## UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

**CASE NO.:** 

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

MOSHE MANOAH and BLAIR G. SCHLOSSBERG,

Defendants.

## **COMPLAINT**

Plaintiff, Securities and Exchange Commission (the "Commission"), files its complaint and alleges that:

#### **OVERVIEW**

- 1. This matter involves trading by Moshe Manoah ("Manoah") and Blair G. Schlossberg ("Schlossberg") in the common stock of O'Charley's, Inc. ("O'Charley's") while they possessed and were aware of material nonpublic information about the tender offer to O'Charley's from Fidelity National Financial, Inc. ("FNF"), which is headquartered in Jacksonville, Florida.
- 2. On February 6, 2012, O'Charley's and FNF announced the execution of a merger agreement, pursuant to which FNF agreed to acquire all of the outstanding shares of

O'Charley's common stock for \$9.85 per share through a tender offer (the "Announcement"). Shares of O'Charley's common stock closed approximately 42% higher on the day of the Announcement than the previous trading day, and volume increased by 200% to over 17.4 million shares.

- 3. More than two months prior to the Announcement, a member of the Board of Directors of O'Charley's ("Board Member") shared in confidence with his accountant, Donald S. Toth ("Toth"), material nonpublic information concerning the impending O'Charley's transaction for purposes of obtaining tax planning advice from Toth.
- 4. Several days later, Toth breached his duty as an accountant to Board Member by communicating material nonpublic information concerning the O'Charley's transaction to Schlossberg.
- 5. Schlossberg then communicated the material nonpublic information to his longtime business partner, Manoah.
- 6. At Schlossberg's suggestion, Schlossberg and Manoah then jointly invested in O'Charley's stock, ultimately purchasing 24,337 shares of O'Charley's which they sold shortly after the Announcement for profits of \$92,717, which the two split equally, each taking \$46,358.50.
- 7. As a result of this conduct, Defendants have engaged and, unless restrained and enjoined by this Court, will continue to engage in acts and practices that constitute and will constitute violations of Section 10(b) and 14(e) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. §§ 78j(b) & 78n(e)] and Rules 10b-5 and 14e-3 thereunder [17 C.F.R. §§ 240.10b-5 & 240.14e-3].

#### **JURISDICTION AND VENUE**

- 8. The Commission brings this action pursuant to Sections 21(d) and 21(e) of the Exchange Act [15 U.S.C. §§ 78u(d) and 78u(e)] to enjoin Defendants from engaging in the transactions, acts, practices, and courses of business alleged in this complaint, and transactions, acts, practices, and courses of business of similar purport and object, for civil penalties, and for other equitable relief.
- 9. This Court has jurisdiction over this action pursuant to Sections 21(d), 21(e), and 27 of the Exchange Act [15 U.S.C. §§ 78u(d), 78u(e), and 78aa].
- 10. Defendants, directly and indirectly, made use of the mails, or the means and instrumentalities of interstate commerce in connection with the transactions, acts, practices, and courses of business alleged in this complaint.
- 11. Certain of the transactions, acts, practices, and courses of business constituting violations of the Exchange Act occurred in the Middle District of Florida.
  Defendant Schlossberg resides in the Tampa Division of the Middle District of Florida.
- 12. Defendants, unless restrained and enjoined by this Court, will continue to engage in the transactions, acts, practices, and courses of business alleged in this complaint, and in the transactions, acts, practices, and courses of business of similar purport and object.

#### **DEFENDANTS**

13. <u>Moshe Manoah</u>, age 45, resides in Davie, Florida and is a residential real estate developer. He and Schlossberg have been friends and business partners for several years.

14. <u>Blair G. Schlossberg</u>, age 47, resides in Holmes Beach, Florida. He has been a client of Toth for several years and, together with Manoah, manages an Atlanta-based real estate development and acquisition business. He is also licensed to practice law in the State of Georgia.

### RELEVANT ENTITY

15. O'Charley's, Inc., a Tennessee corporation headquartered in Nashville,
Tennessee, was a multi-concept restaurant company that operates or franchises restaurants
under three brands: O'Charley's, Ninety Nine Restaurant, and Stoney River Legendary
Steaks. During the relevant period, O'Charley's common stock traded on the NASDAQ
Global Select Market under the symbol "CHUX." O'Charley's was acquired by FNF
through a tender offer.

