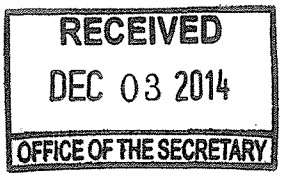
UNITED STATES OF AMERICA
Before The
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16184

In the Matter of

JORDAN PEIXOTO

Respondent.



REPLY BRIEF IN SUPPORT OF RESPONDENT JORDAN PEIXOTO'S MOTION TO STAY

GOTTLIEB & GORDON LLP
111 Broadway, Suite 701
New York, New York 10006
(212) 566-7766 (phone)
(212) 374-1506 (fax)

Attorneys for Respondent Jordan Peixoto

Dated: December 1, 2014

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PRELIMINARY STATEMENT

In its Opposition,[1] the Division of Enforcement (the "Division") mischaracterizes the scope of the *Chiasson/Newman* appeal—*United States v. Newman*, No. 13-1837 and *United States v. Newman (Chiasson)*, No. 13-1917 (collectively, *"Newman/Chiasson"*)—in order to support its position.[2] Specifically, the Division argues that the *Chiasson/Newman* appeal is not relevant to this proceeding because, if anything, it involves only whether a *remote* tippee must have knowledge of the tipper's benefit in order to be liable for insider trading. However, the oral argument transcript from the Second Circuit and relevant case law at issue in the appeal demonstrate that is simply incorrect. The substantive issue on appeal is whether *any tippee*—both direct and remote—must have knowledge of the tipper's benefit. The Second Circuit was asked to clarify a critical element of tippee liability—*any* tippee's liability—without distinction as to their degree of proximity to the tipper. In this particular matter, Respondent Peixoto is charged with tippee liability. A *Chiasson/Newman* decision will directly impact his liability in at least two respects. First, it will clarify the nature of the personal benefit to the tipper that the Division must prove. Second, it will establish whether liability is dependent upon whether a tippee had knowledge of that type of personal benefit.

Further, the Division ignores the well-established analytical framework Federal courts rely upon for stay motions of this nature, namely the *Kappel* factors. *See Kappel v. Comfort*, 914

[1] While this Reply does not directly comment on every point raised in the Division's Objection, Respondent disagrees with the Division's Opposition in its entirety.

[2] The Second Circuit consolidated both appeals. In this Reply, we refer collectively to the joint appeal as "*Newman/Chiasson*."

F.Supp. 1056 (S.D.N.Y. 1996). We respectfully submit that this is the operative analytical structure for evaluating Respondent's instant application.[3]

Under the circumstances here—where Respondent will be unfairly prejudiced absent a stay and the Division will not be prejudiced by granting a stay—the *Kappel* factors and the equities compel staying this matter pending the court's decision. Accordingly, in order to avoid unduly prejudicing the Respondent and in the interests of judicial economy, Mr. Peixoto respectfully requests that this proceeding be stayed pending the outcome of the *Newman/Chiasson* appeal.

ARGUMENT

In its Opposition, the Division overlooks the established legal framework that guides the Commission's analysis of whether to stay this proceeding. Instead, the Division argues against a stay on the grounds that the *Chiasson/Newman* appeal is irrelevant to this proceeding. Rather than repeating all of the arguments set forth in Respondent's moving papers, Respondent herein submits two points for the Commission's consideration:

I. The *Chiasson/Newman* Appeal Directly Bears on This Proceeding

The Division argues that the *Chiasson/Newman* appeal is irrelevant to this proceeding, and contends that the *Chiasson/Newman* appeal is limited to whether (only) a *remote* tippee must have knowledge of the tipper's benefit in order to be liable for insider trading. Because

