UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15925

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

DECLARATION OF BARRY H. BERKE

BARRY H. BERKE, ESQ., hereby declares, pursuant to 28 U.S.C. § 1746 and under penalty of perjury, as follows:

1. I am a partner at the law firm of Kramer Levin Naftalis & Frankel LLP ("Kramer Levin"), counsel for respondent Michael S. Steinberg in the above-captioned matter.

2. I submit this Declaration in opposition to the Division of Enforcement's (the "Division") Motion for Summary Disposition Against Respondent Michael S. Steinberg.

3. To the best of my knowledge, information, and belief, the exhibits to this Declaration are true and correct copies of the following documents.

4. Exhibit A is a copy of the superseding indictment in *United States v. Newman*, No. S2 12-cr-121 (RJS) (S.D.N.Y.), dated August 28, 2012.

5. Exhibit B is a copy of relevant portions of the *United States v. Newman* trial transcript.

6. Exhibit C is a copy of relevant portions of the *United States v. Martoma*, No. 12-cr-973 (PGG) (S.D.N.Y.) trial transcript.

7. Exhibit D is a copy of relevant pages of the Government's Request to Charge, filed May 5, 2014 in *United States v. Rengan Rajaratnam*, No. 13 Cr. 211 (NRB) (S.D.N.Y.).

8. Exhibit E is an unofficial transcript, prepared at the request of Kramer Levin, of the oral argument held by the Second Circuit on April 22, 2014 in *United States v. Newman*, No. 13-1837 and *United States v. Newman (Chiasson)*, No. 13-1917 (collectively, "*Newman/Chiasson*").

9. Exhibit F is a copy of relevant portions of the Proposed Joint Requests to Charge, filed November 6, 2013 in *United States v. Steinberg*, No. S4 12-cr-121 (RJS) (S.D.N.Y.).

10. Exhibit G is a copy of relevant portions of the *United States v. Steinberg* trial transcript.

11. Exhibit H is a copy of relevant portions of the transcript of the May 16, 2014 sentencing held in *United States v. Steinberg*.

12. Exhibit I is a copy of the endorsed May 8, 2014 letter from Barry H. Berke to the Honorable Harold Baer, Jr. requesting, on behalf of Michael Steinberg and the Securities & Exchange Commission, a stay in *SEC v. Steinberg*, No. 13-cv-2082 (HB) (S.D.N.Y.).

13. Exhibit J is a copy of the Order Following Prehearing Conference entered in *In the Matter of Michael S. Steinberg*, Administrative Proceeding File No. 3-15925, dated June 30, 2014.

14. Exhibit K is a copy of the August 6, 2014 Order of the United States Court of Appeals for the Second Circuit granting Michael Steinberg's motion to hold his appeal in

abeyance pending the disposition of the *Newman/Chiasson* appeal and a copy of the August 5, 2014 motion seeking that relief.

15. Exhibit L is a copy of relevant portions of the transcript of the May 16, 2014 conference held in *United States v. Kuo*, No. S2 12-cr-121 (RJS) (S.D.N.Y.).

16. Exhibit M is a copy of relevant portions of the transcript of the May 30, 2014 conference held in *United States v. Rengan Rajaratnam.*

17. Exhibit N is a copy of a May 28, 2014 letter from Assistant United States Attorneys Arlo Devlin-Brown and John T. Zach to the Honorable Brenda P. Murray requesting continuation of a stay in *In the Matter of Steven A. Cohen*, Administrative Proceeding File No. 3-15382.

Dated: August 20, 2014
New York, New York

Barry H. Berke

ORIGINAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

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COUNT ONE

(Conspiracy to Commit Securities Fraud)

The Grand Jury charges:

Relevant Entities and Individuals

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

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

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

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

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

The Insider Trading Scheme

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

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

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

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

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

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

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

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

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

The Dell Inside Information

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

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

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

May 29, 2008 Earnings Announcement

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

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

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

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

August 28, 2008 Earnings Announcement

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

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

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

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

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

The NVIDIA Inside Information

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

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

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

May 7, 2009 Earnings Announcement

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

25. Tortora, in turn, provided the NVIDIA Inside

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

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

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

The Conspiracy

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

others known and unknown, willfully and knowingly did combine, conspire, confederate and agree together and with each other to commit an offense against the United States, to wit, securities fraud, in violation of Title 15, United States Code, Section 78j(b) and 78ff, and Title 17, Code of Federal Regulations, Sections 240.10b-5 and 240.10b5-2.

Object of the Conspiracy

Securities Fraud

29. It was a part and an object of the conspiracy that TODD NEWMAN, ANTHONY CHIASSON, and JON HORVATH, the defendants, and others known and unknown, willfully and knowingly, directly and indirectly, by the use of the means and instrumentalities of interstate commerce, and of the mails, and of the facilities of national securities exchanges, would and did use and employ, in connection with the purchase and sale of securities, manipulative and deceptive devices and contrivances in violation of Title 17, Code of Federal Regulations, Section 240.10b-5 by: (a) employing devices, schemes and artifices to defraud; (b) making untrue statements of material fact and omitting to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and (c) engaging in acts, practices and courses of business which operated and would operate as a fraud and deceit upon any person, all in violation of Title 15, United States Code, Sections 78j(b)

and 78ff, and Title 17, Code of Federal Regulations, Sections 240.10b-5 and 240.10b5-2.

Means and Methods of the Conspiracy

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

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

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

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

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

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

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

Overt Acts

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

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

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

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

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

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

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

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

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

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

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

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

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

COUNTS TWO THROUGH FIVE

(Securities Fraud)

The Grand Jury further charges:

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

33. On or about the dates set forth below, in the Southern District of New York and elsewhere, TODD NEWMAN, the defendant, willfully and knowingly, directly and indirectly, by use of the means and instrumentalities of interstate commerce, and of the mails, and of the facilities of national securities exchanges, in connection with the purchase and sale of securities, did use and employ manipulative and deceptive devices and contrivances, in violation of Title 17, Code of Federal

Regulations, Section 240.10b-5, by (a) employing devices, schemes and artifices to defraud; (b) making untrue statements of material facts and omitting to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and (c) engaging in acts, practices and courses of business which operated and would operate as a fraud and deceit upon persons, to wit, NEWMAN executed and caused others to execute the securities transactions listed below based in whole or in part on material, nonpublic information:

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

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

COUNTS SIX THROUGH TEN

(Securities Fraud)

The Grand Jury further charges:

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

35. On or about the dates set forth below, in the Southern District of New York and elsewhere, ANTHONY CHIASSON, the defendant, willfully and knowingly, directly and indirectly, by use of the means and instrumentalities of interstate commerce, and of the mails, and of the facilities of national securities exchanges, in connection with the purchase and sale of securities, did use and employ manipulative and deceptive devices and contrivances, in violation of Title 17, Code of Federal Regulations, Section 240.10b-5, by (a) employing devices, schemes and artifices to defraud; (b) making untrue statements of material facts and omitting to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and (c) engaging in acts, practices and courses of business which operated and would operate as a fraud and deceit upon persons, to wit, CHIASSON executed and caused others to execute the securities transactions listed below based in whole or in part on material, nonpublic information:

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

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

COUNTS ELEVEN AND TWELVE

(Securities Fraud)

The Grand Jury further charges:

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

37. On or about the date set forth below, in the Southern District of New York and elsewhere, JON HORVATH, the defendant, willfully and knowingly, directly and indirectly, by use of the means and instrumentalities of interstate commerce, and of the mails, and of the facilities of national securities exchanges, in connection with the purchase and sale of securities, did use and employ manipulative and deceptive devices and contrivances, in violation of Title 17, Code of Federal

Regulations, Section 240.10b-5, by (a) employing devices, schemes and artifices to defraud; (b) making untrue statements of material facts and omitting to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and (c) engaging in acts, practices and courses of business which operated and would operate as a fraud and deceit upon persons, to wit, HORVATH provided material, nonpublic information to Portfolio Manager 1, who executed or caused others to execute the securities transactions listed below based in whole or in part on the information:

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

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

FORFEITURE ALLEGATION

38. As a result of committing one or more of the foregoing securities fraud offenses alleged in Counts One through Twelve of this Indictment, TODD NEWMAN, ANTHONY CHIASSON, and JON HORVATH, the defendants, shall forfeit to the United States pursuant to Title 18, United States Code, Section 981(a)(1)(C) and

Title 28, United States Code, Section 2461, all property, real and personal, that constitutes or is derived from proceeds traceable to the commission of the securities fraud offenses.

Substitute Assets Provision

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

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third party;

c. has been placed beyond the jurisdiction of the court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be divided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of the defendants up to the value of the forfeitable property described above.

(Title 18, United States Code, Section 981; Title 28, United States Code, Section 2461; Title 18, United States Code, Sections 371 and 2; Title 15, United States Code, Sections 78j(b) and 78ff; and Title 17, Code of Federal Regulations, Sections 240.10b-5 and 240.10b5-2.)

FOREPERSON

PREET BHARARA MPB
United States Attorney

Form No. USA-33s-274 (Ed. 9-25-58)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- v. -

TODD NEWMAN,
ANTHONY CHIASSON, and
JON HORVATH,

Defendants.

SUPERSEDING
INDICTMENT

S2 12 Cr. 121 (RJS)

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

PREET BHARARA
United States Attorney.

A TRUE BILL

Foreperson.

8/28/12 Filed Superseding Indictment.
ga
Jr de Peek
USMJ

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

v. 12 Cr. 121 (RJS)

TODD NEWMAN,
ANTHONY CHIASSON,

Defendants.

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New York, N.Y.
December 6, 2012
2:05 p.m.

Before:

HON. RICHARD J. SULLIVAN,

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
ANTONIA APPS
JOHN ZACH
RICHARD TARLOWE
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ERIK KITCHEN
MICHELLE LEVIN
-and-
MORVILLO LLP
BY: GREGORY R. MORVILLO

conversation you've had with other IR departments, that you call them up and you say, I need help with my model and you give them feedback. He said yes. Sometimes they say no comment, but sometimes, especially if they are initiating coverage, he is saying this is my model and I don't want to be too far off and they give you information, and I think there was evidence of that.

Your Honor, unless there is more on that --

THE COURT: No. I get it.

You want to move to knowledge?

MR. FISHBEIN: Yes. It's a critical point and there is an important legal issue and then there are factual issues.

And the legal issue is whether, in fact, the defendant, in addition to knowing that generally there is a breach of fiduciary duty, has to know specifically that the information was provided in exchange for personal benefit.

And I will cite three cases from the Southern District which we believe are persuasive authority. The first two, which are Whitman and Rajaratnam, are criminal cases, like this one, that specifically hold that the defendant must know of the personal benefit, not just generally that there was a breach of fiduciary duty, but that there was a personal benefit. And U.S. v. Whitman, I think your Honor has it right, the Rajaratnam case, and then the State Teachers Retirement board v. Fluor, which is Judge Sweet in 1984. They all analyze this

very specific issue.
Basically, the conclusion is that because the distinction between a breach of fiduciary duty that will prevent a tippee from trading and a breach of fiduciary duty that does not, the thing that distinguishes the two is the personal benefit under Dirks. If that's the distinguishing factor, then it is not a crime unless the defendant is aware of that distinguishing factor.
THE COURT: If a defendant believes that it is for money but it turns out to be for some other nonmonetary but right in the middle of the fairway of Dirks personal benefit, you are saying the failure to know the exact nature of the personal benefit means you can't satisfy --
MR. FISHBEIN: No. These cases address that. It's not that you have to know how many dollars and cents it was and, but you have to know that it was in exchange for a personal benefit.
THE COURT: But believing or presuming it to be the case is not enough?
MR. FISHBEIN: I'm sorry. Presuming?
THE COURT: Presuming. In other words, if there is evidence -- I don't know if there is in this case -- but if there is evidence to indicate that members of the conspiracy believe that this was just all for money and it turns out that it was for a nonmonetary personal benefit, that would be all

right or that would not be all right?

MR. FISHBEIN: Your Honor, I don't know that we get to that because I don't think, at least in Mr. Newman's case, there is no evidence that he was aware of any benefit going to the original insider, and so maybe I could focus on that.

THE COURT: Okay.

MR. FISHBEIN: So our position, and I think it's clearly supported by the case law, is that the defendant must at least have some knowledge that the insider got a personal benefit. Whether their knowledge has to be precisely what the benefit was or generally that they got a benefit, they at least, the defendant must know that there is a personal benefit.

Now, in the case of Nvidia, there is no evidence whatsoever that Mr. Newman knew that Mr. Choi was getting a personal benefit. Tortora testified that he was not aware of any benefit given to Choi or, for that matter, he was not aware of any benefit given to Lim, so he could not have passed that on to Mr. Newman. And there is no e-mails or anything else that characterizes the relationship between Choi and Lim. There is an e-mail that says that Lim was a friend of Kuo, but there is zero as to the relationship between Choi and Lim, nothing in writing, nothing to Tortora, and so nothing can go to Newman.

