UNITED STATES OF AMERICA
Before The
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16184

In the Matter of

JORDAN PEIXOTO

Respondent.

DECLARATION OF DERRELLE M. JANEY

DERRELLE M. JANEY, ESQ., hereby declares, pursuant to 28 U.S.C. § 1746 and under penalty of perjury, as follows:

1. I am Counsel at the law firm of Gottlieb & Gordon LLP, counsel for Respondent Jordan Peixoto in the above-captioned matter.

2. I submit this Declaration in support of Respondent Jordan Peixoto's Motion to Stay.

3. Pursuant to Rule 154(c) of the Securities and Exchange Commission's ("Commission") Rules of Practice, I hereby certify that Respondent's Brief of Points and Authorities in Support of Motion to Stay ("Brief") complies with the length limitation set forth in Commission Rule 154(c). I have relied on the word count feature of Microsoft Word to verify that the Brief contains 6,928 words, exclusive of the table of contents and table of authorities.

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

5. Exhibit A is an unofficial transcript 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*").

6. Exhibit B is a copy of the September 30, 2014 Order Instituting Administrative and Cease and Desist Proceedings in this matter.

7. Exhibit C is a copy of relevant portions of the transcript of the May 16, 2014 sentencing held in *United States v. Steinberg*, Case No. S4 12-cr-121 (RJS) (S.D.N.Y.).

8. Exhibit D 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 Commission, a stay in *SEC v. Steinberg*, No. 13-cv-2082 (HB) (S.D.N.Y.).

9. Exhibit E is a copy of Anthony Chiasson's May 9, 2014 Petition for Review of Initial Decision in *In the Matter of Anthony Chiasson*, Admin. Proc. File No. 3-15580.

10. Exhibit F 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

11. Exhibit G is a copy of Michael Steinberg's August 5, 2014 Motion to hold his appeal in abeyance pending the disposition of the *Newman/Chiasson* appeal.

12. Exhibit H is a copy of the August 8, 2013 Order granting the U.S. Attorney's Office application to stay *In the Matter of Steven A. Cohen*, Admin. Proc. File No. 3-15382, pending the resolution of Mr. Steinberg's criminal case.

13. Exhibit I is a copy of the August 26, 2014 U.S. Attorney's Office Application to Stay in *In the Matter of Steven A. Cohen*, Admin. Proc. File No. 3-15382, pending the resolution of Mr. Steinberg's criminal case.

14. Exhibit J is a copy of the transcript of the July 1, 2014 hearing held in *United States v. Kuo*, No. 12 Cr. 121 (RJS) (S.D.N.Y.).

15. Exhibit K is a copy of the Brief for Defendant-Appellant Anthony Chiasson in *United States v. Newman (Chiasson)*, No. 13-1917 (2nd Cir. August 15, 2013).

16. Exhibit L is a copy of the Brief of Defendant-Appellant Todd Newman in *United States v. Newman*, No. 13-1837 (2nd Cir. August 15, 2013).

17. Exhibit M is a copy of the May 12, 2014 Order granting Mr. Steinberg's request for stay in *SEC v. Steinberg*, No. 13-cv-2082 (HB) (S.D.N.Y.).

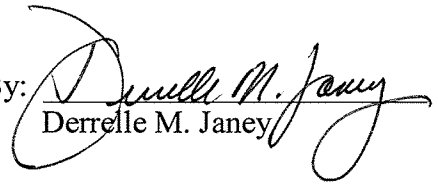
18. Exhibit N is a copy of the Commission's May 30, 2014 Order Granting Petition For Review in *In the Matter of Anthony Chiasson*, Release No. 3841.

19. Exhibit O is a copy of the September 2, 2014 Order granting the U.S. Attorney's request for a continuation of the stay in *In the Matter of Steven A. Cohen*, Admin. Proc. File No. 3-15382.

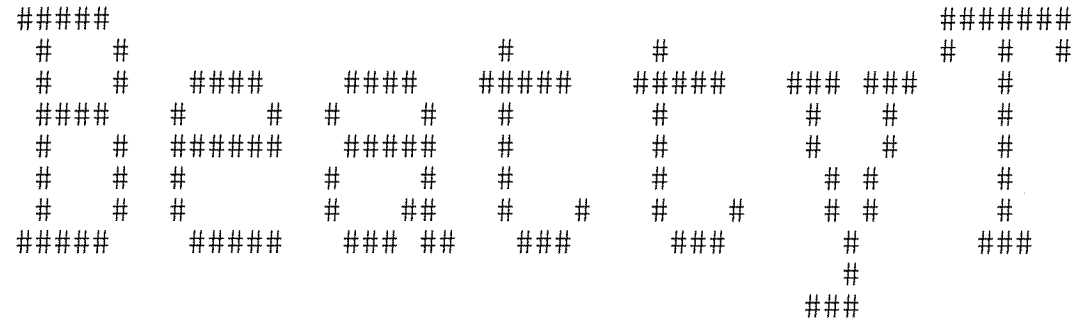
Dated: New York, New York
November 17, 2014

Respectfully submitted,

GOTTLIEB & GORDON LLP

By: 
Derrelle M. Janey

cc: Jack Kaufman, Esq.
Sheldon Mui, Esq.
U.S. Securities and Exchange Commission
3 World Financial Center
New York, N.Y. 10281-1022
KaufmanJa@SEC.GOV
MuiS@SEC.GOV
Attorneys for SEC
Division of Enforcement



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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

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.

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

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.

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?

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

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.

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

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

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

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

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

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

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

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

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

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,

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

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

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

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

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

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?

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.

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

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

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

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

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

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.

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,

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

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

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.

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

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

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

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

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--

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

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-

-

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

Exhibit B

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 73263 / September 30, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-16184

In the Matter of **JORDAN PEIXOTO** **Respondent.**	**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND NOTICE OF HEARING**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Jordan Peixoto ("Peixoto" or the "Respondent").

II.

After an investigation, the Division of Enforcement alleges that:

A. SUMMARY

1. Peixoto engaged in insider trading in connection with securities of Herbalife Ltd. ("Herbalife").

2. In 2012, Peixoto's friend, Filip Szymik ("Szymik"), was a close friend and the roommate of an analyst employed at Pershing Square Management, L.P. ("Pershing"). Pershing was a hedge fund headed by well-known activist investor William Ackman ("Ackman"). Prior to December 19, 2012, Szymik's roommate ("the Analyst") informed Szymik of an upcoming Pershing public presentation regarding its negative view of Herbalife (the "Pershing Presentation"). The Analyst also told Szymik, and Szymik understood and agreed, that any information that Szymik might learn from the Analyst concerning Pershing (including concerning the Pershing Presentation) was highly confidential and that Szymik should not trade securities on the basis of any such information.

3. Nonetheless, in breach of his duty of trust or confidence with the Analyst, Szymik informed his friend Peixoto of the essential substance and date of the upcoming Pershing Presentation, which ultimately took place on December 20, 2012. Peixoto and Szymik knew or recklessly disregarded that that information was material and nonpublic, and both understood that, once publicized, Pershing's negative view of Herbalife likely would cause Herbalife's stock price to fall.

4. On December 19, 2012, prior to any such public announcement, Peixoto purchased a number of Herbalife put options. Later that day, CNBC reported Pershing would be announcing publicly a negative view of Herbalife in a presentation the following day. Immediately following both the CNBC announcement and the Pershing Presentation the following day, Herbalife's stock price dropped considerably, falling a total of 39% by the close of trading on December 24. The market value of Peixoto's Herbalife's put options increased by approximately $339,421 (as of December 21, 2012), and he ultimately obtained $47,100 in actual profits from Herbalife options that he purchased prior to the CNBC report.

5. By purchasing Herbalife put options while in possession of material nonpublic information -- when he knew or had reason to know that that information had been improperly obtained -- Peixoto violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

B. RESPONDENT

6. **Peixoto**, age 30 and a resident of Toronto, is a Canadian citizen. During December 2012, Peixoto was employed as a research analyst at Deloitte in New York, New York. Peixoto has never been registered with the Commission.

C. OTHER RELEVANT INDIVIDUALS AND ENTITIES

7. **Szymik**, age 28 and a resident of New York City, is a Polish citizen. Since 2008, Szymik has worked as a consultant or senior consultant at a consulting firm. Szymik has never been registered with the Commission.

8. **The Analyst**, age 28 and a resident of New York City, is a Polish citizen. The Analyst began working for Pershing in April 2010, as an intern, and later became a research analyst. The Analyst left Pershing in September 2013.

9. **Pershing,** a limited partnership, was formed in New York, New York. Pershing was founded by William Ackman in 2004 and operates as a hedge fund. Pershing is registered with the Commission as an investment adviser. As of December 2012, it had approximately $11 billion in assets under management.

10. **Herbalife**, a Cayman Islands corporation, is headquartered in Los Angeles, California. Herbalife's common stock is registered with the Commission pursuant to

Section 12(b) of the Exchange Act and is traded on the New York Stock Exchange. Herbalife common stock options are traded on various exchanges.

D. BACKGROUND

11. The Analyst began working at Pershing as an intern in April 2010 and became a research analyst and full-time employee in March 2011. Pershing's employee compliance manual states in part that "[Pershing] generates, maintains and possesses information that we view as proprietary, and it must be kept confidential by our Employees"; and that such information includes "investment positions that have not otherwise been publicly disclosed; research analyses that have not otherwise been publicly disclosed ..." Pershing's written compliance policies further state: "Employees may not disclose proprietary information to anyone outside the Firm ..." Upon becoming a full-time Pershing employee, the Analyst acknowledged to Pershing in writing that he had received, read, and understood Pershing's compliance manual and confidentiality policy.

12. As a Pershing employee, the Analyst also attended routine mandatory training seminars hosted by Pershing, which included training concerning Pershing's compliance manual, code of ethics, and insider trading.

13. Beginning in the first quarter of 2012, through at least September 2013, the Analyst was a member of Pershing's investment team assigned to research Herbalife. In that capacity, prior to December 2012, the Analyst learned that Pershing had concluded that Herbalife was operating an illicit pyramid scheme and that Pershing had acquired a substantial short position in Herbalife stock. The Analyst also knew that Pershing intended to publicly disclose its Herbalife thesis through a presentation at the Sohn Conference Foundation (the Pershing Presentation) ultimately scheduled for, and which occurred on, December 20, 2012.

14. All information concerning Pershing's Herbalife research -- including its negative view of Herbalife, its thesis that Herbalife was operating as an illicit pyramid scheme, its short position in Herbalife stock, and the timing of its disclosure of that information -- constituted material nonpublic information. As a Pershing employee, the Analyst knew that such information was nonpublic and highly confidential.

E. THE ANALYST'S RELATIONSHIP WITH SZYMIK

15. In 2012, the Analyst and Szymik were very close friends who had grown up together in Poland. From 2008 to April 2013, they shared an apartment as roommates in New York, New York. The Analyst and Szymik had a relationship of mutual trust or confidence in which they shared both personal and professional confidences.

16. In 2012, Szymik knew that the Analyst was a Pershing research analyst and that his work there was highly confidential.

17. Prior to December 2012, the Analyst expressly cautioned Szymik, and Szymik understood, that all of the Analyst's work at Pershing was highly confidential; that Szymik should not disclose anything regarding Pershing that he might hear or learn from the Analyst to anybody else; and that Szymik should not trade securities using any such information. Prior to December 2012, Szymik explicitly promised the Analyst that he would neither trade on any information he learned from the Analyst concerning Pershing nor disclose such information to anyone else.

18. Prior to December 19, 2012, in violation of Pershing's confidentiality policy, the Analyst disclosed material nonpublic information about his work regarding Herbalife to Szymik. The Analyst told Szymik, at the least, that he was researching Herbalife for Pershing and that Pershing had a negative view of Herbalife. The Analyst also told Szymik that Pershing would present its thesis concerning Herbalife at the Pershing Presentation, and he informed Szymik of the date of the presentation. As described in the preceding paragraph, Szymik had agreed with the Analyst to maintain the confidentiality of such information. Furthermore, given Szymik's and the Analyst's history, pattern, and practice of sharing confidences, Szymik knew or reasonably should have known that the Analyst expected Szymik to maintain the confidentiality of such information.

F. SZYMIK TIPPED PEIXOTO

19. In 2012, Szymik and Peixoto were close friends who lived within a block of each other in New York, New York and spent time socializing together nearly every weekend.

20. Peixoto knew that Szymik and the Analyst were roommates and very close friends, having known each other since childhood. Peixoto also knew that the Analyst worked at Pershing as a research analyst, and Peixoto knew or had reason to know that the Analyst's work at Pershing was highly confidential.

21. In a series of communications prior to December 19, 2012, Szymik breached his duty of trust or confidence to the Analyst by telling Peixoto, at the least, that the Analyst was researching Herbalife for Pershing; that Pershing had a negative view of Herbalife; that Pershing would publicly disclose its Herbalife thesis; and the date that disclosure would occur. At the time of those communications, both Szymik and Peixoto either knew or recklessly disregarded that the information was material and non-public.

22. When Szymik gave Peixoto the confidential information concerning the Pershing Presentation described in paragraph 21 above, Szymik knew or recklessly disregarded both that he was violating his duty of trust or confidence to the Analyst and that Peixoto intended to trade Herbalife securities based on that information. Szymik received a personal benefit by gifting confidential information to his friend, Peixoto.

23. When Peixoto received the confidential information from Szymik described in paragraph 21 above, Peixoto knew or had reason to know that Szymik provided the information to him improperly, in breach of a duty of trust or confidence.

G. PEIXOTO TRADED HERBALIFE OPTIONS

24. On the basis of the confidential information that Szymik had provided to him, Peixoto purchased Herbalife put options in advance of the Pershing Presentation. On December 19, 2012, from approximately 12:00 p.m. to 1:23 p.m. Peixoto purchased eight out-of-the-money Herbalife put options (the "Herbalife Options"). Peixoto previously had never traded options or Herbalife securities, and he sold several other securities to fund his purchase of the Herbalife Options. Szymik did not trade in Herbalife securities.

25. At 1:58 pm EST on December 19, 2012, after Peixoto had purchased the Herbalife Options, CNBC reported that Pershing had acquired a significant short position in Herbalife stock and that Pershing would present its thesis -- that Herbalife was operating an illegal pyramid scheme -- at a conference the next day (the "CNBC Report"). At 2:04 p.m. on December 19, the New York Stock Exchange temporarily halted Herbalife stock trading due to its high volatility in the wake of the CNBC Report.

26. At the December 20, 2012 Pershing Presentation -- a three-hour, 334-slide presentation entitled "Who wants to be a Millionaire?" -- Ackman publicly accused Herbalife of operating an illegal pyramid scheme and disclosed that Pershing held a $1 billion short position in Herbalife stock.

27. Following the CNBC Report, the price of Herbalife stock decreased approximately 12%, from $42.50 per share at the close on December 18, 2012, to $37.34 per share at the close on December 19, 2012.

28. After the CNBC Report and the Pershing Presentation, Herbalife's stock price declined by approximately 39%, from $42.50 per share at the close on December 18, 2012, to a low of $26.06 per share at the close on December 24, 2012.

29. As of the market close on Friday, December 21, 2012, the market value of Peixoto's Herbalife Options had increased by approximately $339,421, and he ultimately obtained $47,100 in actual profits from his illicit trading in Herbalife Options. Peixoto requested that his brokerage firms permit a number of his profitable Herbalife Options to expire without exercising them. However, one of Peixoto's securities brokers refused his request, resulting in the exercise of certain of the Herbalife Options and his obtaining $47,100 in illicit trading profits.

H. VIOLATIONS

30. As a result of the conduct described above, Peixoto violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibit fraudulent conduct in connection with the purchase or sale of securities.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it appropriate that cease-and-desist proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford Respondent an opportunity to establish any defenses to such allegations; and

B. Whether, pursuant to Section 21C of the Exchange Act, Respondent should be ordered to cease and desist from committing or causing violations of and any future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, whether Respondent should be ordered to pay a civil penalty pursuant to Section 21B(a) of the Exchange Act, and whether Respondent should be ordered to pay disgorgement pursuant to Sections 21B(e) and 21C(e) of the Exchange Act.

IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened not earlier than 30 days and not later than 60 days from service of this Order at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondent fails to file the directed answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against him upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondent personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 300 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it

is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Brent J. Fields
Secretary

Exhibit C

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

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

Exhibit D

KRAMER LEVIN NAFTALIS & FRANKEL LLP

BARRY H. BERKE
PARTNER
PHONE 212-715-7560
FAX 212-715-7660
BBERKE@KRAMERLEVIN.COM

May 8, 2014

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

---

[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.

Exhibit E

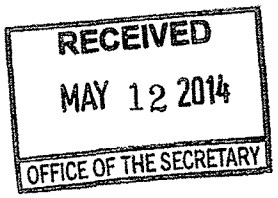
HARD COPY

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15580

In the matter of:

ANTHONY CHIASSON



ANTHONY CHIASSON'S PETITION FOR REVIEW OF INITIAL DECISION

Pursuant to Rule 410 of the Commission's Rules of Practice, 17 C.F.R. § 201.410, Anthony Chiasson hereby submits a petition for review of the Initial Decision issued on April 18, 2014 in the above-captioned proceeding ("Initial Decision").

INTRODUCTION

The United States Court of Appeals for the Second Circuit (the "Second Circuit") is currently considering Mr. Chiasson's appeal of his criminal conviction, so we renew our assertion that this Initial Decision is premature. A successful appeal will vacate the criminal conviction and invalidate the basis for the judgment in a civil case, thereby vitiating the factual predicates for any industry bar of Mr. Chiasson. It would appear at this time that the SEC recognizes the Court's interest in this issue and recently agreed to stay summary judgment against Mr. Steinberg in a related case. *See SEC v. Steinberg*, No. 13-cv-2082 (HB), Docket No. 29. Mr. Chiasson, accordingly, respectfully asks the Commission to review the Initial Decision

and stay the entry of a final order until after the Second Circuit rules on Mr. Chiasson's appeal (if a basis for a final order still exists).

BACKGROUND

As more fully outlined in Mr. Chiasson's Memorandum of Points and Authorities in Response to the Division of Enforcement's Motion for Summary Disposition, Mr. Chiasson was convicted of insider trading in the securities of Dell, Inc. and NVIDIA Corporation on December 17, 2012. On October 4, 2013, the United States District Court for the Southern District of New York entered a consent judgment, permanently enjoining Mr. Chiasson from future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. *See SEC v. Adondakis,* No. 12-cv-409 (HB), Docket No. 92. On April 18, 2014, the Honorable Cameron Elliott, Administrative Law Judge, granted the Division's motion for summary disposition and imposed a collateral industry bar on Mr. Chiasson.

ARGUMENT

The basis for the imposed collateral industry bar may very well soon be mooted by the Second Circuit. That Court heard oral argument on Mr. Chiasson's appeal on April 22, 2014. The argument focused on whether The Honorable Richard J. Sullivan of the United States District Court for the Southern District of New York erred by declining to instruct the jury that to be found guilty of insider trading, a tippee must know the relevant company insiders breached their fiduciary duties by disclosing confidential information in exchange for personal gain. The Second Circuit previously acknowledged that Mr. Chiasson's appeal raised a substantial question of law that could result in a new trial or a judgment of acquittal. *See United States v. Newman,* Nos. 13-1837(L), 13-917(Con), attached hereto as Exhibit A. As the letter from Mr. Steinberg's counsel which was joined by the SEC noted, during oral argument, the questions posed by

Judges Peter Hall, Barrington Parker, and Ralph Winter "appeared to express skepticism as to the sufficiency of Judge Sullivan's jury instructions regarding downstream tipees."[1] *See SEC v. Steinberg*, No. 13-cv-2082 (HB), Docket No. 29. Indeed, for this very reason, just yesterday, the Division requested the Honorable Harold Baer, Jr. stay the summary judgment briefing schedule in Mr. Steinberg's case, which has virtually identical facts to Mr. Chiasson's, pending the Second Circuit's disposition of Mr. Chiasson's appeal. *See Id.*

Mr. Chiasson similarly requested the Division agree to stay summary disposition pending his appeal. The Division declined Mr. Chiasson's request and summary judgment was entered against him. Subsequent to that entry, the Division apparently realized it would be more efficient to wait for the Second Circuit's decision on Mr. Chiasson's appeal before moving for summary judgment against Mr. Steinberg, a defendant convicted of insider trading on the basis of the same jury instructions as Mr. Chiasson. *See Id.* Mr. Chiasson, the man who brought that issue to the Second Circuit, should also benefit from the Division's realization; the Commission should review the Initial Order and refrain from entering a final one until the Second Circuit issues its opinion on Mr. Chiasson's appeal.

If Mr. Chiasson wins his appeal, and accordingly the basis for the Initial Order is vitiated, Mr. Chiasson, the Division, and the Court will need to expend resources on additional motion practice in a matter where there is essentially no dispute. It would be more efficient and a better use of resources for the Commission to review the Initial Order and refrain from entering a final order against Mr. Chiasson until after the Second Circuit issues a decision (if there is even still a basis for a final order). In essence, Mr. Chiasson is requesting the SEC treat his matter in the same manner as it has agreed to treat Mr. Steinberg's.

[1] An unofficial transcription of the oral argument is attached hereto as Exhibit B. Mr. Chiasson will provide an audio recording of the argument should the Commission so request.

Furthermore, there are no other consequences to the Commission refraining from entering a final order until after the Second Circuit issues its decision. Indeed, Mr. Chiasson is effectively already barred. He is currently not working in the securities industry, nor could he attempt to enter the industry during the pendency of his very public appeal.

CONCLUSION

For the reasons above, Mr. Chiasson respectfully requests that the Commission review the Initial Order and refrain from entering a final judgment until after the Second Circuit rules on Mr. Chiasson's appeal.

Dated: May 9, 2014

Respectfully submitted,

MORVILLO LLP

By: Gregory Morvillo (SE)

Gregory Morvillo
Savannah Stevenson
200 Liberty Street
27th Floor
New York, New York 10281
(212) 796-6330

Attorneys for Anthony Chiasson

EXHIBIT A

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 21st day of June, two thousand and thirteen.

Before: Guido Calabresi,
José A. Cabranes,
Barrington D. Parker,
Circuit Judges.

United States of America,

Appellee,

v.

Todd Newman, Anthony Chiasson,

Defendants - Appellants.

ORDER
Docket Nos. 13-1837(L)
13-1917(Con)

Appellants Todd Newman and Anthony Chiasson filed motions for bail pending appeals pursuant to FRAP Rule 9(b). The Government opposes bail. Following argument of the motions on June 18, 2013 the panel ruled from the bench as follows:

IT IS ORDERED that bail pending appeal is granted on the terms previously set by the district court. The case is remanded to the district court for the purpose of adjusting the bail conditions as may be necessary during the pendency of the appeal. The mandate shall issue forthwith for these limited bail-related purposes.

For the Court:

Catherine O'Hagan Wolfe,
Clerk of Court

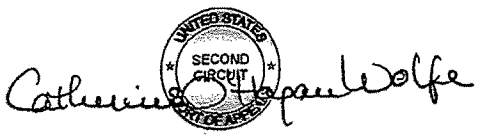


EXHIBIT B

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

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.

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

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.

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?

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

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.

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

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

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

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

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

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

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

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

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

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,

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

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

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

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

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

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?

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.

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

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

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

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

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

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.

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,

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

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

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.

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

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

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

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

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--

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

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

Exhibit F

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

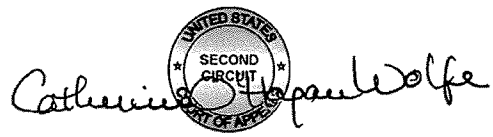

Exhibit G

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.	:	
	:	No. 14-2141
TODD NEWMAN, ANTHONY CHIASSON, JON HORVATH, DANNY KUO, HYUNG G. LIM,	:	DECLARATION IN SUPPORT OF 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 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).

[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.

---

[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

Exhibit H

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 785 / August 8, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15382

In the Matter of	:	
	:	ORDER ON U.S. ATTORNEY'S
STEVEN A. COHEN	:	APPLICATION TO INTERVENE AND
	:	MOTION TO STAY PROCEEDING

On July 19, 2013, the Securities and Exchange Commission (Commission) initiated this proceeding by issuing a Corrected Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940 (OIP). The OIP alleges that Steven A. Cohen (Cohen) failed reasonably to supervise Mathew Martoma and Michael Steinberg, who allegedly violated Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934, while they were employed by wholly-owned subsidiaries of S.A.C. Capital Advisors, LLC, an unregistered investment adviser succeeded in 2008 by S.A.C. Capital Advisors, L.P., that Cohen founded, owns, and controls. A public hearing is scheduled to begin on August 26, 2013. The Commission directed that an Initial Decision in the proceeding be issued within 300 days from July 24, 2013, the date that Cohen was served with the OIP.

On July 26, 2013, the United States Attorney for the Southern District of New York (U.S. Attorney) filed an Application to Intervene and Motion to Stay Administrative Proceeding (Motion to Stay), pursuant to 17 C.F.R. § 201.210(c)(3). The Application to Intervene for the limited purpose of presenting the Motion to Stay pending the resolution of related criminal proceedings being pursued by the U.S. Attorney has three exhibits: Exhibit A, the three-count Indictment returned December 21, 2012, in United States v. Martoma, 12 Cr. 973 (S.D.N.Y.), Exhibit B, the five-count Indictment returned March 28, 2013, in United States v. Steinberg, 12 Cr. 121 (S.D.N.Y.), and Exhibit C, the five-count Indictment returned July 23, 2013, in United States v. S.A.C. Capital Advisors, L.P., 13 Cr. 541 (S.D.N.Y.). The filing included a Memorandum of Law in Support of Motion to Stay.

The Application to Intervene states that the OIP and the pending criminal cases, Martoma, Steinberg, and S.A.C. Capital Advisors, have overlapping factual allegations and will involve largely the same witnesses, documents, and other evidence. The U.S. Attorney represents that the Commission's Division of Enforcement (Division) does not object to the entry of a stay and that he has not sought or obtained consent from Cohen.

On August 2, 2013, Cohen filed a Response to the U.S. Attorney's Motion to Stay (Response). Cohen does not object to staying this administrative proceeding provided that the Commission's investigative record is promptly produced to him in accord with 17 C.F.R. § 201.230. Cohen states that: (1) this administrative proceeding will run on an expedited schedule following the stay and that he will have insufficient time to review the Division's investigative file, said to contain more than five terabytes of data estimated to be 375 million pages, if it is not produced until the stay is lifted; (2) the U.S. Attorney did not claim his position in the criminal proceedings would be prejudiced by turning over the investigative file to Cohen now; and (3) courts have regularly granted partial stays where there are parallel administrative/civil and criminal proceedings. Exhibit 1 to the Response is a July 23, 2013, letter from the Division to Cohen stating that it intends to produce its investigative file once I sign a stipulated protective order, which I have not seen.

On August 7, 2013, the U.S. Attorney filed a Reply Memorandum in Support of the Motion to Stay. The U.S. Attorney argues that: (1) it also has five terabytes of data, about half of which was produced from Cohen's firms, and Respondent's attorneys will receive "largely the same document discovery through the criminal case against the SAC Entity Defendants" as in the administrative proceeding; and (2) there is a clear public interest in limiting a criminal defendant from using a civil proceeding to circumvent limits on discovery in a criminal case.

Ruling

The Commission's Rules of Practice specifically provide that leave to participate on a limited basis may be granted to an authorized representative of a United States Attorney "for the purpose of requesting a stay during the pendency of a criminal investigation or prosecution arising out of the same or similar facts that are at issue in the pending Commission enforcement or disciplinary proceeding," and that a motion for stay shall be favored upon a showing that it is in the public interest or for the protection of investors. 17 C.F.R. § 201.210(c)(3).

There are no objections to the limited intervention by the U.S. Attorney and the parties agree that a stay is appropriate. The only issue is whether the stay should cover the Division's obligation under the Commission's Rules of Practice to:

> make available for inspection and copying by any party documents obtained by the Division prior to the institution of proceedings, in connection with the investigation leading to the Division's recommendation to institute proceedings. Such documents shall include:
>
> (i) each subpoena issued;
>
> (ii) every other written request to persons not employed by the Commission to provide documents or to be interviewed;
>
> (iii) the documents turned over in response to any such subpoenas or other written requests;
>
> (iv) all transcripts and transcript exhibits;

(v) any other documents obtained from persons not employed by the Commission; and

(vi) any final examination or inspection reports prepared by the Office of Compliance Inspections and Examinations, the Division of Market Regulation, or the Division of Investment Management, if the Division of Enforcement intends either to introduce any such report into evidence or to use any such report to refresh the recollection of any witness.

17 C.F.R. § 201.230.

I do not attach much weight to the U.S. Attorney's failure to claim in the Motion to Stay that the criminal cases would be prejudiced by the Division's production of its investigation record because a stay would eliminate that possibility. There was no way the U.S. Attorney could have argued against a position, i.e., granting the stay but requiring production of the investigative record, that he was not aware of when he made his filing. I take as a given that when the U.S. Attorney requested a stay, he intended that nothing further occur.

Cohen's position that he will be severely prejudiced if he does not receive the Division's investigative file immediately if the proceeding is stayed is unpersuasive. The OIP directs that an Initial Decision be issued within 300 days from service of the OIP, excluding the duration of a stay pursuant to Commission Rules of Practice 210 and 360. That will be the goal. I am not aware of any plan to conduct this hearing on an expedited basis.

The Commission clarified this point when it postponed the administrative proceeding A.S. Goldmen & Co., 54 S.E.C. 349, 352 (1999), holding:

> [S]ubstantial prejudice could result to the District Attorney's prosecution of the pending criminal prosecution if the administrative proceeding were not postponed, such as from disclosure of the government's investigative files in this administrative action. Federal courts and the Commission have repeatedly recognized that civil or administrative proceedings may be stayed pending resolution of parallel criminal proceedings where justice requires.

For these reasons, I GRANT the Application to Intervene and Motion to Stay and ORDER the proceeding STAYED pending resolution of Martoma, Steinberg, and S.A.C. Capital Advisors, L.P. Cohen's request that the Division proceed with production of the investigative file despite the stay is DENIED.

The U.S. Attorney shall file a written notice on November 29, 2013, and every ninety days that follow, stating whether the stay should remain in effect, and will inform my Office if the situation changes before that date.

Brenda P. Murray
Chief Administrative Law Judge

Exhibit I

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

August 26, 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, 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,

PREET BHARARA
United States Attorney
Southern District of New York

By: /s/
Arlo Devlin-Brown
John T. Zach
Assistant United States Attorneys
(212) 637-2506/2410
arlo.devlin-brown@usdoj.gov
john.zach@usdoj.gov

cc: Sanjay Wadhwa
Amelia A. Cottrell
Preethi Krishnamurthy
Matthew Solomon
Daniel R. Marcus
Charles Riely
U.S. Securities and Exchange Commission

Martin Klotz
Michael S. Schachter
Alison R. Levine
Willkie Farr & Gallagher LLP
(counsel for respondent)

Daniel J. Kramer
Theodore V. Wells, Jr.
Mark F. Pomerantz
Michael E. Gertzman
Paul, Weiss, Rifkind, Wharton & Garrison LLP
(counsel for respondent)

Exhibit J

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

v. 12 Cr. 121 (RJS)

DANNY KUO,

Defendant.

----------x

New York, N.Y.
July 1, 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

(Case called)

MS. APPS: Antonia Apps for the government. Good afternoon, your Honor. And with me at counsel table is Special Agent Joseph Ng with the FBI.

THE COURT: Ms. Apps, Mr. Ng, good afternoon.

MR. RIOPELLE: Good afternoon, your Honor, Roland Riopelle for the defendant, Danny Kuo.

THE COURT: Mr. Riopelle, good afternoon. Mr. Kuo, good afternoon to you.

There are some family members and friends here.

MR. RIOPELLE: Yes, your Honor. Mr. Kuo's mother, sister, and brother-in-law are all here.

THE COURT: Welcome. This is a public courtroom and everyone is welcome here. I'm sure your presence means a great deal to Mr. Kuo. Thank you for taking the time to be here.

We are here for sentencing. I want to go over with the parties what I reviewed and received in connection with sentencing. If I leave anything out you should let me know.

I have, first of all, reviewed the transcript of the guilty plea that Mr. Kuo took before me on April 3 of 2012, so a little over two years ago. I was here for that. I presided over it, but I think it's a good practice to take a look at the transcript, so I've done that.

I've also reviewed some of the trial testimony in cases where Mr. Kuo wasn't a witness but where he certainly was

referenced. And I particularly reviewed the testimony of Mr. Lim, who dealt with Mr. Kuo and against whom Mr. Kuo cooperated. So I have reviewed that testimony.

