that the scant evidence described above was sufficient to permit the inference of a personal benefit, which we conclude it was not, the Government presented absolutely no testimony or any other evidence that Newman and Chiasson knew that they were trading on information obtained from insiders, or that those insiders received any benefit in exchange for such disclosures, or even that Newman and Chiasson consciously avoided learning of these facts. As discussed above, the Government is required to prove beyond a reasonable doubt that Newman and Chiasson knew that the insiders received a personal benefit in exchange for disclosing confidential information.

It is largely uncontroverted that Chiasson and Newman, and even their analysts, who testified as cooperating witnesses for the Government, knew next to nothing about the insiders and nothing about what, if any, personal benefit had been provided to them. Adondakis said that he did not know what the relationship between the insider and the first-level tippee was, nor was he aware of any personal benefits exchanged for the information, nor did he communicate any such information to Chiasson. Adondakis testified that he merely told Chiasson that Goyal "was talking to someone within Dell," and that a friend of a friend of Tortora's would be getting NVIDIA information. Tr. 1708, 1878. Adondakis further testified that he did not specifically tell Chiasson that the source of the NVIDIA information worked at NVIDIA. Similarly, Tortora testified that, while he was aware Goyal received information from someone at Dell who had access to "overall" financial numbers, he was not aware of the insider's name, or position, or the circumstances of how Goyal obtained the information. Tortora further testified that he did not know whether Choi received a personal benefit for disclosing inside information regarding NVIDIA.

The Government now invites us to conclude that the jury could have found that the appellants knew the insiders disclosed the information "for some personal reason rather than for no reason at all." Gov't Br. 65. But the Supreme Court affirmatively rejected the premise that a tipper who discloses confidential information necessarily does so to receive a personal benefit. *See Dirks*, 463 U.S. at 661-62 ("All disclosures of confidential corporate information are not inconsistent with the duty insiders owe to shareholders"). Moreover, it is inconceivable that a jury could conclude, beyond a reasonable doubt, that Newman and Chiasson were aware of a personal benefit, when Adondakis and Tortora, who were more intimately involved in the insider trading scheme as part of the "corrupt" analyst group, disavowed any such knowledge.

Alternatively, the Government contends that the specificity, timing, and frequency of the updates provided to Newman and Chiasson about Dell and NVIDIA were so "overwhelmingly suspicious" that they warranted various material inferences that could support a guilty verdict. Gov't Br. 65. Newman and Chiasson received four updates on Dell's earnings numbers in the weeks leading up to its August 2008 earnings announcement. Similarly, Newman and Chiasson received multiple updates on NVIDIA's earnings numbers between the close of the quarter and the company's earnings announcement. The Government argues that given the detailed nature and accuracy of these updates, Newman and Chiasson must have known, or deliberately avoided knowing, that the information originated with corporate insiders, *and* that those insiders disclosed the information in exchange for a personal benefit. We disagree.

Even viewed in the light most favorable to the Government, the evidence presented at trial undermined the inference of knowledge in several ways. The evidence established that analysts at hedge funds routinely estimate metrics such as revenue, gross

margin, operating margin, and earnings per share through legitimate financial modeling using publicly available information and educated assumptions about industry and company trends. For example, on cross-examination, cooperating witness Goyal testified that under his financial model on Dell, when he ran the model in January 2008 without any inside information, he calculated May 2008 quarter results of $16.071 billion revenue, 18.5% gross margin, and $0.38 earnings per share. Tr. 1566. These estimates came very close to Dell's reported earnings of $16.077 billion revenue; 18.4% gross margin, and $0.38 earnings per share. Appellants also elicited testimony from the cooperating witnesses and investor relations associates that analysts routinely solicited information from companies in order to check assumptions in their models in advance of earnings announcements. Goyal testified that he frequently spoke to internal relations departments to run his model by them and ask whether his assumptions were "too high or too low" or in the "ball park," which suggests analysts routinely updated numbers in advance of the earnings announcements. Tr. 1511. Ray's supervisor confirmed that investor relations departments routinely assisted analysts with developing their models

Moreover, the evidence established that NVIDIA and Dell's investor relations personnel routinely "leaked" earnings data in advance of quarterly earnings. Appellants introduced examples in which Dell insiders, including the head of Investor Relations, Lynn Tyson, selectively disclosed confidential quarterly financial information arguably similar to the inside information disclosed by Ray and Choi to establish relationships with financial firms who might be in a position to buy Dell's stock. For example, appellants introduced an email Tortora sent Newman summarizing a conversation he had with Tyson in which she suggested "low 12% opex [was] reasonable" for Dell's upcoming quarter and that she

was "fairly confident on [operating margin] and [gross margin]." Tr. 568:18-581:23.