To the extent there was any characterization, I would

point to transcript 480. Let me just find it here. If I can find it quickly. But there is one -- this is Mr. Tortora and I believe he referred to Choi. He didn't know his name, but he referred to him as Kuo's friend's contact. So there is nothing that would support that Tortora knew Choi was a friend or conveyed that to Newman, or anything else about the relationship between Choi and Lim.

With respect to Dell, as we have said, Goyal says that the benefit was career advice, Tortora says that Goyal told him that it was stock tips, so there is a difference there. But the critical thing is that Tortora did not testify that he told Newman anything about any personal benefit. And while the government elicited testimony from Tortora as to various things he told Newman, when that came up they did not ask him, and did you convey that to Mr. Newman? And so there is no evidence in the record at all as to Tortora conveying anything to Newman about any personal benefit.

THE COURT: In your view then, a wily group of conspirators can just make sure that the tippers of the changes never disclosed what the benefit was and everybody is home free?

MR. FISHBEIN: Not exactly. I have two responses to that, both of which were addressed in Whitman.

Number one, yes, this regime that puts emphasis on personal benefit does create situations in which somebody who

doesn't know about personal benefit ends up trading on inside information and making a profit and it's not actionable. And that's the way the law has evolved. In the Dirks case the SEC said, this is outrageous. Anybody who gets material nonpublic information and knows that it's material nonpublic information should be prohibited from trading. And the Supreme Court said no, SEC. The duty derives from the insider. So we have crossed that bridge. And there will be situations in which tippees down the line --

THE COURT: I'm not aware of any case in which what I have just posited, that's a technical defense to insider trading. Do you?

MR. FISHBEIN: Yes. Whitman and Rajaratnam and State Teachers.

THE COURT: Where the tipper just basically insulates his portfolio manager, not only am I going to give you great information, I am giving you the gift of life because I am not going to tell you who is getting the information and how?

MR. FISHBEIN: As in most criminal contexts, where knowledge is an issue, it can be established through conscious avoidance. So if there is evidence that they got together and the ultimate tippee said, don't tell me who the source is or what the benefit is, then that, I suppose, could support conscious avoidance on the issue. So you can establish knowledge through a deliberate plan to insulate, but that is

not the case here.

The testimony of Tortora was, I told Todd Newman that this was Sandy Goyal and I told him that he had a contact at the company, and Tortora and Adondakis spent a lot of time on the stand describing in detail all of what they conveyed to their portfolio managers. There was no evidence to the effect of the portfolio managers saying, don't tell me about it. I don't want to know. It was the opposite. Those cooperators made it seem like the portfolio managers were enthusiastic recipients of information about Sandy Goyal's contact.

To the extent there was any testimony and any characterization of Goyal's contact, it was always contact or person; it was not friend. So we respectfully submit that there is no evidence of knowledge of a personal benefit and there is no evidence of conscious avoidance either of any kind of deliberate effort to not learn about a personal benefit or not learn about other details relating to Mr. Goyal's contact at Dell.

THE COURT: You would admit, the vast majority of the cases, don't ask don't tell, is going to be what exists, not, don't tell me, I don't want to know.

So what you are basically saying is, insider trading is something that through Dirks and other court decisions has been cabined to those who have that specific knowledge and it's got to be proven.

MR. FISHBEIN: It is what I'm saying, but it's also what Judge Rakoff said and what Judge Holwell said and what Judge Sweet said and this was -- the question your Honor was asking, which is a reasonable question, is the same question that was asked to them, and they address it in their opinions, especially Judge Rakoff.

THE COURT: There is no Second Circuit authority on this, right? Sand, I don't think, includes this little bit of extra language that you want to put in under knowledge.

MR. FISHBEIN: I believe that's right, your Honor.

THE COURT: Knowledge of a breach of duty of trust and confidence, but a standard instruction I think ends there. And you've added, in exchange for personal benefit.

MR. FISHBEIN: Correct. And Whitman is November of 2012. I think it's a very well-reasoned decision. It describes the evolution of the law. It makes exactly the point your Honor is making, which is that, you know, in the past it was described more generally, but Judge Rakoff concluded this is the way it should be, Holwell the same and Sweet the same.

And I think a logical reading of Dirks demands that. Because if a breach of fiduciary duty by itself is not give rise to a duty not to trade, except if there is a personal benefit, then the defendant should have to know that there was a personal benefit. And we agree that knowledge can be -- you can't insulate yourself by saying to somebody in the chain,

don't tell me about the personal benefit, here is a lot of cash, don't tell me where it goes. If you do that, perhaps it supports conscious avoidance, but that's not the case here. These cooperators did not testify about any restrictions that their portfolio manager placed on them in describing Sandy Goyal, who was the opposite. Todd Newman was eager to know that this was Goyal's contact at the company.

THE COURT: I think we are prefacing argument on the charge, so I get the point and I don't think there is much dispute for this one, really, about what the state of the record is. I could be wrong about that.

MR. FISHBEIN: Your Honor, I would also add on the conspiracy, and this is largely a reiteration of arguments we made before trial in severance, so I'll be brief, but the government has charged an overarching conspiracy with as much multiple branches so it's Rob Ray, Goyal, Tortora, and then also Adondakis and Chiasson and then going up to Newman, and we respectfully submit that the proof did not support an overarching conspiracy like that with mutual benefit, mutual understandings among the various branches.

THE COURT: I think even if that's true, that's not necessarily a basis for severing the two defendants.

MR. FISHBEIN: This is a sufficiency. This is the government charged the overarching conspiracy and your Honor allowed a joint trial. But they elected to choose this

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

v. 12 Cr. 121 (RJS)

TODD NEWMAN,
ANTHONY CHIASSON,

Defendants.

----------x

New York, N.Y.
December 10, 2012
9:25 a.m.

Before:

HON. RICHARD J. SULLIVAN,

District Judge

APPEARANCES

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

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

I do think there is law to support it.

Having said that, we think the proof has established the actual knowledge. So in order to avoid any potential issue we are willing to change it.

THE COURT: So just make it knows.

MR. TARLOWE: Yes.

THE COURT: All right. Did you also want to discuss in exchange for a personal benefit to the insider?

MR. BISHOP: Yes. As we go, do we need to flag every time it says knows or should have known?

THE COURT: Once we cover the issue I think that should do it, unless there is something inconsistent that would otherwise remain and we don't want that. But otherwise, you have made the objection and we have resolved it.

MR. BISHOP: OK. On knowledge of personal benefit --

THE COURT: Right.

MR. BISHOP: -- beginning with the Dirks case, the Dirks case talks about a tipper's duty not to disclose and points out that that can be violated in a number of ways short of a breach of fiduciary duty that would constitute fraudulent insider trading. It could be violated in a good faith belief that disclosure was authorized. It could result from a mistake as to whether the information was material or a mistake as to whether the information was already public. And any one of these would be a violation of the tipper's duty of

nondisclosure but they wouldn't rise to securities fraud because they don't contain the essential element. Dirks says this is the essential element and it derives it from Cady Roberts, which was the seminal SEC administrative case. It says what makes it securities fraud is self-dealing, personal benefit. So when Dirks talks about a breach of fiduciary duty, that breach of fiduciary duty is personal benefit. They are one in the same thing. On page 662 of Dirks it says personal benefit is the test.

THE COURT: I think that is an interesting point. I think it is one that is supportable certainly by the language of Dirks, but then I have the Second Circuit in Obus which is identifying four elements for a tipper's liability and it breaks out breach of fiduciary duty and personal benefit as separate elements.

I think it doesn't conflate them the way you are suggesting I should or that you are suggesting Dirks indicates they should be conflated. So I am looking at the Second Circuit authority and I am not sure if you want to address that now, but I think that might be the place to start.

If the Second Circuit is interpreting the Supreme Court and I don't happen to like the way they did it, I don't get to tell them that they did it wrong and I am going to follow my view of what the Supreme Court said, right?

MR. BISHOP: I apologize, your Honor. I'm looking for

that part of Obus because I don't recall Obus as turning on a dispute about knowledge of personal benefit.

THE COURT: I don't know if it turns on the dispute. I just think the way it tees up the elements of liability for a tipper and then the elements of liability for a tipee, it seems pretty clear that Second Circuit is not agreeing that there needs to be this included language that you have proposed, which is: In exchange for a personal benefit. In other words, that the tipee knows that the information was disclosed in breach of a duty of trust or confidence and in exchange for a personal benefit to the insider.

MR. BISHOP: Well, I don't know that that language, your Honor, would specifically appear in Obus if that element wasn't disputed in Obus. I don't think the parties brought that to the court.

What Obus says is that there has to be knowledge, and the dispute is about a degree of knowledge, that the confidential information was initially obtained and transmitted improperly. Improperly meaning, in Dirks' terms, breach of fiduciary duty. And Dirks defines that to be identical, coextensive with knowledge of a personal benefit. The test is personal benefit that makes it improper. If there is not knowledge that it was for a personal benefit, then there is not knowledge that it was improper.

We are not arguing that you have to know what the

specific benefit was. But you do have to know that it was for a personal benefit. That is to say, that it involved an element of self-dealing on behalf of the tipper rather than some other breach of nondisclosure duty that while technically perhaps a breach of care doesn't involve the dishonesty that is involved in self-dealing for personal benefit.

MR. FISHBEIN: Your Honor, if I could add, with reference to the particular facts that came out in this case, I submit that the jury could find the following. The jury could find that Rob Ray knew he was supposed to target Neuberger Berman, had a discussion with Sandy Goyal about the model and went too far, went further than Dell's policies allow in terms of the specificity of what he gave Goyal in response to Goyal's questions about his model, and they might find that that breached his confidentiality and employment agreement with Dell but that he didn't do it for personal benefit. He was doing it because he thought, mistakenly, that he was targeting Neuberger Berman and encouraging them to invest. That is not a crime for our clients to trade based on that information. So unless you charge that they knew there was a personal benefit, the jury could be convicting with --

THE COURT: I think the issue is whether they have to find a personal benefit with respect to the tipper, the initial tipper.

MR. FISHBEIN: Right.

THE COURT: And if what you just posed as a hypothetical is that they would find that there was no benefit to the tipper, in which case I think your client's getting acquitted, but now you are saying something in addition. That the jury would have to find beyond a reasonable doubt that your client knew of the personal benefit.

MR. FISHBEIN: Right.

THE COURT: I think that is different than what you said initially.

MR. FISHBEIN: I guess what I am getting at is, if the defendant believed that this information was provided and that maybe the insider went further than Dell's policies but didn't know about a personal benefit, then it just seems like the insider is aware of a state of facts that is not illegal.

It is only if the defendant knows about the personal benefit that they know that what they are doing is improper and unlawful because that is the difference. That is what makes the difference between what might be a breach of confidentiality and what supports an insider trading charge.

It would seem to me the defendant has to know that fact if that is the critical fulcrum fact that makes the distinction between what is lawful and not lawful.

THE COURT: All right. I am not sure that I agree with that is what the law requires. It seems to me that the Second Circuit's analysis in Obus suggests that they are not

parsing it as fine as you are proposing.
MR. BISHOP: If I can say one more thing about Dirks. This goes back to the point that was made in Dirks, that it is --
THE COURT: Go ahead.
MR. BISHOP: In Dirks, the Supreme Court made the point that it is the job of analysts to ferret out information and they will often find information that is non-public and that may turn out to be material, and if they pass that on to traders and traders trade on it, that is part of the functioning of a healthy marketplace. That is specifically legal behavior. The only thing that makes it illegal is if the trader, the tipee, inherits the original tipper's duty because he knows that the original tipper's disclosure was a breach of fiduciary duty.
The thing that makes it a breach of fiduciary duty is the personal benefit. If the tipee doesn't know that, then the tipee doesn't know the difference between whether the original disclosure was improper for self-dealing purposes, in which case it is illegal to trade on it, or it was for some proper purpose or for some mistaken purpose that is not a self-dealing purpose and therefore this information is OK to trade on. It is perfectly legal and part of the healthy marketplace under Dirks. That is the difference.
If the tipee doesn't know that, then the tipee doesn't

have the information to tell which side of the dividing line, legal or illegal, this trade falls upon.

THE COURT: So in your view, then, a representation that there is an insider in the company who is giving us this information but unless someone says, And we're paying him cold hard cash there can't be a conviction.

MR. BISHOP: No. Dirks talks about that as well. It goes on to say --

THE COURT: It is conscious avoidance, basically.

MR. BISHOP: We must not conflate what has to be proved, which is the knowledge that the tipee must have, from how we prove it. You can infer those things from circumstances, and Dirks has a couple of pages where they talk about what those circumstances might be. They are the same kinds of circumstances from which we infer intent to join a conspiracy, for example. It is circumstantial evidence. But the fact that it may be inferred from objective facts is different than what knowledge must be proved in the first place, however proved.

So you don't need someone to come in and swear, this is what the defendant said that reflected this knowledge. There can be inferences from circumstances that prove the knowledge. But the knowledge that has to be proven is that the tipee knew that this information, when tipped by the tipper, was for a self-dealing purpose and not either a proper purpose

or a mistaken purpose that was not a self-dealing purpose.