I have reviewed the presentence report prepared by the probation department. The report that I received is dated June 24. It is a 25-page single-spaced submission. It also includes a recommendation. I have reviewed a sentencing submission from Mr. Riopelle, which was submitted on June 12. It's not been docketed and we should talk about public docketing. Mr. Riopelle's submission is very thorough, characteristically. It is 19 pages, double-spaced and includes a number of letters from friends and family members, some of whom are here. I thank them for taking the time to write. I have reviewed all the letters, which are very helpful and thoughtful.

I have also then reviewed the government's sentencing submission dated June 20, which has always been filed under seal. That letter from Ms. Apps is six pages, single-spaced, and it indicates the government's intention to move for a sentence reduction pursuant to Section 5K1.1 of the sentencing guidelines.

That's what I reviewed in connection with sentencing. Have I left anything out, Ms. Apps?

MS. APPS: Not that I'm aware of, your Honor. Just for the record, the government publicly filed a version of its

sentencing submission redacting certain portions from that submission.

THE COURT: Right. The version I have requests to be filed under seal and there is a redacted version that takes out certain parts.

Mr. Riopelle, anything further?

MR. RIOPELLE: Nothing further from us, your Honor.

THE COURT: We will talk about sealing and redacting at the end.

I want to spend a minute talking about how this proceeding will work.

Mr. Kuo, when you pled guilty I told you there were a number of factors that any judge considers in deciding what's an appropriate sentence. And it's been a couple of years, so you may have forgotten.

My hunch, Mr. Riopelle has gone over these things with you and you're aware of them, but there are others here that may be less familiar. I'll remind you and them as to what they are.

First of all, I am required to consider your own personal history. I have to make sure the sentence I impose is tailored to you as a person. So I look at your entire life history, from your birth right up to the present. There is more to you than this crime. You're a complicated person with many good qualities and many experiences, all of which make you

unique, and so it's important that that be reflected in the sentence that I impose.

I also, of course, have to consider the facts and circumstances of this crime or these crimes, I should say. These are serious crimes. I don't need to belabor it, but these certainly are serious crimes and the sentence imposed has to reflect the seriousness of the crimes. The sentence has to be tailored to you as a person but also tailored to the crimes that are committed because it is important that the sentence promote respect for the law and it also provide a just punishment for the crime. I have to consider not just what this thing is called, conspiracy to commit securities fraud or securities fraud, but the actual details, what you did, what others did, over how long a period of time, how much money was involved, what the roles were of the different players, that sort of thing. I will consider that, of course.

Another factor that I am required to consider includes the need to deter or discourage you and others from committing crimes like this in the future. If you think of it this way, the point is that every sentence at least has the potential to send a message. And the hope is that the message will be sent and received and internalized so that the defendant himself will get the message and not commit any further crimes, but also so that a broader public will get the message and hopefully people who might consider committing such crimes

would be deterred or discouraged because they saw what happened to others and they would say, well, it's not worth the risk. I've seen what happened to other people who are charged and sentenced for these kinds of crimes.

Now, candidly, it's hard to know. It's hard to predict what future conduct will be. It seems a little speculative, but I think most of us recognize there is something to this, and Congress certainly has made that determination. I think most of us would agree that the messages do get sent and society does internalize these messages and courts have to consider that when they decide what an appropriate sentence would be.

Other factors include your own needs while in custody. So often I have defendants who have mental health treatment needs or physical medical needs. Some have substance abuse treatment needs. And courts have to take those things into account to make sure that a person who has been sentenced to some time in prison is given opportunities to deal with issues that might otherwise make it difficult for them to succeed when they are released. Courts have to consider that.

Another factor I have to consider is something called the United States Sentencing Guidelines. And I discussed this with you when you pled guilty. I think you probably remember. But just in case you don't. The sentencing guidelines are a big book. They are put out by a commission of judges and

lawyers and other experts in the field. And this book is designed to give guidance to judges like me in deciding what would be the appropriate sentence. So a new version comes out each year. The current version is red. The day you pled guilty it was a different color. I'm trying to think of what color it was. I think blue. They put a different color cover every year. And the changes are sometimes significant, sometimes quite minor. I think in this area they have not changed too much since you pled.

But the way this book works is that it directs judges to go to the chapter that relates to the crime in question. And for every crime or type of crime there is a chapter in this book. So the judge goes to that chapter, and in this case the chapter relating to insider trading. And once in that chapter the judge is prompted to make certain findings of fact, including what the amount of gain involved in the crime was. That's one of the real drivers for the sentencing guidelines for insider trading.

So the judge makes a finding as to how much the gain was and on the basis of that finding assigns points. And there are other points that get added or subtracted, depending on what the circumstances are, and the judge goes through that process that's quite mathematical, almost mechanical, and ultimately the judge comes up with a number. That number is referred to as the offense level. The judge then goes to a

different chapter in this book that relates to criminal history.

Not surprisingly, people who have previously been convicted of crimes are, generally speaking, treated more harshly than people who have no prior convictions. So the judge goes to the chapter relating to criminal history, makes a fining as to whether there were prior convictions and, if so, what the sentence was, how long the term of imprisonment was, if there was one, determines whether the current crime was committed while the person was being supervised for a prior crime, and, depending on the answers to those questions, the judge assigns points and comes up with another number and, in the case of criminal history, that number is called the criminal history category.

There are six categories. Category I is the lowest and least serious. Category VI is the highest and most serious. Then on the basis of those two findings, the offense level on the one hand and the criminal history category on the other, the judge goes back to the book. There is a table on the very back cover, the inside back cover. And the judge goes down this column here, on the far left, and that relates to the offense level. The judge stops at the one that applies and then the judge goes across to the right to determine the appropriate criminal history category and stops at the one that's appropriate. And where the judge's finger stops is the

range that in the view of the commission that writes this book would be appropriate. And so that's the way the guidelines work.

Ultimately, I'm free to sentence above and below the guidelines. I'm not bound by this book. But I do have to consider what this book says and I have to make findings as to what the range is according to the book. And then, in addition to that, I guess there is two other factors that I am required to consider and they include, first of all, the need to make sure that the sentence I impose in this case on you is not wildly out of whack with the sentences imposed on others who are similar to you, who engaged in similar crimes, who have similar criminal histories, who have other similar characteristics relevant to this prosecution and this sentencing.

And the goal, of course, is to make sure that the public doesn't lose respect for the law because the system is arbitrary. If it were the case that some people did very long terms and others very low terms, based simply on who the judge was, that might seem arbitrary and it might undermine respect for the law. So judges are instructed to take a step back and to sort of just do a gut check as to whether this is appropriate, in light of other sentences imposed on similar defendants, recognizing no two defendants are exactly similar.

And the last factor, which doesn't apply in every

case, but certainly applies in yours, is the Court needs to take into account cooperation that was provided by a defendant who cooperated. It's important to reward that cooperation. It's also important to provide incentives for future cooperators. It's sort of a reverse determined effect, in a sense. It's to encourage people who when apprehended have potential to cooperate. It's to encourage them to do that because that enables the government to investigate and prosecute and ultimately lead to convictions for criminal conduct. And that is, generally speaking, a societal good. So it needs to be rewarded and encouraged. Those are all the factors that I have to consider and balance, and, naturally, the balancing is the tricky part.

We are going to spend now a few minutes talking about each of these and we will do it in this order. We will first start with the presentence report. I'll make sure that there are no objections or, if there are objections, I'll resolve them. I'll then make my findings under the guidelines. I'll then hear from the lawyers, give them a chance to address any of the sentencing factors that I have mentioned. They have done that in their submissions, but I'll certainly give them another opportunity. I may ask a question or two while we are at it.

After they have spoken, then I'll give you an opportunity to speak. You are not required to, but you're

certainly welcome to and you have a right to. I'll give you that opportunity. After that, then I will tell you the sentence that I intend to impose and I'll give you my reasons for it. I'll then check with the lawyers to make sure I have not done anything illegal or improper under the law. And assuming that I have not, then I'll go formally impose sentence. Any questions so far?

THE DEFENDANT: No questions, your Honor.

THE COURT: Let's start with the presentence report.

Mr. Riopelle, you have received a copy of the presentence report?

MR. RIOPELLE: I have, your Honor. I reviewed it thoroughly with Mr. Kuo.

THE COURT: Do you have any objections to it?

MR. RIOPELLE: None. The comments and objections we had have all been incorporated in the final report. We agree with the guidelines range calculated by the probation officer, so we have no substantive objections.

THE COURT: Ms. Apps, you have reviewed the report. Do you have any objections to it?

MS. APPS: Yes. The government reviewed it and we have no objections, your Honor.

THE COURT: That's easy.

Let's talk about how the guidelines apply here. I think in this case there are no disputes between the parties as

to how they apply, and I think it's a pretty straightforward application of the guidelines in this case.

The base offense level is 8, pursuant to Section 2B1.4 of the guidelines, and that's the chapter or the subchapter that relates to insider trading. It has a base offense level of 8. And then there is an increase of 14 levels because of the amount of gain that was involved in this case. The parties agree that the gain amount is about $625,000. That's just a shade under that. That results in a 14-level increase.

The parties agree that because you accepted responsibility in advance of trial, accepting your responsibility and role in this crime, but also saving the Court and the government the resources necessary to try the case, you're entitled to a three-level reduction pursuant to Section 3E1.1, and that results then in a total offense level of 19.

You have no prior convictions of any kind, no involvement with the criminal justice system at all. You're in criminal history category I, which is the lowest. That yields a range, according to the book here, of 30 to 37 months. That's the view of the commission as to what would be appropriate, given those basic facts.

I did have a question for the parties. What is recommended by probation is that there be a forfeiture amount of roughly $8,000. The loss amount is much higher than that.

And so my question is, why is forfeiture limited to $8250 when the gain amount, I should say, not loss, the gain amount is about six and a quarter hundred thousand dollars.

MS. APPS: I would be happy to clarify it, your Honor. The number 8,250 is strictly limited actually to the gains that Mr. Kuo personally earned from trading in his own personal account.

THE COURT: I think that's clear. I'm not puzzled by that. I think that's clear. The issue is why is it not higher, because it seems that the gains derived, some of them were derived by Mr. Dosti or others who were coconspirators, right?

MS. APPS: Unlike the portfolio manager defendants who have been sentenced in this case to date, Mr. Kuo had a very different compensation structure at Whittier Trust Company. My understanding is -- I'll take it year by year. In 2008, he earned a salary of approximately, I think it's $130,000. $120,000. I beg your pardon. That year he earned no bonus. And in 2009 he earned approximately 4 percent more as a salary and he earned approximately $40,000 bonus.

There is no, as we understand it, direct relationship between trading profits earned generally and the bonus, although the better the book does, Mr. Dosti's book does at the firm Whittier Trust Capital, the better Mr. Kuo does, in essence. But essentially there is not the same direct

relationship between the illegal profits earned by the fund and the firm, Whittier Trust Company, and the compensation that was tied to Mr. Kuo.

And because there was no sort of direct relationship in the same way that we did see with other portfolio managers and even some of the other analysts who have yet to be sentenced by your Honor, because of that we are not able to really determine any amount of the illegal gains that were directly attributable to Mr. Kuo. And so that is the reason why we didn't seek to forfeit additional monies based on the trading at Whittier Trust Capital.

THE COURT: Forfeiture law, which has evolved a little bit in recent years, says that Mr. Kuo would be on the hook for what his coconspirators benefited as well, right?

MS. APPS: Yes.

THE COURT: And so the coconspirators in this case include Mr. Dosti, or not? Mr. Dosti hasn't been criminally prosecuted, but I guess there has been an SEC case against them.

MS. APPS: He clearly is a coconspirator, your Honor. And it is true in that respect, Mr. Kuo could be on the hook for Mr. Dosti's gains.

I will point out in the scheme of things here, your Honor, another number of equitable factors considered here, including, of course, that money was disgorged by Whittier

Trust and Victor Dosti, not to say that Mr. Kuo shouldn't bear his fair share. The money has been forfeited through disgorgement penalties and other penalties to the Securities and Exchange Commission. And, your Honor, ultimately the portion to which Kuo benefited from that directly was a factor. But in the end I don't have the number in front of me as to exactly what portion of Mr. Dosti's portion of those profits was versus the portion that was attributable to Whittier Trust Company. We can go back and find that information out if it Court wishes us to do that.

When taking all those considerations into account, essentially, I guess the most obvious forfeiture number was the amount that he personally profited in his personal trading account and it was tougher to attribute, if you like, any trading gains by Mr. Dosti, particularly when Mr. Kuo received absolutely no bonus based on those trading gains.

Of course, I should point out, your Honor, that a substantial portion of the number, 1.7 million, that was disgorged to the Securities and Exchange Commission avoided losses which would, of course, further reduce the amount of profits, if you like, forfeitable by Mr. Kuo.

THE COURT: Then I guess there is also the other members of the analyst group that was sharing information. So the Nvidia trades, for example, information went from Choi to Lim to Kuo to Tortora, Adondakis, and Horvath and others. Is

Mr. Kuo on the hook for those gains as well, at least as a legal matter? We can talk about the equities in a moment. I'm just curious as to what your view is on that.

MS. APPS: With respect to forfeiture, your Honor, obviously, I think the law with respect to coconspirator gains is quite broad. I will say that the manner in which we have proceeded generally in these series of cases, even the portfolio managers, is to hold them on the hook for gains within their own hedge fund, whether a charged defendant within that hedge fund or not a charged individual within that hedge fund. For example, we did with Mr. Chiasson and Mr. Ganek, Mr. Steinberg and for Mr. Cohen.

Arguably, everybody is in the same conspiracy. Nonetheless, I think that when you're talking about forfeiture here, it is in terms of there is foreseeability here. For example, while certainly Mr. Kuo knew he was passing on these Nvidia tips to the other hedge fund analysts, he absolutely understood that those hedge funds would trade in that information. The scale of those trades, I think, in some cases might have been beyond any contemplation by Mr. Kuo.

For example, Mr. Chiasson made over $10 million for Mr. Chiasson -- I misspoke. Based on the Nvidia insider information that Mr. Chiasson received from Mr. Adondakis, his fund, Level Global, earned trading profits of over $10 million. I think the scope and the size of those trading gains was

enormous in comparison to, for example, the size of the trading gains that Mr. Kuo made and Mr. Dosti made in the account at Whittier Trust based on that same inside information.

(Continued on next page)

THE COURT: All right. Mr. Riopelle, anything you want to say in connection with forfeiture?

MR. RIOPELLE: No, I really don't have anything to add to that very thorough explanation, your Honor. I do think the equities are running in favor of the proposed forfeiture by the comment of the $8,000 that is directly traceable to Mr. Kuo's wrongful conduct. Thank you.

THE COURT: Let me turn the floor over to you Mr. Riopelle. I've read your submission, which was very thorough. I'm happy to hear anything else you'd like to say, whether it's just a matter of underscoring points you've made or if there are some additional points that you like to make.

MR. RIOPELLE: Thank you, your Honor. I would like to be heard briefly on behalf of my client and I would like to hit just a few of the factors that the court is required to consider under 3553(a). In doing that, I think it's always appropriate for a Court to ask itself and for a lawyer representing a defendant to ask himself, what was it that caused this particular defendant to engage in this particular crime?

I would submit your Honor that this is really a case of a young man who was an immigrant to this country at the relatively older age, a fellow who, as many immigrants feel, felt a strong need to get ahead, make himself a success, to fit in here. These are the type of impulses that are admirable and

good but that can lead one to the type of crime that the Court has before it.

Getting involved in an insider trading ring was something that helped this young immigrant man get ahead, be successful, and fit into his new country. He has, of course, in the course of this case learned a very tough lesson about what success really is. It's not just about status. It's not just about money. It's not just about one's position.

In fact, as I think the sum and total of the letters written by Mr. Kuo's family, friends, and friends indicate, real success is about the people in your life, your family and your friends. Mr. Kuo I think has learned that, and the letters written to the Court demonstrate that he is a success in that way.

Another important thing the Court should always considerate in sentencing, and I know the Court will, is whether this is a defendant who is capable of reform and is likely to reoffend. I think the record is very clear that this is a young man who is capable of reform.

One of the letters in particular written to the Court from a young man named Menyousay is instructive. You know Mr. Kuo made a remark that was offensive and immediately, upon having been confronted with that, many years ago, before this case came along, made amends to his friend. This is a guy who can take responsibility for his actions and do the right thing.

We see that also in the letter from the administrator at the University of Southern California Business School, his remarks on Mr. Kuo's willingness to share his experience with his fellow students, to discourage them from doing as he did and making the types of mistakes that he made.

This is a man who has done all that he really could over the last couple of years to reform himself: Completing his Master's of Business Administration in the hopes that he will be able to get back on a good economic track, revealing his problems to his fellow students, talking about it, a willingness to come back to the school and speak to these issues.

These types of actions say an awful it's lot about the person he is because he recognizes his problems and he is willing to deal with them in a head-on way by, among other things, cooperating with the government's investigation in this case. Your Honor has before you the thorough submission by the government detailing the degree to which this young man has cooperated.

I would point out, as your Honor has noted, that he never had any problem with the law before this case. There is no indication he's had any issue with the law other than this one incident. The last two-and-a-half years he's lived a good life. There is no reason to believe that won't continue.

Among the history and characteristics of this

defendant are the very strong family he has surrounding him, some of whom are present in the courtroom today. As the letter of his wife indicates, she couldn't be here today because she is home in California taking care of their young daughter.

He is really his family's face to the outside world because he has better English than she does. He handles all the family finances. His wife is sort of a classic stay-at-home mom in the manner of her culture. Mr. Kuo is the sole bread winner. If he is to be incarcerated here, that would really strike a very severe below to his family.

The old precedents about the importance of a defendant to his family structure I think are applicable here. They used to give the Court basis for downward departure. Here I think they give the Court a good basis for a nonguideline sentence that does not include a term of incarceration.

Probation's recommendation, which I know the Court will consider, is a very favorable one. Mr. Kuo declined the opportunity to be interviewed by telephone and insisted on flying out to be interviewed directly by the probation department in this case because he felt it would make more impact. I think he was right. That impact is reflected in the recommendation of the probation department, which I think is entirely appropriate.

I don't believe there's a need for a long probationary period here, a long period of supervision. Mr. Kuo has

effectively been on supervision for the last two-and-a-half years without incident. Given all that we know of his history and his conduct here, there is absolutely no reason to believe that a long period of supervision is necessary or that a fine is necessary, given the very severe financial penalties he already suffered by losing his position in the financial industry and as he struggles to regain his financial footing.

If the Court has questions, I'm happy to answer them. Other than that, I really have nothing more to say on behalf of my client. I know how carefully the Court considers these issues, and my client is ready to accept whatever sentence the Court imposes.

THE COURT: I don't have any questions at this point. I may in a moment. Let me first hear from Ms. Apps.

MR. RIOPELLE: Thank you judge.

MS. APPS: Your Honor, I guess I should start by technically moving pursuant to Section 5K1.1 of the sentencing guidelines that the Court sentence the defendant in light of the factors set forth in Section 5K1.1(a) of those guidelines.

As this Court has previously recognized, insider trading is a serious crime, and it appears from the sheer number of defendants prosecuted in this district alone that it is pervasive.

The use of cooperating witnesses to prove that criminal conduct is critical to the government. While the

public may not be sympathetic to defendants who have pled guilty to criminal conduct and then sought to help the government, from the prosecutor's point of view and from somebody who has built these insider trading cases from the ground up, in cases where wiretap evidence is not the centerpiece of the government's evidence at trial in particular, I can tell you that these cases could not be built without the assistance of cooperating witnesses.

What is striking about the investment community is how closely knit certain financial organizations are and how difficult it is to secure cooperation from the upper echelons of those financial organizations. Indeed, the results in this case, if measured by those who were charged and those who were not, underscores the importance of cooperation in this area of criminal law enforcement.

As this Court recognized at the beginning of this sentencing hearing, even beyond any general principles, your Honor must evaluate the individual defendant that appears before you, including both the substantial assistance rendered and the nature and the seriousness of the offense conduct for this particular individual.

For Mr. Kuo I would say the most important or the most significant contribution that he made was essentially giving up a friend of his, Hyung Lim, who in turn was a witness at two important criminal trials. Kuo was the necessary link in that

chain and with Mr. Lim's testimony. Mr. Lim also, as the Court is aware, pled guilty pursuant to a cooperation agreement and testified pursuant to that agreement. Mr. Lim's testimony assisted the government in obtaining convictions of three defendants.

THE COURT: Let me ask you this question. Are you saying that there would have been no prosecution of Lim and subsequently no cooperation from Lim but for the cooperation of Mr. Kuo, or is it not that clean?

MS. APPS: I'm not sure I can go so far as saying we would never have been able to persuade Mr. Lim to plead guilty and cooperate. In addition to information provided by Mr. Kuo, however, Mr. Kuo also made a consensual recording at the direction of the FBI with his friend Hyung Lim.

THE COURT: That's very valuable, obviously. Was there sufficient evidence to charge, much less convict, Mr. Lim but for Mr. Kuo's cooperation?

MS. APPS: There clearly was circumstantial evidence in the nature of the telephone calls between Mr. Kuo and Mr. Lim and then Mr. Lim to Mr. Choi, evidence which your Honor has seen at two trials over which your Honor presided. Nonetheless, and this is really to underscore the point that I started out making, your Honor, testimony from cooperating witnesses is a really important tool in the criminal enforcement box.

THE COURT: I get that.

MS. APPS: Your Honor is aware of the circumstantial evidence. I can't stand up here and say that but for Mr. Kuo's cooperation, Mr. Lim would never have cooperated. It's a hypothetical which is impossible for me to engage in, in some sense. Nonetheless, Mr. Kuo's information provided to the government was very important.

He told us about payments that he made though Mr. Lim, cash and other items of value amounting to approximately $15,000. All of this evidence in relation to Mr. Lim was important evidence to convince Mr. Lim to cooperate with the government.

In addition, your Honor, as pointed out in the government's 5K submission, Mr. Kuo's information led directly to a civil enforcement action by the Securities and Exchange Commission against Mr. Dosti. And there are other situations in which Mr. Kuo has been helpful which are outlined in the letter.

To be sure, Mr. Kuo did not testify, a significant additional burden that other cooperators in this case have faced. Nonetheless, the information that he has provided to the government was very important. And he did substantially assist the government's ongoing investigation both with respect to the two criminal trials that I've referenced and with respect to other ongoing matters.

Ultimately, your Honor, from the point of view of the offense conduct, of course, the profit numbers earned by Mr. Kuo's firm were smaller than the profit numbers that were earned by some of the other firms that were part of this insider trading conspiracy, as the Court is well aware.

THE COURT: Right, I'm aware of that. But Mr. Kuo was much closer to the source of the media information than some of the other defendants who have been charged and tried.

MS. APPS: Absolutely. And he pressed his friend Hyung Lim to get that information in order to contribute that Nvidia information to the circle of friends so that he could, in exchange, receive other information. He contributed to the circle in part so he could get the benefit of insider's information passed back.

As set forth in the presentence report and the government's sentencing submission, it wasn't just Nvidia that his firm traded on. It was other stocks, such as Dell. So that is, to be sure, the extent of his criminal conduct. And he pled guilty to a conspiracy as well as to substantive securities fraud with check accounts reflecting that criminal conduct.

Your Honor the only other two points that I would like to make other than the fact that I have a forfeiture order if the Court were to --

THE COURT: For 8,250.

MS. APPS: Yes your Honor. The only other important thing to the government, your Honor, is that we would request that his continued cooperation be a condition of the period of supervised release or probation or whatever the Court plans to sentence the defendant.

THE COURT: All right. I may have some other questions for you in a moment. Let me give Mr. Riopelle an opportunity to respond if there's anything that he wished to respond.

MR. RIOPELLE: I think the only thing I'll say to amplify a remark made by Ms. Apps is that while the government may have been able to identify Mr. Lim, I don't think there's going to be any dispute that Mr. Lim's cooperation came much quicker as a result of Mr. Kuo's cooperation against Mr. Lim.

It might have taken the government many months longer to identify him, gather the evidence to prosecute him, flip him, and use him. Here, it happened like that, and that really gave the government's investigation great advantage, the speed with which it was able to convince Mr. Lim to cooperate, which was the result of Mr. Kuo's actions.

Thank you, judge.

THE COURT: Thank you, Mr. Riopelle.

Mr. Kuo, I'm happy to hear from you if you'd like. You're not required to speak, but you certainly are welcome to. You don't have to stand. You can just stay seated and speak

into the microphone, is probably the best thing to do acoustically.

THE DEFENDANT: Thank you, your Honor. I want to, first, apologize for my misconduct. Because of my poor judgment and decisions, I have brought a significant amount of pain and suffering to my family as well as those who care about me. My past actions have brought shame to my family, and for that I am truly sorry.

I want the Court to know that this was not how I was raised by my parents and my past actions are not reflective of the person that I am. I'm sorry for disappointing them and those that believe in me and trust in me.

This experience has made me a more humble, compassionate, forgiving person. Also, recently more time spent with my daughter helping her out at school, attending her kindergarten graduation. I have learned to have a greater appreciation for my family, and for them I am truly thankful and truly blessed. Over the past two years, I have found ways to support my family financially, albeit support is much more difficult than I can imagine. I will have completed my degree and start providing for my family in the future.

I understand the seriousness of this crime that I committed, and I'm here before you today your Honor asking you to see the goodness in me and the person I've become. I hope the Court may consider a sentence allowing me to continue to

financially support my family and raise my daughter, to be the best father that I can be. Thank you, your Honor.

THE COURT: All right, Mr. Kuo.

Let me state the sentence that I am intending to impose and give my reasons for it. I may have a couple of questions before I get that far.

This is a case which, as with many of the defendants who have been charged with insider trading, involves a person who has led by and large an exemplary life. There is much that Mr. Kuo and his family can be proud of for, how he's lived and for the person that he's been. He's demonstrated that over the course of his adult life and in fact probably even before that. So I think that goes without saying.

Many of the letters I received talked about the many good qualities that Mr. Kuo has: His generosity, his kindness, his thoughtfulness, his sense of duty toward his parents, his mother and his late father, his devotion to his own family now, his daughter and his wife, his being a valued friend, a hard working individual.

He has no prior convictions of any kind, no prior charges of any kind, so this conduct is something that's unlike most of how he has led his life, and I credit that. I think that was true, as I said, for many of the defendants that I've taken guilty pleas from, presided over their trials, and in many cases imposed sentence on them.

In some ways the nature of this crime doesn't attract repeat offenders. It attracts people who have generally worked hard and who are smart and who are doing by and large productive things socially and professionally. Mr. Kuo is no exception to that. In fact in some ways he's exceptional because of the good qualities.

I always lead with that because I think it's important to focus on that. Mr. Kuo this crime doesn't define you. There's more to you than this. You are a person of talent and I think ability and with many good qualities. I accept that.

Of course, this is a serious crime, or crimes, I should say. This took place over a number of years, months and years. It's the kind of crime that is engaged in by people who have, frankly, less reason to engage in criminal conduct than many others.

Mr. Riopelle, whom I've known for a long time and for whom I have great respect, I think very eloquently talked about you as a young man who, as an immigrant, felt the need to fit in. Generally, that's a good impulse. It inspired hard work. It inspired very good activity. But it also inspired some negative things that resulted in this crime. I can see that.

But look, in the grand scheme I sentence many defendants who are also immigrants but who have had far few advantages, who didn't have the benefit of two parents, perhaps even one parent, who care deeply for them, as your parents did

for you, who gave opportunities for education and for success, in the broadest definition of that term, as you have. I think in many ways you are among the most fortunate of the defendants that I see.

Through no fault of your own, I suppose, but it's worth noting that in some ways you and the others engaged in this conspiracy and conspiracies like it have far less reason to engage in this kind of conduct in the first place. You and they have jobs that enable you to support your family, not just support them to put food on the table, but to really provide for an upscale existence and to have opportunities that most people on the planet at most moments in the history of the world would be envious of. For you, like those other coconspirators and defendants, in some ways it's more culpable to engage in this kind of conduct to begin with.

This is a crime, as Ms. Apps has said and as I've said on prior occasions, that is not without consequence. It does real harm broadly in society. I think it promotes great disrespect for the law. I think it undermines confidence in markets, which is one of the hallmarks of our economy. It's important that people believe that this system is fair and it's not rigged. Stories of the types of conspiracies like this one that filter out encourage great cynicism, and there's a real cost that comes with that kind of cynicism.

I think Congress has understandably made this a crime,

I guess indirectly, the way the laws have been developed. This is not where there's an explicit insider trading statute as far as securities fraud has evolved as much by judicial opinion as it has by congressional action.

I don't think there's any dispute that this is illegal activity and that the harms are real and that the culpability is high for people who engage in this. It's also the type of crime that's hard to detect; therefore, the penalties I think have to be pegged to a place where there can be a meaningful deterrent effect, because an awful lot of people can get away with these kinds of crimes. It's important that those who are called, like speeders on the highway, are held out and are made examples.

30 to 37 months is what the guidelines manual calls for for this crime, the amount of gain involved. I know there are some who find the sentencing guidelines to be appalling and immoral and unethical. I don't generally share that view. I think that financial crimes are serious. I think that the culpability of those who engage in them when they have less reason to do so in the first place are reflected in the guidelines.

Three to three-and-a-half years, or really about two-and-a-half to three years is what the range is here, is not, doesn't shock my conscience. It seems to me to be in the ballpark of what would be appropriate.

In your case I have to also factor in the cooperation. That's very important. You didn't hesitate. You cooperated right away. You provided very meaningful cooperation, principally directed towards Mr. Lim. That cooperation, if it wasn't the only cause of the prosecution of Mr. Lim, it certainly was an important source of evidence against him. I think it does clearly relate to his decision to cooperate. His decision to cooperate made other prosecutions possible.

So, your role in that chain reaction is a significant one. You should get credit for that.

You haven't testified, again through no fault of your own. That's sometimes just the way it works. But in the grand scheme of cooperation, it would seem to me that your intent and your sincerity your speed was hard to match. In terms of the actual results of your cooperation, certainly I have seen others who have had a greater impact, who were able to bring bigger cases, who were able to testify, who were more central to prosecutions than perhaps you were here. That's not your fault. But that's part of the calculus the judge has to consider both the efforts and the results.

I think you get an A for effort. The results I think is a solid B-plus. I think there are others who in this case and cases like it are sort of an A or A-plus, and some of that is just the way the chips fall. I get that.

And I think it's important to encourage future

cooperators. I agree with everything Ms. Apps said. I mean, these cases are hard to make. Without things like wiretaps, they are harder to make. And cooperators who can testify and explain what went on, can corroborate each other and can be corroborated by other bits of evidence as part of a mosaic of evidence that can be used to demonstrate guilt, those types of cooperators are really important, and that's not lost on me, clearly entitled to and deserve a substantial reduction.

The hard part, as I said, is the balancing of all of this. The balancing, I guess that's why I get paid the big bucks. This is a case where my inclination is, frankly, to impose a well-below-guideline sentence, but I am still inclined to impose a sentence of six months because I think that that is appropriate in light of the conduct. This is a case in which cash was paid by Mr. Kuo to Mr. Lim. This is a case where the trading that went on was explicit, and repeated and clearly the parties knew this was confidential information.

I'll tell you what gives me pause. The only thing that really gives me pause are two things. One, I'd like to hear from the government in particular, and Mr. Riopelle can weigh in, as to whether a six-month sentence which is well below the guidelines will have a chilling effect on future cooperation. I'm not sure if it would be enough to change my view, but I'd be curious of the government's view. You're the professionals in that area. You deal with this more than I do.

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

period of incarceration when Mr. Dosti has not even suffered a conviction.

THE COURT: I think the difference between Mr. Dosti and some of the others that I'm thinking about is that with Mr. Dosti, I don't know why he wasn't charged. I presume because there wasn't sufficient corroborating evidence that made his prosecution something that the prosecutor was willing to do.

In the case of Mr. Kuo vis-a-vis some others who are appealing, it seems to me his knowledge or lack of knowledge of the explicit benefit that was paid to the original sources of the information is, frankly, on par. It would seem unfair for him to do more time than others when the state of the evidence would be the same.

MR. RIOPELLE: I think that's exactly right.

THE COURT: Ms. Apps, may have a view as to why the evidence is not the same, and I will give her a chance to speak to that. But that at least crossed my mind.

MR. RIOPELLE: Certainly on that issue he's in the same position they are. He'd be in a position to put in a petition for habeas corpus, I suppose, if he was in jail and serving his sentence and the appeal came out in his favor.