No reasonable jury could have found beyond a reasonable doubt that Newman and Chiasson knew, or deliberately avoided knowing, that the information originated with corporate insiders. In general, information about a firm's finances could certainly be sufficiently detailed and proprietary to permit the inference that the tippee knew that the information came from an inside source. But in this case, where the financial information is of a nature regularly and accurately predicted by analyst modeling, and the tippees are several levels removed from the source, the inference that defendants knew, or should have known, that the information originated with a corporate insider is unwarranted.

Moreover, even if detail and specificity could support an inference as to the *nature* of the source, it cannot, without more, permit an inference as to that source's improper *motive* for disclosure. That is especially true here, where the evidence showed that corporate insiders at Dell and NVIDIA regularly engaged with analysts and routinely selectively disclosed the same type of information. Thus, in light of the testimony (much of which was adduced from the Government's own witnesses) about the accuracy of the analysts' estimates and the selective disclosures by the companies themselves, no rational jury would find that the tips were so overwhelmingly suspicious that Newman and Chiasson either knew or consciously avoided knowing that the information came from corporate insiders or that those insiders received any personal benefit in exchange for the disclosure.

In short, the bare facts in support of the Government's theory of the case are as consistent with an inference of innocence as one of guilt. Where the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a

theory of innocence as a theory of guilt, that evidence necessarily fails to establish guilt beyond a reasonable doubt. *See United States v. Glenn*, 312 F.3d 58, 70 (2d Cir. 2002). Because the Government failed to demonstrate that Newman and Chiasson had the intent to commit insider trading, it cannot sustain the convictions on either the substantive insider trading counts or the conspiracy count. *United States v. Gaviria*, 740 F.2d 174, 183 (2d Cir. 1984) ("[W]here the crime charged is conspiracy, a conviction cannot be sustained unless the Government establishes beyond a reasonable doubt that the defendant had the specific intent to violate the substantive statute.") (internal quotation marks omitted). Consequently, we reverse Newman and Chiasson's convictions and remand with instructions to dismiss the indictment as it pertains to them.

## CONCLUSION

For the foregoing reasons, we vacate the convictions and remand for the district court to dismiss the indictment with prejudice as it pertains to Newman and Chiasson.

HARD COPY

# EXHIBIT B

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

September 16, 2013

**Via Facsimile: 212-805-7901**

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

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

Dear Judge Baer:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

Daniel R. Marcus
Senior Counsel

cc: All Counsel (by email)

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

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

**JUDGMENT AS TO DEFENDANT TODD NEWMAN**

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

I.

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

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

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

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

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

II.

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

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

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

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

III.

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

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

IV.

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

V.

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

Dated: _____, _____

_____
UNITED STATES DISTRICT JUDGE

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

**JUDGMENT AS TO DEFENDANT ANTHONY CHIASSON**

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

I.

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

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

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

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

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

II.

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

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

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

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

III.

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

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

IV.

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

V.

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

VI.

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

Dated: _____, _____

_____
UNITED STATES DISTRICT JUDGE

HARD COPY

# EXHIBIT C

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

**JUDGMENT AS TO DEFENDANT TODD NEWMAN**

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

I.

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

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

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

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

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

II.

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

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

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

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

III.

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

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

IV.

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

V.

