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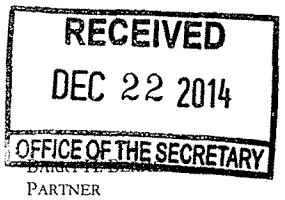

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December 19, 2014

VIA FACSIMILE AND FEDERAL EXPRESS

Mr. Brent J. Fields
Secretary
United States Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: *In the Matter of Michael S. Steinberg*, File No. 3-15925

Dear Mr. Fields:

We represent Respondent Michael S. Steinberg in the above-referenced administrative proceeding. On November 26, 2014, the Commission granted Mr. Steinberg's petition for review of an administrative law judge's initial decision barring him from the securities industry. Mr. Steinberg's brief in support of the petition for review is due to be filed by next Friday, December 26, 2014. The Division of Enforcement's brief in opposition is due in late-January, and Mr. Steinberg's reply is due two weeks thereafter. For the reasons set forth below, we write to request that the Commission stay that briefing schedule in light of the recent decision by the Second Circuit Court of Appeals in the related cases *United States v. Newman*, Nos. 13-1837-cr(L) (2d Cir.) and *United States v. Newman (Chiasson)*, No. 13-1917-cr(con) (2d Cir.) (collectively, "*Newman/Chiasson*"). The Division, by Senior Counsel Daniel R. Marcus, consents to this request.

Pursuant to the Investment Advisers Act of 1940, the Commission commenced the instant administrative proceeding shortly after Mr. Steinberg was convicted of insider trading. Significantly, the criminal case against Mr. Steinberg overlapped substantially with an earlier-prosecuted case against Todd Newman and Anthony Chiasson. Both cases were tried before United States District Judge Richard J. Sullivan, and both involved the same "tipping chain" of analysts who obtained information from other individuals who, in turn, obtained that information from corporate insiders at Dell, Inc. and Nvidia Corp. Most significant to this unopposed application, both cases squarely presented the legal issue of whether, to sustain a conviction in an insider trading case, the government must prove that a remote tippee defendant

knew that a company insider disclosed confidential information in exchange for a personal benefit. At both trials, Judge Sullivan answered that question in the negative and refused to give the defendants' proposed jury instructions concerning tippee knowledge. That refusal was at the heart of the *Newman/Chiasson* appeal, which was argued earlier this year.[1]

Last week, in a unanimous opinion issued on December 10, 2014, the Second Circuit sided with the defendants on the common legal issue of a tippee's required knowledge. Specifically, the Court held that "in order to sustain a conviction for insider trading, the Government must prove beyond a reasonable doubt that the tippee knew that an insider disclosed confidential information *and* that he did so in exchange for a personal benefit."[2] Finding that the District Court's jury instruction to the contrary was erroneous, the Court ruled that the judgments of conviction of Messrs. Newman and Chiasson must be reversed. The Court further ordered that the indictments against Messrs. Newman and Chiasson be dismissed with prejudice because (1) the evidence was insufficient to show "that the corporate insiders received any personal benefit in exchange for their tips," and without that underlying tipper liability there could be no derivative tippee liability and (2) there was no evidence that the defendants knew that they were trading on information obtained from insiders who had provided that information in exchange for a benefit.

Because Judge Sullivan gave the same instructions regarding tippee knowledge to the *Steinberg* and *Newman/Chiasson* juries, and because the relevant facts concerning tipper benefit were necessarily identical in both cases, Mr. Steinberg will be entitled to the same relief as Messrs. Newman and Chiasson unless the panel's decision is vacated or modified in the event the government seeks and is granted upon further review.[3] Given that reversal of Mr. Steinberg's conviction will vitiate the sole basis for Section 203(f) sanctions alleged in the Order Instituting Administrative Proceedings, the parties believe that this proceeding should be stayed at this time.[4]

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[1] The Second Circuit held Mr. Steinberg's separate appeal in abeyance pending a decision in *Newman/Chiasson*.

[2] A copy of the Second Circuit's opinion is attached to this letter as Exhibit A.

[3] On December 12, 2014, the U.S. Attorney's Office moved to extend to January 23, 2015 its time to petition for rehearing and/or rehearing *en banc* so that it could consult with the Solicitor General's office. That motion remains *sub judice*.

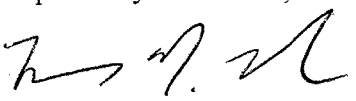
[4] Mr. Steinberg and the Division intend to ask the Honorable Shira Scheindlin to continue to stay the parallel civil injunctive case pending in the Southern District of New York. Additionally, Mr. Steinberg, without opposition from the U.S. Attorney's Office, moved the Second Circuit earlier today to again hold his appeal in abeyance. A copy of Mr. Steinberg's motion is attached to this letter as Exhibit B.