It strikes me that the Court is exactly right, that it doesn't make sense for Mr. Kuo to be exposed to a jail sentence in a circumstance in which coconspirators who are far more

culpable than he may escape a sentence and perhaps a conviction altogether by virtue of a successful appeal.

THE COURT: On an element where it's hard for me to see the difference between the two.

MR. RIOPELLE: I think that's exactly right. As I say, he might be able to have a successful petition for habeas corpus at that point, having now sat at someplace for three or four months assuming the --

THE COURT: There are options. We could give him bail pending appeal. We could put off sentencing until after the appeal is decided.

MR. RIOPELLE: We could. I would urge the Court to reconsider the sentence. I do think that a sentence that does not include a period of incarceration in this case would be right down the middle of the typical sentences of white collar defendants who are first offenders in a case of this magnitude. I can tell the Court that my anecdotal experience is that a first offender in a case of this kind who does cooperate successfully, as Mr. Kuo has, is a probationary sentence. That's what happens typically.

I had two recent sentences of that kind. One that springs immediately to mind was an accounting fraud case in front of Judge Crotty in which the loss amount, because it was an accounting fraud of a public company, was huge. The guidelines were life for that defendant. Judge Crotty

sentenced him to time served and a year of supervised release partly because that defendant had been on bail for some six or eight years as the government puttered along toward getting the case tried against his company defendants. That defendant did testify. So that is a difference there.

I would point out that David Blake, whom we had together, had exactly the same guidelines range as this defendant. Mr. Blake did testify that is a difference.

THE COURT: I think his cooperation was nominal in a sense. It's hard to compare apple and oranges when it comes to cooperation, but the quality of that cooperation struck me as really exceptional. That's not to denigrate the cooperation for Mr. Kuo, but I think there they are somewhat quantitatively different.

MR. RIOPELLE: Every case is unique, no question about it judge. But in that case, again a white collar case, first offense, he cooperated right away. The mine run of those cases is a probationary disposition of some kind.

THE COURT: I don't know whether that's true as an empirical fact. If it is, I imagine that defense lawyers would want to make those arguments to juries going forward.

MR. RIOPELLE: I can only speak from my personal experience, which, as your Honor knows, is somewhat extensive. I'm an old man at this point, at least I feel like it sometimes.

The other thing that I would emphasize is this defendant's importance to his family as a bread winner, as an English speaker, as a guy who is the bridge between a very traditional Asian household and the world at large in America. To take him away for six months -- as important as it is to demonstrate that this is a serious crime, we don't dispute that in any way. Insider trading is a bad thing. We take that head on here. But to impose this on his daughter and wife in this circumstance seems to me unnecessary.

The court has talked about how important it is to reward cooperation, encourage it. I think that a probationary sentence here would do that more, obviously, than a sentence of a modest period of jail. There are lots of reasons why a probationary sentence is the appropriate one here. I've tried to point them out to the court. I would ask the Court to reconsider.

THE COURT: I thought you said a minute ago that you were prepared to accept whatever sentence I hand out.

MR. RIOPELLE: That's exactly what I will do. But I do want to encourage the Court to do what I think is right.

THE COURT: All right.

MR. RIOPELLE: I could give you my whole perspective on deterrence at large, which is based on long experience of the criminal justice system from another side. I don't think there really is such a thing. I think that there is a type of

criminal that is deterred by sentences, a career criminal. I can tell you that I've represented career burglars. They never carry anything to a burglary other than a screwdriver because they know that carrying a gun will get them a longer sentence.

White collar crime like this, it just doesn't occur to the people who commit them that they might get caught. They will get caught. They shouldn't do it. They slip into it. It's a terrible thing. It's too easy. I just don't believe that general deterrence is as important in a case like this. I say that simply so the Court knows my view based on long experience. This is what I do for a living.

THE COURT: I don't share that view, and I don't think Congress shares that view, either. I'm willing to bet a dollar Ms. Apps doesn't share it, either.

MS. APPS: I do not share that view at all, your Honor, particularly as we've watched over the years the reaction amongst the industry to the investigations, and so forth. I think there is affirmative evidence of deterrence, in my personal judgment.

THE COURT: My view is a little different, at least for today's purposes, which is the deterrent effect on future cooperation that flows from a six-month sentence which is well below the guidelines. It's basically a 20 percent sentence on what the guidelines would call for at the low end.

MS. APPS: Your Honor, as you're aware, when we moved

for the --

THE COURT: You don't make sentencing recommendations. I'm not asking you to. I'm asking if you think this will chill future cooperation if the fact that even cooperators get some jail time in white collar cases. If that were true, if it did have a deterrent effect, I guess the government could ensure against it by giving non pros to people where they feel it's a guarantee. But I am curious as to your views as to whether or not you think that a six-month sentence under circumstances like this one will make it harder to get cooperators in the future.

MS. APPS: Your Honor, I think it's impossible to make that judgment call to some degree. I guess what goes hand in hand with my view that deterrence matters is that in the investment community they are very sophisticated players. They watch what goes on intently, I believe. I think that happens on both ends of the spectrum of cooperating witnesses and for defendants who are not cooperating witnesses and who go to trial and receive a prison sentence. I think people watch that intently one way or another.

I can't make a judgment call as to whether or not a six-month sentence will chill future cooperation. I think that is a very difficult judgment call for anyone to make.

THE COURT: Well, it's more intuitive than scientific. But you're not taking the bait. Do you want to respond?

MS. APPS: Can you return to one point about the question about benefit. I certainly won't engage in speculation on how the Court of Appeals might rule on this issue. I found your Honor's opinion in the Steinberg case particularly compelling. I thought the arguments that we presented on appeal were compelling. I don't want to take a position beyond that, your Honor.

With respect to the facts as to Mr. Kuo individually, I would point out, as the government submitted in its sentencing submission for Mr. Kuo, that Mr. Lim told Mr. Kuo that he had a friend in the finance department at Nvidia.

THE COURT: Lim.

MS. APPS: He told Mr. Kuo the information was coming from a friend. That must be, I would submit, knowledge that the information was disclosed for personal benefit to some degree.

THE COURT: I'm not sure it necessarily follows that there is no other explanation for how the information came to be passed on. Certainly, given what I've read about the oral argument, there seemed to be some question as to whether a benefit in the nature of a friendship is enough to even constitute a benefit. I don't know if there's case law that says that, but the panel seemed to be skeptical.

MS. APPS: There were questions to that at the oral argument. Whether or not the Court of Appeals now decides Otis

says something other than how the government has read Otis with respect to the benefit issue. There are so many cases in this circuit and elsewhere, not to mention the Supreme Court in addition, expressly stating that friendship is a sufficient benefit under the law.

Unless the Court of Appeals is going to overturn a substantial line of authority expressly stating that when you tip, you know, friendship is sufficient for benefit, I think the evidence here for Mr. Kuo fully meets that requirement.

THE COURT: His awareness of the fact that Lim had a friend?

MS. APPS: Right, that Lim was a friend -- that the information was passed through a friend. I think the relationship between the insider Choi and Hyung Lim clearly meets the test of benefit under the law most recently in the Zhou case.

THE COURT: You're preaching to the choir on this. I'm just saying it's not clear what, if anything, is going to change. Should we hold off on sentencing Mr. Kuo until we know where things stand? With respect to Mr. Ray, I don't think there's any suggestion that he knew the details of Mr. Ray's relationship to Tortora or others.

MS. APPS: Again, we haven't marshaled the evidence for the purposes of that discussion, your Honor. Mr. Kuo admitted he knew that the Dow information came from somebody

inside the company. This is an experienced investment professional. He himself is tapping his friends for what is clearly confidential information, the nature and the frequency of the information that was provided.

All the same arguments that your Honor is familiar with that we've made with respect to Mr. Newman and Chiasson would apply to Mr. Kuo and his knowledge of the Dow inside information. It is simply that for somebody of any level, any small level of sophistication in this industry to receive the type of information that they received on Dell quarter after quarter after quarter --

THE COURT: I get that. This is the same argument for the most part that you're making with respect to Mr. Chaisson, Mr. Newman, and ultimately Mr. Steinberg, although that hasn't been briefed.

MS. APPS: That is correct. The argument I was making earlier with respect to Nvidia information is that there is additional evidence on the Nvidia side that I think potentially does distinguish Mr. Kuo from other defendants on the knowledge of the benefit issue. But that doesn't answer the question about whether to adjourn.

THE COURT: Right. Okay.

MS. APPS: If you want to take a two-minute recess, I will consult with the office.

THE COURT: You may want to consult with Mr. Riopelle.

Mr. Riopelle, do you have any thoughts on that.

MR. RIOPELLE: I certainly would be willing to adjourn the sentence until such time as the Court of Appeals has decided the issue. Then we can brief the issue of whether Mr. Kuo is guilty of a crime based on the record before the Court. If he's not guilty of a crime, we can dismiss the indictment.

THE COURT: That is simply one scenario, I suppose. I guess the question is do you want to hold off on sentencing? Do you want to go forward with sentencing and delay a surrender date until such time as the circuit decides, or do you want to just get this done now because Mr. Kuo and his family I think understandably have the desire for some kind of closure here?

MR. RIOPELLE: I'd like a moment to consult with my client.

THE COURT: Why don't you take a minute and think about that. I will step off for a minute. I apologize to those who are here. I don't mean to have a lot of handwringing over this, but I only get to do this once, so it is important that we discuss all of the issues and make sure that the sentence imposed is the right one in light of all the circumstances. Here there's certain moving parts that make that a little more complicated than in a typical case perhaps.

All right. Let's take a couple minutes.

MR. RIOPELLE: Thank you, your Honor.

(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)

Exhibit K

13-1837-cr(L)

13-1917-cr(con)

To Be Argued By:
MARK F. POMERANTZ

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

JON HORVATH, DANNY KUO, HYUNG G. LIM, MICHAEL STEINBERG,

Defendants,

TODD NEWMAN, ANTHONY CHIASSON,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT ANTHONY CHIASSON

MARK F. POMERANTZ, ESQ.
MATTHEW J. CARHART, ESQ.
PAUL, WEISS, RIFKIND, WHARTON
& GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

ALEXANDRA A.E. SHAPIRO, ESQ.
DANIEL J. O'NEILL, ESQ.
JEREMY LICHT, ESQ.
SHAPIRO, ARATO & ISSERLES LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880

GREGORY R. MORVILLO, ESQ.
MORVILLO LLP
1 World Financial Center, 27th Floor
New York, New York 10281
(212) 796-6330

Attorneys for Defendant-Appellant Anthony Chiasson

August 15, 2013

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INTRODUCTION

The government's zeal to combat insider trading went too far in this case, and swept in conduct that is not a crime under the law. Anthony Chiasson, a hedge fund manager, was convicted of insider trading based on the use of confidential business information "leaked" by corporate insiders. Chiasson played no role in inducing the insiders to disclose information. He was a remote tippee, removed from the insiders by four degrees of separation. Chiasson did not know who the insiders were or why they divulged information. Critically, he did not know that the tippers had fraudulently breached their fiduciary duties to their employers by exchanging confidential information for personal gain. According to the government's evidence, Chiasson knew only that his research analyst had sources of material nonpublic information coming from "insiders," and he traded on that information.

That is not a crime. There is no general duty to abstain from trading just because a tippee receives material nonpublic information coming from an insider. An insider violates the law only if he commits a fraudulent breach of fiduciary duty, which the Supreme Court has defined as providing confidential information for personal gain. A tippee's liability derives from the insider's liability: To be found guilty of securities fraud, a tippee must be "'a participant after the fact in the insider's breach of fiduciary duty.'" *Dirks* v. *SEC*, 463 U.S. 646, 659 (1983)

(quoting *Chiarella* v. *United States*, 445 U.S. 222, 230 n.12 (1980)). This means that, in order to commit a crime by trading on inside information, the tippee must *know* that the insider provided information for personal benefit.

Here, the government did not prove and the jury was not required to find that Chiasson knew anything about the tippers' exchange of confidential information for personal gain. Although the government argued that Chiasson knew that insiders had "improperly" breached duties of confidentiality to their employers, a breach of a confidentiality duty is not a fraudulent fiduciary breach that supports liability under *Dirks*. Absent knowledge that a tipper exchanged inside information for personal gain, Chiasson did not participate in conduct that violates Section 10(b) or Rule 10b-5.

If accepted, the government's "improper disclosure" theory would ride roughshod over *Dirks* and later cases, and lead to an unwarranted expansion of the federal securities laws. Pursuant to corporate confidentiality policies and the SEC's Regulation FD, many selective disclosures of material nonpublic information are "improper" in the broad sense that they violate some duty of confidentiality. Nonetheless, insiders commonly provide such information to analysts and investors; the financial community is awash in nonpublic information that insiders disclose selectively for a variety of reasons. Most trading on "leaks" and selective disclosures is beyond the scope of insider trading prohibitions, and is

legal. Indeed, thirty years ago, the Supreme Court recognized what the prosecution has since forgotten: "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, which the SEC itself recognizes is necessary to the preservation of a healthy market." *Dirks*, 463 U.S. at 658.

Trading on inside information becomes securities fraud only where the tippee *knows* that an insider provided the information for personal gain. That is what converts trading on a "leak" or a "tip" into a criminal violation of the federal securities laws. Here, the government offered no such proof and the jury was required to make no such finding. Chiasson's conviction should be reversed.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 18 U.S.C. § 3231. The judgment of conviction was entered on May 15, 2013. (A-2940-46).[1] Chiasson filed a notice of appeal on May 15, 2013. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether a remote tippee can be guilty of insider trading if he does not know that the corporate insider disclosed information in exchange for personal benefit—even though the Supreme Court held in *Dirks* v. *SEC* that an insider

[1] "A" refers to the Appendix filed jointly by all parties.

commits a fraudulent fiduciary breach only if he tips for personal benefit, and a tippee commits insider trading only if he knows that the tipper engaged in a fraudulent fiduciary breach.

2. Whether Chiasson is entitled to (a) acquittal on all charges because there was insufficient evidence that he knew that he was trading on material nonpublic information that had been disclosed by a corporate insider in exchange for personal benefit, or (b) a new trial because the jury was not instructed to find such knowledge.

3. Whether Chiasson's 78-month sentence should be vacated because the district court erred in holding Chiasson accountable for the trading gains of a supposed co-conspirator and because the court created unwarranted sentencing disparity by imposing a sentence on Chiasson far in excess of the sentences of other insider trading defendants found guilty of more culpable conduct.

4. Whether the forfeiture order should be vacated, both because the district court erroneously required Chiasson to forfeit fees collected by a supposed co-conspirator and because Chiasson was deprived of his constitutional rights under the Fifth and Sixth Amendments to have the forfeiture amount set by a jury based upon proof beyond a reasonable doubt.

STATEMENT OF THE CASE

Chiasson appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York (Sullivan, J.), following a jury trial. The rulings at issue are unreported.[2]

Chiasson and co-defendant-appellant Todd Newman were charged in a superseding indictment with conspiracy to commit securities fraud in violation of 18 U.S.C. § 371 (Count One). Chiasson also was charged with five substantive counts of securities fraud in violation of Section 10(b) of the Securities Exchange Act and SEC Rules 10b-5 and 10b5-2, based upon alleged insider trading in Dell stock (Counts Six through Nine) and NVIDIA stock (Count Ten). (A-148-68).

The indictment alleged that a group of financial analysts at various hedge funds and other institutional investors exchanged financial information they obtained, mostly indirectly, from company insiders, and that the analyst group passed this information to portfolio managers at their companies. Chiasson, one of those portfolio managers, was alleged to have traded on the information for the benefit of his hedge fund, Level Global. The charges against Chiasson were based entirely on information that his analyst, Sam Adondakis, provided to him. The government did not claim that Chiasson had any contact with any of the insiders or tippees other than Adondakis. (A-151-57).

[2] (A-1725-26; A-2924-34; A-2940-47).

The allegations focused on Dell and NVIDIA information that Adondakis received from the group of analysts. The indictment alleged that prior to Dell's May 29, 2008 earnings announcement, Adondakis relayed to Chiasson that Dell's gross margins would be higher than the market expected, and Chiasson caused Level Global to purchase call options on May 12, 2008. (A-153-54; A-164). The government also alleged that, ahead of Dell's August 28, 2008 earnings release, Adondakis gave Chiasson information that gross margins would be lower than expected; and that Chiasson caused Level Global to execute short sales of Dell stock on August 11 and 18, 2008 and to purchase Dell put options on August 20, 2008. (A-154-55; A-164). Finally, the indictment alleged that, in advance of NVIDIA's May 7, 2009 earnings announcement, Adondakis relayed information indicating that gross margins would be lower than market expectations and that Chiasson then caused Level Global to sell NVIDIA stock short on May 4, 2009. (A-157; A-164).

Trial commenced on November 7, 2012 and lasted approximately six weeks. On December 17, 2012, the jury returned a verdict of guilty on all counts. (A-1972-73).

On May 13, 2013, Judge Sullivan sentenced Chiasson to an aggregate term of 78 months' imprisonment, to be followed by a term of supervised release. He imposed a $5 million fine and ordered forfeiture in an amount not exceeding $2

million.[3] (A-2931-32). The judge denied Chiasson's application for bail pending appeal (A-2938), but this Court reversed that ruling on June 18, 2013. Chiasson is at liberty pending this appeal.

STATEMENT OF FACTS

Viewed in the light most favorable to the government, the trial evidence showed that Chiasson was a remote tippee who knew that Adondakis had received detailed information, leaked by insiders at Dell and NVIDIA, about quarterly revenue, gross margin, and other financial metrics ahead of quarterly earnings announcements. There was no evidence that Chiasson knew who the insiders were or that they had disclosed the information for personal benefit. The evidence also demonstrated that Adondakis and Level Global routinely received similar information from high-level executives at public companies who were not acting for personal benefit, and that these executives selectively disclosed the information in advance of quarterly earnings releases. Thus, the proof showed that Chiasson knew that company insiders frequently reveal material nonpublic information for a multitude of reasons, and was unaware that the information at issue was provided

[3] Judge Sullivan subsequently set the forfeiture amount at $1,382,217. (A-3002-04). In his forfeiture order, Judge Sullivan also mistakenly held, *sua sponte*, that his imposition of a $5 million fine was "plain error" under *United States* v. *Pfaff*, 619 F.3d 172 (2d Cir. 2010), and requested submissions on the remedy. (A-3004). But the judge had imposed the fine under 15 U.S.C. § 78ff, which authorizes fines up to $5 million, rather than under the statute applied in *Pfaff*. (*See* A-3005-06). After the parties pointed this out, the judge left the $5 million fine undisturbed. (A-3007).

corruptly. In other words, Chiasson lacked knowledge of the key fact—the alleged self-dealing of the insiders—that, if known, would have made his trading illegal.

A. The Proof At Trial

The prosecution's case focused principally on two different "tipping chains," one related to Dell and one to NVIDIA.[4]

1. The Dell Tipping Chain

The tips originated with Rob Ray, who worked in Dell's Investor Relations department. Ray did not testify at trial, and he was never charged with a crime or alleged to be a co-conspirator (*see* A-170; A-1631). Ray tipped cooperating witness Sandy Goyal, an analyst at Neuberger Berman (a large institutional investor). Goyal was a former Dell employee who met Ray in business school.

Goyal testified that beginning in late 2007, and for approximately two years, Ray gave him information about Dell's financial results after Dell "rolled up" the numbers but before it publicly released the results. (A-896). Ray provided "ranges" of numbers or comparisons to Wall Street expectations. (A-898). According to Goyal, Ray told him that Dell's margins could be in the "low 18's" (*i.e.*, 18 to 18.3%), or that margins and revenues could be higher or lower than market consensus estimates. (*Id.*). Goyal lied to Ray, claiming that he needed the

[4] The government charged that the conspiracy also involved information about several other companies, but did not discuss them in its summation; the core of the case was the Dell and NVIDIA tipping chains. (A-1774-93).

information to refine his financial model for Dell, and he never told Ray that anyone was trading on the information. (A-947). Goyal never offered Ray money, because he did not want Ray to "suspect[] something was wrong." (*Id.*). The government claimed that Ray shared information with Goyal because Goyal gave Ray "career advice." However, there was never an explicit *quid pro quo*. (A-922). Goyal testified that he gave Ray more career advice than he would have absent the passing of company information, but he would have given advice anyway. (A-923). Ray did not testify, and there was no evidence that Ray understood that he was exchanging inside information for career advice.

Goyal gave Ray's Dell information to Jesse Tortora, another cooperator and co-defendant Newman's analyst at Diamondback Capital. Tortora did not know the name of Goyal's source at Dell, the source's position or seniority, or that Goyal provided the source "career advice" in exchange for confidential information. (A-396-97; A-473; A-576). Tortora testified that Goyal told him only that the Dell insider "liked to talk stocks" and "trading ideas," and that Goyal sometimes gave information back to the insider. (A-498). Tortora testified that the confidential "earnings related metrics" he got from Goyal were specific and useful for trading, so he shared the information with both Newman and Tortora's "group of friends." (A-396-97).

Tortora's "group of friends" included Adondakis, Chiasson's analyst at Level Global. Tortora gave Adondakis the confidential Dell information even though Goyal specifically asked him not to share the information with Adondakis. (A-489-90). Adondakis testified that he passed the information to Chiasson, and Chiasson used it to make trading decisions. (A-1002). Thus, the Dell information passed from Ray to Goyal to Tortora to Adondakis to Chiasson. Chiasson was four levels removed from the original insider/tipper.

Adondakis, the sole conduit of inside information to Chiasson, knew precious little about the original tipper.[5] Adondakis did not know who the source was, where he worked within Dell,[6] or why he "leaked" information about Dell's financial results ahead of their public release. Adondakis was clueless about what, if anything, Ray received for providing Goyal with information. (A-1001; A-1190-91; A-1200). Adondakis simply knew that Goyal had a source of information at Dell, and that is what he told Chiasson. (A-1192).

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[5] The government argued that Ray provided the information only after-hours and on a personal telephone (A-899; A-1777), which showed that Ray was disclosing information improperly. There was no evidence that Chiasson or even Adondakis knew these facts. Also, there was testimony that after-hours conversations were not unusual for investor relations personnel. (A-1435-36).

[6] Adondakis testified that he was told at one point that Ray worked in Dell's finance department, though he did not say that he relayed this to Chiasson. (A-1190). In fact, Ray never worked in Dell's finance department. Ray worked in Investor Relations at Dell during 2007-2009, where he had access to confidential information before Dell released its quarterly financial results. (A-1401).

2. The NVIDIA Tipping Chain

The NVIDIA tipping chain was similarly attenuated. Chris Choi, who worked in NVIDIA's finance unit and was privy to financial data before they were announced in the company's quarterly filings, was the original source. (A-1506). The government never prosecuted Choi or alleged that he was a co-conspirator. (A-170; A-1631). Choi did not testify. Hyung Lim, a cooperator, testified that he was Choi's church and family friend. (A-1511-12). Lim asked Choi "how the quarter [was] doing," and Choi responded by providing NVIDIA's quarterly financial information ahead of public filings. (A-1520-21). Lim never told Choi that he wanted the information to trade in NVIDIA stock, although Choi knew that Lim was a trader. (A-1514). Lim relayed the information to Danny Kuo, a personal friend and poker buddy. (A-1506-07). Kuo, an analyst at Whittier Trust, gave Lim small amounts of money, but neither gave money to Choi.[7] (A-1506; A-1520). Choi did not know that Lim relayed the information to Kuo or anyone else. (A-1521).

Kuo passed the NVIDIA information to the analyst "group of friends," including Adondakis. (A-1042). Adondakis provided it to Chiasson. (*E.g.*, A-

[7] There was no evidence that Adondakis ever knew of these payments, and therefore no conceivable basis on which Chiasson could have known about them. There also was considerable trial testimony relating to $175,000 in payments from Diamondback to Goyal through a consulting agreement with Goyal's wife. (A-490-96; A-900-03). Chiasson and Adondakis knew nothing of this arrangement. (A-785; A-1190-91).

1045). Thus, the NVIDIA tipping chain was Choi to Lim, Lim to Kuo, Kuo to his analyst friends (including Adondakis), and Adondakis to Chiasson.

Adondakis knew little about the NVIDIA insider. He knew that Kuo had a church friend with an NVIDIA contact who was an "accounting manager." (A-1138; A-1221). But Adondakis did not know who the ultimate or intermediate sources were, and never met or spoke with either. There was no evidence that Adondakis knew anything about the relationship between Kuo's "church friend" and the NVIDIA insider, or about any benefit that the insider may have received. Adondakis did not know Lim or Choi, and he knew nothing about their friendship. Chiasson knew only what Adondakis chose to share, and nothing about who leaked NVIDIA's information, or why or how it was leaked. Indeed, Adondakis testified that he did not specifically tell Chiasson that the source of the NVIDIA information even worked at NVIDIA. (A-1044).

3. The Information That Chiasson Received

Lacking evidence that Chiasson knew the insiders or their reasons for disclosing Dell and NVIDIA information, the prosecutors argued that Chiasson knew from the nature and timing of the information that it had been improperly disclosed. The prosecution argued that Chiasson was a "savvy" portfolio manager, who knew that companies did not disclose specific numbers about earnings before public filings. (A-1889). They also argued that the timing, frequency, and

accuracy of the updates showed that the critical information was "coming from someone at the company that should not be giving it out." (*Id.*).

The government attempted to depict a world in which corporate financial information is tightly controlled, and shared with investors and analysts only for proper corporate purposes pursuant to approved and established procedures. To prove that the two insiders breached their obligations to their employers by divulging information, the government called witnesses from Dell and NVIDIA. Robert Williams, Ray's supervisor at Dell, described Dell's internal processes for preparing quarterly financial reports, and detailed Ray's access to confidential information. He testified that Dell's policies and procedures, together with the SEC's Regulation FD,[8] required Ray to protect such information, and prohibited sharing the company's financial results with anyone prior to public announcement. (A-1403-08; A-1416-18). Michael Byron, a witness from NVIDIA, gave similar testimony regarding Choi. (A-1528).

The prosecution portrayed Ray's and Choi's breaches of their companies' confidentiality rules as sinister and manifestly improper. However, there was no evidence that Chiasson knew about these internal Dell and NVIDIA policies or

[8] Regulation FD provides that if an issuer or a defined set of persons acting on its behalf discloses material nonpublic information to certain individuals or entities, the issuer must simultaneously or promptly disclose the same information to the public at large. *See* 17 C.F.R. § 243.100(a). Regulation FD is not an insider trading rule, as discussed *infra* at 27-30, 46-48.

communications. On the contrary, the evidence showed that Chiasson knew that high-level executives at these two companies routinely disclosed similarly precise, accurate information to selected investors, including Chiasson's fund. Adondakis acknowledged that he was in regular contact with investor relations departments at various companies, including Dell and NVIDIA; that investor relations departments "from time to time" put out messages suggesting how the company is going to perform via off-line, private conversations in advance of quarterly filings; that NVIDIA was one of the more "talkative" companies in terms of informal communications from company insiders about likely financial performance; and that it was part of his job as an analyst to solicit this information and share it with Chiasson, who was managing fund portfolios. (A-1032; A-1118; A-1185; A-1222; A-1303-05).

The trial record was replete with examples of insiders "leaking" material nonpublic information to certain analysts and investors. These selective disclosures may have violated Dell's and NVIDIA's confidentiality policies or Regulation FD, but the government did not (and could not) argue that trading on this information was prohibited.

The following are some examples of the significant information that Dell and NVIDIA routinely "leaked" to selected investors, and that Adondakis routinely shared with Chiasson:

- Dell's head of Investor Relations ("IR"), Lynn Tyson, in a one-on-one call, informed Tortora that Dell would soon undertake a "multi-billion dollar" restructuring. Tyson explained that this information was not yet in the marketplace and would be formally announced at an upcoming "analyst day." (A-599-600; A-2379). Dell publicly announced the restructuring five days later. *See* http://www.infoworld.com/t/hardware/dell-eyes-3-billion-in-cost-savings-in-3-years-836.

- During the "quiet period" leading up to Dell's first quarter 2008 release, Dell's CFO told an analyst that Dell would achieve headcount reduction of about three times market expectations. (A-2380-81). This information proved accurate and critical to Dell's quarterly earnings. (A-2257-67; A-2440).

- Halfway through Dell's third quarter 2008, IR told an analyst "offline" that the company would miss quarterly estimates "by a country mile." (A-601-02; A-2387). Dell missed estimates by nearly $1 billion that quarter. (A-2253-56; A-2455).

- During the "quiet period" leading up to Dell's third quarter 2008 release, Tyson told an analyst that gross margin would be stable even if revenue missed expectations. (A-600-01; A-2388). Six days before the earnings release, Dell IR told an analyst that the company would report earnings of at least 30 cents per share. (A-2390; A-1175). Tortora forwarded both insights to his friends including Adondakis, who relayed the information to Chiasson. (A-2388-89; A-2391). Revenues missed widely but gross margin was stable, and the company reported earnings per share of 37 cents. (A-2253-56; A-2455).

- Halfway through Dell's fourth quarter 2008, Tyson told Tortora that soon-to-be-released industry data would show poor results for Dell and that it had strong, not yet reported, sales for Black Friday. (A-567-74; A-2392-94). Tortora forwarded this information to his friends, including Adondakis. (A-2394). When the industry data was released, it showed that Dell's PC shipments declined more than any other manufacturer listed. (A-2472-75).

- Two weeks before Dell's quarter end in April 2009, Tyson told a group of analysts at a lunch that Dell's normalized gross margin would be 18%. (A-482-83; A-920-21; A-2397). Goyal emailed this information to Tortora, and

it was also circulated to Adondakis and others. (A-2397; GX315). Dell later announced gross margin of 18.1%. (A-2403).

- Three weeks before Dell's quarter end in April 2010, Tortora learned from Dell IR that gross margin would be "in-line at best" with market expectations of 17.7%. (A-604-06; A-2399). This proved accurate when Dell reported on May 20, 2010. *See* http://www.dell.com/learn/us/en/uscorp1/investor-financial-reporting?c=us&l=en&s=corp&cs=uscorp1.

- Halfway through NVIDIA's quarter ending in April 2009, NVIDIA IR told a Diamondback consultant that "margins have been hit by collapse of workstation demand . . . higher mix to chipsets, [and] drop in [desktop] margins." (A-2417). This proved to be accurate. (A-2295-311).

- In late March 2009, two thirds of the way through NVIDIA's quarter ending April 2009, Mike Hara, head of IR, "did not flinch" when Adondakis asked about another analyst's precise revenue estimates for the current quarter. (A-2419; *see also* A-708-09; A-1120). Adondakis circulated this information internally at Level Global and to friends. (A-2419). In another report of the same meeting, Adondakis indicated that gross margin would be flat and revenue would track higher than the company's guidance (A-2421), both of which proved accurate. (A-2295-311; A-2423-33).

The government's own witnesses acknowledged that they obtained and passed along such information without believing that they were committing crimes. (A-566-68; A-595-606; A-641-42; A-709; A-749-50; A-753-55; A-920-21; A-1118-24; A-1185; A-1222-24; A-1276-78; A-1288-89; A-1300-01). Chiasson had no reason—without knowing more about Ray and Choi, the nature of their relationships with their immediate tippees, and why they tipped—to believe that their information, unlike other "leaks," was improperly provided for personal benefit.

B. The Jury Charge

Based on the Supreme Court's opinion in *Dirks*, the defendants moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29. They argued that the evidence was insufficient to show that the Dell and NVIDIA insiders provided information in exchange for a personal benefit, and that there was no evidence that the defendants *knew* that the information had been exchanged for personal gain. Absent such knowledge, the defendants argued, they were not aware of or participants in the tippers' fraudulent breaches of fiduciary duties to Dell or NVIDIA, and they could not be convicted of insider trading. (A-1623-29). The defendants also asked the district court to instruct the jury that it must find that a defendant knew that an insider had disclosed information for personal gain in order to find that defendant guilty. (A-198; A-200-01; A-203; A-1626-27).

The district court reserved decision on the Rule 29 motions, remarking that the legal issues "are interesting ones and don't come up in every insider trading case." (A-1633).[9] In discussing the defendants' requested jury charge, the district court acknowledged that their position was "supportable certainly by the language of *Dirks*." (A-1723). But the judge ultimately decided that he was constrained to rule the other way by this Court's decision in *SEC* v. *Obus*, 693 F.3d 276 (2d Cir.

[9] The court never formally ruled on the Rule 29 motions until after sentencing, when it entered a conclusory order denying them. (A-2947).