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

Dated: 10/4, 13

UNITED STATES DISTRICT JUDGE

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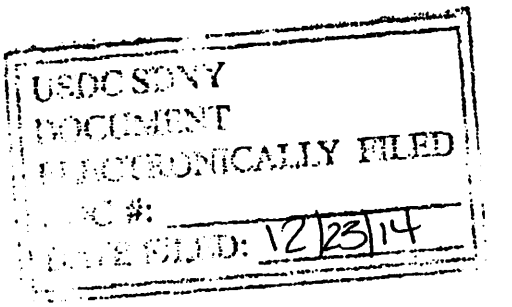
# EXHIBIT D

Scheindlin, S.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK




SECURITIES AN EXCHANGE COMMISSION,

Plaintiff,

- v. -

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 (SAS)

ECF Case

ORDER

WHEREAS, on January 18, 2012, the Securities and Exchange Commission filed a complaint against, among other defendants, Anthony Chiasson and Todd Newman (the "Complaint");

WHEREAS, the Complaint alleged that Defendants Chiasson and Newman engaged in conduct, namely insider trading in the shares of Dell, Inc. and NVIDIA Corp., that violated Section 10(b) of the Securities Exchange Act of 1934, Exchange Act Rule 10b-5, and Section 17(a) of the Securities Act of 1933;

WHEREAS, Defendants Chiasson and Newman were simultaneously indicted for conspiracy to commit insider trading in the shares of Dell, Inc. and NVIDIA Corp. in violation of Title 18, United States Code, Section 371; and insider trading, 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, United States v. Newman, et al., S2-12-cr-121 (RJS) ("the Criminal Matter");

WHEREAS, on December 17, 2012, a jury in the Southern District of New York found the Defendants Chiasson and Newman guilty of all counts in the Criminal Matter;

WHEREAS, on May 9, 2013 and May 14, 2013, judgments of conviction were entered against Defendants Newman and Chiasson, respectively, in the Criminal Matter;

WHEREAS, on October 4, 2013, the Hon. Harold Baer entered partial summary judgment against Defendants Chiasson and Newman in this matter based solely on the collateral estopped effect of their convictions in the Criminal Matter;

WHEREAS, on December 10, 2014, the United States Court of Appeals for the Second Circuit entered a judgment vacating Defendants Chiasson's and Newman's convictions (the "Judgment");

WHEREAS, in light of the Judgment, Defendants Chiasson and Newman have moved to vacate the partial summary judgments pursuant to Rule 60(b)(5) of the Federal Rules of Civil Procedure, and the Securities and Exchange Commission does not oppose the motion; and,

WHEREAS, there remains the possibility that the United States will seek further appellate review of the Judgment, and such further appellate review, if any, may have a material impact on this matter;

NOW, THEREFORE, IT IS ORDERED that:

1. The partial summary judgments against Defendants Anthony Chiasson and Todd Newman are vacated; and,

2. This matter shall be stayed until January 30, 2015, by which date the Parties shall advise the Court of how they intend to proceed in this matter.

Dated: Dec. 23, 2014

UNITED STATES DISTRICT JUDGE

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# EXHIBIT E

INITIAL DECISION RELEASE NO. 562
ADMINISTRATIVE PROCEEDING
FILE NO. 3-15581

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

| | |
|---|---|
| In the Matter of<br><br>TODD NEWMAN | INITIAL DECISION<br>February 10, 2014 |

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

John A. Nathanson, Shearman & Sterling LLP, for Todd Newman

BEFORE: Brenda P. Murray, Chief Administrative Law Judge

The Securities and Exchange Commission (Commission) issued an Order Instituting Proceedings (OIP), pursuant to Section 203(f) of the Investment Advisers Act of 1940 (Advisers Act), on October 21, 2013, alleging that Todd Newman (Newman) was convicted on December 17, 2012, of four counts of securities fraud and one count of conspiracy to commit securities fraud, in violation of Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) and Exchange Act Rule 10b-5, in United States v. Newman, No. 1:12-cr-121 (RJS) (S.D.N.Y.) (Newman). Based on his criminal conviction, a federal district court on October 4, 2013, enjoined Newman from violations of Section 17(a) of the Securities Act of 1933 (Securities Act), Section 10(b) of the Exchange Act, and Exchange Act Rule 10b-5, in SEC v. Adondakis, No. 2:12-cv-409 (HB) (S.D.N.Y.) (Adondakis). This proceeding is based on both the criminal conviction and the civil injunction. See Tr. 6.[1] Newman has appealed his criminal conviction to the U.S. Court of Appeals for the Second Circuit.[2] Docket in Newman, ECF No. 264; see Tr. 5.

[1] Citations are to the transcript of the November 1, 2013, telephonic prehearing conference.