## **FNF'S TENDER OFFER TO O'CHARLEY'S**

- 16. On October 24, 2011, FNF made an indication of interest to the O'Charley's Board of Directors relating to a possible acquisition of all of the outstanding common stock or assets of O'Charley's.
- 17. On October 25, 2011, the O'Charley's Board of Directors convened a special meeting with outside legal counsel to consider the indication of interest from FNF. At that meeting, the O'Charley's Board authorized the engagement of a financial advisor and formation of a Strategic Review Committee.
- 18. On November 23, 2011, O'Charley's and FNF executed a confidentiality and standstill agreement, pursuant to which O'Charley's would provide limited due diligence to FNF to allow FNF to consider improving its proposal for acquiring O'Charley's.

- Negotiations between O'Charley's and FNF continued through December
   January 2012, and early February 2012.
- 20. On February 6, 2012, before the opening of the markets, O'Charley's and FNF each issued a press release announcing the execution of a merger agreement, pursuant to which FNF agreed to acquire all of the outstanding shares of O'Charley's common stock for \$9.85 per share through a tender offer. The acquisition price represented a premium of approximately 42% over the closing price of \$6.92 on the prior trading day.
- 21. The market reacted favorably to the Announcement. In the three months prior to the Announcement, O'Charley's average closing share price was \$6.07 with an average daily trading volume of approximately 87,000 shares. On February 6, 2012, O'Charley's share price closed at \$9.84, and trading volume increased to over 17.4 million shares.

# TOTH'S DISCLOSURE OF MATERIAL NONPUBLIC INFORMATION TO SCHLOSSBERG

- 22. On December 2, 2011, Toth met with Board Member, his longtime client who was a member of the O'Charley's Board of Directors, for a regular tax planning meeting.
- 23. During the tax planning meeting, Board Member discussed with Toth the impending O'Charley's transaction for the purpose of obtaining Toth's advice on mitigating his personal tax liability.
- 24. Based on the longstanding accountant-client relationship between Toth and Board Member, Toth knew that the information shared by Board Member during the tax planning meeting, including the information concerning the impending O'Charley's transaction, was confidential.

- 25. As a licensed certified professional accountant, Toth was prohibited from disclosing confidential information pertaining to a client obtained in the course of performing professional services without that client's consent.
- 26. Board Member did not consent to the disclosure of the information concerning the acquisition of O'Charley's.
- 27. Given his years of experience and licensure as a certified public accountant, as well as his history with Board Member, Toth knew or was reckless in not knowing that dissemination of information shared by Board Member, including the information concerning the impending O'Charley's transaction, would violate his fiduciary duty to Board Member.
- 28. On or about December 6, 2011, Toth attended a meeting at Schlossberg and Manoah's office. During this period, Schlossberg and Manoah were in the process of conducting a real estate transaction for which Toth would be performing accounting services. Disregarding the duty of trust and confidence he owed Board Member, Toth communicated information to Schlossberg concerning the impending O'Charley's transaction that Schlossberg knew or had reason to know was nonpublic and had been acquired directly or indirectly from an insider.
- 29. Toth had been Schlossberg's personal accountant for several years and also performed accounting services for various LLCs controlled by Schlossberg.
- 30. Toth had also been Manoah's personal accountant for several years and also performed accounting services for various LLCs controlled by Manoah.
- 31. Schlossberg and Manoah had been friends and partners in various real estate development projects for several years.

## SCHLOSSBERG AND MANOAH'S TRADING IN O'CHARLEY'S STOCK

- 32. While in possession of material nonpublic information communicated by Toth regarding the impending acquisition of O'Charley's, which Schlossberg subsequently communicated to Manoah, Schlossberg and Manoah jointly invested in O'Charley's stock using a brokerage account held in the name of Manoah's wife (the "Account"), with each paying for approximately half of the purchase price and sharing equally in any profit or loss.
- 33. On or about December 7, 2011, to fund his share of the investment, Schlossberg purchased a \$75,000 cashier's check made out to Manoah's wife that was deposited the same day into the Account.
- 34. Between December 7, 2011 and January 23, 2012, while in possession of material nonpublic information communicated to him by Schlossberg regarding the impending acquisition of O'Charley's, Manoah made the following purchases of O'Charley's common stock in the Account:

<u>Date</u>	Shares Purchased	Investment Amount	
December 7, 2011	10,926	\$65,391.96	
December 8, 2011	7,500	\$44,712.13	
January 11, 2012	3,200	\$19,673.90	
January 12, 2012	2,000	\$12,208.95	
January 23, 2012	711	\$4,253.62	

35. Based on the nature and source of the information, Schlossberg and Manoah knew or were reckless in not knowing that the information was material and nonpublic and

knew or should have known that the information derived from a source who had breached a fiduciary duty by disclosing it.