2012). (A-1725-26). Accordingly, the district court did not instruct the jury that it had to find that Chiasson knew that the Dell and NVIDIA insiders had disclosed confidential information for personal benefit.

SUMMARY OF ARGUMENT

Under *Dirks* v. *SEC*, an insider/tipper who discloses material nonpublic information used to trade securities does not violate Section 10(b) and Rule 10b-5 unless he has engaged in self-dealing—disclosing the information to derive personal gain. It is the exchange of information for gain, and not simply the breach of a duty of confidentiality, that triggers the tipper's liability for securities fraud. A tippee who receives information from a corporate insider has no general duty to refrain from trading on that information, but can be liable derivatively as a "participant after the fact" in the tipper's fraud if he knows that the information was provided to him "improperly." In this context, as *Dirks* made clear, and as numerous courts have held, an "improper" disclosure means a disclosure for personal benefit. Accordingly, in a criminal case the tippee must know that the tipper was engaged in a disclosure of inside information for personal benefit. Unless the tippee knows that the tipper has exchanged information for personal gain, the tippee does not commit securities fraud, and does not act "willfully" under the Securities Exchange Act or generally under the criminal law. The court below therefore erred in ruling that a tippee's knowledge of personal benefit was

not required for fraud liability. Because the government failed to prove that Chiasson knew that the inside information upon which he traded came from insiders who had disclosed the information for personal gain, the evidence was insufficient to prove him guilty of the crimes charged, and he is entitled to an acquittal as a matter of law. At a minimum, a new trial should be ordered, because the trial court's jury instructions failed to tell the jury that it could convict only if Chiasson knew that the tippers had exchanged confidential information for personal gain.

The 78-month term of incarceration that the district court imposed was procedurally and substantively improper. Procedurally, the court below erred by holding Chiasson responsible for securities trades by Chiasson's business partner David Ganek. There was no evidentiary or legal basis for holding Chiasson responsible for Ganek's trades, and as a consequence the court sentenced Chiasson based on an improperly inflated calculation of the amount of his financial "gain." Substantively, Chiasson's sentence was unfair, and the product of a myopic focus on the amount of his purported "gain." The sentencing judge acknowledged that Chiasson was less culpable than his co-defendant, and less culpable than other insider trading defendants, but he imposed a prison term that was significantly longer, resulting in a grossly disparate and unreasonable sentence.

The forfeiture order entered against Chiasson also should be vacated. The amount of the forfeiture was improperly increased because Chiasson was ordered to forfeit gain that was realized by his business partner, without an evidentiary basis for finding that his business partner was a co-conspirator. Further, under recent Supreme Court decisions, the amount of the forfeiture should have been determined by a jury beyond a reasonable doubt, rather than a judge using a "preponderance of the evidence" standard.

Pursuant to Federal Rule of Appellate Procedure 28(i), Chiasson joins in the appellate arguments made by co-defendant Todd Newman, including specifically sections I, II, and III of his Argument.

ARGUMENT

I. CHIASSON'S CONVICTION SHOULD BE REVERSED

As a remote "tippee," Chiasson had no obligation to refrain from trading on inside information unless he knew that an insider disclosed the information for personal gain. The government did not prove that Chiasson had this knowledge, and the jury was not required to find that he did. Accordingly, this Court should direct an acquittal due to insufficient evidence, or at a minimum, grant Chiasson a new trial with a properly instructed jury.

A. To Be Guilty of Insider Trading, a Tippee Must Know That an Insider Provided Confidential Information for Personal Gain

1. *Dirks* and Subsequent Cases Require Tippee Knowledge

The starting point for analysis is settled law: A person who knowingly receives and trades on material nonpublic information from an insider *does not*, without more, commit securities fraud. The Supreme Court has clearly and repeatedly held that there is "no 'general duty between all participants in market transactions to forgo actions based on material, nonpublic information.'" *United States* v. *O'Hagan*, 521 U.S. 642, 660 (1997) (quoting *Chiarella*, 445 U.S. at 233). *See also Dirks*, 463 U.S. at 654-59. A duty to refrain from trading, therefore, does not arise merely from the receipt of nonpublic information from an insider.

More is required, and the Supreme Court has specified what that "more" is. In *Dirks* v. *SEC*, the Court addressed tippee liability at length. The defendant, Raymond Dirks, was a securities analyst at a broker-dealer. Dirks received material nonpublic information from an insider at Equity Funding of America that its assets were vastly overstated. The insider tipped Dirks so that he could expose the fraud. Dirks relayed this information to clients and investors who sold their stock, thereby avoiding losses when the company's fraud became known and its stock price plummeted. The SEC sued Dirks, alleging that he had aided and abetted securities fraud by relaying confidential and material inside information to people who traded the stock.

The Supreme Court held that Dirks did not violate Section 10(b) and Rule 10b-5, and explicitly rejected the theory that a tippee must refrain from trading "whenever he receives inside information from an insider." 463 U.S. at 655. The Court emphasized that tippee liability derives from the tipper's liability, and turns on the purpose of the tipper's disclosure of inside information and the tippee's knowledge of the tipper's improper purpose.

The opinion first considered the duties of corporate insiders, or "tippers." Pointing to the SEC's decision in *In re Cady, Roberts & Co.,* 40 S.E.C. 907 (1961), the Court noted that a tipper's duty to disclose material information or to refrain from trading stemmed from the insider's fiduciary relationship to the issuer. Because Rule 10b-5 is an antifraud measure, the majority explained, "[n]ot 'all breaches of fiduciary duty in connection with a securities transaction' . . . come within the ambit of Rule 10b-5." 463 U.S. at 654 (quoting *Santa Fe Indus.* v. *Green*, 430 U.S. 462, 472 (1977)); *see also Chiarella*, 445 U.S. at 234-35 (emphasizing that Section 10(b) and Rule 10b-5 are "catchall" provisions, but "what [they] catch[ ] must be fraud"). The Court emphasized that the securities laws were intended, among other things, to eliminate the use of inside information for personal advantage. Therefore, the particular fiduciary breach that triggers *fraud* liability is the insider's use of corporate information for his own personal benefit:

> Whether disclosure is a breach of duty therefore depends in large part on the purpose of the disclosure. . . . [T]he test is whether the insider personally will benefit, directly or indirectly, from his disclosure.

463 U.S. at 662.

The dissent in *Dirks* criticized the use of "personal benefit" as the litmus test for Rule 10b-5 liability, noting that there are other ways to breach duties owed to corporate shareholders. *Id.* at 673-74. But the majority understood the critical role in the securities market that analysts play through their ability to "ferret out and analyze information . . . by meeting with and questioning corporate officers and others who are insiders." *Id.* at 658 (internal quotation marks omitted). The Court observed that "[i]mposing 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, which the SEC itself recognizes is necessary to the preservation of a healthy market." *Id.* Accordingly, the Court thought it "essential" that there be a "guiding principle for those whose daily activities must be limited and instructed by the SEC's inside-trading rules." *Id.* at 664. The guiding principle the Court identified was the disclosure of inside information for personal gain: That is how the Court defined the *particular* fiduciary breach that amounts to securities fraud under Section 10(b) and Rule 10b-5.

Having defined the tipper's culpable breach of duty to stockholders as the disclosure of corporate information for personal gain, the *Dirks* Court then addressed tippee liability for insider trading. The Court noted that "the typical tippee" has no independent fiduciary duties to issuers or their shareholders, 463 U.S. at 655, and it rejected the notion that a tippee inherits a duty to disclose or abstain from trading "solely because a person knowingly receives material nonpublic information from an insider and trades on it." *Id.* at 658. Tippees can commit insider trading, the Court held, but only if they "*knowingly* participate with the fiduciary [*i.e.*, the insider] in such a breach," referring back to the insiders' "improper purpose of exploiting the information for their personal gain." *Id.* at 659 (emphasis added). That is, tippee liability exists "only when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee *and the tippee knows or should know that there has been a breach.*" *Id.* at 660 (emphasis added).[10] *See also id.* at 661 n.20 (noting authorities indicating that tippees must have knowledge of the insider's breach).

[10] The Court's reference to the "knows or should know" standard came in the context of a civil enforcement proceeding. In a criminal case, the "should know" formulation has no place, because the government must prove that the defendant acted "willfully." 15 U.S.C. § 78ff(a). A "willful" violation requires the defendant actually to know that his conduct is illegal, which in turn requires proof that he was aware of the tipper's exchange of information for personal benefit. A "should know" standard equates to negligence, a mental state insufficient for a criminal violation, and insufficient generally to warrant criminal sanctions for serious felonies. *See United States* v. *Temple*, 447 F.3d 130, 137 (2d Cir. 2006) ("'Willful' repeatedly has been defined in the criminal context as intentional,

The SEC's finding that Dirks, as a tippee, violated Rule 10b-5 therefore could not stand. The *Dirks* insider provided information to expose a fraud, not benefit personally, and accordingly he had not fraudulently breached his fiduciary duties to shareholders within the meaning of Rule 10b-5. Dirks could not have been a "participant after the fact" in the insider's nonexistent breach, and therefore was not a culpable tippee.

Under *Dirks,* a culpable tippee must know of the insider's breach of duty to stockholders, and that breach must involve a disclosure of material corporate information for personal gain. It necessarily follows that a tippee cannot be convicted of insider trading unless he knows of the insider's self-dealing. Absent such knowledge, the tippee does not know that the tipper has committed a fraudulent breach of fiduciary duty as defined in *Dirks*. The Supreme Court itself confirmed this in *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U.S. 299 (1985), explaining: "A tippee generally has a duty to disclose or to abstain from trading on material nonpublic information *only when he knows* or should know that his insider source 'has breached his fiduciary duty to the shareholders by disclosing the information'—*in other words, where the insider has sought to*

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purposeful, and voluntary, as distinguished from accidental or negligent."). Although the trial court's draft jury instructions referred at various points to a "should have known" standard for scienter, the government acquiesced to a defense request to strike that language in favor of a requirement of knowing conduct. (A-1723; A-1902).

'*benefit, directly or indirectly, from his disclosure.*'" *Id.* at 311 n.21 (quoting *Dirks*, 463 U.S. at 660, 662) (emphasis added).

Since 1983, district courts applying *Dirks* have held repeatedly that insiders must disclose information for personal gain, *and tippees must know that the insiders acted for personal gain*, to violate Section 10(b) and Rule 10b-5:

- *State Teachers Ret. Bd.* v. *Fluor Corp.*, 592 F. Supp. 592 (S.D.N.Y. 1984). Judge Sweet read *Dirks* to require that a tippee know of the tipper's fiduciary breach, and held that this "necessitates tippee knowledge of *each element,* including the personal benefit, of the tipper's breach." *Id.* at 594.

- *United States* v. *Santoro*, 647 F. Supp. 153 (E.D.N.Y. 1986), *rev'd on other grounds*, *United States* v. *Davidoff*, 845 F.2d 1151 (2d Cir. 1988). Then-District Judge McLaughlin agreed that a tippee must know of the tipper's personal benefit, and that the jury had to have this explained "as an element of knowledge of the breach." But the court held that the indictment was not facially deficient for alleging simply knowledge of a breach, because "[a]n allegation that the tippee knew of the tipper's breach necessarily charges that the tippee knew that the tipper was acting for personal gain." *Id.* at 170-71.

- *Hernandez* v. *United States*, 450 F. Supp. 2d 1112 (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." *Id.* at 1118.

- *United States* v. *Rajaratnam*, 802 F. Supp. 2d 491 (S.D.N.Y. 2011). Citing *Fluor*, Judge Holwell reasoned that a tippee cannot be a knowing participant in the tipper's fiduciary breach unless the tippee knows that the tipper was divulging information for a personal benefit. *Id.* at 498-99.

- *United States* v. *Whitman*, 904 F. Supp. 2d 363 (S.D.N.Y. 2012). Judge Rakoff noted the *Dirks* requirement of personal benefit to the tipper, and reasoned 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 if there has been an 'improper' disclosure of inside information." *Id.* at 371.

As Judge Rakoff has noted, *Dirks*' "knowledge of personal benefit" requirement may make it more difficult to prosecute "remote tippees." 904 F. Supp. 2d at 371-72. This is because remote tippees like Chiasson, who do not know what led the insider to disclose confidential information, are not parties to the insider's fraudulent exchange of information for personal gain. They are not, in the words of the *Dirks* Court, "participants after the fact" in the insider's self-dealing. *Cf. United States* v. *Snype*, 441 F.3d 119, 142 (2d Cir. 2006) (criminal liability as an accessory after the fact requires "the defendant's knowledge of the crime's commission").

In the years since *Dirks*, the SEC has acknowledged that *Dirks* "rejected the idea that a person is prohibited from trading whenever he knowingly receives material nonpublic information from an insider." Selective Disclosure and Insider Trading, Exchange Act Release No. 34-42259, 71 SEC Docket 732, 1999 WL 1217849, at *5 (Dec. 20, 1999). The SEC has further recognized that liability under Rule 10b-5 does not depend on whether inside information relates to anticipated corporate earnings, or whether the information is so precise and specific that it provides an unfair advantage to a tippee who trades on it. When it adopted Regulation FD, which makes it unlawful for issuers and certain issuer

personnel to make selective disclosures to investment professionals, the SEC noted that selective disclosures by insiders are common, and often "involve advance notice of the issuer's upcoming quarterly earnings or sales—figures which, when announced, have a predictable significant impact on the market price of the issuer's securities." Selective Disclosure and Insider Trading, Release Nos. 33-7787, 34-42259, IC-24209, 64 Fed. Reg. 72590-01, at 72,592-93 (Dec. 28, 1999). This, of course, is precisely the kind of information that underlay the criminal charges against Chiasson in this case. But the SEC enacted Regulation FD because the insider trading laws do not generally prohibit the disclosure of such information, or a tippee's trading on that information.

The adoption of Regulation FD is telling evidence that conduct such as Chiasson's does not violate Rule 10b-5. Recognizing that corporate insiders commonly "leak" material nonpublic information to analysts and investors, who thereby gain an unequal trading advantage, the SEC adopted Regulation FD to restrict issuers from making selective disclosure of confidential business information. But the Commission expressly elected not to "treat selective disclosure as a type of fraudulent conduct or revisit the insider trading issues addressed in Dirks." *Id.* at 72,594; *see* 17 C.F.R. § 243.102 ("No failure to make a public disclosure required solely by § 243.100 shall be deemed to be a violation of

Rule 10b-5 . . . ."). [11] Thus, Regulation FD did not purport to expand insider trading liability, or to impose trading restrictions on recipients of selective disclosures of material nonpublic information. In the post-Regulation FD environment, selective disclosures might be "improper," in which case insiders making these disclosures are violating legal duties as well as fiduciary duties of confidentiality. Yet analysts and investors can legally trade on selectively disclosed earnings and other issuer information. This trading becomes fraudulent only when the insider discloses information for personal gain and the tippee knows that to be so.

Tippee knowledge is critical, not just because *Dirks* said so but also because a contrary rule would make no sense, and would make a remote tippee's liability for securities fraud depend on facts entirely outside of his knowledge or control. An investor who receives material nonpublic information that comes from an issuer ordinarily can trade legally on that information. But if it turns out—entirely unbeknownst to him—that the disclosure was motivated by an insider's expectation of personal benefit, then he could be imprisoned for trading. Such a rule of law would be inconsistent with the "willfulness" standard of the Securities Exchange Act and with fundamental *mens rea* principles, *see infra* at 32-34, and

[10] *See also* Selective Disclosure and Insider Trading, 64 Fed. Reg. 72590-01, at 72,598 (Regulation FD was "not intended to create duties under Section 10(b) of the Exchange Act or any other provision of the federal securities laws.").

would leave market participants with no ability to predict whether their trading would later be deemed illegal.

As the Supreme Court stated in *Dirks*, it is essential that there be "a guiding principle for those whose daily activities must be limited and instructed by the SEC's inside trading rules." 463 U.S. at 664. *Dirks*, read correctly, provides just such a dividing principle: Those who disclose confidential issuer information cross the line into securities fraud if they disclose for personal benefit, and those who trade on material nonpublic information from insiders likewise commit fraud if they know that the tipper has violated a duty of confidentiality in order to obtain a personal benefit.

The government's position, by contrast, would impose liability on remote tippees whenever a tipper exchanged information for personal gain, whether or not the tippee knew this, provided that the tippee was aware that the tipper's disclosure violated some duty of confidentiality. As discussed, this is a misreading of *Dirks*. A mere breach of a duty of confidentiality is not enough to make a tipper liable for securities fraud, even if he knows that the recipient of the information will trade on it. If such a breach does not make the tipper guilty of fraud, then knowing of such a breach, without more, does not make the tippee guilty. Just as the tipper has to be engaging in self-dealing to commit fraud, the tippee has to know this to participate in the fraud. Further, as noted above, many selective disclosures of

material nonpublic information are "improper" in that they violate duties of confidentiality or Regulation FD, so the government's approach would provide no sensible dividing line or "guiding principle" to shape the conduct of market participants.

The trial record in this case illustrates this point. Senior officials and investor relations personnel at companies whose stock the defendants traded regularly "leaked" material nonpublic information to certain analysts and investors. Under Regulation FD, and issuer policies designed to ensure compliance with Regulation FD, these disclosures may have been "improper," because issuers are not supposed to disclose material nonpublic information unless it is broadly disseminated to the marketplace. Indeed, the government offered evidence in this case that Regulation FD generally requires insiders not to disclose confidential information. (A-1403-06; A-1408; A-2134; A-2150; A-2163).

Since selective disclosures are generally "improper," a rule of law that prohibits recipients from trading whenever they know that an insider has disclosed "improperly" sweeps far more broadly than current insider trading law requires. In practical terms, such a rule would be roughly equivalent to telling tippees that they must not trade on any material nonpublic information known to have been disclosed by an insider. But Rule 10b-5 plainly does not sweep this broadly, and the Supreme Court has thrice rejected the notion that tippees commit securities

fraud whenever they trade on material nonpublic information coming from an insider. *O'Hagan*, 521 U.S. at 661; *Dirks*, 463 U.S. at 654, 658-59; *Chiarella*, 445 U.S. at 233. Such trading may not be socially desirable, and it may erode "market integrity." But it is not against the law. It becomes illegal for tippees only when they learn that the insider has not simply breached a duty of confidentiality, but has traded information for personal gain.

2. Tippee Knowledge of the Insider's Self-Dealing Motive Is Also Required by the "Willfulness" Standard and Fundamental *Mens Rea* Principles

The *Dirks* rule requiring a tippee to know of the tipper's exchange of information for personal benefit is consistent with the particular requirements of the federal securities laws in criminal cases and with general principles of criminal law. Under the Securities Exchange Act, there is no criminal liability for insider trading unless the defendant acts "willfully." 15 U.S.C. § 78ff(a); *see O'Hagan,* 521 U.S. at 665 (Congress intended willfulness standard to provide a "sturdy safeguard[]" in insider trading cases). "Willfulness" requires "'a realization on the defendant's part that he was doing a wrongful act' under the securities laws." *United States* v. *Cassese,* 428 F.3d 92, 98 (2d Cir. 2005) (quoting *United States* v. *Peltz*, 433 F.2d 48, 55 (2d Cir. 1970)); *see also Safeco Ins. Co.* v. *Burr*, 551 U.S. 47, 57 n.9 (2007) ("[W]e have consistently held that a defendant cannot harbor such ["willful"] criminal intent unless he 'acted with knowledge that his conduct

was unlawful." (quoting *Bryan* v. *United States*, 524 U.S. 184, 193 (1998))). Thus, in insider trading cases, as this Court has recognized, there should be a particularly high *mens rea* standard: "Unlike securities fraud, insider trading does not necessarily involve deception, and it is easy to imagine an insider trader who receives a tip and is unaware that his conduct was illegal and therefore wrongful." *United States* v. *Kaiser*, 609 F.3d 556, 569 (2d Cir. 2010).

A defendant does not act "willfully" if he is unaware of a fact that transforms otherwise lawful conduct into an illegal act. *E.g.*, *Safeco*, 551 U.S. at 57 n.9 ("[W]illful' or 'willfully' . . . in a criminal statute . . . limit[s] liability to knowing violations."). Even where criminal statutes do not explicitly require knowledge of unlawfulness, the Supreme Court requires proof that the defendant knew all the facts that "separate[e] legal innocence from wrongful conduct." *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994) (requiring proof of defendants' awareness that performers in pornographic film were underage); *Staples* v. *United States*, 511 U.S. 600, 615 (1994) (requiring proof of knowledge that a semi-automatic had been converted into an illegal machine gun). Here, under *Dirks*, only the insider's intention to reap a personal gain transforms a "leak" of inside information into a fraudulent fiduciary breach that gives rise to a tippee's duty to refrain from trading. Even if the insider's disclosure violates a duty of confidentiality, or Regulation FD, such a violation is not fraudulent in and of itself,

and a tippee who knows of that violation is therefore not on notice that he may not trade. Put otherwise, a tippee who does not know the critical fact that bars his trading—the insider's self-dealing—does not act "willfully" under the Securities Exchange Act or generally as a matter of criminal law. *See, e.g., Whitman,* 904 F. Supp. 2d at 372.

3. The District Court's Reliance on *SEC* v. *Obus* Was Misplaced

At trial, both defendants argued that the government had to prove that the Dell and NVIDIA insiders exchanged material nonpublic information for personal gain, and that the defendants had to know this fact to be found guilty. The defense argued this position in support of their Rule 29 acquittal motions and in connection with the court's jury instructions. Judge Sullivan rejected the argument based on this Court's decision in *SEC* v. *Obus*, 693 F.3d 276 (2d Cir. 2012), which he read to hold that a tippee's knowledge of the tipper's exchange of information for personal benefit is not required to convict. (A-1723; A-1725-26; *see also* A-2804-05).

This was error, which resulted from an overly formalistic misreading of *Obus*. The judge incorrectly read *Obus* to require that the tipper breach a duty "by tipping confidential information," and that the tipper receive a personal benefit, but *not* that the tippee know of that personal benefit. Although the *Obus* opinion lists a tipper's "breach of a fiduciary duty of confidentiality owed to shareholders" and a

tipper's receipt of "personal benefit" as separate elements of tipper scienter, 693 F.3d at 286, this does not mean that the concepts are separable, either for tippers or tippees. *Dirks* made a tipper's "personal benefit" part and parcel of the fiduciary breach, not simply a separate, add-on concept: the opinion states unequivocally that, "[a]bsent some personal gain, there has been no breach of duty to stockholders." 463 U.S. at 662. The exchange of information for personal benefit is not separate from an insider's fiduciary breach; it *is* the fiduciary breach that triggers liability for securities fraud under Rule 10b-5. A breach of a duty of confidentiality is not fraudulent unless the tipper acts for personal gain, and that is how *Dirks* has been understood for the past 30 years. *See*, *e.g.*, *Rothberg* v. *Rosenbloom*, 771 F.2d 818, 826 (3d Cir. 1985) ("The test as to whether a disclosure by an insider amounts to a breach of fiduciary duty focuses on 'objective criteria, i.e., whether the insider receives a direct or indirect personal benefit from the disclosure.'" (quoting *Dirks*, 463 U.S. at 663)); *SEC* v. *Maxwell*, 341 F. Supp. 2d 941, 950 (S.D. Ohio 2004) (granting summary judgment because the tipper "did not derive a personal benefit from the disclosure of material, nonpublic information to [his barber] and, hence, did not breach a duty that he owed to Worthington shareholders"); *SEC* v. *Downe*, 92 Civ. 4092 (PKL), 1993 WL 22126, at *2 (S.D.N.Y. Jan. 26, 1993) ("A corporate insider breaches his fiduciary duty if he improperly discloses material, nonpublic information for

personal benefit." (citing *Dirks*, 463 U.S. at 662)); *Bianco* v. *Texas Instruments, Inc.*, 627 F. Supp. 154, 159 (N.D. Ill. 1985) (summarizing *Dirks*: "[A] tippee does not violate Rule 10b-5 unless the insider's 'tip' was a breach of fiduciary duty, generally determined by the personal benefit the insider derives from the tip.").

Dirks is controlling precedent; obviously, the *Obus* panel could not and did not intend to redefine what constitutes fraudulent insider trading as defined by the United States Supreme Court. On the contrary, *Obus* cites *Dirks* approvingly, particularly with respect to the requirement that "a tippee must have some level of knowledge that by trading on the information the tippee is a participant in the tipper's breach of fiduciary duty." 693 F.3d at 287. *Obus* actually expands on *Dirks* by requiring a tipper to act for his own benefit even in cases based on the "misappropriation theory" of insider trading.[12]

To be sure, *Obus* does not state explicitly that a tippee must know that a tipper is disclosing information for personal gain. It refers only to the requirement that a tippee "knew or had reason to know that the tippee improperly obtained the information (i.e., that the information was obtained through the tipper's breach)." 693 F.3d at 289. At another point, the opinion states that tippee liability turns on whether "a tippee knew or had reason to know that confidential information was

[12] *See supra* at 22-23. *Obus* was a misappropriation case, and the opinion states that it addresses "the scienter requirements for both tippers and tippees *under the misappropriation theory*." 693 F.3d at 286 (emphasis added).

initially obtained and transmitted improperly (and thus through deception)." *Id.* at 288. But, as discussed, and as numerous courts have held, the existence of a fiduciary breach by the tipper, and the essence of what is "improper" tipper conduct for insider trading purposes, is exchanging information for personal gain. Thus, for the tippee, knowing that information was "transmitted improperly" means knowing that the tipper exchanged the information for personal gain. Knowledge of the tipper's personal gain therefore is not, as Judge Sullivan said, the "addition of a totally new element" to tippee liability (A-2805). The requirement may have been "new" when *Dirks* was decided in 1983, but it has been part of the law for the last three decades.

In any event, *Obus* did not squarely address whether it is necessary for the tippee to know of the tipper's expectation of personal gain because the case did not turn on it. The question was whether the SEC's civil case against an alleged tipper and two tippees could withstand summary judgment under the misappropriation theory of insider trading. The SEC contended that Strickland, the tipper, told his friend Black about a forthcoming corporate acquisition involving a client of the tipper's employer. Black in turn relayed the information to his boss, Obus, who traded on the information. 693 F.3d at 279-80. The district court had granted summary judgment against the SEC, based on an internal investigation concluding that Strickland breached no fiduciary duty by providing information to Black, but

had simply "made a mistake." *Id.* at 283, 291. The *Obus* panel decided that the internal investigation was not conclusive, and that the facts would permit a jury to conclude that Strickland had breached a duty by tipping Black. *Id.* at 291.

With respect to whether Strickland's breach involved "personal benefit," the *Obus* panel noted that the district court had not reached this issue, but pointed to a statement in *Dirks* that "personal benefit" can "include making a gift of information to a friend." 693 F.3d at 291. Strickland and Black were college friends, permitting a jury to conclude that Strickland did receive a "benefit" from tipping Black. The opinion did not consider whether Black and Obus had been aware that Strickland's fiduciary breach involved personal benefit to him. Neither defendant appears to have argued this point; rather, they argued that there had been no "tip" and that they were unaware that Strickland had acted inappropriately. *See generally* Br. for Defs.-Appellees, *SEC* v. *Obus*, 10-4749 (2d Cir. June 28, 2011). It would have been futile to have argued specifically that they did not know Strickland had "tipped" for personal gain. There was evidence that both defendants were aware that Strickland and Black were close friends, and Obus even offered to find Strickland a job if he were fired on account of tipping Black, *see* 693 F.3d at 281. A jury that found Strickland to have committed a fiduciary breach, because he was intentionally providing his friend with confidential information upon which to trade, could have found that the breach involved

"personal benefit" under *Dirks'* expansive construction of that term, and that this was known to the tippees.

Obus did not change the law as to tippee scienter, and in particular did not dispense with the requirement that a tippee know that the tipper exchanged information for some personal benefit. *Whitman*, which was decided after *Obus* and discusses it, demonstrates this. There the court held that a tippee must have some knowledge of the tipper's self-dealing. 904 F. Supp. 2d at 371. This holding was based squarely on *Dirks* and its progeny. However, Judge Sullivan rejected *Whitman* as unpersuasive and refused to charge the jury that Chiasson needed to know about the tipper's exchange of information for personal gain. Judge Sullivan rejected *Whitman* because it supposedly "disregard[ed]" *Obus* (A-2806)—an odd criticism, as the *Whitman* opinion discusses *Obus,* and Judge Sullivan himself disregarded *Dirks*, which is the controlling case.[13] Judge Rakoff (who wrote *Whitman*) certainly did not regard his analysis as inconsistent with *Obus*, and he

[13] *Whitman* also distinguished a line of cases—*United States* v. *Falcone*, 257 F.3d 226 (2d Cir. 2001); *United States* v. *Mylett*, 97 F.3d 663 (2d Cir. 1996); *United States* v. *Libera*, 989 F.2d 596 (2d Cir. 1993)—that the government relied upon when it opposed bail pending appeal in this Court. Those "misappropriation" cases were not brought on a *Dirks* (or "classical") insider trading theory. But before *Obus*, this Court had never held that the tipper's personal gain was an element of insider trading based on misappropriation theory, and therefore had no occasion to address whether a tippee has to know of that personal gain. In "classical theory" cases such as this one, it has been clear since *Dirks* that the tipper must anticipate a personal gain and the tippee must know this in order for liability to attach. This Court need not decide here whether the same requirements exist in "misappropriation" cases.

cited *Obus* approvingly in his decision and in a later opinion. *SEC* v. *Conradt*, 12 Civ. 8676 (JSR), --- F. Supp. 2d ---, 2013 WL 2402989, at *6-7 (S.D.N.Y. June 4, 2013).

4. A More Expansive Reading of *Obus* Would Create Due Process, Fair Notice, and Vagueness Problems

If *Obus* altered the substantive law of insider trading in this Circuit, as the district court's decision would suggest, its application to Chiasson's conduct raises serious due process concerns.

First, the last trades at issue occurred in 2009. At that time, it was settled that there is no breach of fiduciary duty by a corporate insider who discloses material nonpublic information—and thus no derivative liability for tippees—unless the tipper acted for his personal benefit. Likewise, it was the law that the tippee had to know that the tipper acted for personal gain. *See Fluor*, 592 F. Supp. at 594-95; *Santoro*, 647 F. Supp. at 170. If *Obus* dispensed with this knowledge of personal benefit requirement, due process would bar its retroactive application to Chiasson. *See, e.g.*, *United States* v. *Lanier*, 520 U.S. 259, 266 (1997) ("[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." (citations omitted)); *Casillas* v. *Scully*, 769 F.2d 60, 65 (2d Cir. 1985) ("[D]ue process prevent[s] the enlargement of a criminal statute through judicial interpretation from being applied retroactively . . . .").

Second, the district court's reading of *Obus* broadens the boundaries of insider trading liability and implicates constitutional vagueness concerns. It expands Section 10(b)/Rule 10b-5 beyond the "solid core" of plainly encompassed conduct. *See Skilling* v. *United States*, 130 S. Ct. 2896, 2930-31 (2010) (construing honest services mail fraud statute narrowly to avoid due process problem). Under current law, the Supreme Court has stated again and again that merely trading on material nonpublic information known to have come from an insider does not violate Rule 10b-5, and the SEC has acknowledged that Regulation FD does not make selective disclosures fraudulent. *See supra* at 28-29.

But under a broad reading of *Obus*, a tippee need not know that the tipper has exchanged information for personal benefit, and must only know that "confidential information was initially obtained and transmitted improperly." 693 F.3d at 288. The result from the tippee's perspective would be the potential criminalization of virtually all trading on selective disclosures. As explained, the trial record was replete with instances of selective disclosures. A recipient of such information would have no way of knowing—without knowledge of why the insider disclosed—whether he could trade or not. The result would essentially force analysts and investors to abstain from trading or risk potential prosecution, even in many cases where it would be legal to trade on the information. If this were to become the law, it would be a radical change that should be effected by

legislation. *See United States* v. *Bass*, 404 U.S. 336, 347-50 (1971) (due process requires that "legislatures and not courts . . . define criminal activity").

In short, the district court's construction of *Obus* would expand Section 10(b) and Rule 10b-5 to cover conduct that is not fraudulent, despite the plain language of these antifraud provisions and decades of Supreme Court precedent. This would violate the Supreme Court's teaching that due process requires courts to exercise "restraint" in interpreting criminal statutes "where the act underlying the conviction . . . is by itself innocuous." *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 703-04 (2005). As the Supreme Court explained in *Chiarella*, "the 1934 Act cannot be read more broadly than its language and the statutory scheme reasonably permit." 445 U.S. at 234 (internal quotation marks omitted).

