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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3 - 18250

In the Matter of **Mark Megalli** **Respondent.**	**DIVISION'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO COMMISSION RULE OF PRACTICE 250**

Pursuant to Rule 250 of the Securities and Exchange Commission's Rules of Practice and the Court's Order of November 7, 2017, the Division of Enforcement (the "Division") respectfully moves for summary disposition against Respondent Mark Megalli and for entry of an order barring him from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization based on entry of a permanent injunction entered against Respondent in SEC v. Mark Megalli, Civil Action No. 1:13-cv-03783-AT (N.D. Ga.).

PRELIMINARY STATEMENT

The issue in this case is simple–whether Respondent, a convicted felon who generated millions of dollars of illegal profits and avoided losses through illegal insider trading, who was subsequently civilly enjoined from future such violations, and who continues to contest his legal culpability, is fit to be associated with securities industry-related entities. The answer most certainly is no, and Respondent should therefore be barred from participating in those activities.

On November 14, 2013, Megalli pled guilty to a criminal information charging him with one count of conspiracy to commit securities fraud. United States v. Mark Megalli, Criminal No. 1:13-CR-442-RWS. Megalli purchased and sold shares of a publicly traded company on behalf of a hedge fund he co-managed based on material, nonpublic information, which allowed the fund to make approximately $2.6 million in profits and losses avoided. Subsequently, on December 17, 2015, the district court presiding over the Commission's related civil action entered a final judgment against Megalli enjoining him from further violations of Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 promulgated thereunder and Section 17(a) of the Securities Act ("Securities Act").

The Division's request for a permanent, industry-wide collateral bar is appropriate where, as here, a respondent's conduct is egregious, recurrent, willful and knowing, and where the respondent's history in the securities industry makes temptation to future violations likely. Thus, the public interest requires that Megalli be barred from the securities industry to prevent him from having any opportunity to commit future securities law violations.

PROCEDURAL BACKGROUND

The matter was instituted on October 12, 2017, and Respondent (through counsel) accepted service on October 16, 2017. The Order Instituting Proceedings was based on the final judgment of permanent injunction entered against Megalli on December 17, 2015. The Commission made documents available to Megalli pursuant to Rule 230(a)(1) of the Commission's Rules of Practice, and the parties participated in a prehearing conference with the Court. Megalli filed his answer on November 6, 2017.

STATEMENT OF UNDISPUTED FACTS

Beginning in September 2009 and continuing through July 2010, Megalli, a Portfolio Manager at Level Global Investors, L.P., ("Level Global") in New York, obtained material, non-public information from a contact at Carter's Inc. ("Carter's") in advance of Carter's quarterly and annual earnings releases and other major corporate events. (Div. Ex. A, Information in United States v. Megalli, Criminal No. 1:13-CR-442-RWS (N.D. Ga.).[1] While in possession of that information, Megalli, knowing and consciously avoiding the knowledge that the information had been obtained from a Carter's insider in violation of the insider's duties of trust and confidence to Carter's, earned illegal profits and illegally avoided losses for Level Global. Id.

On November 14, 2013, Megalli pled guilty to a criminal information charging him with one count of conspiracy to commit securities fraud, resulting from his trading in Carter's stock on behalf of Level Global based on material, nonpublic information. (Div. Ex. C, Guilty Plea in United States v. Megalli, Criminal No. 1:13-CR-442-RWS (N.D. Ga.).[2] On November 14, 2013, the Commission filed a civil enforcement action against Megalli based on the same set of facts, alleging that he violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and Section 17(a) of the Securities Act. (Div. Ex. F, Complaint in SEC v. Megalli, Civil Action No. 1:13-cv-03783-AT (N.D. Ga.).

On February 3, 2015, the Commission moved for summary judgment in its civil enforcement action on the ground, among others, of collateral estoppel. (Div. Ex. G, Brief in

[1] On April 29, 2015, Megalli filed a Motion to Vacate, Set Aside or Correct Sentence, pursuant to 28 U.S.C. § 2255 ("habeas petition") citing the Second Circuit's holding in United States v. Newman, 773 F.3d 438 (2d Cir. 2014) as grounds for vacating his sentence. On September 25, 2017, the district court denied the motion and denied respondent's request for a certificate of appealability. Div. Ex. B, Order Denying Habeas Relief and Denying Certificate of Appealability.

[2] Div. Ex. D is the transcript of Megalli's guilty plea proceedings. Also attached, as Div. Ex. E, is the transcript of Megalli's sentencing hearing.

Support of Motion for Summary Judgment in SEC v. Megalli). Megalli filed his own motion, styled a Motion for Judgment on the Pleadings, arguing that, because of the Newman decision, the Commission could not, as a matter of law, establish his liability for insider trading. On September 24, 2015, the district court entered an order granting in part and denying in part the Commission's motion for summary judgment. SEC v. Megalli, 157 F. Supp. 3d 1240 (N.D. Ga. 2015). Thereafter, at Megalli's request, the Court held oral argument. The district court held that Megalli could not be ordered to disgorge the profits gained and losses avoided resulting from his insider trading in the account of his employer, Level Global. The Court therefore ordered Megalli to pay disgorgement of $19,790, prejudgment interest of $3,633.71, and civil penalties of $38,500. SEC v. Megalli, Case No. 1:13-cv-3783-AT, 2015 WL 13021472 (N.D. Ga. Dec. 15, 2015). The Court also enjoined Megalli from future violations of Section 10(b) of the Exchange Act and Section 17(a) of the Securities Act. On December 17, 2015, the Court entered final judgment imposing those remedies. Id.

ARGUMENT

I. The Division's Motion for Summary Disposition is Ripe and Appropriate

Pursuant to Commission Rule of Practice 250, the Division's motion for summary disposition is ripe at this time because: (1) Respondent has answered; and (2) the Division has made its investigative file available to Respondent. Motions for summary disposition are particularly appropriate where, as here, they are based on a respondent's criminal conviction or the entry of an injunction based on securities fraud. See, e.g., Eric S. Butler, Release No. 65204, 2011 WL 3792730, at *5-6 (Aug. 26, 2011)(Opinion of the Commission) (affirming ALJ's grant of summary disposition based on respondent's criminal conviction for conspiracy to commit

securities and wire fraud); Gary M. Kornman, Release No. 59403, 2009 WL 367635, at *12 (Feb. 13, 2009)(Opinion of the Commission)(affirming ALJ's grant of summary disposition based on criminal conviction)("We have repeatedly upheld the use of summary disposition by a law judge in cases such as this one where the respondent has been enjoined or convicted of an offense listed in Exchange Act Section 15(b) and Advisers Act Section 203, the sole determination is the proper sanction, and no material fact is genuinely disputed."), pet. denied Kornman v. SEC, 592 F.3d 173 (D.C. Cir. 2010); Adam Harrington, Initial Decisions Release No. 484, 2013 WL 1655690, at *4-5 (April 17, 2013) (ALJ Foelak) (granting summary disposition against respondent based on his criminal conviction for securities fraud, wire fraud, mail fraud, and conspiracy to commit these offenses); Gregory Bartko, Esq., Initial Decisions Release No. 467, 2012 WL 3578907, at *2 (Aug. 21, 2012) (ALJ Elliot) ("The Commission has repeatedly upheld use of summary disposition in cases such as this, where the respondent has been enjoined or convicted and the sole determination concerns the appropriate sanction. Under Commission precedent, the circumstances in which summary disposition in a 'follow-on' proceeding involving fraud is not appropriate 'will be rare'" (citations omitted)); Richard P. Callipari, Initial Decisions Release No. 237, 81 SEC Docket 633, 2003 WL 22250402, at *2 (Sept. 30, 2033) (ALJ Foelak) ("The Commission, however, considers summary disposition particularly appropriate in proceedings, such as this one, that are based on a respondent's conviction for fraud."); see also Adoption of Amendments to the Rules of Practice and Related Provisions, Release No. 52846, 86 SEC Docket 1931, 2005 WL 3199273, at *3 (April 21, 2005) ("Motions for summary dispositions are often made in cases where a respondent has been criminally convicted or an injunction has been entered and the conviction or injunction provides the basis for an administrative order against the respondent.").

II. Megalli Should Be Permanently Barred from the Securities Industry

Section 203(f) of the Advisers Act provides, among other things, that "[t]he Commission, by order, shall ... [bar any person, at the time of the alleged misconduct, associated with an investment adviser, from being associated with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization] if it finds ... that such .... [bar] is in the public interest and that such [person] ... "either: (1) "has been convicted ... of any felony ... which the Commission finds ... involves the purchase or sale of any security ..."; or (2) "is permanently enjoined by order, judgment, or decree of any court of competent jurisdiction ... from engaging in or continuing any conduct or practice ... in connection with the purchase or sale of any security." Advisers Act §§ 203(e)(2), 203(e)(4), 203(f).

Here, it cannot be disputed that Megalli was both convicted of a felony involving the purchase or sale of a security and permanently enjoined from engaging in or continuing a conduct or practice in connection with the purchase or sale of a security. Either of the judgments is more than adequate grounds for the associational bar the Division requests. Moreover, there is no question that Megalli was associated with an investment adviser at the time of his misconduct. Therefore, the only remaining issue is what remedial sanctions should be imposed on him.

In determining what remedial actions are appropriate in the public interest, the Court should consider:

1. the egregiousness of the defendant's actions;
2. the isolated or recurrent nature of the infraction;
3. the degree of scienter involved;

4. the sincerity of the defendant's assurances against future violations;

5. the defendant's recognition of the wrongful nature of his conduct; and

6. the likelihood that the defendant's occupation will present opportunities for future violations.

Butler, 2011 WL 3792730, at *3 (citing Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979); Kornman, 2009 WL 367635, at *6 (same); Omar Ali Rizvi, Initial Decisions Release No. 479, 2013 WL 64626, at *6 (January 7, 2013) (Chief ALJ Murray)(same); Bartko, 2012 WL 3578907, at *5 (same); Seghers v. SEC, 548 F.3d 129, 134 (D.C. Cir. 2008) (quoting Steadman).

