UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15925

In the Matter of	:
MICHAEL S. STEINBERG,	:
Respondent.	:

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO THE DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION AGAINST RESPONDENT MICHAEL S. STEINBERG

KRAMER LEVIN NAFTALIS
& FRANKEL LLP
1177 Avenue of the Americas
New York, New York 10036
(212) 715-9100 (telephone)
(212) 715-8000 (fax)

Attorneys for Respondent
Michael S. Steinberg

Dated: August 20, 2014

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Respondent Michael S. Steinberg submits the following response in opposition to the motion of the Securities and Exchange Commission ("SEC" or the "Commission") Division of Enforcement (the "Division") for summary disposition of the claims set forth in the June 11, 2014 Order Instituting Administrative Proceedings ("OIP") Pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act").

PRELIMINARY STATEMENT

The Division's pursuit of an industry bar in this matter flies in the face of the position the Division took just three months ago when it joined in an application that successfully urged a federal district judge to stay its civil injunctive action against Mr. Steinberg following oral argument in *United States v. Newman*, No. 13-1837 and *United States v. Newman (Chiasson)*, No. 13-1917 (collectively, "*Newman/Chiasson*"), consolidated appeals that have put Mr. Steinberg's conviction in potential jeopardy. The Division's current position also runs counter to the prudent wait-and-see approach that the U.S. Attorney's Office, the Commission, the Court of Appeals for the Second Circuit, and numerous judges in the Southern District of New York (including the Honorable Richard J. Sullivan, who presided over Mr. Steinberg's criminal trial) all adopted after the *Newman/Chiasson* argument. And yet the Division, in its papers, ignores its 180-degree about-face and says not one word about the potentially case-dispositive consequences of the *Newman/Chiasson* appeal.

The Division also makes no effort to explain why administrative relief is needed now to permanently bar an individual who has been out of the securities industry for nearly two years, who has agreed to continue absenting himself until the conclusion of all cases against him, and who, the Second Circuit may conclude, was convicted based on jury findings that do not establish criminal intent. It also fails to argue, let alone establish, that the Division or the

public would be prejudiced should an initial decision in this matter await forthcoming guidance from the Second Circuit. Yet Mr. Steinberg would be significantly prejudiced were he to be barred on the basis of innocent conduct.

For these reasons, we respectfully submit that the most sensible approach at this stage is to follow the example set by numerous other courts and agencies and to defer ruling on the Division's motion until the *Newman/Chiasson* appeal is resolved – an event that the U.S. Attorney's Office has predicted will come to pass "within the next several months." In the unlikely event that it appears that a decision in the *Newman/Chiasson* appeal will not be forthcoming within the 210-day period during which an initial decision must be filed pursuant to the OIP, we would respectfully request that Your Honor ask the Commission for additional time as expressly permitted by Rule 360 of the SEC's Rules of Practice.

PROCEDURAL HISTORY AND STATEMENT OF RELEVANT FACTS

A. The Prosecution of Todd Newman and Anthony Chiasson

On August 28, 2012, a grand jury charged Todd Newman and Anthony Chiasson with committing securities fraud and conspiring to commit securities fraud based on allegations that, on behalf of the hedge funds for which they served as a portfolio managers, they traded securities of Dell Inc. ("Dell") and Nvidia Corp. ("Nvidia") while in possession of material nonpublic information disclosed improperly by corporate insiders. *See* Declaration of Barry H. Berke ("Berke Decl."), Ex. A ¶¶ 6-37. Specifically, the indictment alleged that the defendants traded on information their employees had obtained from analysts at other investment firms. *Id.* at ¶¶ 9-10. According to the indictment, those analysts obtained the information from other individuals, who received the information directly or indirectly from inside sources. *Id.* at ¶ 6.

At their joint trial, Messrs. Newman and Chiasson asked the Honorable Richard J. Sullivan to instruct the jury that the prosecution bore the burden of proving that the defendants knew that an insider had disclosed confidential information in exchange for a personal benefit. In support of that request, the defendants cited *Dirks v. SEC*, 463 U.S. 646 (1983), in which the Supreme Court had held that trading on material nonpublic information is illegal only if the insider has engaged in self-dealing by disclosing information in exchange for a personal benefit. Berke Decl., Ex. B at 3346-53.