B. There Was Insufficient Evidence to Satisfy *Dirks*' Knowledge of Benefit Requirement

This Court reviews the sufficiency of the evidence *de novo,* and Chiasson's conviction cannot stand if "no rational trier of fact could have found [him] guilty beyond a reasonable doubt." *Cassese*, 428 F.3d at 98. If the law requires a tippee to know that the tipper has exchanged material nonpublic information for personal benefit, then Chiasson's conviction falls. The government offered no proof from which a rational juror could conclude that Chiasson knew that the Dell and

NVIDIA tippers were exchanging inside information for personal gain. This Court should therefore direct a judgment of acquittal.[14]

The vast majority of the evidence at trial focused on Dell and NVIDIA. The proof showed that the Dell insider, Ray, provided Goyal with confidential information about Dell's earnings in advance of their public release. The government argued that he did so because Goyal was giving him "career advice." However, as Newman explains in his brief to this Court, the proof of the alleged exchange of information for the benefit of "career advice" was wispy thin. (Newman Br. at 50-51). Ray himself did not testify, and Goyal denied that there had been an explicit *quid pro quo* of tips exchanged for career advice. *See supra* at 9. Goyal testified that he spent more time speaking to Ray about how to advance his career than he might have otherwise because Ray was giving him useful information. (A-951). However, the government never established that Ray was providing the confidential information in exchange for career advice.[15]

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[14] If the district court erred by failing to require proof of Chiasson's knowledge that the insiders acted for personal benefit, then the conspiracy count falls along with the substantive counts. Conspiracy liability requires proof that "the defendant had the specific intent to violate the substantive statute[s]." *United States* v. *Lorenzo*, 534 F.3d 153, 159 (2d Cir. 2008) (internal quotation marks omitted). Therefore, the knowledge requirement is relevant "to a conspiracy charge to the same extent as it may be for conviction of the substantive offense." *United States* v. *Torres*, 604 F.3d 58, 65 (2d Cir. 2010) (internal quotation marks omitted).

[15] Prior to trial, the government provided defense counsel with letters indicating that Ray denied having ever disclosed material nonpublic information or intentionally breaching any duty to Dell. During an attorney proffer to the prosecutors, Ray's lawyer suggested that Ray, who was a "relatively junior IR

In any case, there was not a scintilla of evidence that Chiasson knew about the alleged corrupt exchange of confidential information for career advice. Indeed, the trial record established affirmatively that Chiasson could not have known about the alleged exchange because all of Chiasson's knowledge about the Dell insider came from Adondakis, who testified he knew nothing about any benefit to Ray. (A-1190-91). Adondakis knew only that Goyal's source was a Dell insider. (A-1001; A-1190-92; A-1200; A-1299). Since Adondakis did not know about any benefit conferred upon Ray, Chiasson could not and did not know about the career advice Ray supposedly received.

There was also no proof that Chiasson knew of any purported benefit to the NVIDIA insider. The government proved that the insider, Choi, provided confidential information to his friend Lim. The prosecutors argued that the Choi/Lim friendship established that Choi received a "benefit" from tipping Lim. (A-1895). Chiasson, however, did not know Choi or Lim, and knew nothing about their relationship. As with Dell, Chiasson's knowledge came from Adondakis, and there was no evidence that Adondakis knew anything about Choi, or why he shared information with Lim. Adondakis told Chiasson only that the information came

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professional," had perhaps been "outmaneuver[ed]" by Sandy Goyal into providing Goyal with information, ostensibly to allow Goyal to check the accuracy of his Dell financial model. (A-146). Ray, through counsel, acknowledged that he had received some career advice from Goyal, but maintained that "these conversations were not connected to and did not influence the manner in which he performed his duties at Dell." (A-147).

from an NVIDIA "contact," without even stating that the "contact" worked at NVIDIA. (A-1044). Chiasson, therefore, did not know who the tipper was, or why the tipper disclosed information. He never learned that the tipper was exchanging information for the supposed benefit of enriching a personal friend.

Because the prosecution failed to prove Chiasson's knowledge, and because the law requires a tippee to know that the insider has engaged in self-dealing, Chiasson was entitled to an acquittal as a matter of law. It may be, as Judge Rakoff has opined, that "there is no reason to require that the tippee know the details of the benefit provided; it is sufficient if he understands that some benefit, however modest, is being provided in return for the information," *Whitman*, 904 F. Supp. 2d at 371. But here there was no evidence to suggest that Chiasson knew *anything* about personal benefit to the tippees. He was not only ignorant about the specific benefits that the insiders supposedly received; he was ignorant that they received any benefits at all in exchange for information.

In the trial court, the government never argued that Chiasson knew that the insiders were trading information for personal gain; Judge Sullivan ruled that such knowledge was not required, and so the government was relieved of its burden of proof on this issue. However, when it unsuccessfully opposed bail for Chiasson in this Court, and had to confront the prospect of an adverse ruling on the law, the government debuted a new theory with respect to knowledge of personal benefit:

The prosecutors claimed that, as a sophisticated investor, Chiasson "knew that corporate insiders are not authorized to disclose earnings information before it is publicly announced." Because the insiders could not have been making appropriate disclosures, the government claimed, they "must have done so for a personal benefit." (Appellee Opp'n to Appellants' Bail Motions ("Bail Opp'n"), at ¶ 46). The government's view, apparently, is that corporate insiders either disclose confidential information through appropriate channels or the disclosures are "improper," not made for a "legitimate purpose," and therefore are made for personal gain, as the defendants supposedly had to know.[16]

This new argument holds no water. It was never presented to the jury, so the jury's verdict provides the government with no comfort on this score.[17] In any case, the argument flies in the face of market reality. Insiders routinely provide nonpublic information to market participants for myriad reasons—to curry favor with large shareholders, to entice significant investors, to "condition" the market in

[16] The government attempted to bolster its argument by seeking to draw inferences of Chiasson's guilty mind from evidence that he did not divulge his sources to competitors and supposedly instructed Adondakis to create "bogus" and "sham" internal Level Global reports. (Bail Opp'n, at ¶¶ 20, 24). There is nothing nefarious about protecting sources from a competitor hedge fund, and the government mischaracterized the evidence regarding the internal reports. Chiasson told Adondakis to keep the internal reports "high level"—not to misrepresent the facts. (*See* A-2115).

[17] In this circumstance, there is no basis for drawing inferences in the government's favor, or viewing the facts in the light most favorable to the government. *Cf. Chiarella*, 445 U.S. at 236-37.

advance of unexpected earnings results, to bolster their credibility with certain analysts, to provide "comfort" about investment theses, and other reasons. *See, e.g.*, Stephen J. Choi, *Selective Disclosures in the Public Capital Markets*, 35 U.C. Davis L. Rev. 533, 543-48 (2002). These disclosures may be "improper" in that they violate corporate policy or Regulation FD, but they happen all the time and are not motivated by "personal gain."

Indeed, when the SEC proposed Regulation FD in 2000, it acted out of concern that selective disclosures of confidential information were commonplace, but very few of those disclosures were motivated by personal gain, and therefore they could *not* be predicates for insider trading actions under *Dirks*. Selective Disclosure and Insider Trading, 64 Fed. Reg. 72590-01, at 72,593. The SEC emphasized that selective disclosures "commonly" related to "upcoming quarterly earnings or sales figures"—precisely the kind of material nonpublic information involved in this case. The new rule was needed not because these disclosures were made for personal benefit, but because so many of them were *not* made for personal benefit. Regulation FD made many selective disclosures "improper," but that obviously did not mean that, as a matter of fact, they involved an exchange of information for personal gain.

Significantly, the trial record was chock full of disclosures, some or all of which were "improper" under company policy, Regulation FD, or both, that did

not involve an alleged exchange of information for personal benefit. *See supra* at 15-16. Chiasson, as a sophisticated investor who was aware of the many reasons company insiders "leak" material nonpublic information to select market participants, had no basis for knowing that the financial information coming from some insiders was tainted by self-dealing. The notion that Chiasson "must have known" or "had to know" that the information coming from Ray at Dell and Choi at NVIDIA had been exchanged for personal gain rests on surmise and speculation, not fact. *See United States* v. *D'Amato*, 39 F.3d 1249, 1256 (2d Cir. 1994) ("[A] conviction based on speculation and surmise alone cannot stand."). Chiasson knew nothing about the tippers or why they provided information. He could not infer an exchange for personal gain simply because he received material nonpublic information from insiders. The SEC has acknowledged, and the trial record confirmed, that such "leaks" typically do not involve an exchange for personal gain. To prove Chiasson's knowledge, the government had to do more than simply establish his receipt of inside information. As the Supreme Court counseled in *Dirks*, "'[i]t is important in this type of case to focus on policing insiders and what they do . . . rather than on policing information *per se* and its possession.'" 463 U.S. at 662-63 (quoting *In re Investors Mgmt. Co.,* Exchange Act Release No. 9267, 1971 WL 120502, at *10 (July 29, 1971) (Smith, Comm'r, concurring in the result)).

* * *

Any fair reading of the trial record reflects that Chiasson did not know that the alleged "tippers" at Dell and NVIDIA were trading information for personal gain. If the law requires the government to prove such knowledge, then the evidence was insufficient and Chiasson's conviction cannot stand. The appropriate remedy is to reverse the judgment and remand the case with instructions to dismiss the indictment. *See, e.g.*, *United States* v. *Atehortva*, 17 F.3d 546, 552 (2d Cir. 1994).

C. At a Minimum, Chiasson Is Entitled to a New Trial With a Properly Instructed Jury

If the Court agrees with Chiasson's legal argument, he is entitled to a new trial even if there had been sufficient evidence because the court refused to instruct the jury that it had to find that Chiasson knew the tippers provided inside information for personal benefit. Jury instructions are subject to *de novo* review, and the Court of Appeals must find "'error if [it] conclude[s] that a charge either fails to adequately inform the jury of the law, or misleads the jury as to a correct legal standard.'" *United States* v. *Quattrone*, 441 F.3d 153, 177 (2d Cir. 2006) (citation omitted). "An erroneous instruction, unless harmless, requires a new trial." *United States* v. *Hassan,* 578 F.3d 108, 129 (2d Cir. 2008) (internal quotation marks omitted). An 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, 18 (1999). For purposes of harmless error analysis, unlike sufficiency review, inferences are *not* drawn in favor of the government. *See United States* v. *Mejia*, 545 F.3d 179, 199 n.5 (2d Cir. 2008). Because the charge was legally flawed, and the error plainly was not harmless, Chiasson was denied a fair trial.

First, as explained, the defense requested an instruction requiring the jury to find that the defendants knew that the Dell and NVIDIA insiders disclosed the information for a personal benefit, but the district court refused to give it. *Supra* at 34. Instead, the court charged the jury that the government had to prove: (1) that the insiders had a "fiduciary or other relationship of trust and confidence" with their corporations; (2) that they "breached that duty of trust and confidence by disclosing material, nonpublic information"; (3) that they "personally benefited in some way" from the disclosure; (4) "that the defendant you are considering 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. (A-1902; *see also* A-1903). Under these instructions, a defendant could be convicted merely if he knew that an insider had divulged information that was required to be kept confidential. Although the jury had to find that the tippers acted for personal gain, the defendants could be guilty under the court's instructions even if they did not know that fact. Further, the charge told the jury that the tipper could violate his fiduciary

duty simply by disclosing material nonpublic information; the personal benefit requirement was stated as a separate requirement as to the tippers (who of course were not on trial and who had not testified), but Chiasson as a tippee needed to know only that an insider had disclosed material that should have been kept confidential. For the reasons explained above, these instructions were legally erroneous, because they permitted the jury to convict Chiasson even if he lacked the knowledge required to be guilty of criminal insider trading. *Supra* at 21-49.

Second, the error was not remotely harmless because the evidence on whether Chiasson knew that the insiders acted for personal gain was not overwhelming. It was not even "underwhelming." It was nonexistent. *See supra* at 42-49. Had the court properly instructed the jury, Chiasson's closing argument would have focused on his lack of knowledge of the tippers' personal gain, and the jury could well (and should well) have acquitted him.

It is no answer to argue, as the government did in opposing Chiasson's bail pending appeal, that Chiasson was "sophisticated" and therefore knew that the tippers had provided information "for an improper purpose." (*See, e.g.*, Bail Opp'n ¶¶ 15-18, 20-21, 45 (contending Chiasson knew corporate insiders provided information "for an improper purpose," "without authorization" or without "legitimate" corporate purpose); *see also id.* ¶ 46 (claiming Chiasson "had every reason to know" when disclosures are unauthorized and therefore knew that

insiders "must have" disclosed the information "for a personal benefit")). On the contrary, a sophisticated investor like Chiasson would know that companies may have many reasons for leaking financial information to the "street." He would know that sometimes companies release information to temper expectations, so that there is no shock to the marketplace when final results are made public. The truly sophisticated investor also would know that companies like Dell target large institutional investors like Neuberger Berman. Thus, people along the tipping chain could have believed that Dell authorized the release of the information Goyal obtained. Finally, the sophisticated investor might have extensive experience with both Dell and NVIDIA, and know that they were companies that often made selective disclosures notwithstanding Regulation FD.

Indeed, given the abundance of evidence showing that Dell and NVIDIA routinely "leaked" confidential business information, a sophisticated investor would have assumed that the disclosures at issue were made for some purpose other than self-dealing.

In any case, Chiasson had the right to have these arguments considered by a properly instructed jury. The trial court's jury instructions deprived him of that right, and that error could not have been harmless. *See Neder*, 527 U.S. at 19 ("[W]here the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—[the court] should not find the error

harmless.").

II. CHIASSON'S SENTENCE WAS PROCEDURALLY IMPROPER AND SUBSTANTIVELY UNREASONABLE

The district court imposed a 78-month prison sentence—what appears to be the longest sentence ever given to a remote tippee like Chiasson, and the *sixth* longest insider trading sentence in the Southern and Eastern Districts of New York over the last twenty years.[18] That sentence is far out of proportion to Chiasson's conduct, and the product of a clearly erroneous gain finding, a myopic focus on gain, and a blind eye to unwarranted sentencing disparity. This Court should vacate this unreasonable sentence.

A. The Sentencing Proceedings

The insider-trading guideline, United States Sentencing Guidelines Manual § 2B1.4, provides a base offense level of 8 for insider trading and an enhancement depending on "the gain resulting from the offense." This gain is not the pecuniary gain to the defendant, but the increase in the value of the securities realized through the defendant's trading. *See* U.S.S.G. § 2B1.4 cmt. background. Chiasson

[18] Counsel, through court records, government press releases, and published reports, identified 149 defendants sentenced for insider trading in the Southern and Eastern Districts from 1993 to the present. *See generally Inside Trades Draw Lengthier Sentences*, Wall St. J., (Oct. 13, 2011), http://online.wsj.com/article /SB10001424052970203914304576629053026510350.html (collecting sentencing data on sentences between 1993 and Oct. 13, 2011). Of those, only Sam Waksal, Amr Elgindy, Hafiz Naseem, Zvi Goffer, and Raj Rajaratnam received sentences longer than 78 months.

traded for the funds he managed, so he did not pocket the total increase in value. His personal gain from the trades at Level Global, which was a share of professional fees, was at most $335,469. (A-2773). The gain to the funds, which included losses avoided in addition to profits, was in the millions.

The key Guidelines dispute at sentencing was whether Chiasson's gain should be calculated from "all the trades done at Level Global, including the ones that were directed or in the fund that was controlled by [Level Global co-founder David] Ganek." (A-2882). Judge Sullivan had concluded at trial that Ganek was a co-conspirator, rejecting Chiasson's argument that the evidence did not show that Ganek knew that Adondakis's information came from insiders who breached duties of confidentiality. However, at sentencing the court did not treat that finding as a sufficient basis for saddling Chiasson with Ganek's trades. Rather, referencing a prior insider trading conspiracy case, the judge explained that aggregation of co-conspirator trades is reserved for defendants who are responsible for their co-conspirators' criminal actions:

> . . . Mr. Zvi Goffer was charged with the gains that were derived from all the people that he *tipped or coordinated.* And so, I mean, I guess *that's the question.* Why do you believe that Mr. Chiasson is more like Emanuel Goffer[19] than he is like Zvi Goffer?

[19] Emanuel Goffer was a co-conspirator and tippee of Zvi Goffer. Judge Sullivan considered only trades that Emanuel Goffer made personally when calculating his Guidelines range. He did the same for other Zvi Goffer tippees. (A-2881). But

(A-2881) (emphasis added).

The government argued in its sentencing memorandum that Chiasson was "analogous to Zvi Goffer" in that he "*arguably tipped* Ganek" and that Chiasson and Ganek "were jointly responsible for the trades at issue." (A-2797) (emphasis added); *see also* A-2883 (arguing that Chiasson either was the "tipper" or that he and Ganek "were simply making the decisions together"). That approach resulted in a gain of $40.3 million. Chiasson argued that there was no evidence that he tipped Ganek or that they "were doing this together." (A-2574-76). Chiasson argued that he should be responsible only for charged trades that he directed, an approach that yielded a gain of $3.7 million, and a corresponding guidelines range of 63 to 87 months. (A-2769).

The district court stated that it was "persuaded that the loss is greater than 20 million" "largely for the reasons stated by the government in their submission." (A-2888). That determination yielded a Guidelines range of 97 to 121 months. (*Id.*).

Chiasson argued that a sentence even remotely near that range would violate the principles of 18 U.S.C. § 3553(a) because it would reflect undue emphasis on trading gain and create unwarranted sentencing disparity. (A-2578-95); *see also*

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he sentenced Zvi Goffer, the leader of the conspiracy, for trades that others made as well. (*Id.*).

18 U.S.C. § 3553(a)(6). Chiasson cited multiple similarly situated defendants who received sentences of 30 months or less after going to trial:

- Michael Kimmelman, a downstream tippee who did not contribute to the bribes his co-conspirators paid to maintain the flow of inside information. (A-2580-82).
- James Fleishman, a manager at "a totally corrupt" research firm that "was designed" to get company insiders to breach their duties. (A-2582-83).
- Rajat Gupta, a Goldman Sachs director who "stab[bed] Goldman Sachs in the back" by stealing the company's information and passing it to Raj Rajaratnam. (A-2583-85).
- Douglas Whitman, a hedge fund manager who sought out and procured inside information and committed perjury at trial. (A-2586-87).

Chiasson argued that these examples set the benchmark for his sentence because he was not more culpable than any of these defendants.

The 54-month sentence the court imposed on Newman underscored this point. Chiasson and Newman were similarly situated in many respects, beyond being charged in the same conspiracy. Both were hedge fund managers with young families, demonstrated commitments to their community, and no criminal history. However, Judge Sullivan found that Newman had authorized $175,000 in sham payments to Goyal's wife over a two-year period. (A-2746-47). Chiasson

knew nothing about these payments.[20] This distinction, Chiasson argued, warranted a sentence significantly below 54 months.

The district court did not disagree with Chiasson's assessment of his relative culpability, and even acknowledged that Chiasson was less culpable:

> I do agree that you are less involved, less culpable than some of the other defendants I have sentenced over the years. [Zvi] Goffer was a leader and an organizer. He was a corrupter. He was a person who ensnared people who might not otherwise have been involved. I don't think your involvement in this crime can be likened to that in any way, shape or form. Unlike Mr. Newman, you weren't paying tens of thousands of dollars to a source using surreptitious means to do it and fraudulent means to do it.

(A-2930).

Notwithstanding this conclusion, the court imposed a 78-month sentence. The court made no effort to reconcile this sentence with the sentences of the similarly situated defendants Chiasson cited, including Newman. Judge Sullivan did not even mention these sentences, even though they indicated precisely the kind of significant sentencing disparity referenced in § 3553(a)(6).

The court based the severity of the sentence almost entirely on "the amounts of money that are involved."[21] (A-2925). According to the court,

[20] As Newman points out in his appellate brief, the purpose of the Ruchi Goyal payments was a disputed issue at trial. Whether or not the court was correct to view the payments as an aggravating factor for Newman, Chiasson engaged in no similar conduct. Therefore, his offense conduct was, if anything, less culpable than Newman's.

> [The offense] was cheating to realize tremendous profits, tens of millions of dollars. That's a lot of money. Most people would go their whole lives without ever seeing anything close to that, even if they aggregate everything they ever made from the day they were born. So the money matters. The size of the bet matters and the size of the gains matter.

(A-2931).

Comparing Newman and Chiasson highlights the court's emphasis on "the size of the gains." The court in effect concluded that the trading gain attributed to Chiasson—which included the trades of *another person*, and which benefited hedge funds, and not Chiasson personally—warranted (1) eliminating any comparative leniency that might otherwise have resulted from Chiasson's less culpable conduct and (2) an additional two years in prison, *i.e.,* a 44% longer sentence.

B. Standard of Review

This Court reviews sentences for procedural and substantive reasonableness. A sentence is procedurally unreasonable if the court "makes a mistake in its Guidelines calculation" or "rests its sentence on a clearly erroneous finding of fact." *United States* v. *Cavera*, 550 F.3d 180, 190 (2d Cir. 2008) (en banc). A sentence is substantively unreasonable "if affirming it would . . . damage the

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[21] The court also stated that Chiasson's trades spanned "multiple months and even years" and that Chiasson made "some attempt" to keep information about Adondakis's sources out of Level Global's databases. (A-2927; A-2930).

administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *United States* v. *Douglas*, 713 F.3d 694, 700 (2d Cir. 2013) (internal quotation marks omitted).

C. The District Court Erred in Calculating the Guidelines and Relied on Clearly Erroneous Facts

For Guidelines purposes, a defendant's gain derives from "trading in securities by the defendant and persons acting in concert with the defendant or to whom the defendant provided inside information." U.S.S.G. § 2B1.4 cmt. background; *see United States* v. *Royer*, 549 F.3d 886, 891, 904 (2d Cir. 2008) (court properly aggregated trades by persons engaged with defendant in "joint endeavor" whom he tipped and instructed to trade). "[L]argely" agreeing with the "reasons stated by the government in their submission," the district court found that Chiasson was responsible for Ganek's trading and therefore more than $20 million in gain. (A-2888). That finding was clearly erroneous.

To begin with, the district court did not state its finding with precision, which makes it ripe for reversal. *See United States* v. *Archer*, 671 F.3d 149, 161 (2d Cir. 2011) ("[A] conclusion that factual findings are not clearly erroneous is more easily reached when the district court makes those findings explicitly and on the record."). Indeed, it is not clear how the district judge could have made such a finding at all. The court opined that aggregation of co-conspirator trades was reserved for persons "like Zvi Goffer" who tip or coordinate others (A-2881), yet

also determined that Chiasson's "involvement in this crime" could not be "likened" to Zvi Goffer's conduct "in any way, shape or form." (A-2930).

In any event, the evidence does not support the "reasons stated by the government in their submission," namely that Chiasson "arguably tipped Ganek" and that the two "were jointly responsible for the trades at issue." The district court mentioned "testimony that [Chiasson and Ganek] were on conference calls together with Mr. Adondakis." (A-2886). But there was only one such conference call, on August 27, 2008, and it was *Adondakis* who presented information on Dell, not *Chiasson*. (A-1026). Moreover, Adondakis testified specifically that he did not reveal his inside sources to Ganek on that call—or at any other point. (A-1331; *see also* A-1100; A-1115). Participation in a single conference call on August 27 is hardly evidence that Chiasson tipped Ganek or that they "jointly" decided to execute any illegal trades, let alone *all* the illegal trades at issue.

The evidence the government cited at the sentencing hearing fares no better. The government pointed to two communications between Ganek and Chiasson, both from August 26, 2008. (*See* A-2884 (citing GX 513 (A-2062); GX 515 (A-2063-68))). But one of those communications does not even mention Adondakis, and the other simply mentions "sam's people"—an ambiguous phrase that could refer to any of the dozens of people that Adondakis spoke to about Dell. This evidence provides no basis to infer that Chiasson tipped Ganek or was "jointly

responsible" with him for dozens of trades over a period of many months, as the government claimed. Absent evidence that Ganek joined a conspiracy with Chiasson, or that Chiasson told Ganek that Adondakis had illicit sources of information, Chiasson should not have been saddled with Ganek's profits.[22]

This clearly erroneous finding resulted in two procedural errors that should lead this Court to vacate Chiasson's sentence.

First, the district court calculated an incorrect Guidelines range. The court's Guidelines calculation required a finding that Chiasson's gain exceeded $20 million. The government offered no basis for finding that Chiasson's gains exceeded $20 million without Ganek's trades—the government could not even say "what the [gain] number would be if you took out Mr. Ganek's trades." (A-2884-85). Because the court's inclusion of Ganek's trades rested on clearly erroneous findings, its Guidelines determination cannot stand. *See, e.g.*, *Archer*, 671 F.3d at

[22] As an alternative theory, the government argued that "assuming *arguendo* that Ganek was not a coconspirator with Chiasson or that Chiasson did not discuss with Ganek the fact that the [sic] Adondakis had sources inside Dell and NVIDIA, Chiasson should still be held accountable for all of the trades under an aiding and abetting theory of liability." (A-2794; *see also* A-2887-88). The district court gave no indication that it accepted this theory (indeed the district's forfeiture order relied on a finding that Ganek and Chiasson were co-conspirators, *see infra* at 71. It also makes no sense. Aiding and abetting liability would require that Chiasson "knew of the proposed crime," that Chiasson either "acted, or failed to act in a way that the law required him to act, with the specific purpose of bringing about the underlying crime," and that "the underlying crime was committed by" Ganek. *United States* v. *Cruz*, 363 F.3d 187, 198 (2d Cir. 2004). If Ganek was not Chiasson's co-conspirator and Chiasson did not discuss Adondakis's sources with Ganek, then Ganek did not commit insider trading, and Chiasson obviously did not know that Ganek was doing so.

168 (vacating below Guidelines sentence where district court's clearly erroneous findings resulted in an incorrect Guidelines calculation).

Second, and apart from the error in calculating the Guidelines, the district court "err[ed] procedurally" because it "rest[ed] its sentence on a clearly erroneous finding of fact." *Cavera*, 550 F.3d at 190. The district court emphasized that "the size of the gains matter" and that the size of the gain was "tens of millions of dollars." (A-2931). The disparity between Chiasson's and Newman's sentences demonstrates that the court based its sentence virtually exclusively on the "tens of millions of dollars" in "gain." The court reached this dispositive figure on the basis of clearly erroneous findings that led it to count Ganek's trades. This was error apart from the judge's inflated Guidelines calculation. *See United States* v. *DeSilva*, 613 F.3d 352, 358 (2d Cir. 2010) (vacating sentence because district court committed procedural error in relying on a clearly erroneous finding).

D. A 78-Month Sentence for a Remote Tippee Is Substantively Unreasonable

Chiasson's 78-month sentence is also substantively unreasonable. That it is below the district court's Guidelines range (even assuming that range was right) does not render it just. "[T]he amount by which a sentence deviates from the applicable Guidelines range is not the measure of how 'reasonable' a sentence is. Reasonableness is determined instead by the district court's individualized application of the statutory sentencing factors." *United States* v. *Dorvee*, 616 F.3d

174, 184 (2d Cir. 2010). This rule is particularly apt here. From October 1, 2009 through March 31, 2013, courts imposed Guidelines sentences in only 12 of 83 insider trading cases, and none above the Guidelines.[23] This broad rejection of the Guidelines proves they do not measure reasonableness in cases like this and highlights the importance of individualized consideration of the § 3553(a) factors. *See United States* v. *Adelson*, 441 F. Supp. 2d 506, 515 (S.D.N.Y. 2006), *aff'd*, 301 F. App'x 93 (2d Cir. 2008) ("[W]here, as here, the calculations under the guidelines have so run amok that they are patently absurd on their face, a Court is forced to place greater reliance on the more general considerations set forth in section 3553(a), as carefully applied to the particular circumstances of the case and of the human being who will bear the consequences."). The district court's misapplication of the § 3553(a) factors—its disregard for sentencing disparity and its indefensible focus on gain—resulted in a sentence that is manifestly unreasonable.

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[23] *See* United States Sentencing Commission, Preliminary Quarterly Data Report, 2nd Quarter Release at 13 tbl. 5 (2013), *available at* http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2013_Quarter_Report_2nd.pdf; United States Sentencing Commission; 2012 Sourcebook of Federal Sentencing Statistics tbl. 28 (2012), *available at* http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and Sourcebooks/2012/Table28.pdf; United States Sentencing Commission; 2011 Sourcebook of Federal Sentencing Statistics tbl. 28 (2011), *available at* http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_ Sourcebooks/ 2011/Table28.pdf; United States Sentencing Commission, 2010 Sourcebook of Federal Sentencing Statistics tbl. 28 (2010), *available at* http://www.ussc.gov/Research_and_Statistics/ Annual _Reports_and_ Sourcebooks/2010/Table28.pdf.

Courts have imposed sentences of 70 months or more sparingly in insider trading cases, reserving them for the most egregious offenders. Counsel has identified only 10 such sentences (other than Chiasson's) since *United States* v. *Booker*, 543 U.S. 220 (2005). These cases involve persons who directly participated in a breach of a duty of confidentiality for personal gain, coupled with indisputable aggravating factors. Consider:

- Jeffrey Royer (72 months) was an FBI agent who for years leaked information about federal investigations to Amr Elgindy (135 months), who in turn distributed that information to a network of traders. Royer also lied to federal agents and Elgindy committed extortion. *See United States* v. *Royer*, 549 F.3d 886 (2d Cir. 2008).

- Hafiz Naseem (120 months) was a banker who repeatedly stole information from his co-workers and the bank's clients and relayed it to a co-conspirator abroad. *See United States* v. *Rahim*, 339 F. App'x 19 (2d Cir. 2009).

- Michael Guttenberg (78 months) engaged in two different conspiracies in which he breached his duty to UBS by relaying upcoming upgrades or downgrades of public company securities. He did so for personal gain, receiving hundreds of thousands of dollars in illicit payments. *See United States* v. *Guttenberg*, No. 07 Cr. 141, 2007 WL 4115810, at *1-*2 (S.D.N.Y. Nov. 14, 2007); *see also United States* v. *Guttenberg*, No. 07 CR 141 DAB (S.D.N.Y. Nov. 14, 2008) (judgment in a criminal case).

- Joseph Nacchio (70 months) was a public company CEO who had "unusual access and control over [company] information" whom a jury found guilty of 19 substantive counts and whom the court ordered to forfeit more than $44 million in proceeds from the offense. *See United States* v. *Nacchio*, No. 05 Cr 545, Tr. of Sentencing, Vol. 5, at 35:19-20 (D. Colo. June 24, 2010).

- Joseph Contorinis (72 months) received misappropriated information directly from the tipper and was found to have committed perjury at trial. *See United States* v. *Contorinis*, 692 F.3d 136 (2d Cir. 2012).

- Zvi Goffer (120 months) was the "leader[ ] of a fraudulent enterprise who recruited people and poisoned other traders" and paid for information stolen from a law firm. *United States* v. *Goffer*, --- F.3d ---, No. 11-3591-cr(L), 2013 WL 3285115, at *2, *12 (July 1, 2013) (internal quotation marks omitted).

- Raj Rajaratnam's (132 months) criminal activity spanned a decade, involved 19 public companies, more than 20 corrupt insiders, and interlocking conspiracies. *United States* v. *Rajaratnam*, No. 09 Cr. 1184, Tr. of Sentencing at 20-23 (S.D.N.Y. Oct. 13, 2011).

- Matthew Kluger (144 months) and Garret Bauer (108 months) engaged in a 17-year scheme in which they traded for personal gain based on information Kluger stole from law firms. *See United States* v. *Kluger*, --- F.3d ---, No. 12-2701, 2013 WL 3481505 (3d Cir. July 9, 2013).

Chiasson does not belong on this list. He did not participate directly in a breach of a duty for personal gain. He recruited no one to the conspiracy, and engaged in no aggravating conduct. His crime (if it was a crime) was receiving and trading on inside information. He did not even know that the information came from an insider who acted for personal benefit and thus committed fraud. For the district court to have placed Chiasson in the category of persons listed above "damage[s] the administration of justice because the sentence imposed [is] shockingly high." *Douglas*, 713 F.3d at 700 (internal quotation marks omitted).

Moreover, the court did not even acknowledge, let alone explain, why Chiasson deserved a sentence two-and-a-half times greater than the sentences of similarly situated defendants he cited and two years longer than the sentence Newman received. Coupled with the Court's explicit recognition of Chiasson's

lesser involvement and culpability than Newman and other insider trading defendants, the trial court's silence demonstrates a failure to give adequate weight to unwarranted disparity. *See Dorvee*, 616 F.3d at 184 (district court's "cursory explanation" evinced failure to observe principles of § 3553); *United States* v. *Ebbers*, 458 F.3d 110, 129 (2d Cir. 2006) ("[W]e may remand cases where a defendant credibly argues that the disparity in sentences has no stated or apparent explanation.").