[3] As referenced in Respondent's moving papers, the Commission often looks to federal procedural jurisprudence for guidance. *See e.g. In the Matter of Bobby Bruce, Cletus Marion Hodge, John Kilpatrick, Carlos Arturo Smith, Jr., Robert Hardee Quarles, William Edward Shelton, IV. (G. Weeks & Co., Inc.)*, Release No. 254 (ALJ June 25, 1984) (looking to the reasoning of FRCP Rule 32(a)(4)); *In the Matter of Putnam Inv. Mgmt., LLC*, Release No. 614 (Apr. 7, 2004) ("The Federal Rules of Civil Procedure do not govern administrative proceedings before the Commission, but they often provide helpful guidance in resolving issues not directly addressed by the Commission's Rules of Practice."); *Clarke T. Blizzard*, 77 SEC Docket 1505, 1510-11 nn.17, 19 (Apr. 23, 2002) (adopting the work-product protection provided in FRCP Rule 26(b)(3) because it was "consistent with that provided by the rules of most jurisdictions and with the Supreme Court."); *Jay Alan Ochanpaugh*, Exchange Act Rel. No. 54363 (Aug. 25, 2006), 88 SEC Docket 2653, 2662 n.24 ("The Federal Rules of Civil Procedure do not apply in administrative proceedings. Nonetheless, in certain circumstances we are guided by the principles of the Federal Rules.") (citations omitted)

Respondent Peixoto is the *direct* tippee of Mr. Szymik, the Division submits, a *Chiasson/Newman* decision will be entirely irrelevant to this proceeding and, therefore, this proceeding should not be stayed. However, the Division mischaracterizes the *Chiasson/Newman* appeal. The issue on appeal in *Chiasson/Newman* is whether *any tippee*—whether direct or remote—must have knowledge of the tipper's benefit. The Second Circuit was asked to clarify this element of tippee liability without distinction as to directness or remoteness. That this is the issue on appeal is clear from appellants' briefs, from the *Chiasson/Newman* oral argument, and from the related case law in the Second Circuit.

The arguments submitted by both the Government and the private parties in *Chiasson/Newman* do not distinguish between a direct tippee and a remote tippee. The Government argued that, as a categorical matter of law, tippee knowledge of the tipper's benefit is simply not a required element of tippee insider trading liability. *See* Brief for the United States of America at 39-59, *United States of America v. Newman*, No. 13-1837 (2nd Cir. November 14, 2013). The Government's argument was based on its reading of Second Circuit precedent that defines tippee liability—any tippee. *Id.* The Government's brief does not distinguish between direct tippees and remote tippees.

Similarly, appellants' arguments in support of requiring tippee knowledge of tipper benefit do not distinguish between a direct tippee and a remote tippee. Appellants argued that a tipper revealing confidential, non-public information in exchange for personal benefit is *not separate* from the tipper's fiduciary breach. Rather, the receipt of personal benefit *is* the breach of duty that triggers insider trading liability. *See* Brief for Defendant-Appellant Anthony Chiasson at 21-40, *United States of America v. Newman(Chiasson)*, No. 13-1917 (2nd Cir. August 15, 2013); Brief for Defendant-Appellant Todd Newman at 30-40, *United States of*

America v. Newman, No. 13-1837 (2nd Cir. August 15, 2013). Therefore, appellants argued that the required scienter for tippee liability includes knowledge that the tipper personally benefited as a result of transmitting the confidential information. *Id.* This argument in support of requiring tippee knowledge of the benefit is equally applicable whether the tippee is remote or direct.

Moreover, the case law in the Second Circuit, upon which both the Government and appellants rely, does not distinguish between a direct and remote tippee in connection with the required elements of tippee liability.[4] The defendants in *Obus*, a case upon which the Government heavily relied, included a direct tippee and a remote tippee. *See S.E.C. v. Obus*, 693 F.3d 276, 280-282 (2d Cir. 2012). While the issue of tippee knowledge of the tipper's benefit was not on appeal in *Obus*, in summarizing the elements of tippee liability, the *Obus* court did not distinguish between defendant Black—a direct tippee—from defendant Obus—a remote tippee. *Id.*, at 289.

Similarly, the case law requiring tippee knowledge of the benefit, upon which the appellants rely, does not distinguish between a direct and remote tippee. Appellants' briefs rely upon *State Teachers Ret. Bd.,* where the court found that *an immediate tippee* must have knowledge of each element of the tipper's breach, including the personal benefit. *See State Teachers Ret. Bd. v. Fluor Corp.,* 592 F. Supp. 592 (S.D.N.Y. 1984). More recently, in *United States v. Rajaratnam*, the court ruled that the legal standard and the proper jury instruction required that the tippee know of the tipper's benefit. *See United States v. Rajaratnam*, 802 F.