THE COURT: Government, do you want to respond?

MS. APPS: Your Honor, on the benefit issue, what Dirks said was, as far as tipee liability goes there has to be knowledge of an improper purpose. What the defense is arguing is, they are essentially aligning Dirks' requirement that to be a breach in the first place there has to be personal benefit with Dirks' statement as to tipee knowledge. Dirks doesn't do that. It doesn't expressly say for tipee knowledge you have to have knowledge of the personal benefit.

Now to the extent there is any ambiguity in Dirks, I think Obus made it clear that those are separate elements, and when you come to tipee liability all you have to show is knowledge of a breach, not knowledge that the tipper got a personal benefit.

Now one of the things that defense counsel is arguing is, well, then how do you deal with the inadvertent situation. But I think that in most cases if there is a question about inadvertence, it will be decided within the rubric of whether the tipee knows that the disclosure was in breach. In other words, to make sure we don't criminalize inadvertent disclosures or tipee liability based on inadvertent disclosures, the framework of whether it is for a proper purpose or improper purpose is sufficient as far as tipee liability and tipee knowledge goes.

In this case, for example, inadvertent disclosure is not an issue because there was disclosure in multiple quarters, multiple times within a quarter. There can be no doubt that this is not a case of inadvertent disclosure.

So then the only question you are really left with is what is the requirement of the tipee knowledge. I think Obus basically puts that to rest because in the context of talking about whether benefit is required on behalf of the tipper and what the specific knowledge required is on behalf of the tipee, Obus cites Dirks and does not say you have to have knowledge of the benefit. It just says you have to have knowledge of the breach. It is quite clear in the way Obus sets it out.

MR. BISHOP: Your Honor, if I may respond.

THE COURT: Yes.

MR. BISHOP: The problem is we don't know what kind of breach. There has been evidence in this case of various corporate policies that employees have a duty to keep confidences and if an employee leaks information that should have been kept confidential, that can be called a breach. That is a breach of that duty, but it is not a breach of fiduciary duty in the sense that Dirks said it because it is not for personal benefit.

The personal benefit and the self-dealing is what makes it a breach of fiduciary duty that is actionable security fraud under Dirks as opposed to a mere violation or, you could

say, breach of a duty of nondisclosure. This is exactly the point that the jury may be confused on. The jury may hear these corporate insiders had a duty to keep this information confidential. They didn't. Aha, breach. That is all we have to find. They don't have to find the personal benefit and that the tipee knew it, which is how the tipee knows whether it is an improper --

THE COURT: I think we are confusing what the jury has to find and what the jury has to find with respect to the tipee's knowledge.

MR. BISHOP: Yes. What the jury has to find with the tipee's knowledge is that the tipee knew that the insider tipped the information improperly. The definition of improperly, what makes it improper, is the personal benefit. You can't separate them out. Dirks says that.

Dirks says, and this is on page 662 -- first it says, the standard was identified by the SEC in Cady Roberts. A purpose of the securities law was to eliminate "use of inside information for personal advantage." Then it says, "Thus, the test is whether the insider personally will benefit, directly or indirectly, from his disclosure. Absent some personal gain, there has been no breach of duty to stockholders."

Not only is that what must exist for the tipper, that is what the tipee must know. If the tipee doesn't know that there was a personal gain, then the tipee doesn't know that

there was a breach of fiduciary duty under Dirks, which is what makes the information off limits to trade on.

THE COURT: All right. Again, I think my reading of Obus is more in line with the government's. I am trying to figure out the page here because this is a Westlaw. Tipper's scienter, it talks about four elements.

The third element is in breach of a fiduciary duty of confidentiality and the fourth element is for personal benefit to the tipper. Then it talks about tipee scienter, and then -- the opinion does -- and then it also talks about tipping chains. With respect to tipping chains, it talks about tipper liability and tipee liability. Tipee liability requires, one, the tipper breached a duty by tipping confidential information; the tipee knew or had reason to know that the tipee improperly obtained the information that was obtained through the tipper's breach, and, three, the tipee while in knowing possession of the material non-public information used the information by trading or tipping for his own benefit.

I think the instruction that I have got here pretty closely tracks the language of Obus and I am inclined to leave it. So I will take another look at Dirks. I think it is an interesting question. But ultimately I take my marching orders from the Circuit and I think the Circuit did deal with this pretty thoroughly. They basically interpreted Dirks and that is what they are talking about, is Dirks, and they are giving

very clear guidance as to what the elements of a violation are for tippers and tipees and chains of tipees.

So I think I am going to strike that portion that I have indicated beginning on page 19 and then recurring throughout.

All right. What else have we got?

(Continued on next page)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA, New York, N.Y.

v. 12 CR 0973 (PGG)

MATHEW MARTOMA,

Defendant.

----------x

February 4, 2014
9:45 a.m.

Before:

HON. PAUL G. GARDEPHE,

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
BY: ARLO DEVLIN-BROWN
EUGENE INGOGLIA
Assistant United States Attorneys

GOODWIN PROCTER, LLP
Attorneys for Defendant
BY: RICHARD M. STRASSBERG
ROBERTO M. BRACERAS
LARKIN M. MORTON
MEGHAN K. SPILLANE

- also present -

Matthew Callahan, FBI Special Agent
Ruby B. Hernandez, Government Paralegal Specialist
Spencer Hattendorf, Government Paralegal
Stephen Paterson, Defense Consultant
Ray McLeod, Defense Consultant

such securities on the basis of that information.

The law also prohibits a person who is not actually an insider from trading in securities based on material, non-public information if the person knows that the material, non-public information was intended to be kept confidential and knows that the information was disclosed in breach of a duty of trust or confidence and in exchange for a personal benefit to the insider.

Counts Two and Three charge that Mr. Martoma engaged in insider trading as a "tippee" -- that is, that he obtained material, non-public information and wrongfully used it for his own benefit when he knew that the information had been disclosed in violation of a duty of trust and confidence. A person who receives material, non-public information engages in an act of fraud or deceit under the federal securities laws if he buys or sells securities based on material, non-public 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. I caution you, however, that trading on information that does not originate from an insider is not illegal.

The law permits analysts and portfolio managers to meet and speak with corporate officers and other insiders, as well as experts affiliated with such companies, in order to ferret out and analyze information useful in making investment

decisions. I want to emphasize that the receipt and use of material, non-public information does not violate the law unless (1) the inside information was improperly provided to the defendant by an insider or tipper in violation of the duties and obligations that person owed to the company that owned the information, and (2) the defendant knew that the insider or tipper had violated that duty in disclosing the inside information to the defendant and had done so in exchange for a personal benefit.

(Continued on next page)

THE COURT: (Continuing) The insider's, or tipper's breach of a duty, and the defendant's knowledge of that breach, must be established before a defendant can be found to have unlawfully engaged in a device, scheme, or artifice to defraud by trading on material non-public information.

The government alleges that Dr. Sidney Gilman -- referred to as "Doctor-1" in the Indictment -- and Dr. Joel Ross -- referred to as "Doctor-2" in the Indictment -- were "insiders" involved in the clinical trial of bapineuzumab who "tipped" Mr. Martoma, or disclosed inside information to him, in breach of a duty of trust and confidence they owed to Elan and Wyeth.

Mr. Martoma is not charged with being an "insider," but rather is charged with being a "tippee." A tippee is someone who receives inside information and uses it for his own benefit even though he did not personally owe any duty of trust or confidence which prevented him from buying and selling the securities in question.

To summarize, in order to find that the government has established the first element of the crime of insider trading, namely, that, in connection with the purchase or sale of a security, Mr. Martoma employed a device, scheme or artifice to defraud, or engaged in a course of conduct that operated, or would operate, as a fraud or deceit upon a purchaser or seller of the specified security -- the government must prove the

following beyond a reasonable doubt:

(1) that Dr. Gilman or Dr. Ross -- the alleged "insiders" or "tippers" -- had a fiduciary or other relationship of trust and confidence with Elan (as to Count Two) or Wyeth (as to Count Three);

(2) that Dr. Gilman or Dr. Ross breached that duty of trust and confidence by disclosing material, non-public information about the bapineuzumab Phase II clinical trial to Mr. Martoma;

(3) that Dr. Gilman or Dr. Ross personally benefited in some way, directly or indirectly, from the disclosure of the allegedly inside information to Mr. Martoma;

(4) that Mr. Martoma knew that the information he obtained had been disclosed in breach of a duty owed by Dr. Gilman or Dr. Ross to Elan or Wyeth and in exchange for a personal benefit to Dr. Gilman or Dr. Ross; and

(5) that Mr. Martoma used the material, non-public information he received in connection with the purchase or sale of Elan securities (Count Two) or Wyeth securities (Count Three).

I will now define for you several of the terms relevant to determining the first element of insider trading securities fraud.

The government must prove beyond a reasonable doubt that Dr. Gilman and Dr. Ross had a fiduciary or other

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

- v. - :

13 Cr. 211 (NRB)

RAJARENGAN RAJARATNAM, :
a/k/a "Rengan Rajaratnam," :

Defendant. :

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

GOVERNMENT'S REQUESTS TO CHARGE

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United States Attorney for the
Southern District of New York
Attorney for the United States
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- Of Counsel -

REQUEST NO. 18

Securities Fraud: First Element - Insider Trading Scheme: Knowledge of the Breach and Benefit[1]

To meet its burden, the Government must also prove beyond a reasonable doubt 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.

As to the defendant's knowledge that the insider has breached the insider's duty of trust and confidentiality in return for some actual or anticipated benefit, it is not necessary that the defendant know the specific confidentiality rules of a given company or the specific benefit given or

[1] This proposed instruction is adapted from the Honorable Jed S. Rakoff's jury charge in United States v. Whitman, 12 Cr. 125 (JSR) (S.D.N.Y. Aug. 17, 2012). See also id., 904 F. Supp. 2d 363 (S.D.N.Y. 2012) (to establish "tippee" liability, Government must prove that defendant knew the material, nonpublic information derived from an insider had been disclosed not just in breach of a duty of trust and confidence but also in return for a personal benefit). In United States v. Newman, the Honorable Richard J. Sullivan held, contrary to Judge Rakoff's ruling, that the Government need not prove knowledge of benefit in order to establish tippee liability. No. 12 Cr. 121 (RJS), 2013 WL 1943342, at *2. That ruling is the subject of a pending appeal before the Second Circuit. The Government submits that Judge Sullivan's ruling (which the Government requested) is correct and entirely consistent with Second Circuit law governing tippee liability. In an excess of caution, however, and to avoid unnecessary litigation, the Government requests that the Court here issue the instruction that was given in Whitman. (For must the same reason, in United States v. Martoma, the Government did not object to this instruction regarding a tippee's knowledge of the benefit.)

anticipated by the insider in return for disclosure of inside information; rather, it is sufficient that the defendant had a general understanding that the insider was improperly disclosing inside information for a personal benefit. Also, the defendant's knowledge of such facts may be established by proof that the defendant, aware of a high probability that an insider was improperly disclosing inside information for personal benefit, and not actually believing otherwise, deliberately avoided learning the truth; in other words, not that he was merely negligent in finding out a fact but rather that he purposely blinded himself to obtaining actual knowledge of an obvious fact because he had a conscious purpose to avoid learning the truth.

Adapted from the charge of the Hon. Jed S. Rakoff, United States v. Whitman, 12 Cr. 125 (JSR).

United States v. Newman,

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

April 22, 2014 Oral Argument

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

JUDGE WINTER: Okay.

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

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

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

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

knowledge.

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

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

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

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

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

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

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

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

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

And the relevance of personal benefit

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

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

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

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

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

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

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

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

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

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

JUDGE PARKER: So, how does this information differ from the information that they got indicted on?

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

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

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

our argument.

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

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

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

and it's not okay under principles of willfulness in cases like X-citement Video and Morissette that we cite in the brief. I see my bell is--

JUDGE PARKER: Answer me this: Obus and Dirks, as I recall, were civil cases.

MARK POMERANTZ: Yes.

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

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

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

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

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

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

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

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

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

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

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

JUDGE HALL: So, what if the--

MARK POMERANTZ: Classic Dirks.

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

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

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

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

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

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

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

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

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

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

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

JUDGE HALL: Thank you, Mr. Pomerantz.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUDGE HALL: Does it only have to be money?

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

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

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

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

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

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

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

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

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

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

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talk about specific line items."

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

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

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

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

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

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

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

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

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

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before the four defendants were charged in January of 2012.

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

JUDGE PARKER: Then, once you got Judge Sullivan, you superseded with Mr. Steinberg.

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

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

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

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

JUDGE WINTER: Were you trying these people together? You're talking about efficiencies that are a benefit [UNINTEL] trial. Was there any attempt to try Steinberg with somebody else? There's no [UNINTEL PHRASE].

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

JUDGE WINTER: Where are the efficiencies then?