[2] I take official notice of the docket in Newman pursuant to Rule 323 of the Commission's Rules of Practice. See 17 C.F.R. § 201.323.

## Issue

Newman does not concede any of the factual allegations of the OIP, but has agreed with the Division of Enforcement (Division) not to oppose imposition of an industry bar, and the Division has agreed not to oppose Newman's seeking to lift an industry bar if Newman's appeal of his criminal conviction is successful. Tr. 6, 11. Newman acknowledges that the Commission has the right to seek a collateral bar based on the injunction and his criminal conviction, but is unwilling to enter a settlement because he stated that, under the Commission's settlement procedures, he would forfeit his ability to make public statements denying the factual allegations underlying the criminal proceeding, in which his appeal is pending. Tr. 5-8.

Although there is no dispute that Newman has been criminally convicted and civilly enjoined, as alleged in the OIP, and official notice permits reference to the relevant documents, I ordered a summary-disposition procedural schedule, which takes significant time and effort.[3] See AMS Homecare, Inc., Exchange Act Release No. 68506 (Dec. 20, 2012), 105 SEC Docket 62179, 62180-82 (holding, although respondent admitted the allegations, that there was "no justification for departing from" procedural rules that "contemplate the holding of a hearing prior to the issuance of an initial decision in the absence of a successful motion for summary disposition by one of the parties").

## Background

On November 25, 2013, the Division filed a Motion for Summary Disposition (Motion), a Memorandum of Points and Authorities in Support of the Motion (Memorandum), and the Declaration of Daniel R. Marcus (Marcus Declaration), attaching:

> Exhibit 1, the Superseding Indictment in Newman, filed on August 28, 2012;
>
> Exhibit 2, the Judgment as to Newman in Newman, entered May 9, 2013;
>
> Exhibit 3, the Complaint in Adondakis;
>
> Exhibit 4, the Final Judgment as to Newman in Adondakis, signed and filed on October 4, 2013;
>
> Exhibit 5, Newman's Answer in Adondakis, filed March 26, 2012; and
>
> Exhibit 6, Form ADV of Diamondback Capital Management, LLC (Diamondback), filed with the Commission on March 18, 2008.

On December 13, 2013, Newman filed a Memorandum of Points and Authorities in Response to the Division's Motion (Response). Accompanying the Response is the Declaration of John A. Nathanson (Nathanson Declaration), attaching:

> Exhibit A, Brief of Newman, filed in his criminal appeal in Newman, No. 13-1837 (2d Cir.), on August 15, 2013;

[3] I waived Newman's obligation to file an Answer. Tr. 14.

Exhibit B, a letter-brief, dated September 16, 2013, from the Division to U.S. District Court Judge Harold Baer, Jr., in Adondakis, regarding the Division's request for partial summary judgment in its favor and attaching unsigned judgments as to Newman and his co-defendant Anthony Chiasson; and

Exhibit C, the October 4, 2013, Judgment as to Newman in Adondakis.

On December 20, 2013, the Division filed a Reply Memorandum in Further Support of Its Motion (Reply) and the Second Declaration of Marcus, attaching:

Exhibit 1, the docket for the appeal of Newman, No. 13-1837 (2d Cir.), as of December 19, 2013;

Exhibit 2, the docket in United States v. Gupta, No. 12-4448 (2d Cir.), as of December 19, 2013;

Exhibit 3, the docket in United States v. Rajaratnam, No. 11-4416 (2d Cir.), as of December 19, 2013; and

Exhibit 4, the docket in United States v. Goffer, No. 11-3591 (2d Cir.), as of December 19, 2013.

**Findings**

I admit into evidence the declarations and exhibits that are part of the filings made by the Division and Newman, and take official notice of documents in the public record. See 17 C.F.R. § 201.323. I applied preponderance of the evidence as the standard of proof. See Steadman v. SEC, 450 U.S. 91, 101-04 (1981). The findings and conclusions herein are based on the entire record. I have considered and rejected all arguments and proposed findings and conclusions that are inconsistent with this Initial Decision.