[4] The Government principally relies upon: *Dirks v. SEC*, 463 U.S. 646 (1983) (direct tippee); *SEC v. Warde*, 151 F.3d 42 (2d Cir. 1998) (remote tippee); *SEC* v. *Obus*, 693 F.3d 276 (2d Cir. 2012) (direct and remote tippees); *United States v. Jiau*, 734 F.3d 147 (2d Cir. 2013) *cert. denied*, 135 S. Ct. 311 (2014) *and cert. denied*, 135 S. Ct. 311 (2014) (direct tippee). Appellants principally rely upon: *Dirks v. SEC*, 463 U.S. 646 (direct tippee); *State Teachers Ret. Bd. v. Fluor Corp.*, 592 F. Supp. 592 (S.D.N.Y. 1984) (direct tippee); *United States v. Rajaratnam*, 802 F. Supp. 2d 491 (S.D.N.Y. 2011) (direct and remote tippee); *United States v. Whitman*, 904 F. Supp. 2d 363 (S.D.N.Y. 2012), *as corrected (Nov. 19, 2012), aff'd*, 555 F. App'x 98 (2d Cir. 2014) *cert. denied*, 135 S. Ct. 352 (2014) (remote tippee).

Supp. 2d 491, 498-99 (S.D.N.Y. 2011). In *Rajaratnam*, the defendant was charged with multiple counts of insider trading. In a number of the counts—including where the tippers were Rajat Gupta and Rajiv Goel—defendant Rajaratnam was the *direct tippee*, while in other counts he was a remote tippee. *See Rajaratnam,* 802 F. Supp. 2d at 500, 506. In that case, the court did not distinguish between the direct and remote tippee counts. As a categorical matter, the court ruled that, as a tippee, defendant Rajaratnam was required to have knowledge of the tipper's benefit in order to be liable for insider trading. *Rajaratnam,* 802 F. Supp. 2d at 498-99. Thus, the arguments and cases in support articulated in the *Chiasson/Newman* parties' briefs demonstrate that the question on appeal pertains to *all* tippees.

Additionally, the *Chiasson/Newman* oral argument demonstrates that the question on appeal pertains equally to both direct and remote tippees. During oral argument, the parties addressed whether, as a categorical matter, tippee knowledge of the tipper's benefit is a required element of tippee liability. In fact, the parties and the panel did not mention the word "remote" throughout the entire oral argument, with the exception of a single perfunctory reference in describing appellant Chiasson's background. *See* Ex. A to Janey Declaration, at 2, 74. With respect to their legal arguments, the parties did not distinguish between types of tippees—direct or remote. The parties' arguments applied with equal force to both varieties of tippees.

While the Chiasson and Newman appellants were both, as a factual matter, remote tippees, their appeal clearly addressed the broader question of tippee liability at-large. Circumstantially, it may be less likely that a remote tippee knows of the circumstances surrounding the initial tip and, therefore, counsel for appellants argued that, as remote tippees, appellants did not, *in fact*, have the requisite knowledge of the tipper's benefit. However,

appellants' *legal argument* in support of requiring tippee knowledge of tipper benefit did not in any way distinguish between direct and remote tippees.

Finally, a Second Circuit decision limited to only remote tippees would run counter to *Dirks'* objective of creating a bright-line guiding principle for members of the securities industry to follow. As mentioned in Respondent's moving papers, during oral argument, the Second Circuit panel and the parties agreed upon the importance of a bright-line rule that distinguishes between material non-public information upon which one may trade (e.g., "leaks") and impermissible non-public information, thereby furthering underscoring the view that the decision would have broad impact for insider trading law.

In sum, because *Chiasson/Newman* pertains to the elements of liability for *all* tippees, including tippees such as Respondent Peixoto, the appeal directly impacts the legal elements the Division must prove in the instant proceeding.