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

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weeks, presided over the same issues and had--

JUDGE WINTER: I'm not an expert. I've been connected with the Second Circuit for almost all of my professional life a lot of [UNINTEL PHRASE] there were issues that were United States against Rosenberg, where the government marked a criminal case as related.

And at some point, the Southern District changed the rule there, which you can mark a criminal case related, and thereby pick your judge. It caused a great deal of controversy in the Rosenberg case. Now you're trying--you're doing the same thing by superseding the indictments.

So, under the Rosenberg case, the finding was there was a witness in common, which in the prior case Judge Kaufman had trial [UNINTEL] the Rosenbergs. But you're just [UNINTEL] the rule, right?

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

There were certain efficiencies that,

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

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

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

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

JUDGE PARKER: --All the other judges on the list had rejected it, and the government had given it up in the case before Judge Gardephe.

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

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

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

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

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

JUDGE PARKER: But the conservative

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

ANTONIA APPS: But--

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

ANTONIA APPS: Wait--

JUDGE PARKER: Very difficult to understand tactical benefit.

ANTONIA APPS: Your Honor, we--

JUDGE PARKER: Ms. Apps.

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

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

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

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

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

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

ANTONIA APPS: Well, and--

JUDGE PARKER: Right?

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

There are sometimes--for some cases, we

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

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

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

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

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

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

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

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

ANTONIA APPS: I--

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUDGE PARKER: I was taking--I was teeing off on the answer you gave us.

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

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take into account. It was taken into account in Obus. It was taken into account in Judge Winter's decision in Libera. It is a factor that's continually taken into account.

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

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

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

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

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

ANTONIA APPS: Your Honor, as this Court--

JUDGE PARKER: Help me understand that.

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

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

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

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

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

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

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

JUDGE PARKER: What's the benefit?

ANTONIA APPS: Friendship is a benefit under Jiau.

JUDGE PARKER: Friendship is the benefit?

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

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

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

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

JUDGE PARKER: [UNINTEL] Ms. Apps, what you should do is stand closer to the microphone and keep your voice up. And that way, arguments--

this is just hypothetical because you're doing a fine job--because that way, your arguments go better. Is that career advice?

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

JUDGE HALL: Well, don't insult him now that he's giving you advice.

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

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

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

really important point, because--

JUDGE WINTER: Excuse me, on this point, isn't it the case that the tipper who deliberately leaks information always find that it's in the tipper's self-interest to do so? And that seems to be the government's position, the act itself. That will be the next case, the act itself shows the tipper thought the tipper was getting some benefit.

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

JUDGE WINTER: [UNINTEL PHRASE] the defendants might not have to press for it if they were actually bribing to get it.

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

JUDGE WINTER: [UNINTEL PHRASE]

ANTONIA APPS: The--

JUDGE WINTER: Then, I mean, we're [UNINTEL] Dirks. If you read the Dirks opinion fairly it uses the word "guiding principle," has

to establish a guiding principle for people who have--who trade all the time.

ANTONIA APPS: And with that--

JUDGE WINTER: [UNINTEL] nonpublic information. It wants to protect analysts. And, unless there's some kind of concrete, demonstrable benefit coming to a tipper, there's no guiding principle at all. The tipper will always find it in his or her self-interest to be doing what they're doing. It may be misguided, but they'll find it in there.

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

JUDGE HALL: Could you--

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

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

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

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

JUDGE WINTER: Can I ask a couple questions going through your charge, the legal issues and putting aside the facts--? What does the government, in the case of the derivative tippee, in a classical insider trading case--I'm not interested misappropriation cases where a theft [UNINTEL] crime. In the cases you cited there was no issue as to whether or not they knew about the theft, they knew about it.

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What does the government have to prove, beyond the fact that a derivative tippee, a downstream tippee, let's say four levels down, has to believe that the information is nonpublic, in the sense that it's more accurate to the [UNINTEL], that the pricing [UNINTEL] does not accurately reflect the information this [UNINTEL] tippee has?

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

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

JUDGE WINTER: Knowledge of the breach is that it most probably came from the company and the company had some confidentiality policy.

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

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fairly understood, means knowledge of fraud.

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

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

JUDGE PARKER: [UNINTEL]

ANTONIA APPS: That Mr. Fishbein--sorry.

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

ANTONIA APPS: Not necessarily. There--it's not necessarily true that it comes from Dell, and that there could come from--as an argument the defendants made was that this came

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from some kind of modeling or sell-side analyst.

But there was direct evidence that this information came from Dell of every tip that came from the Dell insider. And for NVIDIA, the same is true. Unlike the example that Mr. Fishbein gave, where he talks about the $0.30, that wasn't sourced.

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

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

JUDGE WINTER: How is that?

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

JUDGE WINTER: What do you [UNINTEL] that it came from the company? That he believes it came from the company, or most probably came

from the company, company had a confidentiality policy?

ANTONIA APPS: More than a confidentiality policy. They have to show--we have to show that, in fact, it was adhered to. And the defendants argued, transcript 3815, that it wasn't enough to show that there was policy but there had to be a breach in fact.

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

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

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

And so, those separate elements--and they specifically addressed the level of

knowledge in order to be a participant after the fact, and held that we only need to know of the breach of duty, because that is synonymous with fraud, as was shown in this case. Just to this point of--

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

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

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

of the breach of trust.

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

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

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

JUDGE PARKER: Judge Winter's--

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

JUDGE WINTER: I'm sorry.

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

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

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

JUDGE WINTER: No. [UNINTEL]

ANTONIA APPS: Okay. To this point, they say that Adondakis didn't know whether there was

a benefit received. But, in fact, the question in--at the appendix cite that they put in there, at 1190, was whether Adondakis knew what the tipper received, a fundamentally different proposition, and not even one advanced--

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

Because, you know, there--we sit in the financial capital of the world. And the amorphous theory that you have, that you've tried this case on, gives precious little guidance to all of these institutions, all of these hedge funds out there who are trying to come up with some bright line rules about what can and what cannot be done.

And your theory leaves all of these institutions at the mercy of the government, whoever the government chooses to indict, you know, how big the fund is. You know, it's a billion-dollar fund, so the gain was $50 million, it looks huge, and the jury will--eyes will [UNINTEL] over and so forth.

Isn't the whole community, the legal

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community and the financial community, served by having a rule that says the person you all want to send to jail has to know of the benefit?

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

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

ANTONIA APPS: For purposes of tipper liability--

JUDGE HALL: [UNINTEL]

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

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

ANTONIA APPS: That the--

JUDGE HALL: And I will agree, it was charged-- you have to know there was a breach of trust.

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ANTONIA APPS: That--

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

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

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

The defendants attempted to confuse the jury by saying that all this information was leaked, and it is--it was not. And we rebut each

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of those points in our briefs, Your Honor.

JUDGE: Now--

ANTONIA APPS: But fundamentally, the tips here were so--the defendants were told, "This information came from company insiders." It was, again, information that was accurate to the decimal point.

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

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

JUDGE WINTER: Wasn't Obus a misappropriation case?

ANTONIA APPS: It was, but it explicitly

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

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

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

ANTONIA APPS: I--

JUDGE WINTER: The tipper is not the owner of the information. They're not an owner or agent of the owner. And no one ever said in a misappropriation case that the tippee doesn't have to know of the misappropriation or the theft.

There's no such holding. There are cases that don't mention that because it's obvious that it occurred. Libera. I wrote one of

them. Libera was a case of the--where the defendant made money press [UNINTEL] advance copies of Business Week. [UNINTEL PHRASE] There was no issue as to whether the defendant knew of the misappropriation.

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

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

And so, that is--in order to have a uniform rule, as Obus recognized, explicitly

saying it applies to classical and misappropriation--

JUDGE HALL: Thank you.

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

JUDGE HALL: Thank you very much, Ms. Apps.

ANTONIA APPS: Thank you, Your Honor.

JUDGE HALL: Mr. Pomerantz?

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

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

JUDGE PARKER: Is that all he charged them?

MARK POMERANTZ: Well, on the critical point of what a tippee has to know, the operative language is "a violation of the duty of

confidentiality." So, the government's position is: it's okay; all you need is a knowledge by the defendant that there has been a breach of confidentiality.

And look at the slipperiness of this slope. The government concedes, because it has to, because the Supreme Court has said it time and time again, it's okay, it's legal, to trade on material nonpublic information that comes from an issuer. Dirks, after all, traded on material nonpublic information that he knew had come from an issuer, Seacrist at Equity Funding.

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

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

And, in any case, the bright line that Your Honor is quite right, people in this

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

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

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

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

MARK POMERANTZ: Well, and it is a very--you know, the question whether personal benefit exists is a squishy one, and it's particularly

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squishy in this case when you get into concepts of career advice, friendship, and so on. But--but--you have to remember, however squishy the notion of personal benefit may be, it wasn't even given to the jury to consider here. The jury never even was told it had to find it.

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

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

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

JUDGE HALL: Let me just take you back

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to my personal--I'm sorry, my first question, Mr. Pomerantz. And that is: is it Mr. Chiasson's view, the defendant's view in this case, that only demonstrating personal benefit is sufficient, the knowledge of personal benefit is sufficient to prove knowledge of fraudulent breach?

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

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

MARK POMERANTZ: Yes. Yes.

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

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

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

MARK POMERANTZ: In a classic insider trading case such as this one, I believe--and if you take Dirks to mean what it said, and of course it was reiterated by the Supreme Court in later cases; it's never been retreated from--personal benefit is a defining aspect, a necessary aspect, of a fraudulent fiduciary breach.

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

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

And, again, I come back to the notion that, even if I'm wrong, and there are other

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forms of fiduciary breach that open the door to insider trading liability for tippees, the particular fraudulent fiduciary breach that the government attempted to prove here, and the one that was submitted to the jury when it--when the issue was, "Had the tippers done something wrong?" and then we'll deal separately with the tippees.

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

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

It's an essential part of the fiduciary

breach that there be personal benefit. That's the teaching of Dirks. And that wasn't here. And the-

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

MARK POMERANTZ: Thank you, Your Honor.

JUDGE HALL: Mr. Fishbein?

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

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

So, when Todd Newman gets the email, it's Dell Investor Relations saying 30-percent EPS. That's indistinguishable. Or, similarly, 18-percent gross margin, that was a specific leak from inside Dell. Everybody knew it was coming from inside Dell. It's a specific number, 18

percent. Same with 12-percent opex or missing revenues by a country mile.

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

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

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

It is undisputed that, when they hired Sandy Goyal as a consultant, they hired numerous other consultants. He was hired to do legitimate work. That's what he said and that's what Jesse

Tortora said. When he was hired and they--the amount of money--

JUDGE PARKER: Was there some visa problem there?

STEPHEN FISHBEIN: Yes, yes. Exactly. In other words, Goyal had a visa problem, and that's why he said, "Pay my wife instead." But the undisputed evidence was, when they set that up, it was for Sandy Goyal to do legitimate consulting for Tortora and for Diamondback.

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

And if I could just illustrate it like this, it's a very common instruction in this courthouse. You see somebody walk into the courtroom, dripping wet; you can infer that it's raining. But if I prove for a fact at trial that there's somebody downstairs spraying people with

hoses when they come into the courthouse, you wouldn't give that inference, because you know that it's not true.

And that's exactly what's going on here. We proved unequivocally that none of the money went to Rob Ray. He didn't get that kind of benefit. And so, to infer it is just a specious inference. Thank you.

JUDGE PARKER: Thank you.

JUDGE HALL: Thank you.

JUDGE PARKER: Thank you all.

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

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

Attested to by:

Sonya Ledanski Hyde

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- against -

MICHAEL STEINBERG,

Defendant.

S4 12 Cr. 121 (RJS)

PROPOSED JOINT REQUESTS TO CHARGE

November 6, 2013

2. Substantive Violations: First Element

The first element that the government must prove beyond a reasonable doubt is that, in connection with the purchase of the security specified in the count of the Indictment that you are considering, the Defendant employed a device, scheme or artifice to defraud, or engaged in an act, practice or course of business that operated, or would operate, as a fraud or deceit upon a seller of the specified stock.

A "device, scheme or artifice to defraud" is merely a plan for the accomplishment of any fraudulent objective.

"Fraud" is a general term that embraces all efforts and means that individuals devise to take advantage of others.

The specific "device, scheme or artifice to defraud," or "act, practice, or course of business" that the government alleges the Defendant employed in connection with Counts Two through Five is known as "insider trading."

An "insider" is one who comes into possession of material, confidential, nonpublic information about a specific security or stock by virtue of a relationship that involves trust and confidence. If a person has such "inside information" and his position of trust or confidence prohibits him from disclosing that information, the law forbids him from buying or selling the securities in question or giving that information to others so that they can trade in such securities on the basis of that information.

