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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15925

In the Matter of

MICHAEL S. STEINBERG,

Respondent.

MICHAEL S. STEINBERG'S PETITION FOR REVIEW OF INITIAL DECISION

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Dated: November 4, 2014

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Respondent Michael S. Steinberg, by his attorneys and pursuant to Rule 410 of the Securities and Exchange Commission ("SEC" or the "Commission") Rules of Practice, 17 C.F.R. § 201.410, respectfully submits this petition for review of the October 14, 2014 Initial Decision that (1) granted the Division of Enforcement's (the "Division") motion for summary disposition of the claims set forth in the June 11, 2014 Order Instituting Administrative Proceedings ("OIP") and (2) ordered that Mr. Steinberg be barred from association with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

PRELIMINARY STATEMENT

Five months ago, in a factually-related proceeding, the Commission granted Anthony Chiasson's petition for review of an initial decision barring him from the securities industry. In support of that petition, Mr. Chiasson argued that the Second Circuit had recently heard oral argument in his case[1] and that the tenor of that argument – during which the panel expressed skepticism as to the sufficiency of the jury instructions given at both Mr. Chiasson's trial and Mr. Steinberg's trial – led the Division to seek a stay in the SEC's injunctive action against Mr. Steinberg. Since that time, the U.S. Attorney's Office for the Southern District of New York, the Second Circuit, numerous district judges, and even one of this agency's hearing officers have all sought or imposed similar stays, acknowledging that the Second Circuit is on the verge of determining whether a remote tippee may be guilty of insider trading absent proof that the remote tippee knew that a corporate insider received a personal benefit in exchange for

[1] The Second Circuit consolidated Mr. Chiasson's appeal with that of his jointly tried co-defendant Todd Newman. In this petition, Mr. Steinberg refers collectively to *United States v. Newman*, No. 13-1837, *United States v. Newman (Chiasson)*, No. 13-1917, and the underlying joint trial as "*Newman/Chiasson.*"

disclosing confidential information. Given this posture, Mr. Steinberg asked the Chief Administrative Law Judge ("ALJ") to delay ruling in this administrative proceeding until the Second Circuit decides this case-determinative issue. But mistakenly believing that Commission precedent required the ALJ to ignore the pending appeal despite the unique circumstances presented, the ALJ granted the Division's motion for summary disposition. For the reasons set forth below, we respectfully submit that the Commission should now exercise its discretion to review that decision *de novo*. The Commission also should review the ALJ's erroneous finding that barring Mr. Steinberg serves the public interest, even though he has been out of the securities industry for nearly two years, he has agreed to continue absenting himself from the securities industry until the conclusion of all cases against him, and the Second Circuit may soon conclude he was wrongly convicted.

PROCEDURAL HISTORY AND STATEMENT OF RELEVANT FACTS

A. The Prosecution of Todd Newman and Anthony Chiasson

On August 28, 2012, a grand jury charged Todd Newman and Anthony Chiasson with committing securities fraud and conspiring to commit securities fraud based on allegations that, on behalf of the hedge funds for which they served as a portfolio managers, they traded securities of Dell Inc. ("Dell") and Nvidia Corp. ("Nvidia") while in possession of material nonpublic information disclosed improperly by corporate insiders. *See* Declaration of Barry H. Berke dated August 20, 2014 ("Berke Decl."), Ex. A ¶¶ 6-37.[2] Specifically, the indictment alleged that the defendants traded on information their employees had obtained from analysts at other investment firms. *Id.* at ¶¶ 9-10. Those analysts purportedly obtained the information

[2] Pursuant to Rule 151(b), the Berke Declaration and its exhibits were filed with the Office of the Secretary on August 20, 2014. Those documents are incorporated by reference.

from other individuals who had received the information directly or indirectly from inside sources. *Id.* at ¶ 6.

At their joint trial, Messrs. Newman and Chiasson asked United States District Judge Richard J. Sullivan to instruct the jury that the prosecution bore the burden of proving that the defendants knew that an insider had disclosed confidential information in exchange for a personal benefit. Judge Sullivan refused the defendants' request.