Judge Sullivan's decision not to require the prosecution to prove that the tippee defendants knew an insider had disclosed confidential information in exchange for a benefit was contrary to five other district court decisions, including three from within the Southern District of New York. *See, e.g.*, *United States v. Whitman*, 904 F. Supp. 2d 363, 371 (S.D.N.Y. 2012); *United States v. Rajaratnam*, 802 F. Supp. 2d 491, 498-99 (S.D.N.Y. 2011); *Hernandez v. United States*, 450 F. Supp. 2d 1112, 1118 (C.D. Cal. 2006); *State Teachers Ret. Bd. v. Fluor Corp.*, 592 F. Supp. 592, 594 (S.D.N.Y. 1984); *United States v. Santoro*, 647 F. Supp. 153, 170-71 (E.D.N.Y. 1986), *rev'd on other grounds sub nom. United States v. Davidoff*, 845 F.2d 1151 (2d Cir. 1988). Although Judge Sullivan acknowledged that Messrs. Newman and Chiasson's position was "supportable certainly by the language of *Dirks*" (Berke Decl., Ex. B at 3595), he erroneously concluded, in light of *SEC v. Obus*, 693 F.3d 276 (2d Cir. 2012), that, to support insider trading liability, a tippee need not have known that the tipper had received a benefit. Berke Decl., Ex. B at 3594-605.[1]

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[1] The Second Circuit subsequently rejected Judge Sullivan's belief that *Obus* had held that a defendant-tippee need not know of the insider's personal benefit. *See United States v. Whitman*, 555 F. App'x 98, 106 (2d Cir. 2014) ("*We have yet to decide* whether a remote tippee must know that the original tipper received a personal benefit in return for revealing inside information." (emphasis added)).

On December 17, 2012, a jury found Messrs. Newman and Chiasson guilty on all counts. Judgments of conviction were entered in May 2013.[2] Though Judge Sullivan denied Newman's and Chiasson's requests for bail pending appeal, the Second Circuit granted defendants' Rule 9(b) motion from the bench, agreeing that the issue of whether to be guilty of insider trading a tippee must know of an insider's personal benefit presented a substantial question of law. Order, *Newman* (2d Cir. June 21, 2013).

Five months later, based solely on the collateral estoppel effect of the convictions, the Honorable Harold Baer, Jr. entered partial judgments against Newman and Chiasson in a parallel injunctive action. On October 21, 2013, based on both the criminal convictions and civil injunctions obtained in the district courts, the Commission instituted separate administrative proceedings against Newman and Chiasson.

Since the *Newman/Chiasson* trial, at least three more district courts have incorporated a knowledge-of-benefit requirement into their instructions. In *United States v. Martoma*, No. 12-cr-973-PGG (S.D.N.Y.), the court instructed the jury that a tippee violates the federal securities laws only if he buys or sells securities based on insider information "that he knows was disclosed by another person in breach of a duty of trust and confidence and in exchange for a personal benefit to the insider." Berke Decl., Ex. C at 3183. To find the defendant guilty in that case, the jury was required to determine that Mr. Martoma "knew that the information he obtained had been disclosed in breach of a duty owed by [the tipper] in exchange for a personal benefit." *Id.* at 3186. The court in *United States v. Salman*, No. CR-11-0625, 2013 WL 6655176 (N.D. Cal. Dec. 17, 2013), similarly instructed that, in order to find that the government had proven the defendant's knowledge of the tipper's breach, the jury must find "[t]hat the defendant knew that [the insider] personally benefitted in some way, directly or indirectly, from the disclosure of the allegedly inside information." *Id.* at *5. More recently, in *United States v. Rengan Rajaratnam*, No. 13-cr-211-NRB (S.D.N.Y.), the government *affirmatively requested* – and was granted – an instruction explaining that, to meet its burden, the government had to prove "that the defendant knew that the material, nonpublic information had been disclosed by an insider in breach of a duty of trust and confidence, in return for some actual or anticipated benefit." Berke Decl., Ex. D.