36. On February 6, 2012, the day of the Announcement, Manoah sold all of the shares of O'Charley's common stock, realizing profits of \$92,717. Manoah and Schlossberg split the profits equally with each partner taking \$46,358.50.

## **COUNT I**

# Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5]

- 37. Paragraphs 1 through 36 are hereby re-alleged and are incorporated herein by reference.
- 38. During December 2011 and January 2012, Defendants, in connection with the purchase or sale of securities, by the use of the means and instrumentalities of interstate commerce or by use of the mails, directly or indirectly:
  - a. employed devices, schemes, and artifices to defraud; or
  - b. made untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
  - c. engaged in acts, practices, and courses of business which would and did operate as a fraud and deceit upon the purchasers of such securities, all as more particularly described above.
- 39. In engaging in such conduct, Defendants acted with scienter, that is, intentionally or recklessly.

40. By reason of the foregoing, Defendants, directly or indirectly, have violated and, unless enjoined, will continue to violate Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].

#### **COUNT II**

## Section 14(e) of the Exchange Act [15 U.S.C. § 78n(e)] and Rule 14e-3 thereunder [17 C.F.R. § 240.14e-3]

- 41. Paragraphs 1 through 40 are hereby re-alleged and are incorporated herein by reference.
- 42. By December 2011, substantial steps had been taken to commence a tender offer of the securities of O'Charley's by FNF, including, among others: (1) meetings between senior management of O'Charley's and FNF; (2) retaining financial advisors and legal counsel; and (3) the execution of a confidentiality and standstill agreement.
- 43. At the time Defendants purchased O'Charley's securities, they were in possession of material information regarding the tender offer for O'Charley's by FNF, which they knew or had reason to know was nonpublic, and which they knew or had reason to know was acquired directly or indirectly from an officer, director, partner, or employee or other person acting on behalf of the issuer.
- 44. Schlossberg communicated to Manoah the material nonpublic information relating to the O'Charley's tender offer, and thereby caused Manoah to trade, when he knew or had reason to know that such information came from an officer, director, partner, or employee or other person acting on behalf of the issuer and it was reasonably foreseeable that

such communication was likely to result in Manoah purchasing O'Charley's securities in violation of Section 14(e) and Rule 14e-3.

45. By reason of the foregoing, Defendants violated Section 14(e) of the Exchange Act [15 U.S.C. § 78n(e)] and Rule 14e-3 thereunder [17 C.F.R. § 240.14e-3].

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff the Commission respectfully prays for:

I.

A permanent injunction enjoining Defendants, their agents, servants, employees, and attorneys from violating, directly or indirectly, Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].

II.

A permanent injunction enjoining Defendants, their agents, servants, employees, and attorneys from violating, directly or indirectly, Section 14(e) of the Exchange Act [15 U.S.C. § 78n(e)] and Rule 14e-3 thereunder [17 C.F.R. § 240.14e-3].

III.

An order requiring the disgorgement by Defendants of all ill-gotten gains or unjust enrichment, including any received by their tippees, with prejudgment interest, to effect the remedial purposes of the federal securities laws.

IV.

An order pursuant to Section 21A of the Exchange Act [15 U.S.C. § 78u-1] imposing civil penalties against Defendants.

V.

Such other and further relief as this Court may deem just, equitable, and appropriate in connection with the enforcement of the federal securities laws and for the protection of investors.

Plaintiff hereby demands a jury trial to all issues so triable.

Dated: August 13, 2014

Respectfully submitted,

/s/ M. Graham Loomis
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## **CIVIL COVER SHEET**