Judge Sullivan's decision not to require the prosecution to prove that the tippee defendants knew an insider had disclosed confidential information in exchange for a benefit was contrary to five other district court decisions, including three from within the Southern District of New York. *See United States v. Whitman*, 904 F. Supp. 2d 363, 371 (S.D.N.Y. 2012); *United States v. Rajaratnam*, 802 F. Supp. 2d 491, 498-99 (S.D.N.Y. 2011); *Hernandez v. United States*, 450 F. Supp. 2d 1112, 1118 (C.D. Cal. 2006); *State Teachers Ret. Bd. v. Fluor Corp.*, 592 F. Supp. 592, 594 (S.D.N.Y. 1984); *United States v. Santoro*, 647 F. Supp. 153, 170-71 (E.D.N.Y. 1986), *rev'd on other grounds sub nom. United States v. Davidoff*, 845 F.2d 1151 (2d Cir. 1988).

On December 17, 2012, a jury found Messrs. Newman and Chiasson guilty on all counts. Judgments of conviction were entered in May 2013. Newman and Chiasson timely appealed their convictions, and the Second Circuit heard oral argument six-and-a-half months ago on April 22, 2014. Though Judge Sullivan denied Newman's and Chiasson's requests for bail pending appeal, the Second Circuit granted defendants' Rule 9(b) motion from the bench, agreeing that the issue of whether to be guilty of insider trading a tippee must know of an insider's personal benefit presented a substantial question of law likely to result in reversal or a

new trial. *United States v. Newman,* Nos. 13-1837(L) & 13-1917(Con), 2013 WL 9825204, at *1 (2d Cir. June 21, 2013); 18 U.S.C. § 3143(b)(1)(B).

B. The Prosecution of Michael Steinberg

On March 29, 2013, following the *Newman/Chiasson* criminal trial, the U.S. Attorney's Office unsealed a superseding indictment charging Mr. Steinberg with unlawfully trading securities based on fourth-hand inside information obtained by his research analyst, Jon Horvath. Declaration of Justin P. Smith ("Smith Decl."), Ex. 1.[3] The *Newman/Chiasson* and *Steinberg* cases involved the same "tipping chain" of analysts who obtained the information from other individuals who, in turn, obtained that information from Dell and Nvidia insiders. *Compare* Smith Decl., Ex. 1 ¶¶ 11-12 & 18-20 *with* Berke Decl., Ex. A ¶¶ 12-14 & 22-23.

At Mr. Steinberg's trial – and just as Messrs. Newman and Chiasson had done – Mr. Steinberg asked the district court to instruct the jury that to find him guilty of insider trading, the prosecution had to prove that he knew that an insider breached a duty of trust or confidence "in exchange for a personal benefit to the insider." *See* Berke Decl., Ex. F. Mr. Steinberg's request was critical given there was no evidence at trial that he knew of any benefit to the Dell or Nvidia insiders. 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. Berke Decl., Ex. G at 3442:13-15. The jury was not required to find that Mr. Steinberg knew about any personal benefit to the alleged tipper. *Id.* at 3699:10-3700:8.

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[3] The Division filed the Smith Declaration and its exhibits with the Office of the Secretary on July 24, 2014.

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

C. The *Newman/Chiasson* Appeal

On April 22, 2014, in connection with the *Newman/Chiasson* appeal, the Second Circuit heard argument on the potentially case-dispositive "knowledge of benefit issue." As a result, the "knowledge of benefit issue" has been *sub judice* for six-and-a-half months.[4]

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

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[4] An unofficial transcription of the *Newman/Chiasson* oral argument, prepared at the request of Kramer Levin, was attached as Exhibit E to the Berke Declaration.

demonstrable benefit coming to a tipper." *Id.* at 40-41.[5]

D. The Division's Injunctive Action Against Michael Steinberg

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

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

Pointing to the Division's support of the stay that Judge Baer imposed in the SEC's action against Mr. Steinberg, Anthony Chiasson petitioned the Commission on May 12, 2014 to review Administrative Law Judge Elliot's initial decision to permanently bar him from the

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

securities industry. The Commission granted Chiasson's petition two-and-a-half weeks later. *See In the Matter of Anthony Chiasson*, 2014 SEC LEXIS 1853 (May 30, 2014). As a result of the Commission's ongoing review, the initial decision has not taken effect, and Mr. Chiasson has not been barred.