[2] Newman and Chiasson timely appealed their convictions, and the Second Circuit heard oral argument four months ago on April 22, 2014. An unofficial transcription of the *Newman/Chiasson* oral argument, prepared at the request of Kramer Levin, is attached as Exhibit E to the Berke Declaration.

B. The Prosecution of Michael Steinberg

On March 29, 2013, following the *Newman/Chiasson* criminal trial, the U.S. Attorney's Office unsealed a superseding indictment charging Mr. Steinberg with unlawfully trading securities based on fourth-hand inside information obtained by his research analyst, Jon Horvath. Declaration of Justin P. Smith ("Smith Decl."), Ex. 1. The *Newman/Chiasson* and *Steinberg* cases involved the same "tipping chain" of analysts who obtained the information from other individuals who, in turn, obtained that information from Dell and Nvidia insiders. *Compare* Smith Decl., Ex. 1 ¶¶ 11-12 & 18-20 *with* Berke Decl., Ex. A ¶¶ 12-14 & 22-23.

At Mr. Steinberg's trial – and just as Messrs. Newman and Chiasson had done – Mr. Steinberg asked the district court to instruct the jury that, to find him guilty of insider trading, the prosecution had to prove that he knew that an insider breached a duty of trust or confidence "in exchange for a personal benefit to the insider." *See* Berke Decl., Ex. F. Mr. Steinberg's request was critical, given there was no evidence at trial that he knew of any benefit to the Dell or Nvidia insiders.

Prior to the jury charge conference, in a letter to Judge Sullivan, Mr. Steinberg objected to the district court's decision to omit from its instructions a requirement that the jury must find proof of knowledge of a benefit. In response, the district court overruled the objection, rejected Mr. Steinberg's request to charge, and stated on the record that, during the trial of Messrs. Newman and Chiasson, it had "already ruled on" the proposed instruction of a "tippee's knowledge of the personal benefit" and was "not going to revisit" the issue. Berke Decl., Ex. G at 3442:13-15. The jury was not required to find that Mr. Steinberg knew about any personal benefit. *Id.* at 3699:10-3700:8.

On December 18, 2013, the jury found Mr. Steinberg guilty of all charges. Judge Sullivan sentenced Mr. Steinberg on May 16, 2014 and entered judgment three days later. Recognizing that the Second Circuit had held in the *Newman/Chiasson* case that the "knowledge of personal benefit" issue discussed above presented a substantial question of law likely to result in reversal or a new trial, Judge Sullivan granted Mr. Steinberg's unopposed motion for bail pending appeal. Smith Decl., Ex. 5 at 2; Berke Decl., Ex. H at 53:22-54:9.

C. The *Newman/Chiasson* Appeal

Four months ago, in connection with the appeal that Todd Newman and Anthony Chiasson took from their criminal convictions, the Second Circuit heard argument on the potentially case-dispositive "knowledge of benefit issue." Accordingly, the "knowledge of benefit issue" has been *sub judice* since April.

At the *Newman/Chiasson* oral argument, Judge Barrington Parker pressed the government to articulate "the principle that criminalizes some information . . . and makes virtually indistinguishable information innocuous." Berke Decl., Ex. E at 31. He also stated that, if the government "follow[ed its] position to its logical conclusion, at the end of the day, the person who's likely to be guilty is the person who the government decides to indict." *Id.* at 34. Noting the financial industry's need for "bright line rules about what can and cannot be done," Judge Parker criticized the government's "amorphous theory" that "gives precious little guidance to all of these institutions . . . [left] at the mercy of the government." *Id.* at 49. Similarly, Judge Ralph Winter observed that, while the Supreme Court's opinion in *Dirks* sought to "protect analysts" by establishing "a guiding principle for people who trade all the time," "there's no guiding principle at all" in the absence of "some kind of concrete,

demonstrable benefit coming to a tipper." *Id.* at 40-41.[3]