II. The Division Fails to Address the *Kappel* Factors

Instead of appropriately addressing the *Kappel* factors, the Division merely ignored them. The Division argues, in sum and substance, that the outcome of the *Chiasson/Newman* appeal, will have no consequence for the evidence it will introduce at the hearing; therefore, Respondent Peixoto is not harmed by moving forward with the administrative proceeding. *See* Division Opposition to Respondent Jordan Piexoto's Motion to Stay, at 2, 8. The Division's opinion is largely based on its view that a *Chiasson/Newman* decision will not further clarify the legal definition of "personal benefit" and that its proof in this area will not need to change.

Contrary to the Division's view, based on the record at the oral argument, it is highly likely that the definition of "personal benefit" will be addressed in the *Newman/Chiasson* decision. The discussion during oral argument before the Second Circuit strongly suggests that a

definition of "personal benefit" predicated primarily on a deepened friendship is "soft" and "squishy" in too many instances. *See* Ex. A to Janey Declaration, at 33-35, 57-58. Similarly, tippee knowledge of the personal benefit that rests merely on knowledge of a deepened friendship may very well be deemed insufficient by the Second Circuit. As such, the Division will not be able to rely on the theory it currently advances in the instant matter; *i.e.*, it need only prove that Respondent Peixoto was friends with Szymik and had knowledge of that friendship to establish Respondent Peixoto's knowledge of a "personal benefit" to Szymik. Should the court determine that more than "deepened friendship" is required to prove a "personal benefit" to the tipper, the Division's entire theory regarding personal benefit to Szymik collapses. The Order Instituting Proceeding ("OIP") in this matter does not allege that Szymik traded in the subject security nor does the OIP allege that Szymik received any money whatsoever from Respondent. In the absence of such proof, there would be no liability for Respondent Peixoto.

Additionally, crucial to the *Kappel* analyses is balancing the interests of the Division against the interests of the Respondent. *See Kappel*, 914 F.Supp. 1056. Moving forward in advance of a ruling in *Newman/Chiasson* will substantially and unfairly prejudice the Respondent, as we discuss at length in our moving papers. Absent a stay, Respondent is harmed because he is compelled to defend against claims whose elements are not clear as a matter of law. Requiring the Respondent to defend against an enforcement action when the legal community recognizes that the elements and the nature of the proof are in flux is the very definition of unfair prejudice. Moreover, the Division has failed to articulate any legitimate prejudice it will suffer as a result of staying this proceeding pending the *Newman/Chiasson* decision. Under these circumstances, the *Kappel* factors strongly support granting a stay.

Finally, the Division's argument that a stay pending the *Newman/Chiasson* decision would require the Division to wait "indefinitely" is disingenuous. While the date of a decision is unknown, a stay under these circumstances—where oral argument occurred months ago—is by no means indefinite. As Respondent describes in his moving papers, courts applying the *Kappel* factors have repeatedly found that a stay pending an appellate court's decision is only for a limited duration and, therefore, not prejudicial to the plaintiff. *See e.g. Wing Shing Prods. (BVI) Ltd. v. Simatelex Mfg. Co., Ltd.*, 2005 WL 912184, *2 (S.D.N.Y. Apr. 19, 2005) ("[A] stay of several months will cause little prejudice or hardship to [Plaintiff]."); *Estate of Heiser v. Deutsche Bank Trust Co. Americas*, No. 11 CIV. 1608 AJN MHD, 2012 WL 2865485 at *4 (S.D.N.Y. July 10, 2012) (granting a stay pending a related appeal before the appellate oral argument occurred); *LaSala v. Needham & Co., Inc.*, 399 F.Supp.2d 421, 430 (S.D.N.Y. 2005) (finding a stay would not delay the case indefinitely).