Since the *Newman/Chiasson* Second Circuit oral argument, numerous other government agencies and courts have similarly recognized how a reversal in that case would meaningfully affect the state of insider trading law in the Second Circuit and require reversal of the convictions of Mr. Steinberg and potentially others. For example:

- On August 26, 2014, the U.S. Attorney for the Southern District of New York renewed its application to stay the SEC's failure-to-supervise proceeding against the head of S.A.C. Capital, Steven A. Cohen, "until at least the Second Circuit issues a decision in the *Newman/Chiasson* Appeal." Ex. A. The U.S. Attorney argued that a stay is "necessary" because the allegations against Mr. Cohen are "premised" on the presumption that Mr. Steinberg engaged in criminality and Mr. Steinberg's appeal would raise the "precise legal issue" that the *Newman/Chiasson* panel is expected to decide. *Id.* The August application mirrored a similar request that the U.S. Attorney made three months prior in which he predicted that a decision in the *Newman/Chiasson* appeal would be "forthcoming within the next several months." Berke Decl., Ex. N. The hearing officer promptly granted both of the U.S. Attorney's requests. *See In the Matter of Steven A. Cohen*, 2014 SEC LEXIS 3121 (Sept. 2, 2014); *In the Matter of Steven A. Cohen*, 2014 SEC LEXIS 1832 (May 29, 2014).

- On August 6, 2014, the Second Circuit held Mr. Steinberg's appeal in abeyance pending disposition of the *Newman/Chiasson* appeal. Berke Decl., Ex. K. The U.S. Attorney's Office did not oppose Mr. Steinberg's motion for that relief. *Id.*

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

- On May 30, 2014, Judge Naomi Reice Buchwald pointed to the *Newman/Chiasson* panel's questions and comments as support for her decision to instruct the *Rengan Rajaratnam* jury as to the government's burden to prove the defendant's knowledge of the tipper's personal benefit. *See* Berke Decl., Ex.

M at 10:5-7 ("Look. The government has withdrawn its earlier opposition on the personal benefit aspect. They [the prosecutors] went to the Second Circuit argument. They heard it.").

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

F. The Division's Administrative Proceeding Against Michael Steinberg

After agreeing to stay its civil case in district court, the Division nonetheless sought to impose administrative sanctions against Mr. Steinberg. Though it often does not seek administrative remedies until *both* parallel criminal *and* civil actions have concluded, the Division commenced the instant proceeding less than a month after entry of Mr. Steinberg's conviction, and without achieving any resolution in the civil matter. At a prehearing conference, the Division successfully opposed Mr. Steinberg's request for an adjournment pending disposition of the *Newman/Chiasson* appeal. Berke Decl., Ex. J. With leave, the Division then moved for summary disposition on July 24, 2014. Following briefing by the parties, the ALJ issued the Initial Decision on October 14, 2014.

ARGUMENT

I. THE ALJ ERRED BY REFUSING TO DEFER DECISION ON THE DIVISION'S MOTION

Given the tenuous nature of Mr. Steinberg's conviction, the ALJ should have deferred decision on the Division's motion until the Second Circuit decides the *Newman/Chiasson* appeal and clarifies the elements of tippee liability. Rule 250(b) of the Commission's Rules of Practice directs hearing officers to grant, deny, *or defer* decision on motions for summary disposition. Where a party cannot present facts essential to justify opposition to the motion, denial or deferral is mandatory; in all other circumstances, deferral is discretionary. 17 C.F.R.

§ 201.250(b). But citing two Commission orders and one initial decision, the ALJ held that "an appeal is not a basis for delaying a ruling in an administrative proceeding." *See* Initial Decision at 8. None of those precedents supports such a broad principle.