D. The Division's Injunctive Action Against Michael Steinberg

The Division sued Mr. Steinberg in the Southern District of New York on March 29, 2013. Seeking injunctive relief, disgorgement, civil monetary penalties, and interest, the Division alleged that Mr. Steinberg violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and SEC Rule 10b-5. Smith Decl., Ex. 6. In the 16 months since the Division filed its complaint, the civil case has remained essentially dormant except for very limited discovery. On May 8, 2014, Mr. Steinberg and the SEC jointly asked for the matter to be stayed. In their letter, the parties noted that (1) the *Newman/Chiasson* panel "appeared to express skepticism as to the sufficiency of Judge Sullivan's jury instructions regarding downstream tippees"; (2) "if the Second Circuit reverses or vacates the convictions of Messrs. Newman and Chiasson, it likely will grant the same relief to Mr. Steinberg"; and (3) in the event of reversal or vacatur, "any estoppel that would otherwise operate collaterally in the SEC's favor . . . would no longer apply." Berke Decl., Ex. I. The Division and Mr. Steinberg therefore argued that moving forward in advance of a ruling in *Newman/Chiasson* would be "inefficient and unnecessarily burdensome." *Id.* The district court granted the parties' request four days later. *Id.*

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[3] Many in the media noted that the panel "picked apart the government's case" and "hinted that it might overturn the convictions." Ben Protess & Matthew Goldstein, *Appeal Judges Hint at Doubts in Insider Case*, N.Y. Times, Apr. 23, 2014, at A1; *see also* Christopher M. Matthews, *Insider Cases' Legal Basis Questioned*, Wall St. J., Apr. 23, 2014, at C1 ("Federal prosecutors were peppered with tough questions Tuesday on the legal underpinnings of their near-perfect record in insider-trading cases, raising the prospect that some convictions could be overturned.").

E. The Division's Administrative Proceeding Against Michael Steinberg

After conceding the wisdom of staying its proceeding in district court, the Division sought to impose administrative sanctions against Mr. Steinberg. Though it often does not seek administrative remedies until *both* parallel criminal *and* civil actions have concluded,[4] the Division commenced the instant proceeding less than a month after entry of Mr. Steinberg's conviction and without achieving any resolution in the civil case. At a prehearing conference, the Division successfully opposed Mr. Steinberg's request for an adjournment pending disposition of the *Newman/Chiasson* appeal. Berke Decl., Ex. J. With leave, the Division then moved for summary disposition on July 24, 2014. Though the motion will be fully briefed as of next week (when the Division's reply papers are due), an initial decision need not be filed with the Commission until January 12, 2015 (210 days from service of the OIP).

F. The Extraordinary Reaction to the *Newman/Chiasson* Appeal

In addition to the Division and Judge Baer in the SEC's injunctive action against Mr. Steinberg, numerous other government agencies and courts have recognized the significance of the *Newman/Chiasson* oral argument and how a reversal in that case would meaningfully affect the state of insider trading law in the Second Circuit and require reversal of the convictions of

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[4] The cases cited in the Division's brief that arose from criminal convictions collectively prove this point. In *In the Matter of Anthony Chiasson*, 2014 SEC LEXIS 1366 (Apr. 18, 2014), the Division commenced administrative proceedings only after Chiasson was convicted *and* civilly enjoined. In *In the Matter of Ted Harold Westerfield*, 1999 SEC LEXIS 433 (Mar. 1, 1999), the Division refrained from resorting to administrative relief until after (1) the respondent had been civilly enjoined and (2) the court of appeals had affirmed his criminal conviction. *See In the Matter of Ted Harold Westerfield*, 1998 SEC LEXIS 194 (Feb. 9, 1998) (explaining procedural history). Similarly, the Commission did not institute administrative proceedings against respondent Kent Nelson until seven weeks after the Tenth Circuit disposed of his direct appeal. *Compare In the Matter of Kent D. Nelson*, 2009 SEC LEXIS 440 (Feb. 24, 2009) (noting issuance of order instituting proceedings on August 1, 2008) *with* Order, *United States v. Nelson*, No. 1:05-cr-02021-JAP (D.N.M. June 13, 2008), ECF No. 98-1 (court of appeals order and mandate dismissing appeal for failure to prosecute).