The facts and circumstances here compel this Court to find it appropriate and in the public interest to enter a permanent, industry-wide collateral bar against Megalli. See, e.g., John W. Lawton, Release No. 3513, 2012 WL 6208750, at *10 (Dec. 13, 2012) (Opinion of the Commission) (finding a full industry-wide collateral bar appropriate against respondent even when the underlying conduct predated passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act); Rizvi, 2013 WL 64626, at *7 (granting summary disposition against respondent who was enjoined from future fraud and registration violations of the federal securities laws, and who was associated with a broker and an investment adviser, and barring him from association with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, and nationally recognized statistical rating organization and from participating in an offering of penny stock); Victor Teicher, Release No. 56744, 2007 WL 3254806 (Nov. 5, 2007) (Opinion of the Commission)(affirming ALJ's imposition of bar from association with any broker, dealer, investment company, investment adviser, or municipal securities dealer against respondent who was convicted of insider trading, and who was associated with an investment adviser); Bartko, 2012 WL 3578907, at *5-8 (granting summary disposition against respondent who was convicted

of felonies involving the purchase or sale of securities, among other things, and who was associated with both a broker dealer and an investment adviser, and barring him from association with an investment adviser, broker, dealer, municipal securities dealer, and transfer agent).

All relevant factors support the associational industry-wide bar that the Division requests. Megalli's violations were egregious. Megalli's illicit trades generated $2.6 million in illicit profits and losses avoided. Respondent's Answer to the OIP, p.2. His violations were recurrent, involving multiple trades on two separate pieces of insider information, separated by nine months. Id. With substantial time to reflect both on the wrongfulness of his first occasion of insider trading, he chose to do it again. His scienter was high. Megalli has a law degree and years of experience in choosing investments for a hedge fund; he had to know that his conduct was illegal. Moreover, Megalli admitted at his criminal sentencing that "he knew [his conduct] was wrong." Div. Ex. E, Transcript of sentencing in United States v. Megalli, Criminal No. 1:13-CR-442-RWS (N.D. Ga.), p. 22, lines 4-10.

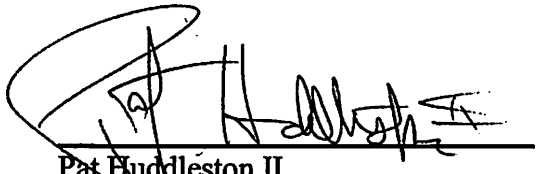
While Megalli does make assurances against future violations, the Court should view those in light of his continued effort to escape a judicial finding of liability in the criminal action. While Megalli admitted the facts pled by the US Attorney's Office in his criminal case, and has admitted the same facts in this action, he continues to maintain through the courts that the law does not sanction his particular conduct. (Div. Ex. H, Notice of Appeal in United States v. Megalli, Criminal No. 1:13-CR-442-RWS (N.D. Ga.). He is appealing the district court's denial of his habeas petition. Finally, Megalli had authority over an account at Level Global. His contacts included the contacts at Carter's Inc. which he exploited for the fund for which he was responsible.

If he were to remain in the securities industry, he would undoubtedly be presented with opportunities to commit future violations.

CONCLUSION

For all the foregoing reasons, the Division respectfully requests that this Court enter an order barring Megalli from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Respectfully submitted this 15th day of December, 2017,



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CERTIFICATE OF SERVICE

Undersigned Counsel for the Division of Enforcement hereby certifies that he has served a copy of the DIVISION'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO COMMISSION RULE OF PRACTICE 250 by electronic mail and by United Parcel Service, addressed as follows:

Secretary Brent J. Fields
Securities and Exchange Commission
100 F Street N.E.
Washington, DC 20549-1090

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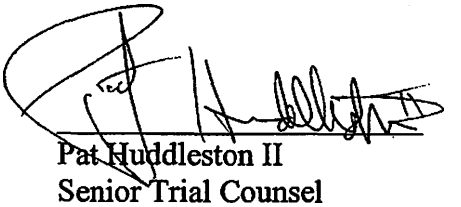
This 15th of December, 2017



Pat Huddleston II
Senior Trial Counsel

Exhibit A

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA

v.

MARK MEGALLI

Criminal Information

No. 1:13-CR-442-RWS

THE UNITED STATES ATTORNEY CHARGES THAT:

COUNT ONE
Conspiracy to Commit Securities Fraud
(18 U.S.C. § 371)

1. Beginning in or about September 2009, and continuing through in or about July 2010, the exact dates being unknown to the United States Attorney, in the Northern District of Georgia and elsewhere, the defendant, MARK MEGALLI, did unlawfully, willfully, and knowingly conspire, combine, confederate, agree, and have a tacit understanding with Eric M. Martin and others known and unknown to the United States Attorney, to commit certain offenses against the United States; to wit, securities fraud, in violation of Title 15, United States Code, Sections 78j(b) and 78ff, and Title 17, Code of Federal Regulations, Section 240.10b-5.

BACKGROUND

2. At all times relevant to this Information:

a. The defendant, MARK MEGALLI, was employed as a Portfolio Manager at Level Global Investors, L.P. ("Level Global"), a prominent hedge

fund manager headquartered in New York, New York. MEGALLI worked out of Level Global's New York office. In connection with his duties at Level Global, MEGALLI was in charge of managing a multi-million dollar portfolio of the securities of publicly-traded companies in the consumer sector, including making investment decisions and causing the execution of securities transactions for the benefit of the portfolio.

b. Carter's, Inc. ("Carter's") was a public company registered in Delaware and headquartered in Atlanta, Georgia, which marketed clothing and apparel for babies and young children in the United States. Carter's common stock was listed on the New York Stock Exchange under the stock ticker symbol, "CRI." Carter's securities were registered with the United States Securities and Exchange Commission ("SEC") pursuant to Section 12(b) of the Exchange Act, and the Company was required to file reports with the SEC pursuant to Section 15(d) of the Exchange Act. Carter's policies prohibited the unauthorized disclosure of Carter's confidential business information.

c. Eric M. Martin was employed by Carter's from in or about January 2003 until his separation from Carter's on March 24, 2009, first as Director of Investor Relations and later as Vice President of Investor Relations. During his employment with Carter's, Martin worked in the Company's corporate headquarters in Atlanta, Georgia.

d. Richard T. Posey was employed as a Vice President of Operations for various Carter's brands and divisions and later as Vice President of Operations for the Company's wholesale sales business from in or about July 2002 until his

separation from Carter's in early 2013. During his employment with Carter's, Posey worked in the Company's corporate headquarters in Atlanta, Georgia. Posey's position afforded him access to material, non-public information of Carter's, including internal information about the Company's business, financial performance, and anticipated earnings and quarterly and annual financial results, in advance of the release of such information to shareholders and the SEC ("quarterly and annual earnings releases").

e. Martin and Posey developed a personal and professional relationship during their employment at Carter's -- including travel, golf outings, lunches, and other work and social events -- which continued after Martin's separation from Carter's and while Posey remained employed at Carter's.

f. Following his separation from Carter's, Martin established an investment advisory and consulting firm in the Atlanta area, Mellon Advisors, LLC ("Mellon Advisors"). In or about September 2009, Martin became a paid outside consultant to several financial institutions and investment firms, directly and through an expert networking firm.

g. On or about September 14, 2009, MEGALLI caused Level Global to retain Martin, whom MEGALLI knew had recently separated from his position as Carter's Vice President of Investor Relations, to be a paid outside consultant to Level Global, through Martin's firm, Mellon Advisors.

OBJECT OF THE CONSPIRACY

3. It was the object and goal of the conspiracy that the defendant, MARK MEGALLI, along with Eric M. Martin and others known and unknown to the

United States Attorney, willfully and knowingly, directly and indirectly, by the use of the instrumentalities of interstate commerce, and of the mails, and of facilities of national securities exchanges, would and did use and employ, in connection with the purchase and sale of securities, manipulative and deceptive devices and contrivances in violation of Title 17, Code of Federal Regulations, Section 240.10b-5 by: (a) employing devices, schemes, and artifices to defraud; (b) making untrue statements of material fact and omitting to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and (c) engaging in acts, practices, and courses of business which operated and would operate as a fraud and deceit upon any person, in violation of Title 15, United States Code, Sections 78j(b) and 78ff, and Title 17, Code of Federal Regulations, Section 240.10b-5.

MANNER AND MEANS

4. The manner and means by which the conspiracy was sought to be accomplished included, among others, the following:

a. From in or about September 2009 through in or about July 2010, the exact dates being unknown to the United States Attorney, the defendant, MARK MEGALLI, obtained material, non-public information ("Inside Information") of Carter's from Martin in advance of Carter's quarterly and annual earnings releases and other major corporate events, including information about Carter's quarterly and annual earnings per share ("EPS"), forward-looking guidance for the Company's future financial periods, and other financial performance information and whether such information would meet, miss, or beat internal

company expectations and estimates, previously issued guidance, and analysts' consensus expectations and estimates.

b. The Inside Information provided to MEGALLI was obtained in violation of (1) fiduciary and other duties of trust and confidence that Posey owed to Carter's, (2) expectations of confidentiality held by Carter's, (3) written policies of Carter's regarding the use and safekeeping of confidential business information, and (4) Posey's agreements to maintain Carter's confidential business information in confidence and to refrain from using any Inside Information of Carter's for his own direct or indirect benefit, from trading on the basis of such information, and from disclosing any Inside Information to others for personal benefit.

c. Posey disclosed the Inside Information to Martin with the understanding that Martin would purchase and sell securities based on the information and, beginning in or about September 2009, that Martin would disclose the information to certain financial institutions and investment firms for which Martin was employed as a consultant for purposes of executing securities transactions based on the information. Posey did so for his own personal benefit, which included but was not limited to stock tips about other publicly-traded companies to which Martin had access, future networking opportunities, friendship, and other tangible and intangible benefits.

d. Martin in turn purchased and sold Carter's securities on the basis of this information knowing that it had been provided by Posey in violation of Posey's duties of trust and confidence to Carter's, earning illegal profits and

illegally avoiding losses. Beginning in or about September 2009 and continuing through in or about July 2010, Martin also disclosed Inside Information to MEGALLI and other consulting clients with the understanding that MEGALLI and the other consulting clients would purchase and sell securities based on the information.

e. MEGALLI in turn caused Level Global to purchase and sell Carter's securities on the basis of, in whole or in part, certain Inside Information provided to him by Martin, knowing and consciously avoiding the knowledge that the Inside Information had been obtained by Martin from a Carter's insider in violation of the insider's duties of trust and confidence to Carter's, earning illegal profits and illegally avoiding losses for Level Global.