In *In the Matter of Todd Newman*, 2014 SEC LEXIS 507 (Feb. 10, 2014) (the first matter cited in the Initial Decision), the ALJ relied on the Commission's decision in *In the Matter of Jon Edelman*, 52 S.E.C. 789 (1996) (the second matter cited in the Initial Decision) in support of the view that the respondent's pending "criminal appeal does not warrant delaying the issuance of an initial decision." *Id.* at *11 n.7. But *Edelman* does not establish that the Commission may *never* consider the pendency of an appeal as good cause for suspending an administrative proceeding. To the contrary, the Commission observed in *Edelman* that a pending appeal is "generally" an insufficient basis for an "indefinite" stay. 52 S.E.C. at 790. Even less availing is the cited footnote from *In the Matter of Ross Mandell*, 2014 SEC LEXIS 849 (Mar. 7, 2014), in which the Commission commented that the prosecution of an appeal does not mitigate the seriousness of a respondent's fraud. *Id.* at *21 n.28. Mr. Steinberg did not argue that his appeal *mitigates* his alleged misconduct, but rather that there was no need for the Commission to rush to judgment given that the Second Circuit would soon decide whether he engaged in any misconduct at all.

In pressing the ALJ to ignore Mr. Steinberg's appeal, the Division cited a footnote from *In the Matter of James E. Franklin*, 2007 SEC LEXIS 2420 (Oct. 12, 2007), for the proposition that the pendency of an appeal does not "preclude" the Commission from taking action based on a district court judgment. *Id.* at *12 n.15. Of course, the appeal in *Franklin* did not elicit from the U.S. Attorney's Office, the Commission, or the courts anything like the unprecedented response to the appeal in *Newman/Chiasson*, which may explain why the ALJ did not refer to

that matter in the Initial Decision. Yet *Franklin* is significant insofar as the SEC recognized in that case that there *are* occasions that could justify a short deferment along the lines that Mr. Steinberg requested. In the footnote on which the Division relied, the Commission quoted the D.C. Circuit's decision in *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099 (D.C. Cir. 1988), which noted that the pendency of an appeal "*ordinarily* does not detract" from a judgment's finality. *Blinder*, 837 F.2d at 1104 n.6 (emphasis added). That important caveat was informed by an earlier decision authored by then-Judge Ruth Bader Ginsburg, who cautioned that "care should be taken in dealing with judgments that are final, but still subject to direct review" because "[a]ccording preclusive effect to a judgment from which an appeal has been taken . . . risks denying relief on the basis of a judgment that is subsequently over-turned." *Martin v. Malhoyt*, 830 F.2d 237, 264-65 (D.C. Cir. 1987). Judge Ginsburg proposed that "[o]ne potential solution to this dilemma is to defer consideration of the preclusion question until the appellate proceedings addressed to the prior judgment are concluded, provided they are moving forward with reasonable dispatch and will not be long delayed." *Id.* That was the precise course that the ALJ declined to follow here.

Given the unprecedented reaction to the *Newman/Chiasson* oral argument, the ALJ should have exercised her discretion to grant a deferral here. Waiting for a decision in *Newman/Chiasson* is precisely what the U.S. Attorney's Office *twice* asked the ALJ to do when it successfully sought to stay the Division's administrative proceeding against Steven A. Cohen. Berke Decl., Ex. N; Ex. A. It is what Judge Sullivan decided to do not only when he granted Mr. Steinberg bail pending appeal (Berke Decl., Ex. H), but also when he adjourned the sentencing of Danny Kuo, one of Mr. Steinberg's alleged co-conspirators, in light of the impact that disposition of the appeal would have on both cases (Berke Decl., Ex. L). And it is what the

Second Circuit did when it agreed to hold Mr. Steinberg's appeal in abeyance. Berke Decl., Ex. K. Even the Division favored a practical wait-and-see approach when it joined in urging Judge Baer to stay the Commission's action against Mr. Steinberg pending a decision from the Circuit. Berke Decl., Ex. I. The ALJ, however, granted the Division's summary disposition motion based on the mistaken belief that precedent precluded considering the significance of the *Newman/Chiasson* appeal. We respectfully submit that review is now appropriate under 17 C.F.R. § 201.411(b)(ii)(B) to correct that erroneous conclusion of law.