In Newman, Newman was convicted on December 17, 2012, after a four-week jury trial of four counts of securities fraud and one count of conspiracy to commit securities fraud. Marcus Declaration, Exhibit 2; Docket in Newman. The counts were described in the Superseding Indictment, which alleged that Newman, while acting as a portfolio manager at a hedge fund, participated in an insider-trading scheme from in or about 2008 through in or about 2009 where analysts provided him with material, nonpublic information, which he then used to execute trades in Dell, Inc. (Dell), and NVIDIA Corporation. Marcus Declaration, Exhibit 1. Newman admits that he was a portfolio manager at Diamondback in 2008 and that he effected trades in Dell.[4] Marcus Declaration, Exhibit 5 at 2. Newman was sentenced to fifty-four months in prison followed by one year of supervised release, and ordered to pay a $1 million fine and $737,724 in criminal forfeiture. Marcus Declaration, Exhibit 2. On May 10, 2013, Newman appealed his conviction. Docket in Newman, ECF No. 264; see Response at 1-2. In Adondakis on October 4, 2013, Newman was enjoined from violating Section 17(a) of the

[4] At the time, Diamondback was registered with the Commission as an investment adviser. Marcus Declaration, Exhibit 6.

Securities Act, Section 10(b) of the Exchange Act, and Exchange Act Rule 10b-5 as alleged in the OIP. Marcus Declaration, Exhibit 4.

**Positions of the Parties**

**Division's Motion for Summary Disposition**

The Division argues that it is in the public interest to impose a collateral industry bar from association, as set forth in Section 203(f) of the Advisers Act, against Newman based on his criminal conviction in Newman and the civil injunction in Adondakis, because his conduct was egregious and intentional, and because Newman has never acknowledged his misconduct or indicated any willingness to refrain from future wrongdoing. Memorandum at 1, 4-8. The Division argues that consideration of the appropriate factors – the egregiousness of respondent's actions, the isolated or recurrent nature of the infractions, the degree of scienter involved, the sincerity of respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his conduct, and the likelihood that respondent's occupation will present opportunities for future violations (Steadman factors)[5] – weigh in favor of a barring Newman from the securities industry. Id. at 5-8.

**Newman's Response**

In his appeal to the Second Circuit, Newman argues "that the District Court erred by failing to instruct the jury that, to find Mr. Newman guilty, it had to find that he knew of a benefit received by the ultimate tipper," among other assertions of error. Response at 2-3. He expects that his appeal may be decided in the first half of 2014, which could occur before an Initial Decision is due in this proceeding on May 22, 2014.[6] Id. at 3-4.

Newman does not agree with the Division's characterization of the facts in its Memorandum or that his actions were egregious, intentional, and repeated. Id. at 1-2, 5. He also takes issue with the Division's statement that he failed to accept the wrongful nature of his conduct, stating that he would not contest this statement if interpreted to mean only that Newman has exercised his right to appeal his criminal conviction and continues to deny the allegations against him. Id. at 5.

**Division's Reply**

The Division sees no sound reason for delaying the Initial Decision, citing Charles Phillip Elliott, 50 S.E.C. 1273, 1276 n.15 (1992), where the respondent in a follow-on proceeding argued that the Commission should withhold judgment pending his appeal; however, the Commission found no need to delay the administrative proceeding until the outcome of the appeal. Reply at 1.

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[5] Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981).

[6] The U.S. Postal Service "green card" returned to the Secretary shows that the OIP, sent to Newman on October 21, 2013, care of his counsel, Nathanson, was delivered on October 24, 2013. 17 C.F.R. § 141(a)(2)(i). The due date for an Initial Decision is therefore May 22, 2014.

## Conclusions

Section 203(f) of the Advisers Act permits the Commission to impose sanctions against Newman because: 1) he has been both a) convicted of securities fraud and conspiracy to commit securities fraud, and b) enjoined from violating the securities statutes, within ten years of issuance of the OIP; 2) at the time of his misconduct, he was associated with an investment adviser; and 3) for the reasons discussed below, it is the public interest to do so. 15 U.S.C. § 80b-3(e), (f). Such sanctions include censure, limiting his activities in the securities industry, suspension for up to twelve months, and a bar from association with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization. 15 U.S.C. § 80b-3(f).