OVERT ACTS

5. In furtherance of the conspiracy, and to effect the objects and purposes thereof, the defendant, MARK MEGALLI, Eric M. Martin, and others known and unknown to the United States Attorney committed various overt acts in the Northern District of Georgia and elsewhere, including, but not limited to, the following:

Carter's October 27, 2009 Earnings Delay

a. On or about October 22, 2009, after the close of business, Posey had an in-person meeting with Martin in Atlanta during which Posey disclosed Inside Information to Martin relating to an internal investigation of accounting irregularities at Carter's, the possibility of a financial restatement, and a potential

delay in the issuance of Carter's quarterly earnings release previously scheduled for October 27, 2009.

b. On or about October 23, 2009, at approximately 11:23 a.m., Martin made a cellular telephone call to MEGALLI that lasted approximately seven minutes. During the call, Martin disclosed certain Inside Information that he had received from Posey to MEGALLI.

c. On or about October 23, 2009, at approximately 11:25 a.m., MEGALLI ordered the sale of 300,000 shares of Carter's common stock in an account controlled by Level Global, which would close out the entirety of Level Global's remaining position in Carter's common stock.

Carter's July 28, 2010 Quarterly Earnings Release

d. On or about July 7, 2010, after the close of business, Posey had an in-person meeting with Martin in Atlanta during which Posey disclosed Inside Information to Martin relating to Carter's financial performance for the second quarter of 2010 and changes in its outlook.

e. On or about July 8, 2010, at approximately 10:39 a.m., Martin made a telephone call to MEGALLI that lasted approximately nineteen minutes. During the call, Martin disclosed certain Inside Information that he had received from Posey to MEGALLI.

f. On or about July 8, 2010, at approximately 11:01 a.m., MEGALLI ordered the short sale of 150,000 shares of Carter's common stock in an account controlled by Level Global.

g. Between July 8 and July 19, 2010, Martin and MEGALLI had telephone conversations during which certain Inside Information was discussed.

h. Between July 12 and July 19, 2010, MEGALLI ordered the short sale of an additional 150,000 shares of Carter's common stock in an account controlled by Level Global.

i. Following the release of Carter's quarterly results after the close of business on July 28, 2010, at approximately 9:30 a.m. on or about July 29, 2010, MEGALLI caused Level Global to cover its short position of 300,000 shares of Carter's common stock acquired between July 8 and July 19, 2010.

All in violation of Title 18, United States Code, Section 371.

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Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARK MEGALLI,	:	MOTION TO VACATE
Movant,	:	28 U.S.C. § 2255
	:	
v.	:	CRIMINAL INDICTMENT NO.
	:	1:13-CR-0442-RWS-AJB-1
UNITED STATES OF AMERICA,	:	
Respondent.	:	CIVIL FILE NO.
	:	1:15-CV-1433-RWS-AJB

ORDER ADOPTING MAGISTRATE JUDGE'S
FINAL REPORT AND RECOMMENDATION

The matter is before the Court on Magistrate Judge Alan J. Baverman's Final Report and Recommendation ("R&R") [64], which recommends that Movant's counseled 28 U.S.C. § 2255 motion [40] and a certificate of appealability (COA) be denied. Movant has filed objections [67] to the R&R.

In reviewing a Magistrate Judge's Report and Recommendation, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). Absent objection, the district judge "may accept, reject, or modify, in whole or in part, the findings and recommendations made by the magistrate judge," 28 U.S.C. § 636(b)(1), and "need only satisfy itself that there is no clear error on the

face of the record in order to accept the recommendation," Fed. R. Civ. P. 72, advisory committee note, 1983 Addition, Subdivision (b).

I. Discussion

A. Background[1]

This action involves a violation of securities law by a remote tippee. A tippee may not trade on material nonpublic information from an insider "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." Dirks v. SEC, 463 U.S. 646, 660 (1983). In determining tippee liability,

> the initial inquiry is whether there has been a breach of duty by the insider. This requires courts to focus on objective criteria, i.e., whether the insider receives a direct or indirect personal benefit from the disclosure, such as a pecuniary gain or a reputational benefit that will translate into future earnings. . . . There are objective facts and circumstances that often justify such an inference. For example, there may 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. The elements of fiduciary duty and exploitation of nonpublic information also exist when an insider makes a gift of confidential information to a trading relative or friend. The tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient.

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[1] The Court's summary of the proceedings reflects much of the Magistrate Judge's language in the Report and Recommendation, with adjustments as necessary for the purpose of *de novo* review.

Id. at 663-64. "Dirks specifies that when a tipper gives inside information to 'a trading relative or friend,' the jury can infer that the tipper meant to provide the equivalent of a cash gift." Salman v. United States, _ U.S. _, _, 137 S. Ct. 420, 428 (2016) (hereinafter Salman).[2] A tipper breaches his fiduciary duty "when the tipper discloses the inside information for a personal benefit. And, . . . a jury can infer a personal benefit – and thus a breach of the tipper's duty – where the tipper receives something of value in exchange for the tip or 'makes a gift of confidential information to a trading relative or friend.'" Id., _ U.S. at _, 137 S. Ct. at 423 (quoting Dirks, 463 U.S. at 664)). The issue raised by Movant in this action is whether, based on the Second Circuit decision in Newman, an insider/tipper's personal benefit can be inferred (or a tippee's knowledge thereof can be based on conscious avoidance) absent a familial or close relationship between tipper and tippees. See United States v. Newman, 773 F.3d 438 (2d Cir. 2014), cert. denied, _ U.S. _, 136 S. Ct. 242 (2015), and abrogated, Salman, _ U.S. at _, 137 S. Ct. at 428.

Movant was charged by information with one count of conspiracy to commit securities fraud by, among other things, causing the purchase and sale of "Carter's

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[2] The underlying Ninth Circuit decision is United States v. Salman, 792 F.3d 1087 (9th Cir. 2015) (hereinafter Salman I), cert. granted in part, _ U.S. _, 136 S. Ct. 899, and aff'd, Salman.

securities on the basis of . . . certain Inside Information provided to him by Eric T. Martin, knowing and consciously avoiding the knowledge that the Inside Information had been obtained by Martin from a Carter's insider[, Richard T. Posey,] in violation of the insider's duties of trust and confidence to Carter's," in violation of 15 U.S.C. §§ 78j(b) and 78ff and 17 C.F.R. § 240.10b-5. (Information at 1, 4, 6, ECF No. 1 (tracking the language of § 240.10b-5.) Movant pleaded guilty to count one as charged. (Guilty Plea and Plea Agreement, ECF No. 3-1.)[3]

At the plea hearing, the government set forth the following –

> [T]he Government would be required to prove beyond a reasonable doubt, first, in connection with the purchase or sale of securities, the Defendant employed a device, scheme or artifice to defraud, or engaged in an act, practice or course of business that operated, or would operate, as a fraud or deceit upon persons; second, the Defendant acted willfully, knowingly and with the intent to defraud; and third, the Defendant used or caused to be used any means or instrumentalities of transportation or communication in interstate commerce or use of the mails in furtherance of the scheme.
>
> . . . . In order to satisfy the first two elements of that test that I just described in an insider trading case, the Government is required to prove, first, that the original tipper, in this case Richard Posey, possessed

[3] The Securities and Exchange Commission (SEC) brought a civil enforcement action against Movant, and the final judgment was entered therein on December 17, 2015. J., Sec. & Exch. Comm'n v. Megalli, No. 1:13-cv-3783-AT (N.D. Ga. Dec. 17, 2015), ECF No. 66; see also Sec. & Exch. Comm'n v. Megalli, 157 F. Supp. 3d 1240 (N.D. Ga. 2015) (ruling on motions for summary judgment in 1:13-cv-3783).

> material nonpublic information regarding a publicly traded company; second, the original tipper, Rick Posey, disclosed this information to the intermediate tippee, in this case Eric Martin, who disclosed it to the remote tippee, in this case [Movant]; third, the remote tippee, [Movant], traded in securities on the basis of the information; and fourth, the original tipper, Rick Posey, breached a fiduciary duty to the source of the information by disclosing it to the intermediate tippee, and the remote tippee, [Movant], knew that the original tipper had violated a fiduciary duty by providing the information to the intermediate tippee.
>
> Now, in the Second Circuit there's currently an issue percolating[4] that's related to some of the insider trading prosecutions up there as to whether there is a fifth element that the remote tippee in [Movant's] position must also know that the original tipper received a personal benefit in exchange for disclosing the information to the intermediate tippee. The Government's position is that this element is not required. Nevertheless, the parties have discussed it; and the Government's position is that as a factual matter – first, as a legal matter, it's not required. As a factual matter, if it was required, the Government could prove it based on circumstantial evidence that [Movant] knew or consciously avoided the knowledge that Martin was meeting with friends and contacts at Carter's and had friendships with one or more persons at Carter's, his former employer. Finally, just so the Court is aware, conscious avoidance or deliberate ignorance is sufficient to articulate the knowledge and intent elements under this, under the securities fraud statutes that we're discussing.

(Plea Hr'g Tr. at 11-14, ECF No. 9.) Movant stated that he understood. (Id. at 14.)

The government stated that if the case went to trial the evidence would show the following: (1) Mr. Posey disclosed insider information to Mr. Martin in exchange

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[4] The issues percolating in November 2013 were decided in Newman on December 10, 2014.

for reciprocal stock tips on other public companies, future networking opportunities, friendship, and other tangible and intangible benefits and (2) Mr. Martin provided the insider information to Movant, who used the information to sell and short Carter's common stock – knowing that Mr. Martin had recently left Carter's and was meeting, speaking, and socially interacting with a Carter's insider[5] and knowing or consciously avoiding that Mr. Martin was obtaining the information from the Carter's insider in breach of the insider's duties. (Id. at 17-19.) Movant presented no significant disagreement on the facts,[6] and the Court accepted his guilty plea. (Id. at 22-25, 31.)