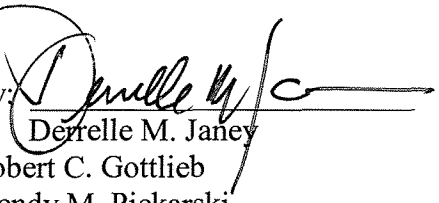
CONCLUSION

The *Newman/Chiasson* appeal is on a controlling question of insider trading law that directly impacts liability in this proceeding. Moving forward with this case without the benefit of a clarification of the controlling law would be inefficient, unnecessarily burdensome, and would severely prejudice Respondent Peixoto. The Division has failed to articulate any legitimate prejudice it will suffer as a result of staying this proceeding pending the Second Circuit decision in *Newman/Chiasson*. The Division has also failed to address the *Kappel* factors, which guide the analysis here. Accordingly, in the interests of judicial economy and to avoid unduly prejudicing the Respondent, Mr. Peixoto respectfully requests that this proceeding be stayed pending the outcome of the *Newman/Chiasson* appeal.

Dated: New York, New York
December 1, 2014

Respectfully submitted,

GOTTLIEB & GORDON LLP

By: 
Derrelle M. Janey
Robert C. Gottlieb
Mendy M. Piekarski
111 Broadway, Suite 701
New York, New York 10006
(212) 566-7766 (phone)
(212) 374-1506 (fax)
djaney@gottliebgordon.com
Attorneys for Respondent
Jordan Peixoto

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

CERTIFICATE OF SERVICE

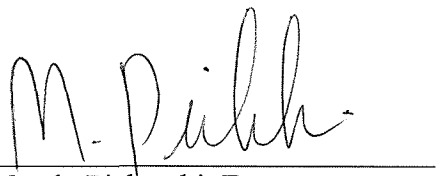
I, Mendy Piekarski, certify that on the 1st day of December, 2014, I caused true and correct copies of the enclosed Reply Brief in Support of Respondent Jordan Peixoto's Motion to Stay to be served by overnight delivery and electronic mail on:

Jack Kaufman, Esq.
Senior Trial Counsel
U.S. Securities and Exchange Commission
Brookfield Place
200 Vesey Street, Suite 400
New York, NY 10281-1022
KaufmanJa@SEC.GOV

Sheldon Mui, Esq.
Senior Counsel
U.S. Securities and Exchange Commission
Brookfield Place
200 Vesey Street, Suite 400
New York, NY 10281-1022
MuiS@SEC.GOV

I also caused a true and correct copy of the enclosed Reply Brief to be served by electronic mail on:

The Honorable Cameron Elliot
Office of Administrative Law Judges
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549
ALJ@SEC.GOV



Mendy Piekarski, Esq.

Gottlieb & Gordon

Gottlieb & Gordon LLP
Trinity Building
111 Broadway, Suite 701
New York, NY 10006
Tel: (212) 566-7766 · Fax: (212) 374-1506
www.gottliebgordon.com
New York · London · Rome

Robert C. Gottlieb, Partner
Celia A. Gordon, Partner

Justin F. Heinrich, Counsel
Derrelle M. Janey, Counsel
Mendy M. Piekarski, Associate
Ravi Kantha, Associate

December 1, 2014

VIA FACSIMILE AND OVERNIGHT DELIVERY
Brent J. Fields, Secretary
Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Mail Stop 1090
Washington, D.C. 20549

RE: **In the Matter of Jordan Peixoto, AP File No. 3-16184**

Dear Mr. Fields:

This law firm represents Respondent Jordan Peixoto in the above-referenced administrative proceeding.

Please find enclosed an original and three copies of Respondent Peixoto's Reply Brief in Support of Respondent Jordan Peixoto's Motion to Stay as well as a Certificate of Service.

Please do not hesitate to contact us with any questions.

Respectfully submitted,

GOTTLIEB & GORDON LLP

By: Derrelle M. Janey, Esq.

Enclosures

cc: The Honorable Cameron Elliot (via email)
Office of Administrative Law Judges
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549
ALJ@SEC.GOV

Jack Kaufman, Esq. (via email)
Sheldon Mui, Esq.
U.S. Securities and Exchange Commission
Brookfield Place
200 Vesey Street, Suite 400
New York, NY 10281-1022
KaufmanJa@SEC.GOV
MuiS@SEC.GOV
Attorneys for SEC
Division of Enforcement