No doubt the government will point to the gain attributed to Chiasson to justify his sentence. The question on appeal is whether that gain "can bear the weight assigned it under the totality of circumstances in the case." *Cavera*, 550 F.3d at 191. The answer is no.

First, gain cannot explain the vastly disparate sentence Chiasson received as compared to other defendants convicted at trial and responsible for multimillion-dollar gains. Gupta was responsible for more than $5 million in gain, yet received a 24-month sentence. *See United States* v. *Gupta*, 904 F. Supp. 2d 349, 353, 355 (S.D.N.Y. 2012). Newman was held responsible for $4 million and received a sentence two years shorter than Chiasson's. (*See* A-2699; A-2749). And both of these cases had aggravating factors absent from Chiasson's case: Gupta brazenly breached the trust owed to the company he served; Newman, according to the trial

court, employed surreptitious payments to procure access to inside information. Chiasson did neither.

Second, gain cannot serve as a proxy for meaningful consideration of sentencing disparity because it does not correlate to factors that courts traditionally rely on to distinguish defendants' culpability, such as offense conduct, motive, state of mind, role in the offense, or criminal history. This case is a prime example of how using gain as the sole comparator can lead to disparate results and a less culpable defendant—Chiasson—receiving a sentence many times longer than more morally culpable defendants convicted of the same crime. One who bribes a source for inside information is more culpable than the person who, without knowledge of the bribe, receives inside information. *See Royer*, 549 F.3d at 904 (district court was justified in granting passive recipient of information a more lenient sentence than a co-defendant who corruptly procured information from FBI sources). Yet the briber can easily gain less than the passive, unknowing recipient. Likewise, as between a recipient of information who knew that the tipper was breaking the law and a recipient who did not, surely the latter is less culpable. Resting a sentence on gain masks this difference, too. Gain may be relevant, but it should not be the overarching factor used to distinguish among defendants. *Cf. Cavera*, 550 F.3d at 192 ("[A] district court may find that even after giving weight to the large or small financial impact, there is a wide variety of culpability amongst

defendants and, as a result, impose different sentences based on the factors identified in § 3553(a)."); *United States* v. *Emmenegger*, 329 F. Supp. 2d 416, 427 (S.D.N.Y. 2004) (Lynch, J.) (describing the amount of loss as a "relatively weak indicator of the moral seriousness of the offense or the need for deterrence").

This Court's recent decision in *United States* v. *Goffer* illustrates how gain fails to capture meaningful distinctions in culpability between defendants. *Goffer* upheld the 66-month sentence that Judge Sullivan gave to Craig Drimal, an insider trading defendant who pled guilty to one conspiracy count and five substantive counts of securities fraud. *See* 2013 WL 3285115 at *1, *14. Drimal's gain was $11 million, but he was unquestionably more culpable than Chiasson: Drimal knew that he was receiving information from sources who broke the law (he was caught on a wiretap admitting that the lawyers who provided him with information could go to jail). *See id.* at *2. Drimal participated in bribing those sources for information. *See id.* Drimal used prepaid cell phones to avoid detection, *see id.* at *1, and then lied to authorities when questioned, *see United States* v. *Drimal*, No. 10 Cr. 56, Tr. of Sentencing (S.D.N.Y. Aug. 31, 2011) ("*Drimal* Sentencing Tr.") at 53. And Drimal traded on his own account, so gain in his case was *his* gain from *his* trades, not the gain of a fund derived from the trades of others. *See id.* at

32. Yet Chiasson received a longer sentence, because of Judge Sullivan's myopic focus on the gain number.[24]

Third, gain is not a good proxy for the harm the insider-trading prohibition seeks to address, which is the breach of fiduciary duty for personal profit. *See Gupta*, 904 F. Supp. 2d at 352 ("In the eye of the law, Gupta's crime was to breach his fiduciary duty of confidentiality to Goldman Sachs."); *see also United States* v. *Reich*, 661 F. Supp. 371, 373 (S.D.N.Y. 1987) ("[T]he essence of this crime was not the acquisition of dollars (or not in [the defendant's] case) but rather the destruction of trust in the integrity of the financial marketplace and in the specialized lawyers and professionals who are essential to the creation and management of the multimillion—and occasionally billion—dollar transactions. . . . To adjust sentences in crimes of this nature by the amount of profits taken (or available to be taken) would reduce the search for a just result to an accounting."). "Yet the Guidelines assess punishment almost exclusively on the basis of how

[24] The Court in *Goffer* noted the "magnitude of [Drimal's] insider trading" in affirming his sentence. But *Goffer* does not justify the district court's excessive focus on gain in this case. First, the *Goffer* court mentioned the "magnitude" of Drimal's trading in addressing Drimal's argument that his sentence "was substantively unreasonable in light of his community service and his commitment to his family," *id.* at *13, not an argument that gain overstated the seriousness of his offense. Second, in reviewing a sentence for substantive reasonableness, this Court considers whether a particular "factor, as explained by the district court, *can bear the weight assigned it under the totality of circumstances in the case*." *Cavera*, 550 F.3d at 191 (emphasis added). As a result of the aggravating factors described above, the district court had no occasion to give gain dispositive weight when sentencing Drimal. *See Drimal* Sentencing Tr. at 48-53.

much money [is] gained by trading on the information. At best, this is a very rough surrogate for the harm to" the company to which the duty was owed. *Gupta*, 904 F. Supp. 2d at 352. The Guidelines look to financial gain in insider trading cases not because it approximates the harm to victims, but because the "victims and their losses are *difficult if not impossible to identify*." U.S.S.G. § 2B1.4 cmt. background (emphasis added). But gain is not a good substitute for unquantifiable harm to victims. *Cf.* Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L.J. 1420, 1476-77 n.235 (2008) ("[T]he Guidelines' 'loss'-penalty tables appear to have been created out of whole cloth, without either statutory or empirical basis. The great weight the Guidelines attached to quantity had been devastatingly criticized, and nowhere explained." (citations omitted)).

Simply put, gain cannot bear the weight the district court placed on it in this case. The district court's undue emphasis on gain—especially in conjunction with its disregard for unwarranted sentencing disparity—led to a substantively unreasonable sentence that this Court should vacate.

III. THE DISTRICT COURT'S FORFEITURE ORDER WAS BASED ON A CLEARLY ERRONEOUS FACTUAL FINDING AND VIOLATED CHIASSON'S DUE PROCESS AND JURY TRIAL RIGHTS

The district court ordered Chiasson to forfeit $1,382,217, the amount of fees that the court determined Chiasson *and Ganek* to have earned from trades in Dell

and NVIDIA during the relevant period.[25] (A-3002-03). Chiasson had argued that he should not forfeit money Ganek received because there had been no jury finding that Ganek was a co-conspirator and because there had been no specific findings by the judge or the jury as to when Ganek joined the conspiracy or which of his trades rested on inside information. Accordingly, Chiasson argued that the forfeiture award should be limited to the fees he earned personally as a result of the charged trades that he executed, which amounted to $70,801. (A-2772). The court rejected that position based on its finding, by a preponderance of evidence, that Ganek was Chiasson's co-conspirator. (A-3003). Because the court clearly erred in making that finding, the forfeiture award cannot stand. But even if this Court determines that the Ganek finding was not clear error, it should still reverse the forfeiture award: under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and its progeny, the district court's forfeiture order violated Chiasson's due process and jury trial rights because it increased his punishment based on facts not found beyond reasonable doubt and not proved to a jury.[26]

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[25] Language in the court's forfeiture order suggests that the parties agreed that Chiasson received $1,180,498 in incentive fees. (*See* A-3002-03 ("[T]he parties agree that Defendant received incentive fees only in connection with the Nvidia trade in May 2009 and that those fees total $1,180,498.")). However, that figure represents the parties' agreement on the incentive fees earned by Chiasson *and* Ganek, not Chiasson alone.

[26] Chiasson preserved this issue for appeal but acknowledged below that the district court lacked authority to rule that the intervening Supreme Court decisions on which this argument is based superseded this Court's holding in

A. The Lower Court's Finding That Ganek Was a Co-Conspirator Was Clearly Erroneous

David Ganek was Chiasson's partner at Level Global, and he was never charged with a crime. The district court held Ganek to be a co-conspirator, finding that Ganek traded Dell and NVIDIA stock based on inside information from Adondakis, even though Adondakis testified that he did *not* reveal his inside sources to Ganek (A-1100; A-1115; A-1331). This finding, made over defense objection, lacked an evidentiary basis, and the district court therefore erred when it included proceeds from Ganek's trades in its forfeiture order as to Chiasson.

First, the court stated Ganek must have known that Adondakis obtained information improperly because Ganek supposedly knew that Adondakis got "incremental checks" that "firmed up" his information about Dell and NVIDIA as those companies' reporting dates approached. (A-1603). However, for the reasons addressed *supra* at 21-34, even if Ganek knew that Adondakis got inside information, this did not make Ganek a member of a criminal insider trading conspiracy. There was no evidentiary basis for finding that Ganek knew that Adondakis's sources disclosed information in violation of confidentiality duties, let alone in exchange for personal benefit.

United States v. *Fruchter*, 411 F.3d 377, 382-83 (2d Cir. 2005), that the *Apprendi* rule does not apply to forfeiture determinations. (A-2607; A-2999).

Second, the court relied on the size of Ganek's trades. But the evidence at trial established that Level Global's positions in Dell and NVIDIA were not unusually large given the fund's size. (*See generally* A-1342-43).

Third, the court inferred that there was "a discussion [] about Adondakis' source" during a closed door meeting between Chiasson, Ganek and Brenner, another Level Global employee. (A-1603). None of the attendees at the supposed meeting testified, so any conclusions about the discussion were necessarily based on speculation. Further, the evidence unequivocally showed that this meeting did not occur. Adondakis testified that he prepared a report containing inside information received from Tortora that Chiasson brought to Ganek in the supposed closed door meeting. The report was dated August 11, 2008 (A-2033), and Adondakis testified that he created it on that date. (A-1214). He said that he "physically handed [the report] to Mr. Chiasson and Mr. Brenner and they went into Mr. Ganek's office with it" on what he "believe[d] was the same day." (A-1214). Documentary evidence established that that testimony could not have been accurate, because Ganek was not in the office on Monday, August 11. (A-2488-91). The district court thus clearly erred in finding that Ganek was a co-conspirator based on speculative inferences that contradicted Adondakis's direct testimony and the documentary record. *See Trans-Orient Marine Corp.* v. *Star Trading & Marine, Inc.*, 925 F.2d 566, 571 (2d Cir. 1991) ("If a finding is directly

contrary to the only testimony presented, it is properly considered to be clearly erroneous.").

B. The Forfeiture Order Violates *Apprendi*

The forfeiture order should be vacated in any event for a different reason. Under evolving Supreme Court case law, the forfeiture process employed in this case was unconstitutional, because the operative facts had to be found by a jury beyond a reasonable doubt. Instead, the district judge made his own factual findings using what appears to have been a preponderance of the evidence standard.[27] Chiasson objected to this procedure in his sentencing submissions. (A-2607).

Apprendi was the landmark Supreme Court case requiring certain sentencing facts to be determined beyond a reasonable doubt by a jury. "Under *Apprendi* '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *S. Union Co.* v. *United States*, 132 S. Ct. 2344, 2350 (2012) (quoting *Apprendi*, 530 U.S. at 490). *Southern Union* extended the *Apprendi* rule to monetary penalties, and requires the factfinder to determine, beyond a reasonable doubt, the facts needed to support a maximum monetary fine

[27] The court's short forfeiture order as to Chiasson did not explicitly reference the preponderance standard. However, the district judge cited this Court's decision in *United States* v. *Gaskin,* 364 F.3d 438, 461 (2d Cir. 2004), (A-3003), which states that sentencing facts need be found only by a preponderance of evidence.

calculated based on the period of the violation. In so holding, the Supreme Court rejected the government's argument that *Apprendi* should be limited to facts that affect the length of incarceration. The Court explained:

> Criminal fines, like these other forms of punishment, are penalties inflicted by the sovereign for the commission of offenses. . . . And the amount of a fine, like the maximum term of imprisonment or eligibility for the death penalty, is often calculated by reference to particular facts. Sometimes, as here, the fact is the duration of a statutory violation; under other statutes it is the amount of the defendant's gain or the victim's loss, or some other factor. In all such cases, requiring juries to find beyond a reasonable doubt facts that determine the fine's maximum amount is necessary to implement *Apprendi*'s animating principle: the preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense.

132 S. Ct. at 2350-51 (internal citations and quotation marks omitted).

It is well settled that criminal forfeiture is a form of punishment. *See, e.g.*, *Austin* v. *United States*, 509 U.S. 602, 622 (1993). Accordingly, under *Southern Union*, any facts, like the amount of the defendant's gain, that underlie the fixing of a maximum criminal forfeiture judgment must be proven to the jury beyond a reasonable doubt.

The Supreme Court's recent decision in *Alleyne* v. *United States*, 133 S. Ct. 2151 (2013), reinforces *Apprendi*'s application to criminal forfeiture judgments. *Alleyne* overruled prior Supreme Court precedent limiting *Apprendi* to maximum statutory penalties, and held that mandatory minimum sentences are also subject to

Apprendi. *Id.* at 2163. The Court rejected the government's argument that *Apprendi* should apply only to those sentencing schemes that provide for a maximum sentence and not those that provide mandatory minimum sentences. It held that "[i]t is indisputable that a fact triggering a mandatory minimum alters the prescribed range of sentences to which a criminal is exposed." *Id.* at 2160. Accordingly, a fact triggering a mandatory minimum "aggravates the [defendant's] punishment," and the *Apprendi* rule applies. *Id.* at 2158. In reaching this conclusion, the Court expressly overruled *Harris* v. *United States*, 536 U.S. 545 (2002), which had held otherwise. *Id.* at 2163.

In this case, the government employed a mandatory forfeiture requirement that functions as a mandatory minimum sentence within the meaning of *Alleyne*. The statute at issue, 28 U.S.C. § 2461(c), provides that the district court "shall order" a forfeiture penalty in addition to any sentence of imprisonment. This is not discretionary. It is a statutory mandatory minimum penalty. Accordingly, *Apprendi* applies to the forfeiture judgment at issue here.

To be sure, prior cases have held to the contrary. The Supreme Court held in *Libretti* v. *United States*, 516 U.S. 29, 49 (1995), that defendants do not have a Sixth Amendment right to a jury determination on forfeiture, and this Court held in *Fruchter*, 411 F.3d at 383, that forfeiture is not subject to the *Apprendi* rule. However, the recent decisions in *Southern Union* and *Alleyne*

invalidate these authorities, and indicate that *Apprendi* does indeed apply to criminal forfeiture sentences.

Fruchter held that the *Apprendi* rule does not apply to criminal forfeiture statutes because they do not have a "previously specified range" of punishments and thus lack a statutory maximum. 411 F.3d at 383. The Supreme Court rejected that rationale in *Southern Union*. The statute at issue in *Southern Union* did not specify a range or provide a definite statutory maximum—a fine of no more than $50,000 accrued every day that a violation occurred, no matter how long. The fine was indeterminate without reference to certain facts. The same is true of criminal forfeiture, for which the statute defines the maximum penalty in reference to any property that "constitutes, or is derived from proceeds traceable to [an offense]." 18 U.S.C. § 981(a)(1)(C). There is no meaningful distinction between a statute that sets a maximum fine in reference to specific facts and a statute that sets a maximum forfeiture in reference to specific facts; both prescribe maximum criminal punishments that are subject to *Apprendi*.

Furthermore, *Alleyne* precludes reliance on *Libretti*, which held that "the right to a jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protection." 516 U.S. at 367-68. The Court in *Libretti*, decided pre-*Apprendi*, concluded that "a defendant does not enjoy a constitutional right to a jury determination as to the appropriate sentence to be imposed," citing *McMillan*

v. *Pennsylvania*, 477 U.S. 79, 93 (1986), in support of this proposition. 516 U.S. at 49. *McMillan* held that facts that increase a mandatory minimum sentence need not be proven to a jury beyond a reasonable doubt. *Alleyne* overruled that holding. *See* 133 S. Ct. at 2164, 2166 (Sotomayor, J., concurring) ("I join the opinion of the Court, which persuasively explains why *Harris* v. *United States* and *McMillan* v. *Pennsylvania* were wrongly decided. . . . With *Apprendi* now firmly rooted in our jurisprudence, the Court simply gives effect to what five Members of the Court recognized in *Harris*: *McMillan* and *Apprendi* are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both." (internal quotation marks and brackets omitted)). Whatever remains of *Libretti* can no longer exclude forfeiture judgments from *Apprendi*'s reach

Even if this Court were to continue to follow *Libretti*, and to permit forfeiture orders to be fixed by judges rather than jurors, it should still reverse the forfeiture order here. *Libretti* concerned only the right to a jury determination on forfeiture under the Sixth Amendment, not the burden of proof the government must bear in a forfeiture proceeding. It thus does not control as to that issue, which implicates the due process protections of the Fifth Amendment. *See Alleyne*, 133 S. Ct. at 2156 ("The Sixth Amendment provides that those 'accused' of a 'crime' have the right to a trial 'by an impartial jury.' This right, *in conjunction with the Due Process Clause*, requires that each element of a crime be proved to the jury

beyond a reasonable doubt." (emphasis added)). *Southern Union* and *Alleyne* make clear that the government must prove beyond a reasonable doubt any fact that increases the maximum forfeiture.[28]

The district court's forfeiture order relied on findings it apparently made on a preponderance standard. The finding that Ganek was Chiasson's co-conspirator alone increased the maximum forfeiture amount by more than $1 million. As discussed, the evidence supporting that finding was insufficient, *see supra* at 72-74, and certainly that finding could not be made "beyond a reasonable doubt." Accordingly, this Court should vacate the forfeiture order as to Chiasson.

[28] This Court in *United States* v. *Bellomo*, a case that predated *Apprendi*, held that a preponderance standard applies to criminal forfeiture proceeding because "[f]act-finding at sentencing is made by a preponderance of the evidence." 176 F.3d 580, 595 (2d Cir. 1999). *Apprendi* and its progeny have invalidated that rationale.

CONCLUSION

The judgment of conviction should be reversed and the case remanded with instructions to enter a judgment of acquittal. In the alternative, the judgment should be vacated and the case remanded for a new trial. If an acquittal or a new trial is not ordered, the sentence and forfeiture order should be vacated, and the case remanded for resentencing.

Dated: New York, New York
August 15, 2013

/s/ Mark F. Pomerantz
Mark F. Pomerantz
Matthew J. Carhart
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

Alexandra A.E. Shapiro
Daniel J. O'Neill
Jeremy Licht
SHAPIRO, ARATO & ISSERLES LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880

Gregory Morvillo
MORVILLO LLP
One World Financial Center
27th Floor
New York, New York 10281
(212) 796-6330

Attorneys for Defendant-Appellant Anthony Chiasson

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENT, AND TYPE STYLE REQUIREMENT

1. The undersigned counsel of record for Defendant-Appellant Anthony Chiasson certifies pursuant to Federal Rules of Appellate Procedure 32(a)(7(C) that the foregoing brief contains 19,793 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the Word Count feature of Microsoft Word 2003.

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Dated: August 15, 2013

/s/ Mark F. Pomerantz
Mark F. Pomerantz

Exhibit L

13-1837-cr(L)
13-1917-cr(con)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

JON HORVATH, DANNY KUO, HYUNG G. LIM, MICHAEL STEINBERG,

Defendants,

TODD NEWMAN, ANTHONY CHIASSON,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLANT
TODD NEWMAN

STEPHEN FISHBEIN, ESQ.
JOHN A. NATHANSON, ESQ.
JASON M. SWERGOLD, ESQ.
SHEARMAN & STERLING LLP
599 Lexington Avenue
New York, New York 10022
(212) 848-4000

Attorneys for Defendant-Appellant
Todd Newman

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INTRODUCTION

The government's case against Todd Newman is part of a broad enforcement campaign designed to "level the playing field" so that ordinary investors feel they have the same access to information as the most sophisticated hedge fund traders. Over and over again, the prosecutors in this case emphasized to the jury the disadvantage to ordinary investors when Wall Street insiders make money from trading on information that is not equally available to everyone. The government opened the case by telling the jury that the defendants made "big money" by getting an "unfair advantage" over "honest investors who were playing by the rules," (Tr. 48, 50), and concluded by arguing that the defendants made "big money trading on information that ordinary investors didn't have" (Tr. 3666).[1]

The problem with the government's level playing field paradigm is that, whether or not it is good policy, it is not the law. Twice the government has tried to persuade the Supreme Court to adopt such a theory of insider trading and twice the Supreme Court soundly rejected the government's position. *Chiarella v. United States*, 445 U.S. 222 (1980); *Dirks v. SEC*, 463 U.S. 646 (1983). In these seminal decisions, the Supreme Court made clear that trading on material, non-public, inside information is not unlawful. It is not fraud. Such trading becomes

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[1] References to the Joint Appendix are cited as "A-__." References to the trial transcript, which is located at pages A-359 to A-1979 in the Joint Appendix, are cited as "Tr. __."

unlawful *only* in the narrow circumstance in which an insider breaches his fiduciary duty to a company by disclosing information *for personal gain*. Where inside information is disclosed in the course of arm's length business conversations, through carelessness, or out of an insider's perceived interest in benefitting the company, recipients are free to trade, and even to make "big money," notwithstanding that "ordinary investors who play by the rules" do not have equal access. While the government has always resisted this as a policy matter, it is the law and has been the law for over 30 years.

In this case, the government's zeal to enforce a level playing field without regard to these governing legal principles led to a fundamentally flawed prosecution. The jury was charged that Mr. Newman did not have to know of self-dealing by the insider, even though that is the fulcrum fact that distinguishes between legal and illegal conduct. The government did not try to prove that Mr. Newman had such knowledge, or even that he knew who the insiders were. And lest a prosecution of the insiders themselves shed unwanted light on the true, and innocent, circumstances of the disclosures, the government never charged the key insiders involved in this case with any wrongdoing whatsoever, only the hedge fund traders who make such an easy target in the government's crusade against Wall Street inequality.

When all was said and done, Mr. Newman was not convicted of trading on information he knew to be obtained improperly, that is, as a result of the insiders' fraudulent self-dealing. The jury was not instructed that such knowledge needed to be proved and the government offered no evidence to prove it. Instead, Mr. Newman was convicted simply of profiting from information that ordinary investors did not have. That is not a crime.

The government has ample recourse if it wishes to establish a level playing field. It can lobby Congress for changes to the insider trading law to eliminate the personal benefit requirement or, for that matter, any requirement other than knowingly trading on material, non-public, inside information. It can put some energy into its so-far toothless enforcement of SEC Regulation FD, which prohibits companies from selectively disclosing material information. And it can prosecute, in appropriate circumstances, the insiders who are the true gatekeepers of corporate information. But what it cannot do is rewrite the criminal law *ex post facto* so as to persecute unpopular hedge fund traders for conduct they understood at the time to be legal. That is what the government did here and that is why Mr. Newman's conviction must be reversed and a judgment of acquittal entered.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291. On May 10, 2013, Mr. Newman filed a

timely notice of appeal from a final judgment of conviction entered on May 8, 2013.

ISSUES PRESENTED FOR REVIEW

1. Whether Mr. Newman is entitled to a judgment of acquittal because (a) the district court refused to give his proposed jury instruction that he needed to know that the information at issue was provided by corporate insiders in exchange for personal benefits, and (b) under the correct legal standard, the evidence was insufficient to prove that Mr. Newman knew of benefits to the insiders.

2. Whether the jury charge was erroneous and prejudicial insofar as it (a) included a "conscious avoidance" charge without a factual predicate for such a charge; and (b) failed to instruct the jury as to the factors to be considered in determining whether corporate information is "confidential" as set forth by this Court in *United States v. Mahaffy*, 693 F.3d 113 (2d Cir. 2012).

3. Whether Mr. Newman is entitled to a judgment of acquittal because the evidence at trial was insufficient to establish that the corporate insiders breached their fiduciary duties to shareholders, including that they provided information in exchange for personal benefits.

4. Whether the government's proof at trial as to the content of the alleged inside information varied impermissibly from the charges in the Superseding Indictment.

STATEMENT OF THE CASE

Superseding Indictment S2 12 Cr. 121 charged Mr. Newman and co-defendant, Anthony Chiasson, with one count of conspiracy to commit insider trading and, with respect to Mr. Newman, four substantive counts of insider trading in the shares of Dell Inc. and NVIDIA Corporation. A-148.

The case was tried before Judge Richard J. Sullivan and a jury between November 7, 2012 and December 17, 2012. On December 17, 2012, the jury returned a verdict of guilty against both defendants on all counts.

Mr. Newman was sentenced on May 2, 2013 to 54 months in prison, a $1 million fine, and ordered to forfeit $737,724. A-2807. In an order dated May 7, 2012, the district court denied Mr. Newman's request for bail pending appeal. A-2803.

On May 10, 2013, Mr. Newman timely filed a notice of appeal, (A-2814), and the same day filed a motion with this Court seeking bail pending appeal. In his bail motion, Mr. Newman argued that whether a tippee must have knowledge of a personal benefit to the insider raised a "substantial question" pursuant to 18 U.S.C. § 3143(b). On June 18, 2013, this Court agreed and granted the motion for bail pending appeal. A-2997.

STATEMENT OF FACTS

A. Newman's Background as a Portfolio Manager

Todd Newman ("Newman") had a legitimate and successful career in the financial industry for over twenty-five years. He worked his way up through a variety of positions including more than ten years as a research analyst. A-2313–14. In March 2006, Newman became a portfolio manager at Diamondback Capital Management ("Diamondback"), where he was in charge of a portfolio of technology-sector stocks. Tr. 1297. Diamondback allocated to Newman about $150 million to invest on behalf of its clients. A-2319.

As a portfolio manager, Newman was both an active and a profitable trader. On average, he traded the stocks of about 300 different companies per year and made well over 100 trades per day. A-2366–67. Between the time Newman started at Diamondback in March 2006 and the beginning of the alleged conspiracy (September 2007), Newman's portfolio generated about $45 million in profits. A-2368. Over the next 28 months through December 2009 (the alleged conspiracy period), Newman made about $73 million in profits, of which only about $4 million was alleged to be tainted by improperly obtained information. A-2368, 2370, 2373.

B. Overview of the Government's Insider Trading Allegations

The government alleged that Newman received inside information from his research analyst, Jesse Tortora. Tortora was a member of a group of friends who

worked as analysts at different investment firms. Tr. 138-39. The group's members exchanged information they obtained from various sources including company insiders. Tr. 51, 137-38, 143. They allegedly passed the information to their portfolio managers, who traded on it. Tr. 139. Tortora was the conduit for all of the allegedly improper tips that went to Newman. It was undisputed that Newman did not have any substantive contact with the other portfolio managers, other members of the analyst group, or the company insiders. Tr. 1105-10.

The information at issue consisted of quarterly financial data relating to technology companies – particularly Dell and NVIDIA[2] – such as revenue, gross margin, operating margin, and earnings per share. Tr. 150. The government alleged that the analysts obtained this information from insiders before the companies made their official quarterly announcements. Tr. 50-52. The information was provided mostly in the form of ranges or directional guidance (*e.g.*, higher or lower than the consensus of analysts' expectations) rather than precise numbers. Tr. 1418, 1517.

Several witnesses testified that analysts estimated these same metrics through legitimate financial modeling using publicly available information and

[2] The government introduced evidence about four other stocks – Altera, Intel, Advanced Micro Devices, and Texas Instruments – but those stocks were not the focus of the government's case and the government did not discuss them in summation.

educated assumptions about industry and company trends.[3] Tr. 1552-54, 2881. Equally important, the evidence showed that quarterly financial information was routinely leaked by the relevant companies, not for corrupt purposes, but because the companies wanted to develop relationships with hedge funds and other firms that might buy their stock, or to condition the market to unexpected news. *See* pp. 17-20, *infra*.

Newman did not treat the quarterly financial information he received from Tortora as if it was anything other than the product of modeling and conversations with legitimate industry contacts. Many of the alleged tips were contained in emails or instant messages from Tortora to Newman that both knew could be read by Diamondback's compliance department and by regulators like the SEC. Tr. 1087-88, 1342-44. While Tortora sometimes used a personal email account when discussing sensitive information with his analyst friends, Newman *always* used his official Diamondback email address, to which the compliance department had access. Tr. 1313, 1342-44.

[3] For example, one of the government's cooperating witnesses was an analyst at Neuberger Berman who developed a financial model on Dell. When the analyst ran the model in January 2008 without any inside information, he calculated May 2008 quarter results of $16.071 billion revenue, 18.5% gross margin, and $0.38 earnings per share. Tr. 1566. These estimates turned out to be nearly perfect. Tr. 1567-68; A-2243 (Dell reported $16.077 billion revenue; 18.4% gross margin; $0.38 earnings per share).

The government's case against Newman was based almost entirely on Tortora's testimony as Tortora was the only witness who said he gave improperly obtained information to Newman.[4] Tortora brought his contacts with him when he joined Diamondback in September 2007, or developed them himself while there, and Tortora continued to exchange information with those same contacts after he left Diamondback in April 2010. Tr. 1132-35. By contrast, Newman did not cultivate or contact any of the alleged sources of inside information himself, and did not have any contact with them after Tortora left Diamondback.

C. The Trading in Dell

Most of the government's case – including three of the four substantive counts – related to Newman's trading in the shares of Dell. The government alleged that Rob Ray, an employee in Dell's Investor Relations department ("IR"), gave Dell quarterly financial information to Sandy Goyal, an analyst at Neuberger Berman, who gave the information to Tortora, who gave the information to Newman. Tr. 52-53.

[4] Tortora's credibility was severely undermined at trial. After his arrest, he made a series of tape recorded telephone calls with his analyst friends in which he referred to Newman as the "scapegoat," (Tr. 663), and agreed to "push every responsibility up to Todd" (Tr. 664-65). Tortora even referred to Newman as the "fall guy" in handwritten notes of these conversations. Tr. 653. Tortora attempted to distance himself from these remarks as something the FBI case agent coached him to say. Tr. 653, 663. But the defense called the case agent, who testified that he never told Tortora to refer to Newman as a "fall guy" or "scapegoat," (Tr. 3467-68, 3472), nor did he instruct Tortora to "push[] every responsibility up to Todd" (Tr. 3471).

1. Ray's relationship with Goyal

Rob Ray was an "acquaintance" of Sandy Goyal whom Goyal knew from business school and when the two worked together at Dell. Tr. 1390; Tr. of Plea Allocution at 17, 19, *United States v. Goyal*, No. 11 Cr. 935 (S.D.N.Y. Nov. 3, 2011), ECF No. 10 (Goyal describing Ray as an "acquaintance"). While at Dell, they had only intermittent contact. Tr. 1390. After Goyal left Dell for jobs at Prudential and then Neuberger Berman, his contact with Ray remained professional in nature; for example, Goyal never socialized with Ray while Ray was at Dell. Tr. 1512. Goyal testified that his relationship with Ray was "not very close or personal." Tr. 1411. When the government asked Goyal at trial if he and Ray were friends, Goyal said "[h]e was not that close." *Id.*[5]

As an IR employee, Ray was authorized to speak to analysts at financial firms. Tr. 2918. An important part of Ray's job was to run Dell's investor "targeting" program, through which IR identified and "targeted" firms that Dell wished to attract as long-term investors. Tr. 2901-04, 2921-22; A-2138. One of the firms that Dell targeted was Neuberger Berman, where Goyal worked.

[5] Goyal told Tortora that he received information from someone at Dell who had access to "overall" financial numbers, but Tortora did not know Ray's name, position, or the circumstances of how Goyal obtained the information. Tr. 156-57, 603. Newman, who learned everything from Tortora, did not know this information either.

Tr. 2903-04. Ray's supervisor knew that Ray spoke to Goyal, which the supervisor agreed "was a normal part of Rob Ray's job." Tr. 2929-30.

2. Ray's conversations with Goyal

Ray did not testify and the government did not offer any written communications between Ray and Goyal purportedly containing inside information. The only account of Ray's disclosure of Dell information came from Goyal's testimony.

According to Goyal, Ray began giving him Dell financial information in late 2007. Tr. 1415. Goyal and Ray's conversations were "casual"; that is, Goyal "didn't press" Ray for information. Tr. 1516. Goyal told Ray he was in Neuberger Berman's "research department," which Ray understood to mean that Goyal worked on financial models. *Id.* Goyal told Ray he was "working on a model and [] wanted to check the accuracy of the model." Tr. 1517. Goyal never told Ray he was sharing the information with anyone else or that anyone was trading on the information.[6] Tr. 1611.