For these reasons, and with the Division's explicit consent, Mr. Steinberg respectfully requests that the Commission stay the current briefing schedule until (1) the U.S. Attorney's Office decides whether to petition for rehearing, rehearing *en banc* and/or *certiorari* in *Newman/Chiasson* and (2) any such petitions are finally decided. The parties will provide the Commission with written updates upon the disposition of these matters.

The parties are available telephonically should your Office or the Commission have any questions or require additional information.

Thank you for your consideration.

Respectfully submitted,



Barry H. Berke

cc: Daniel R. Marcus, Esq. (by facsimile and e-mail)
Justin P. Smith, Esq. (by facsimile and e-mail)

In the
United States Court of Appeals
For the Second Circuit

August Term, 2013

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

UNITED STATES OF AMERICA,
Appellee,

v.

TODD NEWMAN, ANTHONY CHIASSON,
Defendants-Appellants,

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

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

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

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

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

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

BARRINGTON D. PARKER, *Circuit Judge*:

Defendants-appellants Todd Newman and Anthony Chiasson appeal from judgments of conviction entered on May 9, 2013, and May 14, 2013, respectively in the United States District Court for the Southern District of New York (Richard J. Sullivan, *J.*) following a six-week jury trial on charges of securities fraud in violation of sections 10(b) and 32 of the Securities Exchange Act of 1934 (the "1934 Act"), 48 Stat. 891, 904 (codified as amended at 15 U.S.C. §§ 78j(b), 78ff), Securities and Exchange Commission (SEC) Rules 10b-5 and 10b5-2 (codified at 17 C.F.R. §§ 240.10b-5, 240.10b5-2), and 18 U.S.C. § 2, and conspiracy to commit securities fraud in violation of 18 U.S.C. § 371.

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

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

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

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

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

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

> Now, if you find that Mr. Ray and/or Mr. Choi had a fiduciary or other relationship of trust and confidence with their employers, then you must next consider whether the [G]overnment has proven beyond a reasonable doubt that they intentionally breached that duty of trust and confidence by disclosing material[,] nonpublic information for their own benefit.

Tr. 4030.

DISCUSSION

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

I. The Law of Insider Trading

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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]

Motion for: order holding appeal in abeyance United States of America v. Newman (Steinberg)

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 the government decides whether to petition for further appellate review in the lead case, United States v. Newman, No. 13-1837, and the related case, United States v. Newman (Chiasson), No. 13-1917, and pending final resolution of such petition(s).

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

OPPOSING PARTY: United States of America

MOVING ATTORNEY: Barry H. Berke

OPPOSING ATTORNEY: Harry A. Chernoff

[name of attorney, with firm, address, phone number and e-mail]

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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: December 19, 2014 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

Form T-1080 (rev. 12-13)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

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 (1) a decision by the government whether to petition for rehearing, rehearing *en banc* and/or *certiorari* in *United States v. Newman*, No. 13-1837, and *United States v. Newman*

(Chiasson), No. 13-1917 (collectively, "*Newman/Chiasson*") and (2) final resolution of any such petition(s).

2. The government does not oppose this application.

3. On August 6, 2014, this Court granted Mr. Steinberg's unopposed motion to hold his appeal in abeyance pending a merits decision in the *Newman/Chiasson* case, based on substantial overlapping factual and legal issues.[1] The panel in *Newman/Chiasson* issued its decision on December 10, 2014. *United States v. Newman*, __ F.3d __, 2014 WL 6911278 (2d Cir. Dec. 10, 2014).[2] That same day, this Court issued an order lifting the stay of Mr. Steinberg's appeal.[3]

4. Last week, the government moved to extend to January 23, 2015 its time to seek rehearing and/or rehearing *en banc* in *Newman/Chiasson*.[4] The government's motion remains *sub judice*. If the filing deadline is not extended, the government's petition would be due on December 24, 2014.

5. Mr. Steinberg's first abeyance motion explained the substantial overlap in the factual and legal issues presented by the *Steinberg* and

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[1] This Court's order granting Mr. Steinberg's motion is attached hereto as Exhibit A.

[2] This Court's unanimous December 10, 2014 opinion in the *Newman/Chiasson* is attached hereto as Exhibit B.

[3] This Court's December 10, 2014 order is attached hereto as Exhibit C.

[4] The government's motion to extend time is attached hereto as Exhibit D.

Newman/Chiasson cases.[5] Factually, the *Newman/Chiasson* and *Steinberg* cases overlapped, because they 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. The first abeyance motion further explained that the cases overlapped legally because the *Steinberg* case presents one of the exact same grounds for reversal that was squarely presented in the *Newman/Chiasson* appeal: whether in an insider trading case the government must prove that a remote tippee defendant knew that the company insider disclosed confidential information in exchange for a personal benefit. Ex. E, ¶ 2.