The law also prohibits a person who is not actually an insider from trading in securities based on material nonpublic information, if the person knows that the material, nonpublic

information was intended to be kept confidential and knows that the information was disclosed in breach of a duty of trust or confidence in exchange for a personal benefit to the insider.[8]

Each of the substantive counts charges that the Defendant engaged in insider trading as a "tippee," that is, based on the allegations that the Defendant received material, nonpublic information and wrongfully used it for his own benefit when he knew that the information had been disclosed in violation of a duty of trust and confidence and in exchange for a personal benefit.[9] A person who receives material nonpublic information engages in an act of fraud or deceit under the federal securities laws if he buys or sells securities based ***in some part*** / in substantial part[10] on material, nonpublic information that he knows was disclosed by another

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[8] *United States v. Whitman*, 904 F. Supp. 2d 363, 371 (S.D.N.Y. 2012) (reasoning that "if the only way to know whether the tipper is violating the law is to know whether the tipper is anticipating something in return for the unauthorized disclosure, then the tippee must have knowledge that such self-dealing occurred, for, without such a knowledge requirement, the tippee does not know that there has been an 'improper' disclosure of inside information."); *United States v. Rajaratnam*, 802 F. Supp. 2d 491, 498-99 (S.D.N.Y. 2011) (explaining that a tippee cannot be a knowing participant in the tipper's breach of duty unless the tippee knows that the tipper was divulging information for a personal benefit); *State Teachers Ret. Bd. v. Fluor Corp.*, 592 F. Supp. 592, 594 (S.D.N.Y. 1984) (holding that knowledge of the tipper's breach "necessitates tippee knowledge of *each element*, including the personal benefit, of the tipper's breach") (emphasis in original); *Hernandez v. United States*, 450 F. Supp. 2d 1112, 1118 (C.D. Cal. 2006) ("[U]nder the standard set forth in *Dirks*, an outsider who receives material nonpublic information (i.e., 'tippee') can be liable under § 10(b)/Rule 10(b)-5 if the tippee had knowledge of the insider-tipper's personal gain.").

The government refers the Court to its prior briefing and arguments on this issue.

[9] *See* cases cited *supra* note 8.

[10] The government refers the Court to *United States* v. *Rajaratnam*, 719 F.3d 139, 160 (2d Cir. 2013) (approving charge that defendant could be convicted if the material non-public information was a factor "however small" in the defendant's decision to purchase or sell stock, given that the law of this Circuit does not even require that it be a factor, but rather just that the defendant "was aware of" the information).

Defendant objects to the government's proposed language which alters the language in *Newman*, and requests that the language in *Newman* be given. *See Newman*, Tr. Jury Charge at 4034:8 ("A person uses material, nonpublic information in connection with a stock sale or purchase if that information is a *substantial factor* in his decision to purchase or sell the stock.") (emphasis added); 4034:14 ("Bear in mind that the law requires only that the information be a *substantial factor* in the decision to buy or sell.") (emphasis added); 4034:20 ("If . . . you are persuaded . . . that material nonpublic information . . . was a *substantial factor* in that defendant's decision to buy or sell stock . . . .") (emphasis added). *See also United States v. Goffer*, 10 Cr. 56 (RJS) (June 2, 2011), Tr. Jury Charge at 2015.

person in breach of a duty of trust and confidence and in exchange for a personal benefit.[11] I caution you, however, that trading on information that does not originate from an insider is not illegal.

The Indictment alleges that Rob Ray – referred to as the "Dell Insider" in the Indictment – was an "insider" at Dell who "tipped," or disclosed, inside information in breach of a duty of trust and confidence. The Indictment alleges that Chris Choi – referred to as the "NVIDIA Insider" in the Indictment – was an "insider" at NVIDIA who "tipped," or disclosed, inside information in breach of a duty of trust and confidence.

MICHAEL STEINBERG is not charged with being an "insider," but rather is charged with being a "tippee." A tippee is someone who receives inside information and uses it for his own benefit even though he did not personally owe any duty of trust or confidence which prevented him or her from buying and selling the securities in question.

In order to find that the government has established the first of the three essential elements of the crime of insider trading – namely, that, in connection with the purchase or sale of a security, the Defendant employed a device, scheme or artifice to defraud, or engaged in a course of conduct that operated, or would operate, as a fraud or deceit upon a purchaser or seller of the specified security – the government must prove each of the following five things beyond a reasonable doubt:

(1) That Rob Ray or Chris Choi (depending on which count you are considering), who the Indictment alleges were the "insiders" or the "tippers," had a fiduciary or other relationship of trust and confidence with Dell and NVIDIA, respectively;

[11] *See* cases cited *supra* note 8.

(2) That Rob Ray or Chris Choi (depending on which count you are considering) breached that duty of trust and confidence by disclosing material, nonpublic information about Dell and NVIDIA to Sandy Goyal and Hyung Lim, respectively, so that the information could be used to trade in such securities on the basis of that information,[12] and which information was subsequently disclosed to the Defendant;

(3) That Rob Ray or Chris Choi (depending on which count you are considering) personally benefited in some way, directly or indirectly, from the disclosure of the allegedly inside information to Mr. Goyal and Mr. Lim, respectively;

(4) That the Defendant knew that the information he obtained had been disclosed in breach of a duty and in exchange for a personal benefit to Rob Ray or Chris Choi (depending on which count you are considering)[13]; and

(5) That the Defendant used ***in some way***[14] the material, nonpublic information he received to purchase the security you are considering.

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[12] Defendant requests this language be inserted here for consistency with Your Honor's nearly identical instruction, at page 15. ("If a person has such 'inside information' and his position of trust or confidence prohibits him from disclosing that information, the law forbids him from buying or selling the securities in question or giving that information to others so that they can trade in such securities on the basis of that information."). For additional authority, *see United States v. Falcone*, 257 F.3d 226, 229 (2d Cir. 2001) (Sotomayor, J.) ("Under the traditional theory of insider trading, tippee liability was in fact premised on the intent of the tipper to provide the tippee with information that the tippee could use to make money in securities trading.") (citing *Dirks*, 463 U.S. at 664). *See also Gupta*, Tr. Jury Charge at 3371 (charging the jury that the government must prove that "Mr. Gupta anticipated that Mr. Rajaratnam or others at Galleon would trade on the basis of this information . . . .").

The government submits that the defendant's language is not required under *United States* v. *Libera*, which held that there is no requirement that tippers must specifically know that their breach of duty will lead to trading on the information. 989 F.2d 596, 600 (2d Cir. 1993). Further, the "on the basis" language suggests that a higher burden as to the defendant's use of the information than is now required under *Rajaratnam*, 719 F.3d at 160. *See* n. 10 *supra*.

[13] *See* cases cited *supra* note 8.

[14] Defendant objects to the government's proposed language, "in some way," which alters the language in *Newman*. *See supra* note 10.

aware of it. For example, if Dell or Nvidia policy was to give out certain information to people who ask for it, that information is public information.[17] I instruct you further that the law permits analysts and investment advisers to meet and speak with corporate officers and other insiders in order to ferret out and analyze information useful in making investment decisions.[18] Whether information is nonpublic is an issue of fact for you to decide.

On the other hand, the confirmation by an insider of unconfirmed facts or rumors – even if reported in a newspaper or research report – may itself be inside information. A tip from a corporate insider that is more reliable and specific than unconfirmed facts or public rumors is nonpublic information despite the existence of such rumors in the media or investment community. Whether or not the confirmation of a rumor by an insider qualifies as material nonpublic information is an issue for you to decide.

You must also be persuaded, beyond a reasonable doubt, as to the count you are considering, that the information Ray or Choi disclosed was "material" at the time the information was disclosed.

Within the particular context of the purchase and sale of securities, material information is information that a reasonable investor would have considered significant in deciding whether to buy, sell, or hold securities, and at what price to buy or sell. Put another way, there must be a

[17] The Defendant notes that this sentence is taken from Your Honor's Charge in *United States v. Contorinis*, 09 Cr. 1083 (RJS) (Oct. 4, 2010), Tr. Jury Charge at 1871. *See also U.S. v. Contorinis*, 629 F.3d 136 (2d Cir. 2012) ("[i]nformation is also deemed public if it is known by only a few securities analysts or professional investors.").

[18] *United States v. Rajaratnam,* 09 Cr. 1184 (RJH) (Apr. 25, 2011), Tr. Jury Charge at 5613; *see also Dirks v. SEC*, 463 U.S. 646, 658 (1983) ("Imposing a duty to disclose or abstain solely because a person knowingly receives material nonpublic information from an insider and trades on it could have an inhibiting influence on the role of market analysts . . . . It is commonplace for analysts to ferret out and analyze information . . . and this is often done by meeting with and questioning corporate officers and others who are insiders.").

substantial likelihood that the fact would have been viewed by the reasonable investor as having significantly altered the total mix of information then available.

5. Substantive Counts – First Element – Benefit to the Tipper

If you find that the insider disclosed material, nonpublic information, you must then determine whether the government proved beyond a reasonable doubt that Ray or Choi received or anticipated receiving some personal benefit, direct or indirect, from disclosing the material, nonpublic information at issue. The benefit does not need to be financial or tangible in nature; it could include obtaining some future advantage, developing or maintaining a business contact, enhancing the tipper's reputation, or the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend. You are permitted to base your finding of a benefit to Ray or Choi on all the objective facts and inferences presented in this case. You may find that Ray or Choi received a direct or indirect personal benefit from giving inside information if you find that Ray or Choi gave the information to another with the intention to confer a benefit on that person, or as a gift, ***to maintain a personal friendship***,[19] or to benefit themselves in some manner.

6. Substantive Counts – First Element – Knowledge of Breach

To meet its burden, the government must also prove beyond a reasonable doubt that the Defendant knew that the material nonpublic information had been disclosed by the insider in breach of a duty of trust and confidence in exchange for a personal benefit.[20] The mere receipt

[19] The government refers the Court to the charge in the *Newman* trial.

Defendant objects to the government's proposed language. *See Goffer*, Tr. Jury Charge at 2016-17 (no mention of maintaining a personal friendship as possible benefit); *see also Rajaratnam*, Tr. Jury Charge at 5622 (same); *Dirks*, 643 U.S. at 662-64 (same).

[20] *See supra* note 8.

of material, nonpublic information by the 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 and in exchange for a personal benefit.[21] The Defendant does not have to receive the material nonpublic information directly from the individual who violated a duty of confidentiality. I will discuss how you should determine knowledge and state of mind a little later in this charge.

7. Substantive Counts – First Element – Use of Inside Information

In order to find that the Defendant engaged in insider trading, you must also find that he purchased or sold stock using material, nonpublic information that had been originally disclosed by Ray or Choi. A person uses material, nonpublic information in connection with a stock sale or purchase if that information is a ***factor, however small,*** / substantial factor[22] in his decision to purchase or sell the stock.

How do you tell whether a person who has material nonpublic information and who buys or sells a stock while in possession of that information "uses" the information to do so? Bear in mind that the law requires only that the information be ***one*** / a substantial[23] factor in the decision to buy or sell. It need not be the only consideration. You should consider how important the information would be in deciding whether to buy or sell.[24] If, after considering all of the circumstances, you are persuaded beyond a reasonable doubt that material nonpublic information

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[21] *See supra* note 8.

[22] *See supra* note 10.

[23] *See supra* note 10.

[24] *Newman*, Tr. Jury Charge at 4034; *see also Goffer*, Tr. Jury Charge at 2015.

originating from Ray or Choi was a substantial[25] factor in the Defendant's decision to buy or sell stock and that this information was still nonpublic and material at the time the Defendant used it, then this element will have been satisfied.

8. Substantive Counts – First Element – In Connection with a Purchase or Sale

If you find that a Defendant used material, non-public information that he knew was disclosed by a company insider in breach of that insider's duty of trust and confidence, and in exchange for a personal benefit to the insider,[26] you must then determine whether the device, scheme or artifice to defraud was "in connection with" the purchase of the security specified in the count you are considering. However, you need not find that the Defendant actually participated in any securities transaction if the Defendant was engaged in fraudulent conduct that was "in connection with" a purchase or sale of a security. The "in connection with" element is satisfied if you find there was some nexus or relation between the allegedly fraudulent conduct and the purchase of the security in the count you are considering.

Fraudulent conduct may be "in connection with" the purchase or sale of a security if you find that the alleged fraudulent conduct "touched upon" a securities transaction on a national securities exchange. In this regard, the "in connection with" a purchase or sale aspect is satisfied if you find that the Defendant used material, nonpublic information for the purpose of securities trading, even though there is no evidence that other purchasers or sellers were harmed.

9. Substantive Counts – Second Element – Knowledge, Intent, and Willfulness

Everything I have been telling you thus far on Counts Two through Five relates to the first element of the crime of securities fraud, that is, the existence of a fraudulent scheme.

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[25] *See supra* note 10.

[26] *See* cases cited *supra* note 8.

The second element of the substantive offense charged in Counts Two through Five that the government must prove beyond a reasonable doubt is that the Defendant participated in a scheme to defraud, that is, the insider trading scheme alleged in the Indictment, knowingly, willfully, and with intent to defraud.

To "participate" in a scheme to defraud means to associate oneself with it with a view and intent to make it succeed.