Mr. Steinberg and potentially others. For example:

- Two weeks ago, the Second Circuit held Mr. Steinberg's appeal in abeyance pending disposition of the *Newman/Chiasson* appeal. Berke Decl., Ex. K. The U.S. Attorney's Office did not oppose Mr. Steinberg's motion for that relief. *Id.*

- Acknowledging that the Second Circuit could "suggest that there had to have been knowledge, explicit knowledge, of the benefit that went to [the tipper]" in order to sustain a tippee's insider trading conviction, Judge Sullivan himself adjourned the July 1, 2014 sentencing of cooperating witness Danny Kuo until after the Second Circuit renders its decision in the *Newman/Chiasson* appeal. Berke Decl., Ex. L at 35:2-20, 46:13-47:8.

- Three months ago, the Commission granted Anthony Chiasson's petition for review of Administrative Law Judge Elliot's initial decision to permanently bar him from the securities industry. *See In the Matter of Anthony Chiasson*, 2014 SEC LEXIS 1853 (May 30, 2014). As a result of the Commission's ongoing review, the initial decision has not taken effect, and Mr. Chiasson has not been barred.

- On May 30, 2014, Judge Naomi Reice Buchwald pointed to the *Newman/Chiasson* panel's questions and comments as support for her decision to instruct the *Rengan Rajaratnam* jury as to the government's burden to prove the defendant's knowledge of the tipper's personal benefit. *See* Berke Decl., Ex. M at 10:5-7 ("Look. The government has withdrawn its earlier opposition on the personal benefit aspect. They [the prosecutors] went to the Second Circuit argument. They heard it.").

- On May 28, 2014, the U.S. Attorney for the Southern District of New York asked to stay the SEC's failure-to-supervise proceeding against the head of S.A.C. Capital, Steven A. Cohen, "until at least the Second Circuit issues a decision in the *Newman/Chiasson* Appeal," arguing that a stay is "necessary" because the allegations against Mr. Cohen are "premised" on the presumption that Mr. Steinberg engaged in criminality and Mr. Steinberg's appeal would raise the "precise legal issue" that the *Newman/Chiasson* panel is expected to decide "within the next several months." Berke Decl., Ex. N. Your Honor granted the U.S. Attorney's request. *See In the Matter of Steven A. Cohen*, 2014 SEC LEXIS 1832 (May 29, 2014).

- At Mr. Steinberg's May 16, 2014 sentencing, Judge Sullivan granted bail pending appeal, noting that Second Circuit had "indicated" that the knowledge-of-benefit issue at the heart of the *Newman/Chiasson* and *Steinberg* cases "is a closer call than [he had] thought" when he denied similar relief to Newman and Chiasson a year prior. Berke Decl., Ex. H at 53:22-54:9.

ARGUMENT

I. DECISION ON THE DIVISION'S MOTION SHOULD BE DEFERRED

Given the tenuous nature of Mr. Steinberg's conviction, deferral is warranted until the Second Circuit decides the *Newman/Chiasson* appeal and clarifies the elements of tippee liability. Rule 250(b) of the Commission's Rules of Practice directs hearing officers to grant, deny, *or defer* decision on motions for summary disposition. Where a party cannot present facts essential to justify opposition to the motion, denial or deferral is mandatory; in all other circumstances, deferral is discretionary. 17 C.F.R. § 201.250(b). The unprecedented reaction to the *Newman/Chiasson* oral argument underscores all the reasons that strongly favor an exercise of that discretion to grant a deferral here. Waiting for a decision in *Newman/Chiasson* is precisely what the U.S. Attorney's Office asked Your Honor to do when it successfully sought to stay the Division's administrative proceeding against Steven A. Cohen. Berke Decl., Ex. N. It is what Judge Sullivan decided to do not only when he granted Mr. Steinberg bail pending appeal (Berke Decl., Ex. H), but also when he adjourned the sentencing of Danny Kuo, one of Mr. Steinberg's alleged co-conspirators, in light of the impact that disposition of the appeal would have on Mr. Kuo's case (Berke Decl., Ex. L). And it is what the Second Circuit did just two weeks ago when it agreed to hold Mr. Steinberg's appeal in abeyance. Berke Decl., Ex. K. Even the Division favored a practical wait-and-see approach when it joined in urging Judge Baer to stay the Commission's injunctive action pending a decision from the Circuit. Berke Decl., Ex. I.