In his sentencing memorandum, Movant referred to the then ongoing litigation in Newman and pointed out that he, Movant, had waived the possibility of requiring the government to prove (1) a breach/personal-benefit in regard to the insider and

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[5] The government stated that the insider, Posey (whose name had been unknown to Movant) and Mr. Martin had developed a personal and professional relationship which included travel, golf outings, lunches, work events, and social events, and which continued after Mr. Martin left Carter's. (Plea Hr'g Tr. at 18-19.)

[6] See Megalli, 157 F. Supp. 3d at 1248 ("[Movant] concedes that in his guilty plea he admitted that he made trades on 'the basis of, in whole or in part, certain material, non-public information provided by Eric Martin . . . knowing and consciously avoiding the knowledge that the material, non-public information had been obtained by Martin from a Carter's insider in violation of the insider's duties of trust and confidence to Carter's.'" (citation omitted)); *see also* Def. Mark Megalli's Answer at 2, S.E.C. v. Megalli, No. 1:13-cv-3783-AT (N.D. Ga. Dec. 17, 2015), ECF No. 13.

(2) Movant's knowledge of that breach/personal-benefit. (Mov't Sentencing Mem. at 57-60, ECF No. 26.) Movant explained that he had not improperly waived a legal defense but that the government's ability to prove knowledge of benefit "is hardly a foregone conclusion, which means it should factor as a mitigating circumstance in the Court's assessment of a reasonable sentence in this case." (Id. at 60.)

At sentencing, the government requested a sentence at the low end of the forty-one to fifty-one month guidelines range, stating, among other things that Movant had made a "tremendous demonstration of acceptance of responsibility." (Sentencing Tr. at 4, ECF No. 31.) Movant, through counsel, admitted – "[c]onscious avoidance . . . is equally as culpable as actual knowledge but I'm here to tell you that we also have actual knowledge in this case" – and then asked the Court to consider that jail time was not the end-all of deterrence as he was facing significant liability in the SEC action ($3.17 million in disgorgement) then pending before the Honorable Judge Amy Totenberg.[7] (Id. at 7-9.) Movant took responsibility for his actions as wrong and life-altering – "I knew it was wrong and I should not have traded on it . . . . We're paying a tremendous price . . . financially, emotionally, psychologically. . . . [W]e're paying

[7] In the December 2015 final judgment in the SEC action, Movant was ordered to pay $19,790.00 in disgorgement. J., Megalli, No. 1:13-cv-3783-AT.

a tremendous amount for my mistakes and I want to apologize to my family in particular for putting them into this position." (Id. at 22.) The Court imposed a twelve month and one day term of imprisonment. (Id. at 28.) The record does not show that Movant appealed.

B. Motion to Vacate

In his motion to vacate, Movant argues that his conviction is subject to collateral attack because, after he was sentenced, the Second Circuit Court of Appeals in Newman modified the law so that the facts underlying Movant's guilty plea no longer establish the crime for which he was charged. (Mov't Mem. at 2-4 (sealed un-redacted version), ECF No. 44.)[8] Movant states that under Newman, (1) the personal benefit to the insider/tipper must be a tangible economic benefit and (2) the remote tippee (Movant) must actually know that the insider disclosed confidential information in exchange for such benefit. (Id. at 3-4.) Movant contends that under Newman – which he asserts is binding on this Court as an extension of Dirks – the guilty plea colloquy and factual proffer were deficient and his guilty plea is invalid (1) because he was not subjectively aware that Mr. Martin was providing him with information

[8] Movant pleaded guilty on November 14, 2013, and Newman was decided on December 10, 2014.

obtained from a Carter's insider who had provided confidential information in exchange for a personal benefit, an essential element under Newman, and (2) because the insider's benefit was not "'a potential *gain of a pecuniary or similarly valuable* nature.'" (Mov't Mem. at 3, 5, 16-27 (quoting Newman, 773 F.3d at 452).)

Movant asserts that his challenge to his guilty plea is not barred by procedural default (1) because Newman is so unprecedented as to provide cause for failure to raise his claim earlier, which resulted in prejudice as he was deprived of a voluntary and intelligent plea, and (2) because he shows actual innocence under the standard announced in Newman. (Mov't Mem. at 30-41.)

The government argues, among other things, that Movant's claims are barred by procedural default, which he fails to overcome, and additionally comments that, in his sentencing memorandum, Movant presented as a mitigating consideration the fact that he was waiving his Newman defense. (Resp't Resp. at 34-69, ECF No. 47.)

In reply, Movant asserts that the Court has jurisdiction to hear a challenge to the guilty plea for the first time on collateral attack. (Mov't Reply at 9-13, ECF No. 52 (citing Bousley v. United States, 523 U.S. 614 (1998); Davis v. United States, 417 U.S. 333 (1974)).) In asserting his lack of criminal liability (i.e., actual innocence), Movant states that he "does not contest that he relied on Carter's inside information,

knowing or consciously avoiding the knowledge that it had been imparted to Martin in breach of an underlying fiduciary duty owed to Carter's by someone with whom Martin had been in contact prior to communicating with [Movant.]" (Id. at 26-27.) Movant, however, asserts that he did not admit that the Carter's insider/tipper received a quantifiable, pecuniary benefit or that Movant was aware of the substance of that benefit (as required under Newman). (Mov't Reply at 27.)

Movant obtained a stay in order that the Court could consider the United States Supreme Court's resolution of a case out of the Ninth Circuit, Salman I. Movant contended that the matter on review in Salman I went directly to the merits of his petition as it involved the Newman issue of whether essential insider trading elements included (1) that the insider must receive a pecuniary or similarly tangible benefit for his disclosure and (2) that the remote-tippee must be aware of the substance of the exchange. (Mot. to Stay at 1-7, ECF No. 54.)

After Salman was decided, Movant filed a supplemental brief in which he contends that the facts in Salman are "far removed from" and in "stark contrast" to the facts in his case and that his § 2255 motion is removed from the purview of Salman. (Suppl. Br. at 2-4, ECF No. 63.) Movant states that Salman addressed only the giving of inside information to trading *relatives* when the remote tippee knew the identity of

the tipper/insider and that, therefore, his Newman argument is not foreclosed by Salman. (Id. at 4-12.)[9] Movant states that, absent a familial or close relationships between the tipper and tippees, there is no high probability of a benefit which can be inferred and a remote tippee cannot be held liable based on conscious avoidance of such "benefit." (Id. at 11-12.)

C. The Magistrate Judge's Recommendation

The Magistrate Judge found, under Bousley, that Movant's challenge to his guilty plea was procedurally defaulted by his failure to challenge it on direct review and that he must overcome his default in order to obtain review. (R&R at 17, ECF No. 64); see Bousley, 523 U.S. at 616 (reviewing guilty-plea challenge that had been procedurally defaulted on direct appeal and holding that the movant "may be entitled to a [§ 2255] hearing on the merits of it if he makes the necessary showing to relieve

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[9] Movant argues that the tippee's awareness of the insider's benefit is required because the United States Supreme Court declined "to disturb the Second Circuit's reversal in Newman of the underlying trader convictions based on the government's failure to prove the traders' knowledge of insider benefit." (Suppl. Br. at 6.) Movant's point is less than clear, but the Court emphasizes that when the United States Supreme Court in reviewing Salman I from the Ninth Circuit declined "to disturb the Second Circuit's reversal in Newman of the underlying trader convictions based on the government's failure to prove the traders' knowledge of insider benefit," (Suppl. Br. at 6), it *did not* thereby issue any kind of binding holding on a Newman issue which was not before the Supreme Court.

the default"). The Magistrate Judge found that Movant's attempt to show cause by asserting that his argument was novel failed because his "current arguments were reasonably available to Movant to preserve and raise on appeal if he had wished to do so, just as the arguments were available to the litigants in Newman." (Id.) The Magistrate Judge noted as follows –

> In contrast to Movant, the defendants in Newman directly appealed their convictions and challenged the elements that must be proven for insider trading. Newman, 773 F.3d at 442-44. The same arguments were available to Movant. (See Plea Tr. at 13 (government discussing issue percolating in the Second Circuit on whether remote tippee must know original tipper received a personal benefit); Mov't Sentencing Mem. at 57-60 (Movant discussing Newman issues); Resp't Ex. 1, Mem. at 23, ECF No. 50 (Movant discussing in a pre-plea memorandum the issues in Newman)). Additionally, Movant argued in his sentencing memorandum that his waiver of Newman issues should weigh in his favor at sentencing. (Mov't Sentencing Mem. at 57-60.)

(R&R at 17-18 n.12.) The Magistrate Judge found that Movant's attempt to overcome his default by showing actual innocence failed because Newman was not binding precedent in this Court and had been abrogated. (Id. at 19.)

D. Objections and Ruling on Objections

In his objections movant states that the R&R is "fundamentally objectionable because, at its core, it posits that the U.S. Supreme Court abrogated [Newman] in deciding Salman . . . ." (Objections at 1, ECF No. 67.) Movant states that the R&R

incorrectly determined that Salman rejected Newman's determination that a personal benefit could not be inferred based merely on a personal relationship absent "proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." (Objections 1-3 (quoting Newman, 773 F.3d at 452).) Movant asserts that, to the contrary, Salman decided only that a personal benefit could be inferred when the insider/tipper and tippee are related by blood or marriage and the tippee has direct knowledge of the source of information on which they relied. (Id. at 1-2.) Movant sets forth four objections, which are addressed separately below.

1. First Objection

In his first objection, Movant asserts that Salman does not abrogate Newman, that it endorses Dirks, and that it ratifies and endorses Newman's amplified application of Dirks, an amplification that requires additional proof in regard to the insider/tipper benefit for tipping chains that involve unrelated parties when there is no meaningfully close personal relationship, as in Movant's case. (Objections at 4-7.) Movant asserts that Newman and the Salman ratification of Newman entitle him to relief and show that his guilty plea to criminal insider trading was involuntary because

he did not plead guilty to the essential elements of an (1) insider benefit and (2) Movant's knowledge of that benefit. (Objections at 6.)