A person acts "knowingly" if he acts intentionally and voluntarily and not because of ignorance, mistake, accident or carelessness.

A person acts "willfully" if he acts deliberately and with the intent to do something that the law forbids, that is, with a bad purpose to disobey and disregard the law.

"Intent to defraud," in the context of securities laws, means to act knowingly with the intent to deceive. For the Defendant to have acted with the specific intent to defraud means that he must have known of the fraudulent nature of the scheme and acted with the intent that it succeed.

It is not required that the government show that the Defendant, in addition to knowing what he was doing and deliberately doing it, also knew that he was violating some particular federal statute. But the Defendant must have acted with the intent to help carry out some essential step in the execution of the scheme to defraud that is alleged in the Indictment.

It is not a willful deceptive device in contravention of the federal securities law for a person to use his or others' superior financial or expert analysis or his or others' educated guesses or predictions or his or others' past practice or experience to determine which securities to buy or sell. Nor is it a deceptive device in contravention of the federal securities laws for a person to buy or sell securities based on public information, or on tips where he does not know

that the information had been disclosed in violation of a duty or confidence, in exchange for a personal benefit to the tipper,[27] or where the information is obtained from permissible sources.

The government may prove that the Defendant acted "knowingly" in either of two ways. [28] ***First, it is sufficient, of course, if the evidence satisfies you beyond a reasonable doubt that the Defendant actually knew of a particular fact.***

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

If, for example, you find beyond a reasonable doubt that the Defendant was aware that there was a high probability that he obtained information that had been disclosed in exchange for personal benefit,[29] ***in violation of a duty of trust and confidence, but deliberately and consciously avoided confirming this fact, then you may find that the Defendant acted knowingly. However, if you find that the Defendant actually believed that the information he obtained was not disclosed*** in exchange for a personal benefit,[30] ***in violation of a duty of trust and confidence, he may not be convicted. It is entirely up to you whether you find that the***

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[27] *See* cases cited *supra* note 8.

[28] The defense objects to a conscious avoidance instruction on the grounds that it expects there to be no factual predicate.

[29] In the event the Court overrules Defendant's objection and decides to give this instruction, we request that it include this underlined language. *See* cases cited *supra* note 8.

[30] *Id.*

satisfy the venue requirement if any act in furtherance of the crime charged occurred within the Southern District of New York. Such an act would include, for example, the placing of a telephone call to or from the Southern District of New York or the execution or settlement of a securities trade within this district.

As to this venue requirement only, the government need not meet the burden of proof beyond a reasonable doubt. That is only with respect to venue.[31] On this venue requirement only, the government meets its burden of proof if it establishes by a preponderance of the evidence that an act in furtherance of the crime occurred within this District. A preponderance of the evidence means that something is more likely than not.

13. Willfully Causing a Crime

A Defendant may be convicted of a substantive offense if he willfully caused an act to be done which, if directly performed by him, would constitute a crime. Section 2(b) of Title 18 of the United States Code reads as follows: "Whoever willfully causes an act to be done which, if directly performed by him, would be an offense against the United States, is punishable as a principal."

What does the term "willfully caused" mean? It does not mean that the Defendant himself physically committed the crime or supervised or participated in the actual criminal conduct charged in the Indictment.

For each substantive offense charged in Counts Two through Five, the meaning of the term "willfully caused" can be found in the answers to the following questions:

[31] *Newman*, Tr. Jury Charge at 4042.

> -- Did the Defendant have possession of material, nonpublic information that he knew had been provided by an insider in violation of a duty of trust or confidence and in exchange for a personal benefit?[32]
>
> -- Did the Defendant intentionally cause another person to execute the securities transaction charged in that Count based on that material, nonpublic information?

If you are persuaded beyond a reasonable doubt that the answer to both these questions is "yes," then the Defendant is guilty of the crime charged in that Count just as if he himself had actually committed it.

C. Conspiracy Count – The Statute and the Charge

Now that I have charged you with respect to the substantive offenses charged in Counts Two through Five, I will turn to the conspiracy count charged in Count One of the Indictment.

Count One of the Indictment charges MICHAEL STEINBERG with conspiring with Jon Horvath and others to violate federal statutes and regulations that make it unlawful to commit fraud in connection with the purchase and sale of securities. Count One reads as follows:

> From in or about late 2007 through in or about 2009, in the Southern District of New York and elsewhere, MICHAEL STEINBERG, . . . and others known and unknown, willfully and knowingly did combine, conspire, confederate and agree together and with each other to commit an offense against the United States, to wit, securities fraud, in violation of Title 15, United States Code, Sections 78j(b) and 78ff, and Title 17, Code of Federal Regulations, Sections 240.10b-5 and 240.10b5-2.

The relevant statute on this subject is Title 18, United States Code, Section 371. That section provides as follows:

> If two or more persons conspire . . . to commit any offense against the United States . . . , and one or more of such persons do any act to effect the object of the conspiracy, each [is guilty of an offense against the United States].

[32] *See* cases cited *supra* note 8.

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

v. 12 CR 121 (RJS)

MICHAEL STEINBERG,

Defendant. Jury Trial

----------x

New York, N.Y.
December 16, 2013
9:14 a.m.

Before:

HON. RICHARD J. SULLIVAN,

District Judge

APPEARANCES

PREET BHARARA,
United States Attorney for the
Southern District of New York
ANTONIA APPS
HARRY A. CHERNOFF
Assistant United States Attorney

KRAMER LEVIN NAFTALIS & FRANKEL LLP
Attorneys for Defendant
BARRY H. BERKE
MEGAN RYAN
STEVEN SHANE SPARLING

the gold standard in these parts and appropriately so. There is nobody than Judge Sand at this -- maybe somebody from a different era -- but I think Judge Sand is about as good as they come. So, that's my inclination, to stick with Sand.

We have already covered the preparation of witnesses point.

The multiple conspiracies charge need not be given. Everybody is in agreement on that. I think that's right.

I think the remaining objections really are I think reiterating objections that have been made, pretty well developed, and it's just designed to sort of make a fuller record, so I think the record has been achieved.

So, tippee's knowledge of the personal benefit, tipper intent vis-a-vis trading, I think I have already ruled on those, so I am not going to revisit those.

Testimony of cooperating witnesses, again that's pretty standard charge, and I am not going to alter that. And I think we have already discussed that.

MS. APPS: Your Honor, just one point on that.

THE COURT: On cooperating witnesses?

MS. APPS: There was a sentence in bold that defendants are agreeing should come out, because there was no suggestion at this trial that any cooperating witness pled guilty without covering all of its conduct.

THE COURT: You mean the sentence that says, "There is

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

v. 12 CR 121 (RJS)

MICHAEL STEINBERG,

Defendant. JURY TRIAL

----------x

New York, N.Y.
December 17, 2013
9:40 a.m.

Before:

HON. RICHARD J. SULLIVAN,

District Judge

APPEARANCES

PREET BHARARA,
United States Attorney for the
Southern District of New York
ANTONIA APPS
HARRY A. CHERNOFF
Assistant United States Attorney

KRAMER LEVIN NAFTALIS & FRANKEL LLP
Attorneys for Defendant
BARRY H. BERKE
MEGAN RYAN
STEVEN SHANE SPARLING

the first of the three essential elements of the crime of insider trading, namely that in connection with the purchase or sale of a security, the defendant employed a device, scheme, or artifice to defraud, or engaged in a course of conduct that operated or would operate as a fraud or deceit upon a purchaser or seller of the specified security, the government must prove each of the following five things beyond a reasonable doubt.

We're still talking about the first element for Counts Two through Five.

The five things that would have to be established beyond a reasonable doubt:

First, that Rob Ray or Chris Choi, depending on which count of the indictment you're considering, who the indictment alleges were the insiders, were the tippers, had a fiduciary or other relationship of trust and confidence with Dell and Nvidia respectively.

Second, the government would have to show that Rob Ray or Chris Choi, again, depending on which count of the indictment you're considering, breached that duty of trust and confidence by disclosing material nonpublic information about Dell and Nvidia to Sandy Goyal and Hyung Lim respectively, and which information was subsequently disclosed to the defendant.

Third, the government would have to show that Rob Ray or Chris Choi, again, depending on which count you're considering, personally benefited in some way, indirectly or

directly, from the disclosure of the allegedly inside information to Mr. Goyal and Mr. Lim.

Fourth, the government would have to show that the defendant knew that the information he obtained had been disclosed in breach of a duty.

And, fifth, that the defendant used in some way the material nonpublic information he received to purchase the security you are considering.

Now, several of the terms that I just discussed with you have specific meanings under the federal law, so I want to give you what those meanings are now.

With respect to the first factor I mentioned, the government must prove beyond a reasonable doubt that Rob Ray and Chris Choi had a fiduciary or other relationship of trust and confidence with Dell and Nvidia respectively; that as a result of that relationship, they were entrusted with material nonpublic information with the reasonable expectation that they would keep it confidential and would not use it for personal benefit.

A person will be considered an insider if the government proves beyond a reasonable doubt that he assumed a special confidential relationship affording him access to material nonpublic information intended to be available only for a corporate purpose and not for his own personal benefit; thus, it is the confidential nature of the relationship which

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

v. 12 CR 121 (RJS)

MICHAEL STEINBERG,

Defendant.

----------x

New York, N.Y.
May 16, 2014
11:30 a.m.

Before:

HON. RICHARD J. SULLIVAN,

District Judge

APPEARANCES

PREET BHARARA,
United States Attorney for the
Southern District of New York
ANTONIA APPS
HARRY A. CHERNOFF
Assistant United States Attorney

KRAMER LEVIN NAFTALIS & FRANKEL LLP
Attorneys for Defendant
BARRY H. BERKE
MEGAN RYAN
STEVEN SHANE SPARLING

ALSO PRESENT: KAITLIN PAULSON, Paralegal
JAMES HINKLE, FBI

Okay. So have a seat. That's the sentence.

I should tell you -- I think you know already -- you have a right to appeal the sentence. And so if you wish to appeal, you need to file a notice of appeal within two weeks. Mr. Berke will help you with that, I'm sure.

All right. Mr. Berke, any recommendations you'd like me to make to the Bureau of Prisons?

MR. BERKE: Thank you, your Honor.

We would ask that you recommend that the sentence be served at the satellite camp at Otisville close to Mr. Steinberg's family.

THE COURT: I will make that recommendation. I'm not sure if anybody could hear you, but the request is that I make a recommendation to the Bureau of Prisons that he be designated to the Otisville facility, which is in -- it's not Westchester, I guess it's -- it might be Orange or Dutchess, I'm not sure. In any event, it's pretty close, so close enough to visit.

I can only make recommendations; I can't order it. But I certainly will make the recommendation in the strongest possible terms, okay?

MR. BERKE: Thank you, your Honor.

The other request we have, your Honor, is that your Honor grant bail pending appeal. The government has consented to that.

THE COURT: Look, I had denied a similar request to

Mr. Chiasson and Mr. Newman. And I denied it on the basis that I didn't think the standard had been met; seemed to me that the law was pretty clear, and so I denied it.

The Circuit reversed it, and I since, I think, indicated that this is a closer call than I thought. And I respect that. They are the Circuit; they get to make the final calls on this.

So in light of those changed circumstances, certainly I will grant the request, okay?

MR. BERKE: Thank you, your Honor.

THE COURT: I'll probably know what's going on. It may be that I might want to revisit this, depending on how the appeal in the Newman and Chiasson case goes. So if that comes down in the interim, I'd ask the parties to submit a joint letter indicating how that ruling would affect bail pending appeal, if at all. I'll probably learn about it at the same time you do, but we'll both keep our eyes out, okay?

MR. BERKE: Thank you, your Honor.

THE COURT: Anything else we should cover today?

MS. APPS: No, your Honor.

There are no open counts.

THE COURT: No other open counts.

Okay. Mr. Berke, anything else from your perspective?

MR. BERKE: No, your Honor.

The only thing I would say is to alert your Honor with

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May 8, 2014

5/12/14 Let's not make this more complicated than necessary - the PTC is stayed in its entirety until Sept 25, 2014 & a PTC will be held Thursday, Sept 25 in the afternoon, should the CA of Appeals decide prior thereto the SEC & we will notify chambers promptly compliance. SO ORDERED Harold Baer USDJ

BY CM/ECF AND HAND DELIVERY

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

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

Dear Judge Baer:

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

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

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

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

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

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

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

Thank you for your consideration.

Respectfully submitted,

/s/ Barry H. Berke
Barry H. Berke

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

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

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

Endorsement:

Let's not make this more complicated than necessary. The pre trial scheduling order is stayed in its entirety until September 15, 2014 and a pre trial conference will be held the Thursday before whatever that date is at 2:30 P.M. in the afternoon. Should the Court of Appeals decide prior thereto the SEC will notify Chambers promptly and we will have an earlier conference.