6. In its December 10, 2014, unanimous opinion in *Newman/Chiasson*, this Court sided with the defendants on the common legal issue of a tippee's required knowledge, holding that "in order to sustain a conviction for insider trading, the Government must prove beyond a reasonable doubt that the tippee knew that an insider disclosed confidential information *and* that he did so in exchange for a personal benefit." *Newman*, 2014 WL 6911278, at *1 & *6-8. Finding that the District Court's jury instruction to the contrary was erroneous and that the proof was insufficient, this Court ruled that the judgments of conviction of Newman and Chiasson must be reversed. *Id.*

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[5] Mr. Steinberg's initial motion to hold his appeal in abeyance is attached hereto as Exhibit E.

7. Because the same District Judge gave the same erroneous instruction on this issue at both the *Newman/Chiasson* and *Steinberg* trials, *see* Ex. E, ¶¶ 5 & 11, Mr. Steinberg will be entitled to the same relief on the jury charge error.

8. The *Newman/Chiasson* decision further ordered that the indictments against Messrs. Newman and Chiasson be dismissed with prejudice because (1) the evidence was insufficient to show "that the corporate insiders received any personal benefit in exchange for their tips," and without that underlying tipper liability there could be no derivative tippee liability, *Newman*, 2014 WL 6911278, at *10-11, and (2) there was no evidence that the defendants knew that they were trading on information obtained from insiders who had provided that information in exchange for a benefit, *id.* at *11-13.

9. The panel's decision in *Newman/Chiasson* also compels the same relief for Mr. Steinberg.

10. With respect to whether the insiders received the required benefit in exchange for their tipping, the relevant facts are necessarily identical in the *Newman/Chiasson* and *Steinberg* trials and appeals. In both cases, the alleged underlying breaches of fiduciary duty were based on exactly the same facts: that an insider at Dell (Rob Ray) breached his duty by sharing confidential information in exchange for career advice from a purported friend, Sandy Goyal, and that an

insider at Nvidia (Chris Choi) breached his duty by sharing nonpublic information in exchange for friendship with Hyung Lim. The *Newman/Chiasson* panel rejected the sufficiency of this evidence of purported benefits. *Id.* at *10-11.

11. Because Mr. Steinberg's trial and appeal involve the same insiders and the same purported benefits, the *Newman/Chiasson* decision requires that Mr. Steinberg's convictions be reversed and his indictment dismissed with prejudice as well.

12. The government may elect to seek further review in *Newman/Chiasson*. That provides related grounds for holding Mr. Steinberg's appeal in abeyance again. First, if the result of the government's decision is that the panel's opinion remains in place (whether because the government decides not to petition for review of *Newman/Chiasson*, its petition is denied, or further review results in reinstating or affirming the panel's decision), Mr. Steinberg will receive the same relief for the same reasons, with no need for briefing on other issues, thus saving this Court the need to address Mr. Steinberg's other grounds for reversal. Second, in the event further review in *Newman/Chiasson* modifies the Court's opinion or leads to a different outcome, staying Mr. Steinberg's appeal until such review is completed would allow both parties to address the common issues with the benefit of knowing the law that applies. An abeyance would also preserve judicial resources by allowing the Court to decide Mr. Steinberg's appeal by

applying the new opinion in *Newman/Chiasson* to the identical and overlapping issues that Mr. Steinberg's appeal raises.[6]

13. In the interest of judicial economy, this Court has held appeals in abeyance where, as here, a factually or legally related and potentially case-dispositive appeal is closer to final resolution. *See, e.g.*, Order, *Pedersen v. Office of Prof'l Mgmt.*, Nos. 12-3273 & 12-3872 (2d Cir. Nov. 28, 2012) (granting motion to hold appeal in abeyance pending disposition of petitions for certiorari in four related cases).[7] Similarly, other circuit courts have held appeals in abeyance pending post-decision review of an appeal that raises identical legal issues. *See, e.g.*, Order, *Menominee Indian Tribe of Wisc. v. United States*, No. 12-5217 (D.C. Cir. Feb. 15, 2013) (holding appeal in abeyance pending disposition of petition for rehearing *en banc* in Federal Circuit case that presented same legal question).[8]

WHEREFORE, Mr. Steinberg respectfully requests that his appeal, including the briefing schedule, be held in abeyance pending (1) the deadlines for a decision by the government whether to petition for rehearing, rehearing *en banc* and/or *certiorari* in *Newman/Chiasson* and, in the event the government elects to file such petition(s), (2) the final non-appealable disposition of any such

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[6] In the event full merits briefing is required, Mr. Steinberg intends to present additional arguments for reversal that are not directly relevant to this application.

[7] The *Pedersen* order is attached hereto as Exhibit F.

[8] The *Menominee Indian Tribe* order is attached hereto as Exhibit G.

petition(s). As noted at the outset, the government, by Assistant U.S. Attorney Harry A. Chernoff, does not oppose this request.

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

Executed on December 19, 2014
New York, New York

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