Although the Court in § 2255 proceedings may "consider" a guilty-plea challenge that is raised for the first time, that consideration is through the lens of the rules on procedural default. See Bousley, 523 U.S. at 616 (reviewing guilty-plea challenge that had been procedurally defaulted on direct appeal and holding that the movant "may be entitled to a [§ 2255] hearing on the merits of it if he makes the necessary showing to relieve the default"). When a claim has been procedurally defaulted, collateral review is barred, absent a showing of cause and prejudice or a showing of actual innocence. See McKay v. United States, 657 F.3d 1190, 1196 (11th Cir. 2011).

This objection fails. Movant's argument based on Newman simply does not demonstrate cause for his procedural default. Newman is not binding precedent. See United States v. Veal, 322 F.3d 1275, 1278 (11th Cir. 2003) ("[I]t is important to note that we are in no way bound by a decision from the Second Circuit Court of Appeals.").

Even if Newman were binding precedent, it has been abrogated, as discussed immediately below. Further, the United States Supreme Court in Salman endorsed

Dirks. It did not decide, or endorse, the Newman amplification of Dirks. See infra I. D. 4.

The Second Circuit held in Newman that in order to show an insider/tipper's breach of his fiduciary duty (disclosing inside information for a personal benefit), there must be evidence of a personal benefit – of a pecuniary or similarly valuable nature – to the insider/tipper, when the disclosure occurred between business associates or between family friends and there was no proof of a meaningfully close personal relationship. Newman, 773 F.3d at 452. The Ninth Circuit subsequently held in Salman I, (1) that additional evidence of a pecuniary or similar benefit is *not* required in order to show an insider/tipper's breach of their fiduciary duty by disclosing information for a benefit, when the disclosure occurs between family members, and (2) that a personal benefit could be inferred based on relationship between family members. Salman I, 792 F.3d at 1092-94. In reviewing Salman I, the United States Supreme Court found that to the extent that Newman "held that the tipper must also receive something of a 'pecuniary or similarly valuable nature' in exchange for a gift to family or friends, . . . [the] requirement is inconsistent with Dirks." Salman, _ U.S. at _, 137 S. Ct. at 428 (quoting Newman, 773 F.3d at 452). The Supreme Court observed that the facts in Salman I were in the heartland of the

Dirks gift rule pertaining to relatives. Id. at 429. Thus, there remained a question as to whether the Supreme Court's treatment of Newman necessarily foreclosed a Newman claim for a non-heartland relationship – a relationship that did not qualify as "meaningfully close personal relationship." United States v. Bray, 853 F.3d 18, 27 n.5 (1st Cir. 2017).

The Second Circuit has addressed that question, stating, "[w]e hold that the logic of Salman abrogated *Newman*'s 'meaningfully close personal relationship' requirement." United States v. Martoma, _ F. 3d _, _, No. 14-3599, 2017 WL 3611518, at *1 (2d Cir. Aug. 23, 2017).[10]

> The Supreme Court's decision in Salman explicitly rejected certain aspects of Newman. See 137 S. Ct. at 428. While the Supreme Court did not have occasion to expressly overrule Newman's requirement that the tipper have a "meaningfully close personal relationship" with a tippee to justify the inference that a tipper received a personal benefit from his gift of inside information – because that aspect of Newman was not at issue in Salman – "[e]ven if the effect of a Supreme Court decision is 'subtle,' it may nonetheless alter the relevant analysis fundamentally enough to require overruling prior, 'inconsistent' precedent." Doscher, 832 F.3d at 378 (quoting Wojchowski v. Daines, 498 F.3d 99, 108 (2d Cir. 2007)).

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[10] The Second Circuit Court of Appeals has allowed Martoma until October 6, 2017 in which to seek reconsideration. See United States v. Martoma, No. 14-3599 (2nd Cir. Aug. 23, 2017). The possibility of reconsideration does not change the result here, however, because Newman is not binding within the Eleventh Circuit.

> We respectfully conclude that Salman fundamentally altered the analysis underlying Newman's "meaningfully close personal relationship" requirement such that the "meaningfully close personal relationship" requirement is no longer good law.
>
> . . . Nothing in Salman[] . . . supports a distinction between gifts to people with whom a tipper shares a "meaningfully close personal relationship". . . and gifts to those with whom a tipper does not share such a relationship.

Martoma, _ F. 3d at _, 2017 WL 3611518 at *1. Movant's first objection is overruled.

2. Second Objection

In his second objection, Movant, relying on United States v. Peter, 310 F.3d 709 (11th Cir. 2002), argues that the R&R's adherence to the doctrine of procedural default is error when the district court lacked jurisdiction to accept his guilty plea, a claim that cannot be procedurally defaulted. (Objections at 7-11.) Movant asserts that the facts underlying his guilty plea and the guilty plea colloquy are insufficient to support his securities fraud conviction in that there is nothing to support the essential elements of a benefit to the insider/tipper or Movant's knowledge of the benefit. (Id. at 10.) Movant argues that he could not waive his right to challenge a conviction based on conduct subsequently deemed to be a non-offense by an intervening change in law. (Id. at 10-11.)

The Court in Peter held that a challenge to the government's charge for a non-offense, though not contested at the time of his plea or on direct appeal, was not subject to procedural default because such challenge went to the district court's jurisdiction. Peter, 310 F.3d at 711, 713.

Here, Movant's attempt to switch to a jurisdictional challenge fails. Newman, the alleged intervening change in law (which is not binding in this Court), does not demonstrate that the information, to which Movant pleaded guilty in this Court, charged him with a non-offense. Movant does not otherwise show that the information to which he pleaded guilty charged him with a non-offense, and a review of the information shows that it tracks the applicable regulatory language related to securities manipulation and deception. See United States v. Berger, 188 F. Supp. 2d 307, 337 (S.D. N.Y. 2002) ("The Information adopts, almost word for word, the language of Rule 10b–5 to allege that Berger committed a securities violation. As a result, Berger's challenge merely goes to the merits of the Government's prosecution, not to the jurisdiction of the Court."). Movant fails to show that he was charged with a non-offense.

3. Third Objection

In his third objection, Movant objects to the Magistrate Judge's finding that his argument based on Newman was not novel and was reasonably available at the time that Movant pleaded guilty. (Objections at 12-16.) Movant asserts that Newman was an "unprecedented change in controlling authority that has since been ratified by the Supreme Court." (Id. at 16.)

As stated earlier, collateral review is now barred, absent a showing of cause and prejudice or a showing of actual innocence, see McKay, 657 F.3d at 1196, and cause may be provided by a "claim that 'is so novel that its legal basis is not reasonably available to counsel,'" Bousley, 523 U.S. at 622 (quoting Reed v. Ross, 468 U.S. 1, 16 (1984)). On *de novo* review, the Court agrees with the Magistrate Judge on this issue. Newman was not so novel that Movant could not have raised the Newman issues – of which he was aware – before the Newman opinion was issued. See supra I. C. (quoting R&R at 17-18 n.12).)

4. Fourth Objection

In his fourth objection, Movant asserts that, the rejection of his claim of actual innocence is fundamentally objectionable because the R&R misapprehended that Salman abrogated Newman and mistakenly relied on SEC v. Yun, 327 F.3d 1263

(11th Cir. 2003).[11] (Objections at 16-23.) According to Movant, "the Supreme Court actually affirmed Newman with respect to (i) the standard for remote tippee liability in prosecutions involving, as in this case, ephemeral contractual or social contacts and (ii) the level of trader knowledge required if the underlying tips have been secured by more concrete consideration." (Objections at 17.) Movant asserts that he "is actually innocent of insider trading if the government is required to prove both a qualifying insider benefit and his culpable knowledge of the same." (Id. at 4.) Movant also argues that he should be granted a COA. (Id. at 23-25.)

As stated earlier, a showing of actual innocence can overcome a procedural default. McKay, 657 F.3d at 1196. A defendant who can show that he has been convicted for an act that the law (as changed by binding precedent, including the circuit court for the circuit of his conviction) no longer makes criminal, shows a fundamental defect that is properly raised in a collateral proceeding. Davis, 417 U.S.

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[11] The Magistrate Judge's reference to Yun, which decided tippee liability for securities fraud under the misappropriation theory, did not work an error that changes the result in Movant's case, which involves securities fraud under the classical theory. The Magistrate Judge discussed, among other cases, Dirks and Yun. Further, Yun discusses Dirks and classical and misappropriation theory and states that "there is no reason to distinguish between a tippee who receives confidential information from an insider (under the classical theory) and a tippee who receives such information from an outsider (under the misappropriation theory)." Yun, 327 F.3d at 1276.

at 347;[12] see also Vosgien v. Persson, 742 F.3d 1131, 1134 (9th Cir. 2014) ("One way a petitioner can demonstrate actual innocence is to show in light of subsequent case law that he cannot, as a legal matter, have committed the alleged crime."); Phillips v. United States, 734 F.3d 573, 582-83 (6th Cir. 2013) (stating that actual innocence may be shown by pointing to an intervening change in binding precedent which demonstrates that the petitioner stands convicted based on actions that the law deems non-criminal). Law from another circuit, however, does not represent an "intervening change in the law that could serve as a basis for an equitable exception argument in

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[12] In Davis, on petition for *certiorari* from the Ninth Circuit Court of Appeals' decision affirming the petitioner's conviction, the United States Supreme Court held as follows –

> In this case, the petitioner's contention is that [the Ninth Circuit's application of the law in a case decided] after his conviction was affirmed, establishes that his induction order was invalid under the Selective Service Act and that he could not be lawfully convicted for failure to comply with that order. If this contention is well taken, then Davis' conviction and punishment are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice' and 'present(s) exceptional circumstances' that justify collateral relief under s 2255. Therefore, although we express no view on the merits of the petitioner's claim, we hold that the issue he raises is cognizable in a § 2255 proceeding.

Davis, 417 U.S. at 346-47.

this Court that [Movant] stands convicted of an act that the law does not make criminal." Phillips, 734 F.3d at 585 (internal quotation marks and citation omitted) (rejecting attempt to use law from another circuit to show actual innocence).