The evidence showed that conversations in which IR personnel assisted analysts with models were a regular part of the business. Goyal testified that he

[6] The government made much of the fact that Ray and Goyal spoke outside of business hours on their personal phones. But Rob Williams, Ray's supervisor in the Dell IR department, testified that IR personnel were expected to be available to analysts at any time, and that "there was nothing wrong" with IR personnel speaking to analysts on nights and weekends. Tr. 2894-96.

spoke to IR departments "a lot" to run his model by them and to ask whether his assumptions were "too high or too low" or in the "ball park." Tr. 1511. Ray's supervisor in the Dell IR department further confirmed that it was "the job of a financial analyst" to use conversations with IR to come up with specific estimates, through modeling, of a company's upcoming financial results. Tr. 2880-81. Dell IR not only tracked analysts' models to monitor street expectations, but assisted analysts with developing their models. Tr. 2925. If an analyst working on a model inquired about a specific Dell financial line-item, IR "would absolutely discuss it." Tr. 2827-29.

Consistent with Goyal's testimony that he led Ray to believe he was seeking routine help in preparing a financial model, the information Ray provided was not precise. While Ray had access to precise numbers as a member of IR, Ray did not give Goyal those numbers, but rather gave "a range of numbers" or expressed the numbers relative to analysts' expectations (*i.e.*, higher/lower than market consensus). Tr. 1417. The ranges Ray provided for gross margin, for example, could be as large as 17% to 17.5%, or provided in more general terms such as "low 18's." Tr. 1417, 1517.

When Tortora received this information from Goyal, Tortora well understood it was not precise and conveyed that lack of precision to Newman. For

example, in advance of Dell's August 2008 quarterly announcement[7] – the basis for two of the substantive counts against Newman – Tortora told Newman he got Dell information from Goyal, based on which he "guess[ed]" that Dell's gross margin would not get as high as analysts were expecting. A-2012. Tortora further said gross margin would "maybe [be] 18 . . . but who knows[?]" *Id.* As to Dell's earnings per share that quarter, Tortora testified at trial that he either used Goyal's information to model the result or he "did a quick swag;"[8] either way, his calculation was incorrect. Tr. 248.

In addition to being imprecise, Ray's information (as filtered through Goyal) was often wrong, including during the two quarters for which Newman was charged with substantive insider trading. In the May 2008 quarter, Ray incorrectly told Goyal that gross margin would be higher than the market expected; in fact gross margin came in lower than expectations. Tr. 828-30. In the August 2008 quarter, Ray incorrectly told Goyal that revenue would be "slightly" higher than $16 billion, a number that proved to be nearly $400 million too low. Tr. 882. When Tortora saw Dell's actual revenue for the second quarter, he "freaked," (A-2019), because the number was so far off from what he had been expecting. On

[7] Dell typically announced its earnings four weeks after the quarter closed. For example, Dell announced earnings on August 28, 2008 for the quarter ended August 1, 2008.

[8] A "swag" is a "scientific wild-assed guess." *See* http://dictionary.reference.com/browse/scientific+wild+ass+guess.

the stand, Tortora admitted that Goyal's information on Dell was accurate only 70% of the time.[9] Tr. 887, 890. At one point, after giving Newman information from Goyal that ultimately proved incorrect, Tortora told Newman "from now on [I'm] goign [sic] to tell you to [do the] opposite of what i think." A-2378.

Goyal did not provide Ray with financial or tangible benefits in exchange for the information from Ray. Tr. 1512. Instead, the government's theory was that Goyal gave Ray advice on advancing his career. However, Goyal's testimony made clear that this "advice" was little more than a gesture to be polite, and certainly did not translate into any concrete assistance in helping Ray find a job. For example, Goyal "put in a good word" with someone who was not looking to hire at the time, (Tr. 1401), encouraged Ray to "keep trying," (Tr. 1402), reviewed Ray's resume, and provided "tips" on how to interview (Tr. 1423). But Goyal never found Ray a job at his own firm, Neuberger Berman, or anywhere else, nor did he arrange for Ray to be interviewed at Neuberger. Tr. 1513. Further, Goyal began giving Ray "career advice" nearly two years *before* Ray began providing information, (Tr. 1514), and Goyal said he would have given Ray advice even

[9] The evidence showed many additional examples of Goyal's information being inaccurate, most of which Tortora passed on to Newman. *See* A-2000 (wrong about gross margin in Dell's earnings announcement); A-2377–78 (wrong about Dell unit data reported by IDC/Gartner); A-2021 (information from Ray did not indicate problems less than three days before Dell pre-announced negative results); A-2396 (Tortora telling another analyst he was "dead wrong" on Dell last quarter).

without receiving information because he routinely did so for industry colleagues (Tr. 1515). Certainly, Ray never said that the career advice was a *quid pro quo* for assistance he was giving Goyal with his model. Tr. 1514.

Significantly, Goyal never told Tortora about any career advice that he was giving to Ray. Tortora was under the mistaken impression that Goyal gave stock tips to Ray. Tr. 1415. Goyal never testified about providing stock tips to Ray and there was no evidence that he did so; Goyal instead claimed that he gave career advice to Ray. Tr. 1423. In any event, Tortora never told Newman about career advice, stock tips or any other benefit Goyal allegedly gave to Ray, and there is no evidence that Newman knew of any benefit.

3. Newman's Trading in Dell

Newman's trading in Dell showed that he did not treat the information he received from Tortora as if it were the "sure thing" that the government sought to portray. To the contrary, Newman frequently traded in the opposite direction of Tortora's recommendations, even incurring losses after supposedly being tipped with inside information.

Newman traded Dell throughout the quarters in question, not just around the dates of the alleged tips. A-2331–39. Although Newman held significant positions going into Dell's May and August 2008 quarterly announcements, those positions were established through a series of purchases and sales over time, often

in the opposite direction of the information supplied by Tortora. Thus, Count Two of the Superseding Indictment charged that Newman bought Dell shares on May 16, 2008 on the basis of information from Goyal that Dell's results would be better than analysts' expectations. A-163. But a few days after this purchase – and before Dell's results were announced on May 29th – Newman *sold* almost the entire position *for a loss* of about $85,000. A-2369. Even Tortora supported reducing the position based on information wholly unrelated to Goyal. A-2383 (Tortora telling Newman he should "trim" Dell position based on Goldman Sachs analysis of reduced PC production in Taiwan). As the government's summary witness testified, selling stock when a trader expects it to rise in the near future would be "leaving profits on the table." Tr. 3182.

Similarly, Counts Three and Four charged Newman with taking short positions in Dell on August 5 and August 15, 2008 based on information from Goyal that Dell's results would be worse than the market was expecting. A-163. But in each case, Newman "covered" (*i.e.*, closed out) those short positions, sometimes for losses, after the alleged tips and before Dell announced its results on August 28, 2008. A-2371–72. As with the May trading, it would make no sense

for a trader to eliminate his position, especially for losses, if he had what he knew to be accurate inside information.[10]

4. Dell's leaks of quarterly financial results

While the government sought to draw nefarious inferences from the fact that Newman received earnings-related information in advance of Dell's quarterly announcements, the uncontroverted evidence established that Dell routinely leaked this information to analysts. The government's own witnesses acknowledged that these leaks were not made in exchange for personal benefits, and the government never contended that the leaks were improper. *E.g.*, Tr. 567-68, 574, 591, 602,

[10] The government argued that Newman ultimately took large positions in May and August based on Goyal's track record of providing reliable information in prior quarters. But, as explained above, Goyal's information was significantly incorrect in the immediately preceding quarters. *See* n.9, *supra*. Furthermore, Newman's positions going into the quarterly announcements were consistent with market developments separate and apart from the information Goyal learned from Ray. In the May quarter, Newman sold off most of the position he had put on after the alleged tip from Tortora on May 16th; but then Newman increased the position after Hewlett Packard's ("HP") quarterly announcement suggested that Dell won market share from HP, and again after positive comments from Dell's CEO, Michael Dell, just a day before Dell's earnings announcement. A-2335–36, 2384, 2386, 2435. In the August quarter, Newman covered much of the short position he had put on after the alleged tips from Tortora on August 5th and 15th; but then Newman began to short again on August 20th, the day after HP's quarterly announcement showed reduced margins in its business segments that overlapped with Dell. Tr. 866-891; A-2338, 2497, 2518. In addition, Tortora and Newman both thought Dell's gross margin would be low in the August quarter based on a detailed analysis by a Diamondback consultant, Scott Kanowitz, showing that average selling prices of Dell computers were falling sharply, thereby putting pressure on Dell's gross margin. *See* A-2008 (Tortora remarking that Kanowitz's analysis was "very negative for [Dell] margin"); A-2019 (Newman telling Tortora right after August announcement that Kanowitz's analysis had been helpful on gross margin issue).

695, 703-04, 721, 1510, 1644, 2512. The leaks were consistent with Dell's "targeting" program that was designed to build institutional relationships with analysts at firms that might invest in Dell, or were made to condition the market to unexpected news.[11] And while Ray's information was generally in the form of ranges or "directional," and often proved inaccurate, the Dell leaks were both precise and accurate. Among the leaks established at trial were the following:

- Halfway through Dell's quarter ended November 2, 2007, Lynn Tyson (head of Dell IR) told Tortora at a one-on-one breakfast that Dell's reported sales would start to improve, led by the small and medium business segment. A-2401. Tortora testified that this was "one of [Dell's] important segments" and that this was "useful information to get from somebody on the inside at Dell." Tr. 695-96.

- During the "quiet period" leading up to Dell's May 2008 earnings release, Dell's CFO, Don Carty, told an analyst at dinner that Dell would achieve headcount reduction three times larger than what the market was expecting. A-2380. This information proved accurate and material to Dell's earnings, announced two weeks later. Tr. 1576; A-2261–62, 2437.

- Halfway through Dell's quarter ended October 31, 2008, Dell IR told an analyst "offline" that Dell would miss quarterly estimates "by a country mile." A-2387. Dell's revenue missed by nearly $1 billion that quarter. A-2253, 2455.

[11] Ray's supervisor, Rob Williams, testified that it was essential for Dell to establish "trust and credibility" with the analyst community, which in part meant avoiding surprises such as disappointing quarterly results after the CEO had spoken positively about the company. Tr. 2949-50. Williams told the FBI that prior to Dell's August 2008 earnings announcement, Dell released some information because the company knew the quarterly results would not be good. Tr. 2897-98. On the stand, Williams claimed he never made that statement to the FBI, though he acknowledged it was contained in the FBI's report of its interview with him. *Id.*

- During the "quiet period" leading up to Dell's November 2009 earnings release, Tyson told an analyst that gross margin would be stable even if revenue missed expectations. A-2388. When Dell reported earnings, revenue missed expectations by nearly $1 billion, but gross margin was stable. A-2253, 2455.

- Just six days before the November 2008 earnings release, during the "quiet period," Dell IR told an analyst that the company would report earnings of at least 30 cents per share. A-2389.

- Halfway through Dell's quarter ended January 30, 2009, Tyson told Tortora that soon-to-be released industry data would show poor results for Dell. A-2394. When the data was released, it showed that Dell's PC shipments declined more than any other manufacturer. A-2473. Tyson also told Tortora that "low 12%" operating expense was "reasonable" for the quarter and Tyson "sounded fairly confident on [gross margin] and [operating margin]." A-2394.

- Roughly one month before the end of Dell's quarter ended January 30, 2009, Tyson told analysts that "all is well w[ith] share loss yesterday will make it up on margins." A-2395. Tortora testified that he understood this to mean that despite weaker revenues (which had been reported a day earlier), Dell's earnings per share would not suffer because the revenue shortfall would be made up for by higher margins. Tr. 946.

- Two weeks before the end of Dell's quarter ended May 1, 2009, Tyson told analysts at a group lunch that Dell's normalized gross margin would be 18% for the current quarter. Tr. 1506; A-2397. Dell later announced gross margin of 18.1%. A-2403.

- Three weeks before the end of Dell's quarter ended May 1, 2009, Tortora learned from Dell IR that gross margin would be "in-line at best" with market expectations of 17.7%. A-2399. This proved to be accurate when Dell reported gross margin of 17.6%. Dell Inc., Current Report (Form 8-K, Ex. 99-1) (May 20, 2010).[12]

[12] The Court may take judicial notice of "relevant matters of public record." *Giraldo v. Kessler*, 694 F.3d 161, 164 (2d Cir. 2012).

- Rob Williams of Dell IR testified that Dell provides specific unit sales data, a critical component of revenue, to paid research services used by financial analysts to predict earnings. Tr. 2887-88.

- Sandy Goyal testified that, wholly apart from Rob Ray, he had five or so "friends" at Dell who gave him segment financial information in advance of quarterly announcements. Tr. 1384-85, 1409. For example, Goyal's friends told him in January 2008, a month and a half before Dell announced its earnings, that the US corporate business would experience sequential decline in margins and that US consumer revenue growth was fine. A-2100. At trial, Tortora testified that these were "legitimate" contacts with "useful" information that he did not believe "cross[ed] the line." Tr. 961-62.

Even after the trial, Dell continues to leak specific information about current quarter financial results. On May 14, 2013, the *Wall Street Journal* reported that "according to [a] person briefed on the financial results," Dell would report revenue of "roughly $14 billion," operating income of $600 million, and earnings per share of "20 cents," all numbers that were significantly different from analysts' expectations. *See* Shira Ovide, *Dell to Miss Profit Estimates, Beat on Revenue*, Wall St. J. May 14, 2013 (available at http://online.wsj.com/article/SB10001424127887324715704578483151440568828.html). Two days later, on May 16, Dell reported revenue of $14.1 billion, operating income of $590 million, and earnings of $0.21 per share. *See* Dell Inc., Current Report (Form 8-K, Ex. 99-1) (May 16, 2013).

5. Diamondback's payments to Ruchi Goyal

The government introduced evidence that Diamondback paid $175,000 in consulting fees to Sandy Goyal's wife, Ruchi Goyal, and argued that these were

secret payments for inside information. Tr. 3678. The proof at trial, however, told a different story.

Prior to working at Diamondback, Tortora was employed as an analyst at Prudential, where Goyal worked for him. Tr. 127-28. After Prudential shut down its research division in summer 2007, Tortora moved to Diamondback and Goyal moved to Neuberger Berman. Tr. 133, 136, 1375. Shortly after Tortora started at Diamondback, he asked Goyal if Goyal could continue doing the same kind of support work that he had been doing for Tortora at Prudential, and Goyal agreed.[13] Tr. 1519, 1523. Thereafter, Goyal helped Tortora with financial modeling and analysis of various stocks, as he had done at Prudential. Tr. 1523-31. Goyal also provided Tortora information gleaned from various sources, including from several Dell employees whom neither Tortora nor Goyal believed gave information improperly. Tr. 961, 1384-85. Importantly, when this consulting arrangement was put in place, it did not contemplate Goyal getting information from Rob Ray because Goyal had not yet begun to receive information from Ray. Tr. 1523.

In exchange for providing these services, Tortora and Goyal agreed that Diamondback would pay Goyal $18,750 quarterly through its soft dollar

[13] Around the same time, Tortora arranged for Diamondback to hire other consultants, (Tr. 629), none of whom the government has suggested provided information improperly. This process of hiring consultants to assist in research activities was a normal and expected part of a hedge fund analyst's job. Tr. 684.

program.[14] Tr. 1427. Diamondback also paid Goyal a $100,000 bonus at the end of 2008. Tr. 1431-32. However, instead of paying Goyal directly, Tortora and Goyal agreed that Diamondback would pay Goyal's wife. According to both Tortora and Goyal, this was not done because they wanted to conceal that Goyal was working as a consultant; rather, Goyal's visa status prohibited him from working for more than one employer. Tr. 384-85, 1425-26. No portion of the money paid to Goyal was intended to go to Ray and none did. Tr. 1612.

D. The Trading in NVIDIA Corp.

The government also charged Newman with one substantive count of insider trading in the stock of NVIDIA. As with Dell, Newman was several steps removed from the source, Chris Choi, who worked in NVIDIA's finance department. A-2270. Choi passed information to his friend Hyung Lim, (Tr. 3032), who gave information to Danny Kuo, an analyst at Whittier Trust, who gave information to Tortora, who gave information to Newman. Tr. 61-63.

The NVIDIA information – like the Dell information – was often incorrect. For example, in February 2009, Kuo sent an email to Tortora with his calculation for non-GAAP gross margin based on information he received from Choi, which turned out to be 30% off. Tr. 995-98; A-2109. As a result of this incorrect

[14] Asset managers like Diamondback generate "soft dollars" by paying trading commissions to broker/dealers, who give back a portion of those commissions to be used for research and related services, including to pay consultants. Tr. 1315.

information, Kuo's calculation for earnings per share was also incorrect. Tr. 999-1000.

As to why Choi provided information to Lim, Choi did not testify, and his motivation was not apparent from the testimony of others. Lim himself said that he did not provide anything of value to Choi in exchange for the information. Tr. 3067-68. During Lim's direct examination, the government tried to establish that Choi knew that Lim was trading on the information Choi provided, (Tr. 3044, 3083), but Lim testified during cross-examination that Choi did not know that Lim was trading NVIDIA stock. Tr. 3068-69. In addition, Lim did not trade on the information from Choi between April 2009 and July 2009, which includes the period relevant to the only NVIDIA count against Newman. Tr. 3078.

There was no evidence that Tortora had any understanding of why Choi provided information to Lim, and Tortora testified that he did not know whether Choi received any kind of personal benefit. Tr. 994. If Tortora, through whom the information flowed to Newman, did not know these facts, Newman himself could not have known them.

Like Dell, the evidence at trial showed that NVIDIA IR selectively disclosed accurate, confidential information to analysts in advance of the company's earnings announcements. The government witnesses testified that there was nothing improper about these disclosures. Tr. 1006-07, 1043. In one example,

NVIDIA IR told a Diamondback consultant halfway through the company's quarter ended April 26, 2009 that "09 [would] suck" and that "[m]argins have been hit by collapse of workstation demand . . . higher mix to chipsets, [and] drop in [desktop] margins." A-2417. This information proved to be accurate when NVIDIA reported its earnings in May 2009. A-2300. In another example, Mike Hara, head of NVIDIA IR, met with Sam Adondakis (another analyst co-conspirator) one month before the end of NVIDIA's quarter ended April 26, 2009. During the meeting, Adondakis asked Hara about an analyst's recent, precise revenue estimate for the current quarter, in response to which Hara "[d]id not flinch." A-2419. Adondakis's written report from the meeting indicated that gross margin would be flat for the quarter, (A-2421), which proved accurate. A-2300, 2427. Finally, Tortora testified it was well known in the investment community that in May 2009 NVIDIA would post a significant revenue increase over the prior quarter, (Tr. 1008, 1112-13), a fact that could only have come from inside the company.

Newman's trading in NVIDIA, as with Dell, was inconsistent with a belief that he was in possession of reliable inside information. Count Five of the Superseding Indictment charged Newman with taking a short position in NVIDIA leading up to the company's quarterly announcement on May 7, 2009. A-163. But on three occasions in the eight days leading up to the announcement, Newman

covered his short position for losses. A-2374–76. Indeed, Newman eliminated his entire short position the day before NVIDIA's announcement for a loss of over $55,000. A-2376. In the end, and after eliminating a significantly larger short position, Newman held only a small short position at the time of the announcement, which resulted in a gain of about $73,500. A-2373. The government's summary witness confirmed that had Newman kept his larger position from days earlier, he would have made considerably more money. Tr. 3206. The government offered no explanation as to why Newman would take off a potentially profitable position if he knew he had reliable information that no one else had.

E. The Jury Instruction on *Mens Rea*

At the charge conference, Newman requested an instruction – based on *Dirks v. SEC*, 463 U.S. 646 (1983) and decades of Southern District of New York precedent – that to convict, the jury had to find that Newman knew that the insiders provided material, non-public information in exchange for personal benefits. Tr. 3594-605; A-200–01, 203. The district court acknowledged that this request was supported by *Dirks* but concluded that it was inconsistent with this Court's decision in *SEC v. Obus*, 693 F.3d 276 (2d Cir. 2012). Tr. 3595. As a result, the district court instructed the jury that it had to find (i) that the insider breached a duty of trust and confidence by disclosing material, nonpublic information and,

separately, (ii) that the insider personally benefited from the disclosure. Tr. 4028. But with respect to Newman's knowledge, the district court instructed the jury that it had to find only that Newman knew the information was disclosed in breach of a duty; the district court refused to instruct the jury that it needed to find that Newman knew the information was disclosed in exchange for a personal benefit. *Id.*

SUMMARY OF ARGUMENT

Trading on material, non-public, inside information is illegal only if the insider engaged in self-dealing by disclosing the information for personal gain. *Dirks v. SEC*, 463 U.S. 646, 662 (1983) ("[T]he 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."). And since personal gain is the key fact that distinguishes legal from illegal activity, standard principles of *mens rea* require that a criminal defendant know about the personal benefit. *E.g.*, *Staples v. United States*, 511 U.S. 600, 605 (1994) ("conventional *mens rea* element" requires "that the defendant know the facts that make his conduct illegal"). This has been the reasoning of nearly 30 years of precedent in the Southern District of New York requiring knowledge of the benefit as a pre-requisite to insider trading liability. *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); *State Teachers Ret. Bd. v. Fluor Corp.*, 592 F. Supp. 592, 594 (S.D.N.Y. 1984).

The district court acknowledged that requiring knowledge of a personal benefit was "supportable certainly by the language of *Dirks*." Tr. 3595. But the court declined the proposed defense instruction, citing this Court's decision in *SEC v. Obus*, 693 F.3d 276 (2d Cir. 2012). *Obus*, however, was a *civil* case that did not implicate criminal *mens rea* requirements. Moreover, the parties in *Obus* did not address whether a tippee must have knowledge of a benefit provided to the insider and the Court had no occasion to decide that issue. Indeed, Judge Rakoff's decision in *Whitman* was issued *after* the *Obus* decision, yet Judge Rakoff did not read *Obus* to dispense with the knowledge of benefit requirement in a criminal case; in fact, Judge Rakoff held that such knowledge *was* an essential element for criminal tippee liability.

The appropriate remedy for the district court's improper instruction on knowledge of benefit is a judgment of acquittal. The government presented no evidence that Newman knew of any personal benefits to the insiders, and there was no evidence from which a reasonable inference of such knowledge could be drawn. To the contrary, the overwhelming evidence was that Dell and NVIDIA employees routinely gave out financial information in advance of earnings announcements for reasons other than personal gain; the only reasonable inference to someone in

Newman's shoes was that the information he received was disclosed under similar circumstances. Certainly, there was no basis in the record to presume from the fact that an insider provided financial information that it must have been in exchange for a personal benefit.

The erroneous jury instruction on knowledge of benefit was compounded by other flawed instructions that further reduced the government's burden to establish a culpable state of mind. First, the court improperly gave a "conscious avoidance" charge notwithstanding the lack of any foundation for such a charge as required by this Court's precedents. In particular, there was no evidence that Newman deliberately sought to avoid learning the circumstances under which the information was disclosed. Second, notwithstanding that the parties vigorously disputed whether the information at issue in this case was truly "confidential" (in light of the evidence of wide-spread leaks), the district court refused to give a charge guiding the jury as to the definition of "confidential." In *United States v. Mahaffy*, 693 F.3d 113 (2d Cir. 2012), this Court said such guidance was important in cases, like this one, where a company's practical efforts to keep information secret diverge from the lofty goals articulated in generic confidentiality policies.

The government's proof was also inadequate as to the essential requirement that the insiders breached fiduciary duties to their employers by improperly providing information in exchange for personal benefits. For example, the

undisputed evidence established that the Dell insider, Rob Ray, provided information to assist Sandy Goyal, a research analyst at another firm, in developing a financial model. Goyal never told Ray he was trading on the information or sharing it with anyone else. Such innocuous assistance in modeling was well within Ray's job responsibilities, and does not constitute a deliberate breach of a duty of trust and confidence that the law requires. Likewise, the government's proof that information was provided in exchange for a personal benefit was insufficient because – even accepting that "career advice" can constitute a personal benefit – Goyal began giving Rob Ray the advice years before any improper information was provided, the advice was generic and ineffective, Goyal testified he would have given similar advice to any professional colleague, and Ray never indicated the advice was a *quid pro quo* for him to assist Goyal with his model.

Finally, the government's proof at trial varied impermissibly from the charges in the Superseding Indictment on the core issue of the content of the inside information. As to Dell's May 2008 quarter, the Superseding Indictment specified that the inside information consisted of tips that gross margin would be higher than analysts' expectations. Confronted at trial with evidence that gross margin was actually lower than consensus, the government switched theories and argued that the inside information related to revenue and earnings, not gross margin. Newman was prejudiced because, having refuted the charges in the Superseding Indictment,

he was then confronted mid-trial with a new charge as to which he had inadequate time or opportunity to prepare.[15]

STANDARD OF REVIEW

This Court reviews *de novo* challenges to jury instructions where, as here, the court refused to give an instruction proposed by the defense. *United States v. Applins*, 637 F.3d 59, 72 (2d Cir. 2011). The Court also reviews *de novo* the sufficiency of the evidence, *United States v. Desposito*, 704 F.3d 221, 226 (2d Cir. 2013), and whether the proof at trial materially varied from the conduct charged in the indictment. *See United States v. D'Amelio*, 683 F.3d 412, 416 (2d Cir. 2012).

ARGUMENT

I. THE JURY SHOULD HAVE BEEN INSTRUCTED THAT KNOWLEDGE OF A PERSONAL BENEFIT WAS REQUIRED

Newman is entitled to a judgment of acquittal because the instructions to the jury omitted a key element – the tippee's knowledge of the insider's self-dealing – and the government's proof was insufficient to establish a crime under the correct legal standard.

A. The Personal Benefit Requirement

The Supreme Court has long held that trading on material, non-public information disclosed by a company insider is not, by itself, illegal. *Dirks v. SEC*,

[15] Pursuant to Federal Rule of Appellate Procedure 28(i), Newman joins in Chiasson's arguments, including with respect to forfeiture as discussed in Point III of Chiasson's brief on appeal.

463 U.S. 646, 653-54 (1983) (citing *Chiarella v. United States*, 445 U.S. 222, 235 (1980)). Such trading is illegal only if the insider breached a fiduciary duty to shareholders and the tippee knows about the breach. As the Supreme Court explained in *Dirks*, "a tippee assumes a fiduciary duty to the shareholders of a corporation not to trade on material nonpublic information only when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should know that there has been a breach." 463 U.S. at 660.

In the context of insider trading, an essential element of a breach of fiduciary duty giving rise to tippee liability is that the insider engaged in self-dealing. *Id.* at 654. As summarized by the Supreme Court:

> Whether disclosure is a breach of duty therefore depends in large part on the purpose of the disclosure. . . . [T]he 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. And absent a breach by the insider, there is no derivative breach [by tippees].

Id. at 662. Accordingly, tippees do not "assume an insider's duty to the shareholders . . . because they receive inside information[.]" *Id.* at 660; *id.* at 659 ("recipients of inside information do not invariably acquire a duty to disclose or abstain"). Rather, they assume such a duty only when "[inside information] has been made available to them *improperly*," that is, when an insider discloses information in exchange for a personal benefit. *Id.* at 660 (emphasis in original).

The personal benefit requirement as articulated in *Dirks* is not merely advisory or incidental – it goes to the core of the statutory scheme prohibiting insider trading. Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and SEC Rule 10b-5 promulgated thereunder prohibit *fraud* in connection with the purchase or sale of securities. Not all breaches of fiduciary duty are fraudulent. *Dirks*, 463 U.S. at 654 (citing *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 472 (1977)). In an insider trading case, the fraud derives from the "inherent unfairness" of a corporate insider taking advantage of corporate information for *personal gain*. *Id.* at 654, 662 (citing *In re Cady, Roberts & Co.*, 40 S.E.C. 907 (1961)). In other words, it is the insider's corrupt use of corporate information to benefit himself rather than the company that renders the disclosure improper.

Thus, personal benefit to the insider marks a bright line between conduct that is fraudulent (and therefore prohibited) and conduct that is entirely legal. The facts of *Dirks* illustrate this point: Mr. Dirks was cleared of wrongdoing because the company whistleblower who provided him with confidential inside information received no personal benefit for doing so. And numerous courts since *Dirks* have similarly declined to impose liability on traders where they obtained confidential information from company insiders under circumstances that did not involve self-dealing. *See, e.g.*, *SEC v. Anton*, No. 06-2274, 2009 WL 1109324, at *9 (E.D. Pa. Apr. 23, 2009) (no evidence that tipper benefitted because he had limited social or

personal relationship with tippee); *SEC v. Maxwell*, 341 F. Supp. 2d 941, 948 (S.D. Ohio 2004) (tipper gave information to his barber but had no family relationship or close friendship, and no history of gifts between the two men); *SEC v. Switzer*, 590 F. Supp. 756, 762, 764, 766 (W.D. Okla. 1984) (tippee overheard conversation at sporting event but provided no benefit to tipper); *see also United States v. Evans*, 486 F.3d 315, 323 (7th Cir. 2007) (speculating that jury acquitted tipper because he did not receive any personal benefit); *SEC v. Rorech*, 720 F. Supp. 2d 367, 415-16 (S.D.N.Y. 2010) (tipper and tippee had "purely professional working relationship" and "were not friends").

B. Criminal Tippee Liability Requires Knowledge of a Personal Benefit to the Insider

If a personal benefit to the tipper marks a bright line between lawful and unlawful conduct, then it is axiomatic that a tippee must know of the personal benefit. *Dirks* made this clear in its holding that a tippee must "know[] . . . that there has been a breach" of fiduciary duty. 463 U.S. at 660. Since there is no breach giving rise to tippee liability absent a personal benefit, *id.* at 662, a tippee can "know" of a breach only if he knows of the benefit.[16]

[16] This reading of *Dirks* is supported by the Supreme Court's subsequent decision in *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299 (1985) in which the Court cited *Dirks* for the proposition that "[a] tippee generally has a duty to disclose or to abstain from trading on material nonpublic information only when he knows or should know that his insider source 'has breached his fiduciary duty to the shareholders by disclosing the information' — in other words, where the

The Supreme Court's reasoning in *Dirks* is consistent with the basic proposition in our jurisprudence that, to be convicted of a crime, a person must know the difference between innocent and wrongful behavior, and must know on which side of the line his conduct falls. *Morissette v. United States*, 342 U.S. 246, 250 (1952) (referring to "ancient," "universal," and "persistent" requirement in criminal cases of a culpable state of mind). If wrongfulness turns on the existence of a fact – in this case, the fact that the insider disclosed the information in exchange for a personal benefit – the government must prove the defendant's knowledge of that fact. *Id.* at 271 (in prosecution for stealing government property, defendant "must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion"); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994) (defendant must know that actors in pornographic film were underage because "the age of the performers is the crucial element separating legal innocence from wrongful conduct"); *Staples v. United States*, 511 U.S. 600, 605 (1994) (noting "conventional *mens rea* element, which would require that the defendant know the facts that make his conduct illegal"); *Liparota v. United States*, 471 U.S. 419, 425-26 (1985) (defendant must know that his acquisition or

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insider has sought to 'benefit, directly or indirectly, from his disclosure.'" *Id.* at 311 n.21 (quoting *Dirks*, 463 U.S. at 660, 662).

possession of food stamps was in a manner unauthorized by statute or else it would "criminalize a broad range of apparently innocent conduct").[17]

The need to require proof that a defendant knew of a personal benefit to the insider is particularly compelling here because the securities fraud statute limits criminal liability to persons who act "willfully." 15 U.S.C. § 78ff(a). In this context, willfulness means "'a realization on the defendant's part that he was doing a wrongful act under the securities laws.'" *United States v. Cassese*, 428 F.3d 92, 98 (2d Cir. 2005) (quoting *United States v. Peltz*, 433 F.2d 48, 55 (2d Cir. 1970)). This Court has recognized that the *mens rea* standard for insider trading is rigorous so as to prevent criminalization of conduct that a defendant did not understand to be illegal. *United States v. Kaiser*, 609 F.3d 556, 569 (2d Cir. 2010) ("it is easy to imagine an insider trader who receives a tip and is unaware that his conduct was illegal and therefore wrongful"). Since *Dirks* defines the line between legal and illegal conduct in relation to whether there was a personal benefit to the insider, a

[17] In opposition to Newman's motion for bail pending appeal, the government cited a series of cases in which a defendant did not have to know about facts pertaining to the seriousness of a crime or subject matter jurisdiction. *E.g.*, *United States v. King*, 345 F.3d 149, 152 (2d Cir. 2003) (defendant had to know only that he possessed illegal drugs, not the drug type and quantity); *United States v. Griffith*, 284 F.3d 338, 350-51 (2d Cir. 2002) (defendant charged with transporting minor in interstate commerce for purposes of prostitution need not know age of minor because defendant already knows he is promoting prostitution, which is a crime). These cases are inapposite because the personal benefit requirement marks the difference between unlawful and lawful conduct, and is not merely an aggravating circumstance or a basis for the court's jurisdiction.