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS Securities and Exchange Commission			DEFENDANTS BLAIR G. SCHLOSSBERG, MOSHE MANOAH			
(b) County of Residence of First Listed Plaintiff  (EXCEPT IN U.S. PLAINTIFF CASES)  (c) Attorneys (Firm Name, Address, and Telephone Number)			County of Residence of First Listed Defendant Manatee  (IN U.S. PLAINTIFF CASES ONLY)  NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.  Attorneys (If Known)			
Robert Schroeder 950 Ea Atlanta, GA 30326 404.842.7600						
II. BASIS OF JURISDI	ICTION (Place an "X" in O	ne Box Only)	II. CITIZENSHIP OF P	RINCIPAL PARTIES		
■ 1 U.S. Government Plaintiff	3 Federal Question (U.S. Government Not a Party)		(For Diversity Cases Only) P1 Citizen of This State			
☐ 2 U.S. Government Defendant	☐ 4 Diversity (Indicate Citizenshi)	4 Diversity (Indicate Citizenship of Parties in Item III)		2		
			Citizen or Subject of a  Foreign Country	3	06 06	
IV. NATURE OF SUIT			FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
CONTRACT    110 Insurance   PERSONAL INJURY   310 Airplane   315 Airplane   316 A	PERSONAL INJURY  310 Airplane 315 Airplane Product Liability 320 Assault, Libel & Slander 330 Federal Employers' Liability	PERSONAL INJURY  365 Personal Injury - Product Liability  367 Health Care/ Pharmaceutical Personal Injury Product Liability  368 Asbestos Personal Injury Product	Ges Drug Related Seizure of Property 21 USC 881	□ 422 Appeal 28 USC 158 □ 423 Withdrawal 28 USC 157  PROPERTY RIGHTS □ 820 Copyrights □ 830 Patent □ 840 Trademark	OTHER STATUTES  375 False Claims Act 400 State Reapportionment 410 Antitrust 430 Banks and Banking 450 Commerce 460 Deportation 470 Racketeer Influenced and Corrupt Organizations 480 Consumer Credit	
	Liability PERSONAL PROPERTY  370 Other Fraud  371 Truth in Lending  380 Other Personal Property Damage  385 Property Damage Product Liability	TABOR  710 Fair Labor Standards Act 720 Labor/Management Relations 740 Railway Labor Act 751 Family and Medical Leave Act 790 Other Labor Litigation	SOCIAL SECURITY    861 HIA (1395ff)   862 Black Lung (923)   863 DIWC/DIWW (405(g))   864 SSID Title XVI   865 RSI (405(g))	□ 490 Cable/Sat TV ■ 850 Securities/Commodities/ Exchange □ 890 Other Statutory Actions □ 891 Agricultural Acts □ 893 Environmental Matters □ 895 Freedom of Information Act □ 896 Arbitration		
REAL PROPERTY  210 Land Condemnation 220 Foreclosure 230 Rent Lease & Ejectment 240 Torts to Land 245 Tort Product Liability 290 All Other Real Property	CIVIL RIGHTS    440 Other Civil Rights   Habeas Corpus:   463 Alien Detainee   510 Motions to Vaca Sentence   530 General   535 Death Penalty Other:   540 Mandamus & Other:   550 Civil Rights	☐ 463 Alien Detainee ☐ 510 Motions to Vacate Sentence		FEDERAL TAX SUITS  7 870 Taxes (U.S. Plaintiff or Defendant)	□ 899 Administrative Procedure Act/Review or Appeal of Agency Decision □ 950 Constitutionality of State Statutes	
		☐ 535 Death Penalty Other: ☐ 540 Mandamus & Other ☐ 550 Civil Rights ☐ 555 Prison Condition ☐ 560 Civil Detaince - Conditions of	IMMIGRATION  ☐ 462 Naturalization Application ☐ 465 Other Immigration Actions			
	emoved from 3	Remanded from Appellate Court	4 Reinstated or	er District Litigation		
VI. CAUSE OF ACTIO	ON Cite the U.S. Civil State Section 10(b) of the Brief description of call		filing ( <i>Do not cite jurisdictional stat</i> 5 U.S.C. § 78j(b)] and Rule	tutes unless diversity): 10b-5 thereunder		
VII. REQUESTED IN CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.			DEMAND \$	DEMAND \$ CHECK YES only if demanded in complaint:  JURY DEMAND:		
VIII. RELATED CAS	E(S) (See instructions):	JUDGE		DOCKET NUMBER		
DATE		SIGNATURE OF ATTO	ORNEY OF RECORD			
FOR OFFICE USE ONLY	1	1/000	Schroeney			
RECEIPT# A	MOUNT	APPLYING IFP	JUDGE	MAG. JU	DGE	

JS 44 Reverse (Rev. 12/12)

#### INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below. United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here. United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box. Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

  Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; NOTE: federal question actions take precedence over diversity cases.)
- III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit. Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin. Place an "X" in one of the six boxes.
  - Original Proceedings. (1) Cases which originate in the United States district courts.
  - Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
  - Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing
  - Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date. Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
  - Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. Do not cite jurisdictional statutes unless diversity. Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P. Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction. Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases. This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.