Movant's final objection fails. As stated earlier, Newman is not binding in this Court. Further, the Supreme Court in Salman did not affirm Newman. The Newman decision was not, itself, before the Supreme Court. Accordingly, Newman remains non-binding precedent, which has been abrogated by Salman and has now been further abrogated by the Second Circuit. Salman, which is binding in this Court, reinforced Dirks, to which the Eleventh Circuit and this Court adhere and adhered at the time Movant pleaded guilty. Movant does not show that Salman modified the Dirks principle. Dirks is not new law, and Movant shows no cause for his default of an argument based on Dirks.

II. Conclusion

On *de novo* review of Movant's objections, the Court agrees with the Magistrate Judge and otherwise finds no clear error in the R&R. Further, a COA is not warranted. Not all decisions resolving a motion to vacate, which peripherally involve complex areas of law, are themselves complex or reasonably debatable. Such is the case here, based on Movant's procedural default.

The Court agrees with the Magistrate Judge that Movant presents no reasonably debatable issue that warrants a COA.

Accordingly, **IT IS ORDERED** that Plaintiff's objections [67] are overruled and that the Magistrate Judge's Report and Recommendation [64] is **ADOPTED** as the Order of the Court. **IT IS ORDERED** that the motion to vacate [40] is **DENIED and** that a certificate of appealability is **DENIED.**

SO ORDERED this 25th day of September, 2017.

RICHARD W. STORY
UNITED STATES DISTRICT JUDGE

Exhibit C

GUILTY PLEA and PLEA AGREEMENT

United States Attorney
Northern District of Georgia

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
CRIMINAL NO. 1:13-CR-442-RWS

The United States Attorney for the Northern District of Georgia ("the Government") and Defendant MARK MEGALLI, enter into this plea agreement as set forth below in Part IV pursuant to Rule 11 (c)(1)(B) of the Federal Rules of Criminal Procedure. MARK MEGALLI, Defendant, having received a copy of the above-numbered Information and having been arraigned, hereby pleads GUILTY to the sole count of the Information.

I. ADMISSION OF GUILT

1. The Defendant admits that he is pleading guilty because he is in fact guilty of the crime charged in the Information.

II. ACKNOWLEDGMENT & WAIVER OF RIGHTS

2. The Defendant understands that by pleading guilty, he is giving up the right to plead not guilty and the right to be tried by a jury. At a trial, the Defendant would have the right to an attorney, and if the Defendant could not afford an attorney, the Court would appoint one to represent the Defendant at trial and at every stage of the proceedings. During the trial, the Defendant would be presumed innocent and the Government would have the burden of proving him guilty beyond a reasonable doubt. The Defendant would have the right to confront and cross-examine the witnesses against him. If the Defendant wished, he could testify on his own behalf and present evidence in his defense,

and he could subpoena witnesses to testify on his behalf. If, however, the Defendant did not wish to testify, that fact could not be used against him, and the Government could not compel him to incriminate himself. If the Defendant were found guilty after a trial, he would have the right to appeal the conviction.

3. The Defendant understands that by pleading guilty, he is giving up all of these rights and there will not be a trial of any kind.

4. By pleading guilty, Defendant also gives up any and all rights to pursue any affirmative defenses, Fourth Amendment or Fifth Amendment claims, and other pretrial motions that have been filed or could have been filed.

5. The Defendant also understands that he ordinarily would have the right to appeal his sentence and, under some circumstances, to attack the conviction and sentence in post-conviction proceedings. By entering this Plea Agreement, the Defendant may be waiving some or all of those rights to appeal and to collaterally attack his conviction and sentence, as specified below.

6. Finally, the Defendant understands that, to plead guilty, he may have to answer, under oath, questions posed to him by the Court concerning the rights that he is giving up and the facts of this case, and the Defendant's answers, if untruthful, may later be used against him in a prosecution for perjury or false statements.

III. ACKNOWLEDGMENT OF PENALTIES

7. The Defendant understands that, based on his plea of guilty, he will be subject to the following maximum and mandatory minimum penalties:

As to the sole charge in the Information

(18 U.S.C. § 371 -- Conspiracy to Commit Securities Fraud)

a. Maximum term of imprisonment: 5 years.

b. Mandatory minimum term of imprisonment: None.

c. Maximum term of supervised release: 3 years.

d. Maximum fine: $250,000, due and payable immediately.

e. Full restitution, due and payable immediately, to all victims of the offense(s) and relevant conduct.

f. Mandatory special assessment: $100.00, due and payable immediately.

g. Forfeiture of any and all proceeds from the commission of the offense, any and all property used or intended to be used to facilitate the offense, and any property involved in the offense.

8. The Defendant understands that, before imposing sentence in this case, the Court will be required to consider, among other factors, the provisions of the United States Sentencing Guidelines and that, under certain circumstances, the Court has the discretion to depart from those Guidelines. The Defendant further understands that the Court may impose a sentence up to and including the statutory maximum as set forth in this paragraph and that no one can predict his exact sentence at this time.

9. REMOVAL FROM THE UNITED STATES: The Defendant recognizes that pleading guilty may have consequences with respect to his immigration status if

he is not a citizen of the United States. Under federal law, a broad range of crimes are removable offenses, including the offense to which the Defendant is pleading guilty. Indeed, because the Defendant is pleading guilty to this offense, removal is presumptively mandatory. Removal and other immigration consequences are the subject of a separate proceeding, however, and the Defendant understands that no one, including his attorney or the district court, can predict to a certainty the effect of his conviction on his immigration status. The Defendant nevertheless affirms that he wants to plead guilty regardless of any immigration consequences that his plea may entail, even if the consequence is his automatic removal from the United States.

IV. PLEA AGREEMENT

10. The Defendant, his counsel, and the Government, subject to approval by the Court, have agreed upon a negotiated plea in this case, the terms of which are as follows:

No Additional Charges

11. The United States Attorney for the Northern District of Georgia agrees not to bring further criminal charges against the Defendant related to the charges to which he is pleading guilty, including any charges relating to any confidential information provided to the Defendant by Eric M. Martin and Mellon Advisors, LLC. The Defendant understands that this provision does not bar prosecution by any other federal, state, or local jurisdiction.

Sentencing Guidelines Recommendations

Base/Adjusted Offense Level

12. The Government will recommend, and the Defendant agrees not to dispute or contest, the following applications of the Sentencing Guidelines:

a. The applicable offense guideline is Section 2B1.4 ("Insider Trading"), resulting in a Base Offense Level of 8.

b. The amount of loss resulting from the offense(s) of conviction and all relevant conduct is more than $2,500,000 but less than $7,000,000, resulting in an 18-level increase in the Base Offense Level under Section 2B1.4(b)(1).

Role in the Offense Adjustments

13. The Government and the Defendant stipulate and agree that the following Sentencing Guidelines do not apply:

a. Any enhancement or reduction for an aggravating or mitigating role under Sections 3B1.1 or 3B1.2.

b. Any enhancement for abuse of a position of public or private trust, or use of a special skill, in a manner that significantly facilitated the commission or concealment of the offense, under Section 3B1.3.

Acceptance of Responsibility

14. The Government will recommend that the Defendant receive the two-level adjustment for acceptance of responsibility pursuant to Section 3E1.1 of the Sentencing Guidelines, and the additional one-level adjustment if the offense

level is 16 or higher. However, the Government will not be required to recommend acceptance of responsibility if, after entering this Plea Agreement, the Defendant engages in conduct inconsistent with accepting responsibility. Thus, by way of example only, should the Defendant falsely deny or falsely attempt to minimize Defendant's involvement in relevant offense conduct, give conflicting statements about Defendant's involvement, fail to pay the special assessment, fail to meet any of the obligations set forth in the Financial Cooperation Provisions set forth below, or participate in additional criminal conduct, including unlawful personal use of a controlled substance, the Government will not be required to recommend acceptance of responsibility.

Right to Answer Questions, Correct Misstatements, and Make Recommendations

15. The Government reserves the right to inform the Court and the Probation Office of all facts and circumstances regarding the Defendant and this case, and to respond to any questions from the Court and the Probation Office and to any misstatements of fact or law. Except as expressly stated elsewhere in this Plea Agreement, the Government also reserves the right to make recommendations regarding application of the Sentencing Guidelines. As to any Guideline issues not specifically addressed in this Plea Agreement, the parties are free to advocate their respective positions at sentencing.

Right to Modify Recommendations

16. With regard to the Government's recommendation as to any specific application of the Sentencing Guidelines as set forth elsewhere in this Plea Agreement, the Defendant understands and agrees that, should the Government obtain or receive additional evidence concerning the facts underlying any such recommendation, the Government will bring that evidence to the attention of the Court and the Probation Office. In addition, if the additional evidence is sufficient to support a finding of a different application of the Guidelines, the Government will not be bound to make the recommendation set forth elsewhere in this Plea Agreement, and the failure to do so will not constitute a violation of this Plea Agreement.

Sentencing Recommendations

Downward Variance Recommendation

17. In this case, the Defendant expeditiously entered a plea of guilty prior to indictment, thereby conserving limited judicial and prosecutorial resources. As a result, the Government will recommend that the Defendant receive a one-level downward variance.

Specific Sentence Recommendation

18. The Government agrees to recommend that the Defendant be sentenced at the low end of the adjusted guideline range.

Fine--No Recommendation As To Amount

19. The Government agrees to make no specific recommendation as to the amount of the fine to be imposed on the Defendant within the applicable guideline range.

Reservation of Rights Under 18 U.S.C. § 3553(a)

20. The Defendant reserves his right to argue for a downward variance from the Court at sentencing pursuant to 18 U.S.C. § 3553(a), and the Government reserves its right to oppose such request or argument.

Financial Cooperation Provisions

Special Assessment

21. The Defendant agrees that, within 30 days of the guilty plea, he will pay a special assessment in the amount of $100 by money order or certified check made payable to the Clerk of Court, U.S. District Court, 2211 U.S. Courthouse, 75 Spring Street, S.W., Atlanta, Georgia 30303. The Defendant agrees to provide proof of such payment to the undersigned Assistant United States Attorney within 30 days of the guilty plea.