"willful" criminal violation requires that the defendant be aware of the personal benefit.

Applying the foregoing principles, nearly thirty years of precedent in the Southern District of New York (prior to the district court's decision in this case) established that insider trading liability requires a tippee to know that the insider received a personal benefit. *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); *State Teachers Ret. Bd. v. Fluor Corp.*, 592 F. Supp. 592, 594 (S.D.N.Y. 1984).[18] Each of these decisions found that, under *Dirks*, self-dealing is an essential element of a breach of fiduciary duty giving rise to insider trading liability and, as such, must be known to the defendant. *Whitman*, 904 F. Supp. 2d at 370-72; *Rajaratnam*, 802 F. Supp. 2d at 498-99; *State Teachers*, 592 F. Supp. at 594. As explained by Judge Rakoff in *Whitman*:

> 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 if there has been an 'improper' disclosure of inside information.

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[18] *See also United States v. Santoro*, 647 F. Supp. 153, 170 (E.D.N.Y. 1986) ("the tippee must know that the tipper has transferred information, that that information is material and nonpublic, and that the tipper has done so for personal benefit"), *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) (tippee can be liable "if the tippee had knowledge of the insider-tipper's personal gain").

904 F. Supp. 2d at 371. Further, because "[d]erivative liability can attach only if the tippee recognizes that the relationship between tipper and tippee is such that the tippee has effectively become a participant after the fact in the insider's breach," the tippee must know each of the facts that gives rise to the tipper's liability in the first place. *Rajaratnam*, 802 F. Supp. 2d at 499 (quoting *Dirks*, 463 U.S. at 659); *State Teachers*, 592 F. Supp. at 594-95 (same).

The court below agreed that requiring knowledge of a personal benefit was "supportable certainly by the language of *Dirks*," (Tr. 3595), but declined to give the requested instruction based on its reading of this Court's decision in *SEC v. Obus*, 693 F.3d 276 (2d Cir. 2012). In *Obus*, a civil case, this Court said that tippee liability requires that "the tippee knew or had reason to know that the tippee improperly obtained the information (*i.e.*, that the information was obtained through the tipper's breach)." *Id.* at 289. That statement is correct as far as it goes. But the *Obus* Court did not decide the further question of what it means to have knowledge of the insider's breach in a criminal insider trading case – *i.e.*, whether the tippee must know of an insider's self-dealing. *Obus* did not reach this issue because the parties did not present it.[19] Specifically, the defendants in *Obus*

[19] The same situation arose in *United States v. Goffer*, No. 11-3591-cr, 2013 WL 3285115 (2d Cir. July 1, 2013). As in *Obus*, the defendant in *Goffer* asserted that the evidence was insufficient to establish knowledge of a breach of duty, but did not raise the knowledge of personal benefit issue. *Id.* at *5. This Court noted that:

disputed whether any tip occurred, arguing that there was no breach of fiduciary duty because the tipper was merely conducting authorized due diligence when he had a conversation with his friend at a hedge fund. *Id.* at 289-90. They did not contest whether the tipper received a personal benefit, *see* SEC Br. at 31 n.5, *SEC v. Obus*, No. 10-4749 (2d Cir. Mar. 29, 2011), nor did they argue that to be found liable they had to have known that the tipper received a benefit. Indeed, the district court opinion in *Obus* makes no mention of any of the tippees' knowledge (or lack of knowledge) of any personal benefits.[20] *SEC v. Obus*, No. 06 CIV 3150, 2010 WL 3703846 (S.D.N.Y. Sept. 20, 2010).

It is also critically significant that *Obus* was a civil case. This is an important distinction because, as discussed above, a criminal conviction under the securities fraud statute requires willfulness while civil liability does not. The *Obus*

> [Defendant] does not challenge, and we therefore do not discuss, any elements of insider trading aside from the knowing use of material nonpublic information obtained in violation of a fiduciary duty.

Id. n.9. This is exactly right and, presumably, this Court had the same principle in mind in *Obus*, namely that courts decide issues as presented to them and do not decide issues that neither party has raised.

[20] It is understandable that the parties in *Obus* did not focus their arguments on personal benefit (or knowledge of personal benefit) because, historically, the Second Circuit has not required a personal benefit in insider trading cases, like *Obus*, that are prosecuted under the misappropriation theory. *See United States v. Libera*, 989 F.2d 596 (2d Cir. 1993); *SEC v. Lyon*, 605 F. Supp. 2d 531, 548 (S.D.N.Y. 2009) ("the Second Circuit has declined to impose a 'benefit' requirement in misappropriation theory cases").

Court was well aware of the civil nature of the claims at hand, including in the context of describing the scienter requirement. *E.g.*, 693 F.3d at 286 ("We read the scienter requirement set forth in *Hochfelder* . . . to apply broadly to civil securities fraud liability . . ."). While the same basic elements may apply in civil and criminal cases, the degree to which a defendant must *know* of the existence of an element can be higher in the criminal context. *See Staples*, 511 U.S. at 616-18 (criminal penalties support imposition of *mens rea* requirement even if statute is silent); *X-Citement Video*, 513 U.S. at 72 (same). This is especially the case where, as here, the statute expressly distinguishes between civil and criminal violations and requires heightened *mens rea* for the latter.

In sum, *Obus* left open the question of whether, in a criminal insider trading case, knowledge of a breach of fiduciary duty means knowledge that the tippee received a benefit. Indeed, the *Obus* decision does not even cite or discuss either *Rajaratnam* or *State Teachers*, the two prior lower court decisions squarely addressing the knowledge of benefit issue. Presumably, this Court would have at least acknowledged this long-standing precedent had it intended to announce a contrary result on such an important issue.[21] Judge Rakoff's written decision in

[21] If *Obus* is read to permit criminalization of trading without knowledge of the insider's self-dealing, then it announced a new rule, contrary to the *State Teachers* and *Rajaratnam* decisions before it, and should not be applied retroactively to Newman's conduct. *See United States v. Lanier*, 520 U.S. 259, 266 (1997) (due

Whitman, issued after *Obus* was decided, is particularly instructive on the limited application of *Obus* to a criminal case. Judge Rakoff undertook a comprehensive analysis of the personal benefit element in insider trading law; in doing so, he did not construe *Obus* as affecting his analysis that in a criminal case, a tippee must know that information was provided in exchange for a personal benefit because, "without such a knowledge requirement, the tippee does not know if there has been an 'improper' disclosure of inside information." *Whitman*, 904 F. Supp. 2d at 371.

C. A Judgment of Acquittal Is Warranted Because the Government's Proof Was Insufficient Under the Correct Legal Standard

Where the government's proof is insufficient, the proper remedy is acquittal. *United States v. Santos*, 449 F.3d 93, 95 (2d Cir. 2006). Applying the correct legal standard, there was *no evidence* in this case, let alone proof beyond a reasonable doubt, establishing that Newman knew the insiders were disclosing information in exchange for personal benefits. Tortora, the sole conduit of information to Newman, never testified that he discussed with or even suggested to Newman that the insiders – Ray and Choi – were receiving personal benefits.

With respect to Dell, Tortora was under a mistaken understanding as to what benefit Ray might have been receiving, but in any case did not pass any information about benefits to Newman. *See* p. 15, *supra*. With respect to

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process bars courts from applying criminal statutes to "conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope").

NVIDIA, Tortora testified that he was unaware of whether Choi was receiving a benefit, (Tr. 994), and so could not have passed any such knowledge to Newman.

Nor could a jury reasonably infer knowledge of a personal benefit from the circumstances of the disclosures. Indications that the information came from insiders or was of a type that official company policies deemed to be confidential are insufficient in view of the extensive trial evidence that Dell and NVIDIA employees routinely disclosed quarterly results in advance of official earnings announcements for reasons other than self-dealing.[22] *See* pp. 17-20, *supra.* Newman was copied on virtually all of the emails describing Dell and NVIDIA leaks and had no reason to think that the information that Tortora obtained from Goyal and Kuo was any different. The leaks included precise information, usually accurate, that was disclosed to analysts even during the "quiet period" leading up to the earnings announcements. Newman's awareness of like circumstances shows only that he was aware of being privy to similar leaks, and says nothing about whether the insiders engaged in self-dealing (which they did not with respect to the myriad leaks revealed during trial). Certainly these circumstances cannot establish

[22] Tortora also acknowledged that, in general, company insiders give out information that is supposed to be confidential without any personal benefit in return. Tr. 688. Again, this negates any inference that there must be a personal benefit whenever confidential information is obtained from an insider.

beyond a reasonable doubt that Newman knew of self-dealing by the insiders. Accordingly, a judgment of acquittal is warranted.

II. THE DISTRICT COURT IMPROPERLY CHARGED THE JURY REGARDING CONSCIOUS AVOIDANCE AND THE DEFINITION OF CONFIDENTIAL INFORMATION

The government's burden to prove criminal responsibility was further, and impermissibly, diminished by two other jury instructions relating to conscious avoidance and whether the financial information at issue was truly "confidential."[23] Each of these errors provides an independent basis for reversal.

A. Conscious Avoidance

Over defense objection, the district court instructed the jury that knowledge "may be established by proof that the defendant you are considering deliberately closed his eyes to what otherwise would have been obvious to him." Tr. 4037. This instruction was error because the necessary factual predicate was absent.

A "conscious avoidance" instruction is permissible only if "the appropriate factual predicate for the charge exists." *United States v. Ferrarini*, 219 F.3d 145,

[23] The district court's refusal to give jury instructions as requested by the defense stands in marked contrast to its willingness to interject itself into witness examinations, which ultimately inured to the benefit of the government. For example, during the cross-examination of Rob Williams, the district court asked questions of Williams that allowed him to retract his defense-favorable answer about public statements by Dell executives on current quarter business. Tr. 2949. In another example, the court *sua sponte* instructed the jury on conspiracy immediately after Hyung Lim admitted that his conduct "had nothing to do with Todd Newman." Tr. 3051-52.

154 (2d Cir. 2000). This requires evidence that the defendant "deliberately avoided confirming" a disputed fact. *United States v. Svoboda*, 347 F.3d 471, 480 (2d Cir. 2003); *Goffer*, 2013 WL 3285115 at *9; *see Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2070-71 (2011) (conscious avoidance consists of "deliberate actions" to avoid knowledge). It is "essential to the concept of *conscious* avoidance that the defendant must be shown to have *decided* not to learn the key fact, not merely to have failed to learn it[.]" *United States v. Rodriguez*, 983 F.2d 455, 458 (2d Cir. 1993) (emphasis in original).

In this case, the government offered no evidence that Newman deliberately decided not to learn that the information he was receiving was improperly obtained. Tortora repeatedly testified that he relayed information to Newman *verbatim*. Tr. 160, 238, 613, 789. There was no evidence that Newman asked Tortora to limit what he provided or that Tortora did so. *Cf. Goffer*, 2013 WL 3285115, at *9 (conscious avoidance charge appropriate where defendant told co-conspirator he was "better off not knowing where [his tips] were coming from"). Much of Tortora's communication with Newman was in the form of emails that Tortora forwarded to Newman just as he received them. *E.g.*, A-2001–05, 2108. 2111. And Newman frequently asked for *more information* about Tortora's sources and their reliability. *E.g.*, A-2012 (asking whether Dell information was from Goyal); A-2112 (asking whether NVIDIA source was "good on gm"). On

this record, the conscious avoidance charge impermissibly allowed the jury to find that Newman *should have known* that the information was obtained improperly, not that he *deliberately* avoided knowing. This is error. *Ferrarini*, 219 F.3d at 157 (improper to establish knowledge on the basis that "the defendant had not tried hard enough to learn the truth").

The government will no doubt argue that the circumstances of Newman's trading were "so overwhelmingly suspicious" that his "failure to question the suspicious circumstances establishes the defendant's purposeful contrivance to avoid guilty knowledge." *Svoboda*, 347 F.3d at 480 (citations omitted). But a "failure to question" does not constitute the "deliberate" action that the Supreme Court has recently held defines the concept of conscious avoidance. *Global-Tech Appliances*, 131 S. Ct. at 2071. And, in any event, the circumstances here were the opposite of "overwhelmingly suspicious." The information Newman received was consistent with legitimate financial modeling and with the many leaks by Dell and NVIDIA that not even the government argued were unlawful. The information was imprecise and frequently incorrect, further suggesting that it was not obtained improperly. Newman certainly did not treat the information as if there was anything suspicious in how Tortora obtained it, as evidenced by his open discussions with Tortora on his office email, which could be read by the compliance department and the SEC. And even the government apparently did not

find the disclosures sufficiently suspicious to justify charging Ray and Choi, the very insiders who made the disclosures and were closest to the relevant facts. Under these circumstances there was no basis for a conscious avoidance charge premised on "overwhelmingly suspicious" circumstances.

B. Confidential Information

A hotly disputed issue at trial was whether the alleged inside information was truly confidential given that Dell and NVIDIA regularly disclosed this type of information to the market. The government argued that Dell and NVIDIA had written policies prohibiting any disclosure of quarterly information prior to their official earnings releases. *E.g.*, Tr. 2807, 3097. The defense countered with extensive evidence of leaks that cast doubt on whether those companies really tried to keep quarterly information secret. *See* pp. 17-20, *supra*.

In *United States v. Mahaffy*, 693 F.3d 113 (2d Cir. 2012), this Court provided important guidance as to how such disputed confidentiality issues should be resolved. The Court explained that a company's information is not "confidential" unless the company takes affirmative steps to treat it as such. *Id.* at 135 n.14. Where confidentiality is at issue, "district courts would do well to provide additional guidance to the jury regarding how to evaluate whether employers treat information as confidential." *Id.* To make this determination, a jury should consider several factors, including: "written company policies,

employee training, measures the employer has taken to guard the information's secrecy, the extent to which the information is known outside the employer's place of business, and the ways in which other employees may access and use the information." *Id.* Importantly, "[i]f employers 'consider' information to be confidential but do not really take affirmative steps to treat it as such and maintain exclusivity," then the information is not confidential. *Id.*

The district court denied Newman's request for a *Mahaffy* charge on the grounds that *Mahaffy* was a wire fraud case, not a securities fraud case. Tr. 3609-10. But that distinction is meaningless. Just as in this case, the "critical issue" in *Mahaffy* "was whether portions of the [leaked] information actually were confidential." 693 F.3d at 121. And just as in this case, the government offered the testimony of corporate representatives that the information was confidential, *id.* at 121-22, while the defense elicited testimony that, in practice, the information was not treated confidentially. *Id.* at 122. Thus, *Mahaffy* addressed precisely the issue presented here. Moreover, *Mahaffy*'s discussion of confidentiality drew heavily on the Supreme Court's decision in *Carpenter v. United States*, 484 U.S. 19 (1987), itself a securities fraud case. Accordingly, the jury should have been provided with additional guidance on the concept of confidentiality as set forth in *Mahaffy* and failure to do so is an additional basis to reverse Newman's conviction.

III. THE GOVERNMENT'S PROOF WAS LEGALLY INSUFFICIENT TO ESTABLISH THE CHARGED OFFENSES

As explained above, an acquittal is warranted in this case because the government's proof that Newman knew of any personal benefit to the insiders was insufficient. In addition, the government's evidence was insufficient to prove an intentional breach of fiduciary duty by Ray or Choi, including that they received the kind of personal benefits required under *Dirks*.

A. Intentional Breach of Duty

The government failed to prove that Ray intentionally breached a fiduciary duty to Dell. Goyal – the only trial witness with knowledge of the circumstances of Ray's disclosures – testified that he led Ray to believe that nothing was wrong. Goyal portrayed himself to Ray in an innocuous way as a research analyst working on his model, affirmatively misled Ray into thinking that Goyal was not trading on the information, and failed to mention that Goyal was sharing the information with anyone else. *See* p. 11, *supra*. On top of this, Ray's supervisor in Dell IR confirmed that there was nothing improper about Ray speaking to Goyal during off hours, and that it was the job of IR employees to assist analysts, including with their models. *See* pp. 11-12 & n.6, *supra*. The extensive evidence of Dell leaks further undermined any inference that advance disclosure of quarterly results was such a serious infraction so as to imply a knowing breach. Finally, Ray has never been charged with any wrongdoing whatsoever, a telling indication of the

government's view of his culpability.[24] *See Dirks*, 463 U.S. at 666 n.27 (noting that insider was never charged).

Similarly, the evidence with respect to Choi was wholly insufficient to prove an intentional breach of fiduciary duty. The government offered the testimony of an NVIDIA representative to show that company policy prohibited the disclosure of quarterly information. Tr. 3097-98. But there was no evidence to show that Choi deliberately breached NVIDIA policies. The government did not call Choi to testify and the person to whom Choi gave information, Hyung Lim, did not give any indication that Choi knew he was doing anything wrong. Instead, the evidence showed that NVIDIA employees, including the head of IR, selectively disclosed confidential quarterly information. *See* pp. 23-24, *supra*. And like Ray, Choi has never been charged with any wrongdoing.

[24] The government's decision not to charge either of the key tippers in this case (Ray and Choi) is consistent more broadly with its focus on demonizing hedge fund managers while not pursuing others who received similar information. For example, the government did not charge Tortora's stepfather, Marshall Ingel, even though Tortora gave him the alleged Goyal tips, including that Dell's results would be weak in August 2008, and Ingel traded on the information. *E.g.*, A-2493. Similarly, Dan Niles, a trader at Neuberger Berman, has not been charged despite receiving information from Goyal that Goyal got from Rob Ray. A-2081. And Victor Dosti, who as Kuo's boss received the same information as Newman regarding NVIDIA, (*e.g.*, A-2108), has been sued civilly by the SEC but has not been subject to any criminal charges.

B. Personal Benefit

While the required personal benefit can take many forms (*e.g.* monetary payment; gift to a trading relative; reputational gain that translates into future earnings), there are nevertheless limits to what constitutes a benefit sufficient to establish insider trading liability. As one court put it, "*Dirks* requires an intended benefit of at least some consequence." *Maxwell*, 341 F. Supp. at 948 (no personal benefit notwithstanding that tipper and tippee knew each other for many years); *Anton*, 2009 WL 1109324, at *9 (no personal benefit notwithstanding tipper and tippee socialized on some occasions and had long-standing professional relationship). Importantly, where the government asserts that the tip was a gift to the tippee there must be "a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the particular recipient." *Dirks*, 463 U.S. at 664; *see also SEC v. Aragon Capital Mgmt., LLC*, 672 F. Supp. 2d 421, 432 (S.D.N.Y. 2009) ("A close personal relationship between the tipper and a tippee who trades suffices because the 'tip and trade resemble trading by the insider himself followed by a gift of profits to the [tippee].'"), *aff'd in part and vacated in part on other grounds sub nom. SEC v. Rosenthal*, 650 F.3d 156 (2d Cir. 2011). Ultimately, the personal benefit must be sufficiently meaningful to support the conclusion that an insider was acting fraudulently by forsaking corporate interests in favor of his own.

With respect to Ray, the evidence was clear that Ray and Goyal did not have a close relationship. During his plea allocution, Goyal repeatedly characterized Ray as an "acquaintance," not a friend. Tr. of Plea Allocution at 17, 19, *United States v. Goyal*, 11 Cr. 935 (S.D.N.Y. Nov. 3, 2011), ECF No. 10. Although they attended the same business school (in different class years) and both worked at Dell for a time, Goyal testified that they had limited contact. Tr. 1390. More importantly, Goyal specifically drew a distinction between Ray and five friends that Goyal knew at Dell. Goyal considered the latter "personal friends" and he travelled to Texas to socialize with them. Tr. 1384-85, 1411, 1469, 1492. In contrast, he had no such contact with Ray until after Ray had left Dell. Tr. 1469, 1512. And when the government specifically asked Goyal if he considered Ray a friend, Goyal responded that they "were not that close." Tr. 1411.

Faced with an alleged tipper and tippee who had a professional, not a personal, relationship – and absent evidence of any monetary or other tangible rewards – the government dug deep to come up with a personal benefit, ultimately arguing that Ray gave Goyal inside information in exchange for career advice. This theory was flatly refuted at trial. The evidence showed that (i) Goyal began giving Ray "career advice" nearly two years *before* Ray began providing financial information, (Tr. 1514), (ii) the alleged career advice amounted to routine and ultimately ineffective courtesies such as assistance with a resume, making an

introduction that went nowhere and telling Ray to "keep trying," (A-2076–78), (iii) Goyal would have given the advice even without receiving the information because he routinely did so for industry colleagues, (Tr. 1515), and (iv) Ray never connected the career advice as a *quid pro quo* to any assistance he was giving Goyal with his model (Tr. 1514). Were common courtesies like these sufficient to establish a personal benefit, the *Dirks* self-dealing requirement would be eviscerated, and only the rude would escape tippee liability by arguing that their dealings with the insider were so devoid of pleasantries that no benefit could possibly be inferred.

With respect to Choi, the evidence was that he and Lim knew each other from church. Tr. 3032. Although Lim described Choi as a "family friend," outside of attending church they only spoke on the phone and occasionally had lunch together. Tr. 3033. When asked directly if he ever provided Choi with anything of value in exchange for information, Lim testified that he did not. Tr. 3067-68. There was also no evidence that Choi benefitted from Lim's trading in NVIDIA, nor that he expected the information he gave to Lim to be a gift in any way. Lim testified that Choi was unaware that Lim was trading NVIDIA stock, (Tr. 3068-69), which in any event Lim did not do between April 2009 and July 2009 (the period that includes Count Five) (Tr. 3078). Thus, because Lim did not trade on the information from Choi during the relevant period, and Choi had no

reason to believe that Lim was ever trading NVIDIA stock, the tip and trade did not resemble "trading by the insider himself followed by a gift of the profits to the recipient." *See Dirks*, 463 U.S. at 664.

IV. THE GOVERNMENT'S PROOF AS TO THE MAY DELL TRADES IMPERMISSIBLY VARIED FROM THE CHARGES IN THE SUPERSEDING INDICTMENT

Count Two of the Superseding Indictment charged Newman with insider trading leading up to Dell's announcement of its quarterly results on May 29, 2008. According to the Superseding Indictment, as well as the Criminal Complaint on which Newman was arrested and the Information to which Goyal pleaded guilty, the content of the inside information was that Dell's gross margin would be *higher* than market expectations.[25] A-153; Criminal Complaint, *United States v. Newman*, 12 Cr. 121 (S.D.N.Y. Jan. 17, 2012), ECF No. 1; Information, *United States v. Goyal*, 11 Cr. 935 (S.D.N.Y. Nov. 3, 2011), ECF No. 3. The proof at trial, however, was the opposite, namely that gross margin was *lower* than market expectations.[26] This blatant mistake clearly showed that the government's effort to

[25] The Superseding Indictment stated that the inside information "indicated, among other things, that gross margins would be higher than market expectations." A-153. While this leaves room for other parameters, gross margin was the only parameter identified in the Superseding Indictment. It was only at trial when the gross margin allegations proved incorrect that the government shifted its focus to other parameters.

[26] The parties stipulated that analysts expected gross margin to be 18.5%. A-2363. Actual gross margin was between 18.1% and 18.4% depending on whether a GAAP or adjusted figure was used. A-2243 (Dell reporting GAAP gross margin

prove specific, accurate tips was fundamentally flawed. Rather than concede error, however, the government simply shifted its theory mid-trial and argued that the inside information pertained to revenue or was "generally" positive without identifying a specific line item. *See* Tr. 3673 (government argument that Dell's earnings in general would beat market expectations); Tr. 178-79 (Tortora testimony that earnings would be positive). This variance substantially prejudiced Newman's defense because, having decisively refuted the factual allegation in the Superseding Indictment, Newman was left with insufficient opportunity to rebut the new theory that the government asserted for the first time at trial.

A variance occurs "'when the charging terms are unaltered, but the evidence offered at trial provides facts materially different from those alleged in the indictment.'" *United States v. Wallace*, 59 F.3d 333, 338 (2d Cir. 1995) (quoting *United States v. Helmsley*, 941 F.2d 71, 89 (2d Cir. 1991)). "Even where there is evidence to support an offense pleaded in the indictment, the error of variance may arise if the evidence actually presented by the government at trial impermissibly shifts the government's theory of proof." *Id.* Where, as here, the variance "caused the defendant 'substantial prejudice' at trial," a reversal is warranted. *See United States v. McDermott*, 245 F.3d 133, 139 (2d Cir. 2001). This is so because a

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of 18.4%); Tr. 829-30 (Tortora acknowledging gross margin was less than consensus); A-2439 (Citibank analyst report showing adjusted gross margin of 18.1%); A-2448 (Lehman Brothers report showing same).

prejudicial variance infringes on the rights that "indictments exist to protect," namely an ability to prepare a defense. *United States v. Dupre*, 462 F.3d 131, 140 (2d Cir. 2006) (internal citations omitted); *Helmsley*, 941 F.2d at 90 (variance deprives defendant of an "opportunity to meet the prosecutor's case").

The prejudice here was substantial because – unlike inconsistencies in dates, times, or other similar details – the *content* of the inside information goes to the very core of the offense and is integral to a defendant's ability to prepare for trial. Newman was prepared to meet, and successfully did meet, the government's charge that he traded based on inside information related to gross margin. But Newman could not be expected to meet on such short notice the government's changed theory that focused on revenue and earnings, not gross margin. These are discrete elements of a company's financial performance – each affected by different variables – which can, and do, move in different directions from each other quarter to quarter. Variance as to these financial parameters is considerably more significant than the kinds of details that have been held insufficient to support a claim of prejudicial variance. *See United States v. Moore*, 639 F.3d 443, 447 (8th Cir. 2011) (date of conspiracy); *United States v. Ramirez*, 482 F.2d 807, 817 (2d Cir. 1973) (type of drugs).

The prejudice in this case was particularly severe because the district court prevented the defense from fully exploring the inconsistencies in the government's

allegations. The three key government witnesses all testified that they could not remember whether they received information on Dell's gross margin for the May 2008 quarter, despite the fact that the government must have questioned them to arrive at the allegations in the Superseding Indictment. Tr. 178-79 (Tortora); Tr. 1571 (Goyal); Tr. 2463-67 (Adondakis). Yet the district court prohibited the defense from showing these witnesses the Superseding Indictment to refresh their memories as to whether they had previously told the government that the inside information indeed related to gross margin. Tr. 827. Similarly, the district court prohibited the defense from questioning the FBI case agent about the criminal complaint he signed, which also specified higher than expected gross margin as the inside information that was disclosed in Dell's May 2008 quarter. Tr. 3431-37.

It is one thing for the government to shift theories mid-trial and to have the inconsistency fully exposed as such so that the jury can take it into consideration in evaluating the government's evidence; it is entirely another to shift theories while at the same time restricting the defense from fully exploring the change. The combination of a variance on a core issue with the inability to explore the inconsistency prejudiced the defense and requires reversal.

CONCLUSION

For the foregoing reasons, the Court should reverse Newman's conviction on all counts.

Dated: August 15, 2013

Respectfully submitted,

SHEARMAN & STERLING LLP

By: /s/ Stephen Fishbein
Stephen Fishbein
John A. Nathanson
Jason M. Swergold
599 Lexington Avenue
New York, New York 10022
212-848-4000
sfishbein@shearman.com
john.nathanson@shearman.com
jason.swergold@shearman.com

Attorneys for Todd Newman

CERTIFICATE OF COMPLIANCE

I, Stephen Fishbein, hereby certify that:

1. I am an attorney representing Defendant-Appellant Todd Newman in this appeal.

2. This brief complies with the type face requirement of Fed. R. App. P. 32(a)(7)(B) because it contains 13,949 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font.

3. In making this certification, I have relied on the word count feature of the word-processing program used to prepare the brief.

/s/ Stephen Fishbein
Stephen Fishbein

Exhibit M

KRAMER LEVIN NAFTALIS & FRANKEL LLP

BARRY H. BERKE
PARTNER
PHONE 212-715-7560
FAX 212-715-7660
BBERKE@KRAMERLEVIN.COM

May 8, 2014

5/12/14
Let's not make this more complicated than necessary - the PTC is stayed in its entirety until Sept 15, 2014 & a PTC will be held that Thursday (in the afternoon, should the CA2 appeals whatever that date is at 2:30) to decide prior thereto the SEC & the trial schedule promptly following conference. 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.

Exhibit N

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
May 30, 2014

INVESTMENT ADVISERS ACT OF 1940
Release No. 3841 / May 30, 2014

Admin. Proc. File No. 3-15580

In the Matter of ANTHONY CHIASSON	ORDER GRANTING PETITION FOR REVIEW AND SCHEDULING BRIEFS

Pursuant to Commission Rule of Practice 411,[1] the petition of Anthony Chiasson for review of the administrative law judge's initial decision is granted. In addressing the issues raised by Chiasson's petition, the parties are also directed to address the question of whether the initial decision should be summarily affirmed pursuant to Rule of Practice 411(e).[2] Pursuant to Rule of Practice 411(d),[3] the Commission will determine what sanctions, if any, are appropriate in this matter.

Accordingly, IT IS ORDERED, pursuant to Rule of Practice 450(a),[4] that a brief in support of the petition for review shall be filed by June 30, 2014. A brief in opposition

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1 17 C.F.R. § 201.411.

2 17 C.F.R. § 201.411(e).

3 17 C.F.R § 201.411(d).

4 17 C.F.R. § 201.450(a).

shall be filed by July 30, 2014, and any reply brief shall be filed by August 13, 2014.[5] Pursuant to Rule of Practice 180(c),[6] failure to file a brief in support of the petition may result in dismissal of this review proceeding as to that petitioner.

For the Commission, by the Office of General Counsel, pursuant to delegated authority.

Lynn M. Powalski
Deputy Secretary

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[5] As provided by Rule of Practice 450(a), no briefs in addition to those specified in this schedule may be filed without leave of the Commission. Attention is called to Rules 150 – 153, 17 C.F.R. §§ 201.150 – 153, with respect to form and service, and Rules of Practice 450(b) and (c), 17 C.F.R. §§ 201.450(b), 201.450(c), with respect to content and length limitations. Requests for extensions of time to file briefs are disfavored.

[6] 17 C.F.R. § 201.180(c).

Exhibit O

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 1749 / September 2, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15382

In the Matter of	:	
	:	ORDER CONTINUING STAY
STEVEN A. COHEN	:	

On July 19, 2013, the Securities and Exchange Commission initiated this proceeding with a Corrected Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940 alleging that Steven A. Cohen (Cohen) failed reasonably to supervise Mathew Martoma and Michael Steinberg, who allegedly violated Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934, while they were employed by wholly owned subsidiaries of S.A.C. Capital Advisors, LLC, an unregistered investment adviser succeeded in 2008 by S.A.C. Capital Advisors, L.P., which Cohen founded, owns, and controls. At the request of the United States Attorney for the Southern District of New York (U.S. Attorney), I stayed this administrative proceeding pending resolution of *United States v. Martoma*, 12-cr-973 (S.D.N.Y.), *United States v. Steinberg*, 12-cr-121 (S.D.N.Y.), and *United States v. S.A.C. Capital Advisors, L.P.*, 13-cr-541 (S.D.N.Y.). *See Steven A. Cohen*, Admin. Proc. Rulings Release No. 785, 2013 SEC LEXIS 2303 (Aug. 8, 2013). I have continued the stay twice. *See Steven A. Cohen*, Admin. Proc. Rulings Release No. 1277, 2014 SEC LEXIS 736 (Mar. 4, 2014), Admin. Proc. Rulings Release No. 1472, 2014 SEC LEXIS 1832 (May 29, 2014).

On August 26, 2014, the U.S. Attorney provided an update on the status of the criminal prosecutions in *Steinberg, Martoma*, and *S.A.C. Capital Advisors*, noting that the *Steinberg* and *Martoma* matters remain ongoing, and requested that the stay be continued.

Ruling

Due to the ongoing status of the underlying criminal prosecutions, the STAY IS CONTINUED. The U.S. Attorney shall provide this Office with written notice as to whether a stay remains warranted on or before November 28, 2014.

Brenda P. Murray
Chief Administrative Law Judge