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 1575 / June 30, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15925

In the Matter of MICHAEL S. STEINBERG	ORDER FOLLOWING PREHEARING CONFERENCE

The Securities and Exchange Commission (Commission) issued an Order Instituting Proceedings (OIP) on June 11, 2014, alleging that Michael S. Steinberg (Steinberg) was convicted of one count of conspiracy to commit securities fraud and four counts of securities fraud in United States v. Steinberg, 1:12-cr-121 (RJS) (S.D.N.Y. Dec. 18, 2013). The OIP alleges further that Steinberg was sentenced to a prison term of three and a half years, followed by three years of supervised release, and was ordered to pay a fine of $2 million and $365,142.30 in criminal forfeiture. The Commission's Rules of Practice require Steinberg to answer the allegations in the OIP within twenty days of service of the OIP. OIP at 3; 17 C.F.R. § 201.220. Steinberg was served with the OIP, by delivery of the OIP to his counsel, on June 16, 2014. See 17 C.F.R. § 201.141.

I held a telephonic conference on June 26, 2014, at which Steinberg's counsel requested that this proceeding be adjourned for ninety days to allow for what he believes will be a favorable ruling from the U.S. Court of Appeals for the Second Circuit that would affect Steinberg's appeal. Counsel offered many reasons why, in these circumstances, delay would be the proper course of action, including the Division of Enforcement's (Division) actions in the related civil action, SEC v. Steinberg, 13-cv-2082 (S.D.N.Y.). The Division expressed opposition to any delay in this proceeding, disagreed on the likely outcome and timing of a decision by the Second Circuit, and requested leave to file a motion for summary disposition. See 17 C.F.R. § 201.250. The Division agreed to waive the requirement that Steinberg answer the OIP. OIP at 3; 17 C.F.R. § 201.220.

Order

The case precedent is that an administrative proceeding should proceed even though the conviction on which the proceeding is based is being appealed. If the underlying conviction is reversed, a party can petition to have any sanction imposed in this proceeding dismissed. See 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).

Accordingly, during the prehearing conference, I granted the Division leave to file a motion for summary disposition, and ORDERED the parties to follow this briefing schedule:

July 24, 2014:	The Division will file a motion for summary disposition;
August 20, 2014:	Steinberg will file an opposition; and
August 27, 2014:	The Division will file a reply.

Further, I WAIVED the requirement that Steinberg file an answer.

Brenda P. Murray
Chief Administrative Law Judge

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 6th day of August, two thousand and fourteen.

Before: Ralph K. Winter,
Circuit Judge.

United States of America,
Appellee,

v.

Michael Steinberg,
Defendant-Appellant,

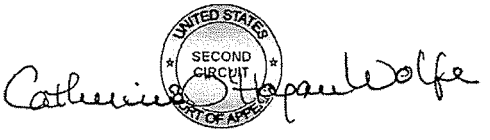
Todd Newman, Danny Kuo, Hyung G. Lim, Jon Horvath, Anthony Chiasson,
Defendants.

ORDER
Docket No. 14-2141

Appellant moves to hold this appeal in abeyance pending the disposition of 13-1837 and 13-1917.

IT IS HEREBY ORDERED that the motion is GRANTED.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court



UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 14-2141 Caption [use short title] United States of America v. Newman (Steinberg)

Motion for: order holding appeal in abeyance

Set forth below precise, complete statement of relief sought:

Mr. Steinberg respectfully requests that his appeal, including the briefing schedule, be held in abeyance until this Court decides the lead case, United States v. Newman, No. 13-1837, and the related case, United States v. Newman (Chiasson), No. 13-1917.

MOVING PARTY: Michael Steinberg
☐ Plaintiff ☑ Defendant
☑ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: United States of America

MOVING ATTORNEY: Barry H. Berke
[name of attorney, with firm, address, phone number and e-mail]
Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas, New York, NY 10036
(212) 715-7560, bberke@kramerlevin.com

OPPOSING ATTORNEY: Harry A. Chernoff
U.S. Attorney's Office/S.D.N.Y.
One St. Andrew's Plaza, New York, NY 10007
(212) 637-2481 harry.chernoff@usdoj.gov

Court-Judge/Agency appealed from: U.S. District Court, S.D.N.Y. - Hon. Richard J. Sullivan

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☑ Unopposed ☐ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☑ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this Court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:
/s/ Barry H. Berke **Date:** August 5, 2014 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, *Appellee*, v. TODD NEWMAN, ANTHONY CHIASSON, JON HORVATH, DANNY KUO, HYUNG G. LIM, *Defendants*, MICHAEL STEINBERG, *Defendant-Appellant.*	:	No. 14-2141 DECLARATION IN SUPPORT OF MOTION TO HOLD APPEAL IN ABEYANCE

BARRY H. BERKE, pursuant to 28 U.S.C. § 1746, hereby declares as follows:

1. I am an attorney duly admitted to practice law in the State of New York and before this Court. I am a member of the law firm Kramer Levin Naftalis & Frankel LLP, counsel for Defendant-Appellant Michael Steinberg in this appeal. I make this declaration in support of Mr. Steinberg's unopposed motion for an order holding his appeal in abeyance pending this Court's decision in *United States v. Newman*, No. 13-1837, and *United States v. Newman (Chiasson)*, No. 13-1917 (collectively, "*Newman/Chiasson*"). Mr. Steinberg's opening brief is currently due on September 22, 2014.

2. As explained in further detail below, the factual and legal issues presented by the *Steinberg* and *Newman/Chiasson* cases overlap significantly. Staying the current briefing schedule in this case would be most efficient for the Court and the parties because one of the legal issues that could result in reversal of Mr. Steinberg's convictions – whether in an insider trading case the government must prove, among other things, that a remote tippee defendant knew that the company insider disclosed confidential information in exchange for a personal benefit– has also been briefed in the *Newman/Chiasson* case, which was argued and submitted several months ago.

3. The government has advised me that it does not oppose Mr. Steinberg's request to hold his appeal in abeyance pending this Court's decision in the *Newman/Chiasson* appeal.

The *Newman* and *Chiasson* Cases in the District Court

4. 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 by corporate insiders in violation of 15 U.S.C. §§ 78j(b) and 78ff and 17 C.F.R. §§ 240.10b-5 and 240.10b5-2. Specifically, the indictment alleged that the

defendants traded on information their employees had obtained from analysts at other investment firms. According to the government, those analysts obtained the information from other individuals, who received the information directly or indirectly from Dell and Nvidia insiders.

5. At the joint trial of Messrs. Newman and Chiasson, Judge Sullivan instructed the jury that the government had to prove that the defendants knew the inside information was disclosed by the insiders in breach of a duty of trust and confidence, and rejected the defendants' request that the jury be charged that the defendants had to know that the insiders received a personal benefit in exchange for their improper disclosures. (*Newman* Tr. 3346-53, 3594-605).[1]

6. On December 17, 2012, a jury found Messrs. Newman and Chiasson guilty on all counts. Judgments were entered in May 2013, and Messrs. Newman and Chiasson timely appealed their convictions and sentences to this Court.

7. Judge Sullivan denied Newman's and Chiasson's requests for bail pending appeal. However, a panel of this Court reversed that denial and 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

[1] All cited transcript pages from the *Newman* trial are attached hereto as Exhibit A.

benefit presented a substantial question of law likely to result in reversal or a new trial. Order, *Newman* (2d Cir. June 21, 2013); *see also* 18 U.S.C. § 3143(b)(1)(B). Subsequently, a separate panel noted that this Court had "yet to decide whether a remote tippee must know that the original tipper received a personal benefit in return for revealing inside information." *United States v. Whitman*, 555 F. App'x 98, 106 (2d Cir. 2014).

8. This Court heard oral argument in *Newman/Chiasson* on April 22, 2014.[2]

The *Steinberg* Case in the District Court

9. On March 29, 2013, following the *Newman/Chiasson* trial, the government charged Mr. Steinberg in a superseding indictment with unlawfully trading securities based on fourth-hand information that his research analyst, Jon Horvath, had obtained from analysts at other investment firms. The *Newman/Chiasson* and *Steinberg* cases included the same "tipping chain" of analysts who obtained the information from other individuals who, in turn, obtained that information from Dell and Nvidia insiders.

10. 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 government must prove that he knew that

[2] An unofficial transcription of the *Newman/Chiasson* oral argument is attached hereto as Exhibit B.

an insider breached a duty of trust or confidence "in exchange for a personal benefit to the insider." *See* Docket No. 309 (Proposed Joint Requests to Charge) at 15-16 & n.8; *id.* at 16-18, 22-26, 31. Additionally, in a supplemental submission, Mr. Steinberg objected to the district court's decision to omit from its jury charge any instruction relating to proof of knowledge of a benefit. Docket No. 323 (Dec. 15, 2013 letter from Barry H. Berke) at 3. In response, the district court stated 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. (Tr. 3442).[3]

11. The district court ultimately instructed the jury that the law prohibits "trading in securities based on material nonpublic information if the person knows that the material nonpublic information was intended to be kept confidential, and knows that the information was disclosed in breach of a duty of trust or confidence." (Tr. 3697). While the district court further instructed the jury that it would have to find that the insiders "personally benefited in some way, indirectly or directly, from the disclosure," the court did not require the jury to find that Mr. Steinberg knew about any such personal benefit. (Tr. 3699-3700).

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[3] All cited transcript pages from Mr. Steinberg's trial are attached hereto as Exhibit C.

12. On December 18, 2013, the jury found Mr. Steinberg guilty of all charges. Judge Sullivan sentenced Mr. Steinberg to 42 months' imprisonment on May 16, 2014 and entered judgment three days later.

13. Recognizing that the "knowledge of personal benefit" issue was pending before this Court in *Newman/Chiasson*, Judge Sullivan granted Mr. Steinberg's unopposed motion for release pending his appeal. Mr. Steinberg timely filed a Notice of Appeal, and his opening brief and appendix are due to this Court on September 22, 2014.

The Pending Appeals in This Court

14. This case and the *Newman/Chiasson* appeal share the same substantial question of law—a question that this Court has found sufficiently viable that it warrants bail pending appeal. Each case raises the question whether the jury should have been instructed that to find a remote tippee guilty of insider trading, the government had to prove, among other things, that the tippee knew that a corporate insider disclosed information in exchange for personal benefit. And if this Court agrees with appellants that reversible error occurred, the remaining question in each case will be whether the district court should enter judgments of acquittal or proceed with new trials on remand.[4]

[4] Mr. Steinberg intends to advance additional arguments for reversal in his appeal, but they are not directly relevant to this application.

15. Following the oral argument in *Newman/Chiasson*, a civil case, an administrative proceeding, and a criminal sentencing have all been stayed in recognition of the potential impact of the *Newman/Chiasson* appellate decision. *See* Order, *SEC v. Steinberg*, No. 13-cv-2082 (HB) (S.D.N.Y. May 12, 2014) (granting application for stay based on joint letter from the SEC and Mr. Steinberg stating, *inter alia,* that "if the Second Circuit reverses or vacates the convictions of Messrs. Newman and Chiasson, it likely will grant the same relief to Mr. Steinberg after his conviction is entered and appealed") (attached hereto as Ex. D); *In the Matter of Steven A. Cohen*, Administrative Proceeding No. 3-15382 (May 29, 2014) (granting application of U.S. Attorney's Office to stay SEC administrative proceeding against Steven A. Cohen, based on government's argument that the SEC's allegations against Mr. Cohen are "premised" on the presumption that Mr. Steinberg engaged in criminality and thus a stay was "necessary" because Mr. Steinberg's appeal would raise the "precise legal issue" that this Court is expected to decide in the *Newman/Chiasson* case) (order and application attached hereto as Ex. E); Transcript of Hearing, *United States v. Kuo*, No. 12 Cr. 121 (RJS) (S.D.N.Y. July 1, 2014), at 35 (Judge Sullivan adjourning the July 1, 2014 sentencing of cooperating witness Danny Kuo until after this Court renders its decision in the *Newman/Chiasson* appeal) (attached hereto as Ex. F).

The Relief Sought by This Unopposed Motion

16. Because the *Newman/Chiasson* and *Steinberg* cases indisputably present the same important and potentially outcome-dispositive legal issue, and because the *Newman/Chiasson* case is ripe for decision, it is in the interest of judicial economy to postpone briefing in Mr. Steinberg's case until this Court clarifies the elements of tippee liability.

17. Three related grounds support holding Mr. Steinberg's appeal in abeyance. First, such an order would spare Mr. Steinberg the burden of presenting (and would spare this Court the burden of considering) questions this Court is already positioned to address in an appeal that has been submitted for decision. Second, it would allow the parties to brief the issues in Mr. Steinberg's appeal with the benefit of knowing the effect of the *Newman/Chiasson* decision on those issues. Finally, an abeyance would allow the panel that is assigned to Mr. Steinberg's appeal the opportunity to consider and decide the effect of the decision in *Newman/Chiasson* on the issues that Mr. Steinberg's appeal raises. *See Bechtel Corp. v. Local 215, Laborers' Int'l Union*, 544 F.2d 1207, 1215 (3d Cir. 1976) ("In the exercise of its sound discretion, a court may hold one lawsuit in abeyance to abide the outcome of another which may substantially affect it.").