Restitution

22. Pursuant to 18 U.S.C. § 3664(h), the Defendant agrees to pay, and the Government agrees to recommend, a minimum and a maximum of $50,000.00 as restitution to the Clerk of Court for distribution to the following victims of the offense(s) to which he is pleading guilty and all relevant conduct, including, but not limited to, any counts dismissed as a result of this Plea Agreement:

Carter's, Inc.
c/o Chief Legal Officer
The Proscenium
1170 Peachtree St. NE, Ste. 900
Atlanta, GA 30309

Fine/Restitution - Terms of Payment

23. The Defendant agrees to pay any fine and/or restitution imposed by the Court to the Clerk of Court for eventual disbursement to the appropriate account and/or victim(s). The Defendant also agrees that the full fine and/or restitution amount shall be considered due and payable immediately. If the Defendant cannot pay the full amount immediately and is placed in custody or under the supervision of the Probation Office at any time, he agrees that the custodial agency and the Probation Office will have the authority to establish payment schedules to ensure payment of the fine and/or restitution. The Defendant understands that this payment schedule represents a minimum obligation and that, should Defendant's financial situation establish that he is able to pay more toward the fine and/or restitution, the Government is entitled to pursue other sources of recovery of the fine and/or restitution. The Defendant further agrees to cooperate fully in efforts to collect the fine and/or restitution obligation by any legal means the Government deems appropriate. Finally, the Defendant and his counsel agree that the Government may contact the Defendant regarding the collection of any fine and/or restitution without notifying and outside the presence of his counsel.

Financial Disclosure

24. The Defendant agrees that Defendant will not sell, hide, waste, encumber, destroy, or otherwise devalue any such asset worth more than $5,000 before sentencing, without the prior approval of the Government. The Defendant understands and agrees that Defendant's failure to comply with this provision of the Plea Agreement should result in Defendant receiving no credit for acceptance of responsibility.

25. The Defendant agrees to cooperate fully in the investigation of the amount of restitution and fine; the identification of funds and assets in which he has any legal or equitable interest to be applied toward restitution and/or fine; and the prompt payment of restitution or a fine.

26. The Defendant's cooperation obligations include: (A) fully and truthfully completing the Department of Justice's Financial Statement of Debtor form, and any addenda to said form deemed necessary by the Government, within ten days of the change of plea hearing; (B) submitting to a financial deposition or interview (should the Government deem it necessary) prior to sentencing regarding the subject matter of said form; (C) providing any documentation within his possession or control requested by the Government regarding his financial condition and that of his household; and (D) fully and truthfully answering all questions regarding his past and present financial condition and that of his household in such interview(s); and (E) providing a waiver of his

privacy protections to permit the Government to access his credit report and tax information held by the Internal Revenue Service.

27. So long as the Defendant is completely truthful, the Government agrees that anything related by the Defendant during his financial interview or deposition or in the financial forms described above cannot and will not be used against him in the Government's criminal prosecution. However, the Government may use the Defendant's statements to identify and to execute upon assets to be applied to the fine and/or restitution in this case. Further, the Government is completely free to pursue any and all investigative leads derived in any way from the interview(s)/deposition(s)/financial forms, which could result in the acquisition of evidence admissible against the Defendant in subsequent proceedings. If the Defendant subsequently takes a position in any legal proceeding that is inconsistent with the interview(s)/deposition(s)/financial forms -- whether in pleadings, oral argument, witness testimony, documentary evidence, questioning of witnesses, or any other manner -- the Government may use the Defendant's interview(s)/deposition(s)/financial forms, and all evidence obtained directly or indirectly therefrom, in any responsive pleading and argument and for cross-examination, impeachment, or rebuttal evidence. Further, the Government may also use the Defendant's interview(s)/ deposition(s)/financial forms to respond to arguments made or issues raised sua sponte by the Magistrate or District Court.

Recommendations/Stipulations Non-binding

28. The Defendant understands and agrees that the recommendations of the Government incorporated within this Plea Agreement, as well as any stipulations of fact or guideline computations incorporated within this Plea Agreement or otherwise discussed between the parties, are not binding on the Court and that the Court's failure to accept one or more of the recommendations, stipulations, and/or guideline computations will not constitute grounds to withdraw his guilty plea or to claim a breach of this Plea Agreement.

Limited Waiver of Appeal

29. LIMITED WAIVER OF APPEAL: To the maximum extent permitted by federal law, the Defendant voluntarily and expressly waives the right to appeal his conviction and sentence and the right to collaterally attack his conviction and sentence in any post-conviction proceeding (including, but not limited to, motions filed pursuant to 28 U.S.C. § 2255) on any ground, except that the Defendant may file a direct appeal of an upward departure or variance above the sentencing guideline range as calculated by the district court. The Defendant understands that this Plea Agreement does not limit the Government's right to appeal, but if the Government initiates a direct appeal of the sentence imposed, the Defendant may file a cross-appeal of that same sentence.

Miscellaneous Waivers

FOIA/Privacy Act Waiver

30. The Defendant hereby waives all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case, including, without limitation, any records that may be sought under the Freedom of Information Act, Title 5, United States Code, Section 552, or the Privacy Act of 1974, Title 5, United States Code, Section 552a.

No Other Agreements

31. There are no other agreements, promises, representations, or understandings between the Defendant and the Government.

In Open Court, this 14th day of November, 2013.

SIGNATURE (Defendant)
MARK MEGALLI

SIGNATURE (Assistant U.S. Attorney)
David M. Chaiken

SIGNATURE (Attorney for Defendant)
Suzanne Jaffe Bloom

SIGNATURE (Assistant U.S. Attorney)
Stephen H. McClain

SIGNATURE (Attorney for Defendant)
Paul N. Monnin

SIGNATURE (Approving Official)
Randy S. Chartash

INFORMATION BELOW MUST BE TYPED OR PRINTED

Suzanne Jaffe Bloom, Esq.
NAME (Attorney for Defendant)

Winston & Strawn LLP
200 Park Avenue
STREET

New York, NY 10166-4193
CITY & STATE ZIP CODE

PHONE NUMBER (212) 294-4604

MARK MEGALLI
NAME (Defendant)

c/o Suzanne Jaffe Bloom, Esq.
Winston & Strawn LLP
STREET

_____
CITY & STATE ZIP CODE

PHONE NUMBER _____

STATE BAR OF GEORGIA NUMBER _____

Paul N. Monnin, Esq.
NAME (Attorney for Defendant)

DLA Piper LLP
One Atlantic Center
1201 West Peachtree St., Suite 2800
STREET

Atlanta, GA 30309
CITY & STATE ZIP CODE

PHONE NUMBER (404) 736-7804

STATE BAR OF GEORGIA NUMBER 576612

I have read the Information against me and have discussed it with my attorney. I understand the charges and the elements of each charge that the Government would have to prove to convict me at a trial. I have read the foregoing Plea Agreement and have carefully reviewed every part of it with my attorney. I understand the terms and conditions contained in the Plea Agreement, and I voluntarily agree to them. I also have discussed with my attorney the rights I may have to appeal or challenge my conviction and sentence, and I understand that the appeal waiver contained in the Plea Agreement will prevent me, with the narrow exceptions stated, from appealing my conviction and sentence or challenging my conviction and sentence in any post-conviction proceeding. No one has threatened or forced me to plead guilty, and no promises or inducements have been made to me other than those discussed in the Plea Agreement. The discussions between my attorney and the Government toward reaching a negotiated plea in this case took place with my permission. I am fully satisfied with the representation provided to me by my attorney in this case.

Mark Megalli
SIGNATURE (Defendant)
MARK MEGALLI

11/14/13
DATE

I am MARK MEGALLI's lawyer. I have carefully reviewed the charges and the Plea Agreement with my client. To my knowledge, my client is making an informed and voluntary decision to plead guilty and to enter into the Plea Agreement.

SIGNATURE (Defense Attorney)
Suzanne Jaffe Bloom

DATE

Paul N. Monnin

11/14/13

SIGNATURE (Defense Attorney)
Paul N. Monnin

DATE

Filed in Open Court

This 14th day of NOVEMBER 2013

By Rick Boss

U. S. DEPARTMENT OF JUSTICE

Statement of Special Assessment Account

This statement reflects your special assessment only. There may be other penalties imposed at sentencing.

ACCOUNT INFORMATION	
CRIMINAL ACTION NO.	1:13-CR-442-RWS
DEFENDANT'S NAME	MARK MEGALLI
PAY THIS AMOUNT	$100

Instructions:

1. Payment must be made by **certified check** or **money order** payable to:
   Clerk of court, U.S. District Court
   personal checks will not be accepted
2. Payment must reach the clerk's office within 30 days of the entry of your guilty plea
3. Payment should be sent or hand delivered to:
   Clerk, U.S. District Court
   2211 U.S. Courthouse
   75 Spring Street, S.W.
   Atlanta, Georgia 30303
   (Do Not Send Cash)
4. Include defendant's name on **certified check or money order.**
5. Enclose this coupon to insure proper and prompt application of payment.
6. Provide proof of payment to the above-signed AUSA within 30 days of the guilty plea.

Exhibit D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	)	DOCKET NO. 1:13-CR-442-RWS
	)	
V.	)	ATLANTA, GEORGIA
	)	
MARK MEGALLI	)	NOVEMBER 14, 2013
	)	
DEFENDANT.	)	
	)	
	)	

TRANSCRIPT OF GUILTY PLEA
BEFORE THE HONORABLE RICHARD W. STORY
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT: DAVID CHAIKEN, ESQ.
STEPHEN MCCLAIN, ESQ.
ASSISTANT U.S. ATTORNEYS

FOR THE DEFENDANT: PAUL MONNIN, ESQ.
DEFENSE ATTORNEY

COURT REPORTER: SHARON D. UPCHURCH
2114 U. S. COURTHOUSE
ATLANTA, GEORGIA 30303-3361
(404) 215-1354

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY, TRANSCRIPT PRODUCED BY COMPUTER.

P R O C E E D I N G S

(November 14, 2013; In open court)

THE DEPUTY CLERK: The Court calls the case of the United States versus Mark Megalli, Criminal Number 1:13-CR-442.

THE COURT: All right. If counsel and the Defendant will approach the podium, Mr. Goss will administer the oath to the Defendant.

(The Defendant was sworn.)

THE COURT: Mr. Chaiken, you may proceed.