For purposes of this proceeding, the facts and findings of the criminal and civil proceedings are taken to be true, despite the pending appeal. As in Elliott, the focus of this proceeding is Newman's conviction and injunction and their public-interest implications.[7] See Elliott, 50 S.E.C. at 1276. A criminal conviction of one count of conspiracy to commit securities fraud and four counts of securities fraud shows egregious, wrongful behavior. Newman's sentence of fifty-four months in prison, followed by one year of supervised release, and the imposition of a $1 million fine and $737,724 in criminal forfeiture buttress the egregiousness of his actions. According to the Superseding Indictment in Newman, Newman's illegal conduct occurred from in or about 2008 through in or about 2009. Marcus Declaration, Exhibit 1. Also, the criminal conduct for which Newman was convicted requires scienter. 15 U.S.C. §§ 78j(b), 78ff; 18 U.S.C. § 371; see United States v. Feola, 420 U.S. 671, 686 (1975) (holding that in order 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); United States v. Vilar, 729 F.3d 62, 88-89 (2d Cir. 2013) (scienter is an element of the government's criminal case for securities fraud under Section 10(b) of the Exchange Act). The application of the Steadman factors leaves no doubt that it is in the public interest to bar Newman from further participation in the securities industry. See Bruce Paul, 48 S.E.C. 126, 128 (1985).

## Order

I GRANT the Division's Motion and ORDER that, pursuant to Section 203(f) of the Investment Advisers Act of 1940, Todd Newman is barred from association 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 of the Commission's Rules of Practice. 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 of the Commission's Rules of Practice. 17 C.F.R. § 201.111. If

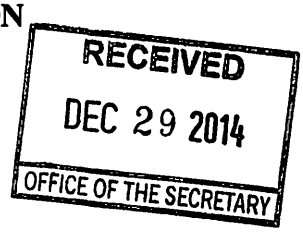
[7] Newman's criminal appeal does not warrant delaying the issuance of an Initial Decision. See Response at 3-4. If the statutory basis for the collateral bars is no longer present, the remedy is to petition the Commission for reconsideration of this action. See Jon Edelman, 52 S.E.C. 789, 790 (1996).

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 occur, the Initial Decision shall not become final as to that party. 17 C.F.R. § 201.360(b)(1).

Brenda P. Murray
Chief Administrative Law Judge

HARD COPY

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION




**ADMINISTRATIVE PROCEEDING**
**File No. 3-15581**

| | |
|---|---|
| **In the matter of:** | |
| **TODD NEWMAN,** | |
| **Respondent.** | |

## CERTIFICATE OF SERVICE

I, Andrew Z. Lipson, hereby certify that, pursuant to Rule 150(c)(3) and (4) of the United States Securities and Exchange Commission's Rules of Practice, on December 24, 2014, I caused a true and correct copy of the enclosed Petition for Reconsideration, Memorandum of Points and Authorities in Support of such petition, and the Declaration of John A. Nathanson (and the accompanying exhibits) to be served upon the following persons according to the method(s) specified for each:

**Via facsimile and FedEx:**

Brent J. Fields, Secretary
Office of the Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

**Via email and FedEx:**

The Honorable Brenda P. Murray
Administrative Law Judge
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549
[redacted]

**Via email (pursuant to agreement with the Division of Enforcement):**

Daniel R. Marcus
Matthew Watkins
Securities and Exchange Commission
New York Regional Office
200 Vesey Street, Suite 400
New York, NY 10281
[redacted]

*Counsel to Securities and Exchange Commission Division of Enforcement*

Dated: December 24, 2014

Andrew Z. Lipson

HARD COPY

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



**ADMINISTRATIVE PROCEEDING**
**File No. 3-15581**

| | |
|---|---|
| **In the matter of:** | |
| **TODD NEWMAN,** | |
| **Respondent.** | |

## RULE 152(d) STATEMENT

I, Andrew Z. Lipson, hereby state that, pursuant to Rule 152(d) of the United States Securities and Exchange Commission's Rules of Practice, I caused a true and correct copy of the (1) Petition for Reconsideration; (2) Memorandum of Points and Authorities in Support of Petition for Reconsideration; (3) Declaration of John A. Nathanson (and the accompanying exhibits); and (4) the accompanying certificate of service to be faxed to the Office of the Secretary of the Securities and Exchange Commission, with attention to Secretary Brent J. Fields, on December 24, 2014 to the following fax number: (202) 772-9324.

Dated: December 24, 2014

Andrew Z. Lipson