Four months have passed since oral argument in *Newman/Chiasson*, and nearly five additional months remain until the January 12, 2015 initial decision deadline that the Commission has set for this administrative proceeding. It is therefore likely that a Rule 250(b)

deferral will provide sufficient time for the Second Circuit to address the merits of the *Newman/Chiasson* appeal and for the impact of the court's decision on Mr. Steinberg to become known. However, in the event the Second Circuit does not rule within the requisite time frame, we would respectfully request that, pursuant to Rule 360, Your Honor ask the Commission to extend the time for filing of the initial decision. *See* 17 C.F.R. § 201.360(a)(3) ("[T]he Chief Administrative Law Judge may determine, in his or her discretion, to submit a motion to the Commission requesting an extension of the time period for filing the initial decision."). Such a motion would need to be made by December 12, 2014. *Id.* ("This motion must be filed no later than 30 days prior to the expiration of the time specified in the order for issuance of an initial decision.").

The SEC, however, urges that the *Newman/Chiasson* appeal is of no moment. It cites a footnote from *In the Matter of James E. Franklin*, 2007 SEC LEXIS 2420 (Oct. 12, 2007), for the proposition that the pendency of an appeal does not "preclude" the Commission from taking action based on a district court judgment. *Id.* at *12 n.15. Needless to say, the appeal in *Franklin* did not elicit from the U.S. Attorney's Office, the Commission, and the courts anything like the unprecedented response to the appeal in *Newman/Chiasson* (indeed, the Division has not cited a single analogous case). In addition, the Commission's actual holding was far less definitive, and it recognized that there are occasions that may justify a short deferment. In the footnote on which the Division relies, the Commission quoted the D.C. Circuit's decision in *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099 (D.C. Cir. 1988), which noted that the pendency of an appeal "*ordinarily* does not detract" from a judgment's finality. *Blinder*, 837 F.2d at 1104 n.6 (emphasis added). That important caveat was informed by an earlier decision authored by then-Judge Ruth Bader Ginsburg, who cautioned that "care should

be taken in dealing with judgments that are final, but still subject to direct review" because "[a]ccording preclusive effect to a judgment from which an appeal has been taken . . . risks denying relief on the basis of a judgment that is subsequently over-turned." *Martin v. Malhoyt*, 830 F.2d 237, 264-65 (D.C. Cir. 1987). Judge Ginsburg proposed that "[o]ne potential solution to this dilemma is to defer consideration of the preclusion question until the appellate proceedings addressed to the prior judgment are concluded, provided they are moving forward with reasonable dispatch and will not be long delayed." *Id.* That is the precise course that Mr. Steinberg requests here.[5]

II. A PRE-APPEAL BAR IS NOT IN THE PUBLIC INTEREST

For nearly two years now, Mr. Steinberg has been "associated" with an investment advisor only in the most nominal sense of the word. Since fall 2012, Mr. Steinberg has been on leave from his employer. Weeks before the Commission commenced this proceeding, Mr. Steinberg offered to memorialize in a signed writing his willingness to maintain the status quo and to stay out of the securities industry until the final resolution of this matter and all pending actions in district court. The Division rejected that offer, even though such an agreement would effectively grant to the Division the very relief sought by way of its motion for summary disposition.

The Division's assessment of the *Steadman* factors improperly presumes that Mr. Steinberg's conviction will survive the aftermath of the *Newman/Chiasson* appeal. Though the Division's papers claim in conclusory fashion that Mr. Steinberg's actions were "egregious,

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[5] The cases cited in the June 30, 2014 Order Following Prehearing Conference also do not establish that the Commission may never consider the pendency of an appeal as good cause for suspending an administrative proceeding. *See, e.g.*, *In the Matter of Jon Edelman*, 52 S.E.C. 789, 790 (1996) (pending appeal is "*generally*" insufficient basis for "indefinite" stay (emphasis added)).