18. This Court has repeatedly held appeals in abeyance where, as here, another pending appeal (i) is closer to a decision and (ii) may significantly

inform the merits of the issues presented. *See, e.g.*, Order, *Pedersen v. Office of Prof'l Mgmt.*, Nos. 12-3273 & 12-3872 (2d Cir. May 16, 2013) (granting motion to hold appeal in abeyance pending Supreme Court's decision where movants argued that a stay would allow the parties to provide the court of appeals with "briefing that takes into account the Supreme Court's opinion")[5]; Order, *United States v. Miller*, No. 05-1203 (2d Cir. Aug. 15, 2005) (holding appeal in abeyance pending this Court's issuance of decisions in *United States v. Amerson*, No. 05-1423, and *United States v. Graves*, No. 05-1063); Order, *United States v. Grullon-Jiminez*, No. 05-1170 (2d Cir. Aug. 8, 2005) (same); Order, *In re Herald, Primeo & Thema Funds Sec. Litig.*, No. 12-184-cv (2d Cir. Apr. 6, 2012) (granting appellants' motion in consolidated appeal to hold briefing in abeyance pending decision in lead appeal where question presented by subsidiary appeal was also presented by lead appeal).

WHEREFORE, Mr. Steinberg respectfully requests that his appeal, including the briefing schedule, be held in abeyance pending this Court's decision in *United States v. Newman*, No. 13-1837, and *United States v. Newman (Chiasson)*, No. 13-1917. As noted at the outset, the government, by Assistant U.S. Attorney Harry A. Chernoff, does not oppose this request.

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[5] The *Pedersen* order and motion are attached hereto as Exhibit G.

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

Executed on August 5, 2014
New York, New York

/s/ Barry H. Berke
BARRY H. BERKE
Attorney for Defendant-Appellant
Michael Steinberg

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

v. 12 Cr. 121 (RJS)

DANNY KUO,

Defendant.

----------x

New York, N.Y.
July 2, 2014
4:10 p.m.

Before:

HON. RICHARD J. SULLIVAN,

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
ANTONIA APPS
Assistant United States Attorney

SECARZ & RIOPELLE
Attorneys for Defendant
BY: ROLAND G. RIOPELLE

So that I think is a live question.

The other question I have, and I'm not sure how to resolve that here, is that there are appeals before the Second Circuit now and it's not clear how they're going to come out. If they were to come out and rewrite the law as I see it on insider trading and suggest that there had to have been knowledge, explicit knowledge, of the benefit that went to Mr. Choi or the benefit that went to Rob Ray, I'm not sure that, frankly, in the guilty plea there's a sufficient basis to conclude that Mr. Kuo had that knowledge.

So, some part of me is reluctant to impose a sentence that, depending on how the circuit comes out on certain things, might result in Mr. Kuo doing more time than the people who benefited substantially more than he did from this crime in terms of dollars and who didn't cooperate at all, and, in fact, who didn't even accept responsibility.

That is something that also weighs on me and suggests that maybe we ought to think about whether we put this off or whether there is some other alternative that might be appropriate. Mr. Riopelle, that's a lot to think about.

MR. RIOPELLE: Yes, your Honor. I guess I begin by pointing out that Mr. Kuo's boss, Mr. Dosti, who clearly was a co-conspirator, we've heard that today, benefited from the conspiracy more than Mr. Kuo. He hasn't been prosecuted at all. It strikes me as a strange thing for Mr. Kuo to suffer a

(Recess)

THE COURT: I gather the lawyers have conferred and Mr. Kuo has presumably conferred with Mr. Riopelle. What do you think?

MR. RIOPELLE: Your Honor, from Mr. Kuo's perspective, I think he would prefer to adjourn the sentencing for now. We can pick a control date or adjourn it sine die until a mandate comes down in that other case or the other case is decided. We can pick a date, whatever is the Court's preference, but he would prefer to adjourn for today.

THE COURT: Does the government have a view on that?

MS. APPS: Your Honor, we consent to the adjournment.

THE COURT: I think that that's not unreasonable in light of what's going on and some of the issues that we've talked about today. This is an important day for Mr. Kuo and his family, and I think it's important that we have complete information before we go forward with the sentencing.

I'm sure it's a bit disappointing not to have the closure that you thought you were going to get here today, Mr. Kuo, and I apologize for that. Hopefully, it won't be too long.

I'll set a date by which the parties should submit a letter to me apprising me of what's going on or whether they've changed their view. Once the circuit decides, I'll probably learn about the same time you do. Send me a joint letter

within 24 hours of that, but in no event later than four months, which would put us at November 2. Which is what day of the week?

MS. APPS: Can we make it 48 hours?

THE COURT: Forty-eight hours is fine. I'll issue an order to this effect. Otherwise, we'll remain adjourned until that November 3. November 3 or within 48 hours of the circuit's decision, whichever is earliest.

Mr. Kuo, in the meantime you'll continue on bail the way. You have to continue to comply with all of the conditions.

For Mr. Kuo's family members who came here today, thanks for being here. I'm sorry you're not getting the closure that you may have hoped for as well. If nothing else, I hope you can see that this is not something that we do lightly. Sentencing is the hardest and in many ways the most important thing that I do. And I want to make sure that I get it right on full information. Even if you disagree with where I come out so far or disagree with ultimate conclusions, I hope at the very least you see that it's a process that's done very carefully and with respect and not rashly or vindictively in any way.

So thanks to all of you. Let me thank the court reporter as well. I'll see you in a few months I guess.

(Adjourned)

E5UURAJC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA

v. 13 CR 211(NRB)

RENGAN RAJARATNAM,

Defendant.

----------x

New York, N.Y.
May 30, 2014
11:20 a.m.

Before:

NAOMI REICE BUCHWALD

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
BY: CHRISTOPHER D. FREY
RANDALL W. JACKSON
Assistant United States Attorneys

LANKLER SIFFERT & WOHL LLP
Attorneys for Defendant
BY: DANIEL M. GITNER
MICHAEL D. LONGYEAR

ALSO PRESENT
Sam Moon, Special Agent, FBI
Ruby Hernandez, Paralegal Specialist, United States Attorney's Office

benefit element, it, frankly, does not. If you look at the charge that Judge Holwell gave and the charge Judge Rakoff gave in Whitman and, again, I don't know how your Honor is going to come out on this --

THE COURT: Look. The government has withdrawn its earlier opposition on the personal benefit aspect. They went to the Second Circuit argument. They heard it.

MR. GITNER: I understand. My point was, I don't know how your Honor is going to come out in terms of the exact charge that your Honor gives.

THE COURT: You are quite right. I don't know yet.

MR. GITNER: Because Judge Holwell gave a different charge than Judge Rakoff gave, but if you look at either of those charges, the way the government is proposing to proceed is totally at odds with them. The government is proposing to proceed by proving knowledge of the personal benefit.

Let's just focus on what is now Counts 2 and 3, the Clearwire accounts, with evidence, solely, solely about other stocks -- AMD issue of a phone call -- I don't remember the exact date, I think it is August 15th -- and now they say another call was July 30th that has to do with totally different stock that is not charged in this case, months later.

And that is exactly what they said they would not do when your Honor was questioning the government about my duplicity motion. Your Honor said -- I don't have the exact

U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

May 28, 2014

By Electronic Mail
Honorable Brenda P. Murray
Chief Administrative Law Judge
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-2557

Re: *In the Matter of STEVEN A. COHEN*, Administrative Proceeding File No. 3-15382

Dear Judge Murray:

Pursuant to the Court's Orders dated August 8, 2013 and March 4, 2014, the United States Attorney's Office for the Southern District of New York (the "U.S. Attorney") writes to update the Court with respect to its continued request to stay the proceedings in the above-captioned matter based on ongoing criminal proceedings. The U.S. Attorney respectfully submits that the stay should continue in effect because certain of the criminal proceedings that originally warranted a stay of the administrative action remain ongoing.

In its original application for a stay of administrative proceedings, the U.S. Attorney identified three pending criminal prosecutions with facts that substantially overlapped with the allegations of the United States Securities and Exchange Commission in the Order Instituting Proceedings ("OIP"). The OIP alleges that respondent Steven A. Cohen, the founder of a group of affiliated hedge funds (collectively, the "SAC Hedge Fund" or "SAC"), failed to reasonably supervise two portfolio managers, Mathew Martoma and Michael Steinberg, who were alleged to have engaged in insider trading in violation of Title 15, United States Code, Section 78j(b) and Title 17, Code of Federal Regulations, Section 240.10b-5. At the time of the OIP, Martoma and Steinberg had been criminally charged with engaging in the insider trading activity upon which the failure to supervise allegations are premised. *See United States v. Martoma*, 12 Cr. 973 (PGG) and *United States v. Steinberg*, 12 Cr. 121 (RJS). Additionally, shortly after the OIP was filed, the U.S. Attorney brought criminal charges against the four corporate entities owned by Mr. Cohen that were responsible for managing the assets of the SAC Hedge Fund (collectively, the "SAC Hedge Fund Entities"). *See United States v. S.A.C. Capital Advisors, L.P., et al.*, 13 Cr. 541 (LTS). The criminal charges against the SAC Hedge Fund Entities were based in part on the alleged insider trading of Martoma and Steinberg, among several other employees.

On August 8, 2013, this Court issued an order granting a complete stay of proceedings "pending resolution of *Martoma*, *Steinberg*, and *S.A.C. Capital Advisors, L.P.*" (August 8, 2013 Order at 3). On November 29, 2013 and again on March 4, 2014, following updates as to the

status of the criminal prosecutions, the Court continued the stay based on the information provided by the U.S. Attorney.

At present, only one of the three matters referenced in the Court's prior order – the case against *S.A.C. Capital Advisors, L.P., et al.* – has been fully resolved. As the Court is aware, the four SAC Hedge Fund Entities pled guilty to insider trading charges on November 8, 2013. Subsequently, on April 10, 2014, the District Court accepted those guilty pleas and sentenced the SAC Hedge Fund Entities to, among other things, a five-year term of probation and a $900 million fine (in addition to the $284 million penalty previously imposed in connection with the civil forfeiture action). No appeal was taken.

The two other matters underlying the U.S. Attorney's request for a stay – the *Martoma* and *Steinberg* cases – remain ongoing. First, with respect to *Martoma*, the defendant was convicted after trial on February 6, 2014, but has yet to be sentenced. The sentencing hearing is presently scheduled for June 10, 2014.

Second, proceedings in the *Steinberg* case are also continuing. The defendant, who was convicted of all counts on December 18, 2013, and thereafter sentenced on May 16, 2014 to a 42-month term of imprisonment, has expressed his intention to appeal his judgment of conviction. Based on the litigation in the District Court, we expect that one of his primary arguments on appeal will be that the offense of insider trading requires a tippee to know that the insider who supplied material, non-public information did so in exchange for a benefit, and that there was insufficient proof to establish this element at trial. This precise legal issue – whether a tippee must know of the benefit (in addition to knowing of a breach of duty) – is a central question in a separate appeal brought by two of Steinberg's co-conspirators, Todd Newman and Anthony Chiasson.[1] That appeal, which has been fully briefed and was argued on April 22, 2014, is currently pending before the United States Court of Appeals for the Second Circuit. *See generally United States* v. *Todd Newman & Anthony Chiasson*, Docket Nos. 13-1837(L), 13-1917(con) (the "*Newman/Chiasson* Appeal").

On May 15, 2014, the District Court in the *Steinberg* case issued its decision denying the defendant's motion for a judgment of acquittal and rejecting his argument that the law requires proof of his knowledge of a benefit conferred upon the tipper. *See United States* v. *Steinberg*, No. 12 Cr. 121 (RJS), 2014 WL 2011685, at *9 (S.D.N.Y. May 15, 2014). In so doing, the District Court "acknowledge[d] the possibility that the Second Circuit may change course and require a new knowledge-of-benefit element" in insider trading cases, but "[u]ntil then, however, the Court must follow precedent as it is written," which does not require a "jury . . . [to] find any knowledge of the tippers' benefits beyond what [is] necessary to find knowledge of the tippers' breaches." *Id.* at *7-*8.

In view of these circumstances, and given the pendency of the sentencing in the *Martoma* case, the U.S. Attorney respectfully submits that the continued stay of the above-captioned

[1] Newman and Chiasson were portfolio managers at different hedge funds who obtained the same material, nonpublic information that Steinberg also received. Newman and Chiasson were convicted in a separate trial that took place in the Southern District of New York in November and December of 2012.

administrative proceeding remains necessary until at least the Second Circuit issues a decision in the *Newman/Chiasson* Appeal, which we expect to be forthcoming within the next several months.

Pursuant to the Court's August 8, 2013 Order, the U.S. Attorney will provide a further update as whether a stay remains warranted on or before August 26, 2014, or earlier should the *Newman/Chiasson* Appeal be decided before that time.

Respectfully submitted,

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