II. THE ALJ FAILED TO RECOGNIZE THAT A PRE-APPEAL BAR IS NOT IN THE PUBLIC INTEREST

Compelled by the Division to make findings as to whether barring Mr. Steinberg will serve the public interest, the ALJ improperly assessed the familiar *Steadman* factors by presuming that Mr. Steinberg's conviction will survive the aftermath of the *Newman/Chiasson* appeal. Though the ALJ found that Mr. Steinberg's actions were "egregious because they were a willful and knowing betrayal of trust by a person at a very high level in the securities industry" (Initial Decision at 8), and done with "a high degree of scienter" because the superseding indictment stated that they were done "willfully and knowingly" (*id.*), the very issue presently under review by the Second Circuit is whether Mr. Steinberg's conviction is based on findings that actually established a criminal state of mind.[6] Since a favorable ruling would mean that Mr. Steinberg was found to have violated no law at all, it would negate both

[6] The ALJ's assertion that Mr. Steinberg's conviction established that he perpetrated a "betrayal of trust" is without basis. Mr. Steinberg was alleged to have been a fourth-level remote tippee; even if the allegations of the superseding indictment were true, Mr. Steinberg owed and breached no duty of trust. To the contrary, the Supreme Court in *Dirks* made clear that, in a classical insider trading case, tippee liability derives from a breach of trust *by the tipper*. *See Dirks*, 463 U.S. at 659-60 ("[T]he tippee's duty to disclose or abstain is derivative from that of the insider's duty. . . . And absent a breach by the insider, there is no derivative breach.").

the ALJ's findings as well as the ALJ's assessment that Mr. Steinberg's conduct "resulted in substantial unlawful profits" (*id.*).

The ALJ's determination that a bar is necessary to "protect the public" (*id.*) not only rests erroneously on the soon-to-be-tested assumption that Mr. Steinberg's conduct was, in fact, unlawful, but also ignores that for the past two years Mr. Steinberg has been "associated" with an investment adviser only in the most nominal sense of the word. Since fall 2012, Mr. Steinberg has been on leave from his employer. Weeks before the Commission commenced this proceeding, Mr. Steinberg offered to memorialize in a signed writing his willingness to maintain the status quo and to stay out of the securities industry until the final resolution of this matter and all pending actions in district court. The ALJ wrongfully disregarded that commitment based on a concern that Mr. Steinberg "could change his mind at any time." Initial Decision at 8. Yet such an arrangement would have effectively granted the Division the very relief it seeks through this proceeding.

Properly considered, the *Steadman* factors supported deferral. Given that Mr. Steinberg's conviction has been significantly called into question by the *Newman/Chiasson* appeal and the overwhelming reaction to the Second Circuit's questions and comments at oral argument, *each* of the *Steadman* factors is inconclusive at best. As suggested above, given that the Second Circuit has not yet determined whether criminal liability can lie absent proof of knowledge-of-benefit, we respectfully submit that it was premature of the ALJ to hold that Mr. Steinberg acted egregiously, wrongfully, or with a high degree of scienter. It was equally premature to presume that Mr. Steinberg committed any infractions or violations, let alone multiple infractions, or is likely to do so in the future.

CONCLUSION

The ALJ erred in refusing to defer decision on the Division's motion for summary disposition until after the Second Circuit decides the *Newman/Chiasson* appeal given (1) the advanced status of the *Newman/Chiasson* appeal, (2) the universal appreciation for the significance of the issues being considered by the Second Circuit, (3) the fact that reversal in that case would overturn Mr. Steinberg's conviction and moot the instant administrative proceeding, and (4) the fact that the public interest does not clearly justify an industry bar at this time. To correct that error, we respectfully submit that the Commission should grant Mr. Steinberg's petition for review, issue a briefing schedule, and vacate the ALJ's Initial Decision.

Dated: November 4, 2014

Respectfully submitted,

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EXHIBIT A

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August 26, 2014

By Electronic Mail
Honorable Brenda P. Murray
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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, March 4, 2014, and May 29, 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, March 4, 2014 and again on May 29, 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 was previously scheduled for June 10, 2014, but has since then twice been adjourned and is now scheduled for September 8, 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, filed a notice of appeal to the United States Court of Appeals for the Second Circuit. The defendant has made clear 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, remains 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"). Steinberg sought and obtained a stay to the briefing schedule governing his own Second Circuit appeal until the *Newman/Chiasson* Appeal is decided.

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.

[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.

In view of these circumstances, the U.S. Attorney respectfully submits that the continued stay of the above-captioned administrative proceeding remains necessary until at least the Second Circuit issues a decision in the *Newman/Chiasson* Appeal.

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 November 26, 2014, or earlier should the *Newman/Chiasson* Appeal be decided before that time.

Respectfully submitted,

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