intentional, and repeated" (Div. Mem. 7), the very issue receiving such serious attention from the Second Circuit is whether Mr. Steinberg's conviction is based on findings that do not establish a criminal state of mind. Such a holding would directly repudiate the Division's allegations concerning the degree of scienter involved. It would also contradict the Division's assessment of the "egregious" and "repeated" nature of Mr. Steinberg's "illegal conduct," which the Second Circuit may hold violated no law at all. Similarly, the Division's evaluation of Mr. Steinberg's "failure to accept the wrongful nature of his conduct," refusal to "provide any assurances against future misconduct," and recurrent nature of his infractions (*id.*) again rests on the soon-to-be-tested assumption that Mr. Steinberg's conduct was, in fact, unlawful. The Division weakly asserts that, if Mr. Steinberg were to reenter the securities industry after serving his three-and-a-half-year prison sentence, he would then be presented with the opportunity for future violations – again presuming the existence of a previous violation and ignoring that, in light of the serious issues being considered by the Second Circuit, Mr. Steinberg's incarceration has been stayed. The Division alleges no exigent circumstance that could justify a refusal by the Commission to wait the "several months" that the U.S. Attorney's Office believes will pass before a decision in *Newman/Chiasson* is handed down. Berke Decl., Ex. N at 3.

In fact, a fair evaluation of the *Steadman* factors supports granting a deferral. Given that Mr. Steinberg's conviction has been called into question by the *Newman/Chiasson* appeal and the overwhelming reaction to the Second Circuit's questions and comments at oral argument, *each* of the *Steadman* factors are inconclusive at best. As suggested above, until the Second Circuit determines whether criminal liability can lie absent proof of knowledge-of-benefit, it would be premature to hold that Mr. Steinberg acted egregiously, wrongfully, or with

a high degree of scienter. It would be equally premature to presume that he committed any infractions or violations, let alone multiple infractions, or is likely to do so in the future.

III. AN INDUSTRY BAR WOULD UNFAIRLY PREJUDICE MR. STEINBERG

If the Second Circuit follows the eight district courts that have held that, to support a conviction, a tippee must know that an insider received a personal benefit in exchange for disclosing information, Mr. Steinberg would be significantly prejudiced by any continuing restraint on his ability to seek employment in the securities industry. Even after a conviction has been reversed, and even after the Division consents to lifting a previously imposed bar, it appears that months can pass before the Commission restores a respondent's right to associate. *See, e.g.*, *In the Matter of Linus N. Nwaigwe*, 2013 SEC LEXIS 1997 (July 11, 2013); *In the Matter of Kenneth E. Mahaffy, Jr.*, 2012 SEC LEXIS 4020 (Dec. 18, 2012). In addition, for nearly two years, Mr. Steinberg has been on leave – a status that has permitted Mr. Steinberg, his wife, and his children to receive certain benefits, including medical and dental insurance coverage, while he abstains from any trading activity or gainful employment. A bar would terminate those benefits. Since the impending disposition of the *Newman/Chiasson* appeal will determine the viability of the conviction that underlies the OIP against Mr. Steinberg, fairness dictates that the Commission should postpone immediate action and wait to see how the Second Circuit rules.

* * *

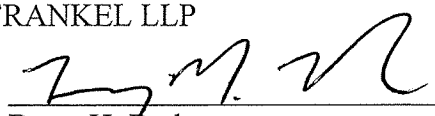
CONCLUSION

Given the advanced status of the *Newman/Chiasson* appeal, the universal appreciation for the significance of the issues being considered by the Second Circuit, the fact that reversal in that case would overturn Mr. Steinberg's conviction and moot the instant administrative proceeding, the undue prejudice that a bar will cause to Mr. Steinberg, the lack of prejudice to the Division, and the fact that the public interest does not clearly justify an industry bar at this time, Mr. Steinberg respectfully suggests that, pursuant to Rule 250(b) of the Commission's Rules of Practice, decision on the Division's motion for summary disposition should be deferred until the Second Circuit decides the *Newman/Chiasson* appeal. In the event that the appeal remains pending on December 12, 2014, we respectfully request that Your Honor move the Commission pursuant to Rule 360(a)(3) for an extension of time to file an initial decision.

Dated: August 20, 2014

Respectfully submitted,

KRAMER LEVIN NAFTALIS &
FRANKEL LLP

By: 

Barry H. Berke
Robin M. Wilcox
Theodore S. Hertzberg
1177 Avenue of the Americas
New York, New York 10036
(212) 715-9100 (telephone)
(212) 715-8000 (fax)

Attorneys for Respondent
Michael S. Steinberg