MR. CHAIKEN: Thank you, Your Honor. Your Honor, we have a proposed plea agreement for the Court's consideration. It is in the case of the United States versus Mark Megalli, case number 1:13-CR-442. Mr. Megalli flew down late last night from Manhattan in order to have these proceedings today, and we appreciate the Court being flexible and accommodating us, notwithstanding the Court's trial schedule.

THE COURT: That's fine, thank you. Do you want to go ahead and verify the signatures?

MR. CHAIKEN: Yes, Your Honor.

Mr. Megalli, I have a document entitled Guilty Plea and Plea Agreement. Would you please verify on page 13 and on page 15 of the document is that your signature above your typed name on the left side of the page on 13?

THE DEFENDANT: Yes, it is.

MR. CHAIKEN: And also on the left side of the page

on 15?

THE DEFENDANT: Yes, it is.

MR. CHAIKEN: And Mr. Monnin, as counsel to Mr. Megalli, would you verify is that your signature on the left side of the page on page 13 above your typed name?

MR. MONNIN: It is.

MR. CHAIKEN: And again on the left side of page 16 above your typed name?

MR. MONNIN: It is.

MR. CHAIKEN: Thank you.

Your Honor, having verified the signatures, the Government respectfully tenders the guilty plea and plea agreement to the Court at this time.

THE COURT: Very well. Thank you.

EXAMINATION

BY THE COURT:

Q. Mr. Megalli, before I can accept your plea of guilty, I will need to go over a number of matters with you. And as we go through this process, if anything I ask is not clear, ask me to clear it up.

A. Okay.

Q. It's important that you answer the questions truthfully. You've taken an oath to tell the truth. Obviously, a failure to do so could result in additional charges. Also, as you answer the questions, if you will, as you've just done, answer

out loud so the court reporter can take down your responses. That allows us to have an accurate record of this afternoon's proceedings. Do you understand?

A. Understood.

Q. How old are you, sir?

A. I'm 41.

Q. And what's your educational background?

A. I went to Yale for college and I went to Yale Law School and School of Management where I received a JD-MBA.

Q. In the last 24 hours, have you taken any type of drugs, medicine, pills, had any alcoholic beverages to drink?

A. I did take a prescribed sleep aid last night to help me sleep; but other than that, no.

Q. That is not affecting your ability to think clearly or to make judgments today?

A. No, sir.

Q. In the last or in recent times, have you suffered from any type of mental illness or for addiction to alcohol or drugs?

A. No.

THE COURT: Mr. Monnin, are you aware of any issues regarding your client's competence to enter this plea?

MR. MONNIN: I'm not, Your Honor.

BY THE COURT:

Q. Mr. Megalli, I'm going to go over a number of rights that you're guaranteed by the Constitution and laws of the United

States to be sure you understand these rights but more importantly understand that by entering this plea of guilty, you're giving up many of the rights.

First of all, you are pleading --

THE COURT: He's pleading to an information; correct?

MR. CHAIKEN: That's correct.

BY THE COURT:

Q. You're pleading to an information. You understand that under the Constitution, you're entitled to have charges that are felony charges presented to a grand jury for that grand jury to determine if there's sufficient evidence to warrant your being required to come before the court and answer the charges by the returning of an indictment. Do you understand you have that right?

A. Yes, Your Honor.

Q. Do you understand that by entering a plea to this information, you're giving up that right and agreeing to answer to charges that have been drawn by the U.S. Attorney and have not been presented to the grand jury?

A. I do.

Q. Do you understand that regardless of whether you're charged by an information or an indictment, you have the right to plead not guilty and to have a trial by a jury?

A. I understand.

Q. Do you understand that you have the right to be

represented by a lawyer throughout all proceedings and that if you cannot afford counsel, counsel would be appointed to represent you at no cost to you?

A. I do, Your Honor.

Q. Do you understand that if you pled not guilty and went to trial, at the trial you would be presumed to be innocent and the Government would have to overcome that presumption and prove you guilty beyond a reasonable doubt?

A. Yes.

Q. Do you understand that at such a trial, you would have the right to subpoena witnesses to compel their appearance on your behalf at the trial?

A. I do.

Q. And do you understand that the witnesses for the Government would have to come into court and testify in your presence?

A. Yes.

Q. And do you understand that your lawyer would have the opportunity to cross-examine any Government witnesses, to object to evidence offered by the Government and to offer evidence in your behalf?

A. Yes.

Q. Do you understand that at a trial, while you would have the right to testify if you chose to do so, you also would have the right not to testify?

A. Yes.
Q. And do you understand that if you chose not to testify or put on any evidence, those matters could not be considered against you?
A. I do.
Q. Do you understand that in order to be convicted, the jury would have to reach a unanimous verdict of guilty?
A. Yes.
Q. And do you understand that by entering this plea, you are not going to have a trial; I will find that you're guilty based upon your admissions here, and the only matter that will then remain would be your sentencing by the Court?
A. I understand.
Q. And you're willing to give up that right and proceed with a plea at this time.
A. I am.

THE COURT: Mr. Chaiken, if you would please summarize briefly the terms of the plea agreement that the Defendant has entered into with the Government.

And I'll be asking you after he goes over the agreement if you will just confirm that your view is that this agreement does represent the understanding that you have with the Government.

If you would come up and turn this mike toward you, Mr. Chaiken.

MR. CHAIKEN: Yes, Your Honor.

THE COURT: Thank you.

MR. CHAIKEN: Your Honor, the plea agreement, under the plea agreement the Defendant, Mr. Megalli, agrees to plead guilty to the sole count of the criminal information which charges a felony violation of 18, United States Code, Section 371. He agrees to pay a special assessment of $100, any fine imposed by the Court, and to forfeit all proceeds of unlawful activity or substitute assets.

I want to say one thing briefly about that. There is no forfeiture provision in the criminal information. There is no order of forfeiture and the Government has not identified forfeitable assets; and, therefore, as a practical matter, there will not be forfeiture in this case. But this is in the plea agreement as to make sure everyone is on the same page as to the fact that it is mandatory and it is a technical possibility, although as a practical matter, it's not, we don't expect that that will happen.

Mr. Megalli has agreed as part of the plea to pay restitution in the amount of $50,000 to Carter's Inc. And that is intended to represent an equitable portion of the legal fees incurred by Carter's to date in connection with the Government's insider trading investigation.

The plea agreement recites at paragraph 20 an unusual provision; but nevertheless, it contemplates that Mr. Megalli

reserves the right to argue under 3553(a) for a downward variance at sentencing. And, of course, the Government reserves the right to oppose such request or argument.

And then the Court makes the final and ultimate decisions on sentencing, notwithstanding anything the parties agree to in the plea agreement. And Mr. Megalli understands that if the Court does not do that, it is not grounds to withdraw from the plea agreement.

And then finally a very important provision appears at paragraph 29. To the maximum and fullest extent of the law, Mr. Megalli agrees to waive his rights to appeal which he would ordinarily have and to his right to attack his conviction and sentence pursuant to 28 U.S.C., Section 2255.

For its part the Government in the plea agreement agrees to bring no further charges against Mr. Megalli relating to the conduct to which he is pleading guilty. It agrees to recommend that he receive full credit for acceptance of responsibility under the guidelines. It agrees to recommend that he receive an additional one-level downward variance for his early pre-indictment resolution and acceptance of responsibility. It agrees to recommend that he receive a sentence at the low end of the adjusted guideline range, and it agrees to make no specific recommendation as to any fine that could be imposed upon him by the Court.

There are also guideline stipulations contained in

the plea agreement. Specifically, the parties stipulate and agree that the applicable offense guideline is Section 2B1.4 which relates to insider trading and dictates a base offense level of eight.

The parties agree that Mr. Megalli is responsible for illegal insider trading gains and losses avoided resulting from the conspiracy and relevant conduct between 2.5 million and $7 million resulting in an eight-level -- 18-level increase in the base offense level. And the Government and Mr. Megalli agree that the following two enhancements do not apply: First, any enhancement or reduction for aggravating or mitigating role under Sections 3B1.1 or 3B1.2; and secondly, any enhancement based on Mr. Megalli -- well, any enhancement based on an abuse of a position of public or private trust or use of a special skill in a manner that significantly facilitated the commission or concealment of the offense.

Finally, the plea agreement recites that there are no other agreements or understandings between the parties that are not reflected in the agreement.

BY THE COURT:

Q. Mr. Megalli, does that reflect your understanding of your agreement?

A. Yes.

Q. And you understand that as Mr. Chaiken has already stated, the provisions concerning recommendations that may be made

concerning your sentence are not binding on the Court such that if I choose not to follow some recommendation, you understand that you'll still be bound by your plea of guilty and that would not give you the right to withdraw the plea.

A. I understand.

Q. Other than what's in this plea agreement, has any other promise of any kind been made to you to get you to plead guilty?

A. No.

Q. Other than the plea agreement, has anyone threatened or forced you to plead guilty or told you that if you do not plead guilty, additional charges are going to be brought against you or any other adverse action taken against you?

A. No.

THE COURT: Mr. Chaiken, if you would state the elements of the offense to which the Defendant is pleading.

These are the matters the Government would have to prove beyond a reasonable doubt at trial.

MR. CHAIKEN: Your Honor, for the Government to prove a violation as charged of 18 U.S.C., Section 371, the Government would be required to prove beyond a reasonable doubt, first, that two or more persons in some way agreed to try to accomplished a shared and unlawful plan; second, that the Defendant, Mr. Megalli, knew the unlawful purpose of the plan and willfully joined in it; third, that during the

conspiracy one of the conspirators knowingly engaged in at least one overt act as described in the criminal information; and fourth, that the overt act was committed at or about the time alleged and with the purpose of carrying out or accomplishing some object of the conspiracy.

Now, in this case the object of the conspiracy is insider trading in violation of Title 15, United States Code, Section 78j(b); 78f, as in Frank, f, as in Frank; and 17 CFR, Section 240.10b-5. To prove that violation, the Government would be required to prove beyond a reasonable doubt, first, in connection with the purchase or sale of securities, the Defendant employed a device, scheme or artifice to defraud, or engaged in an act, practice or course of business that operated, or would operate, as a fraud or deceit upon persons; second, the Defendant acted willfully, knowingly and with the intent to defraud; and third, the Defendant used or caused to be used any means or instrumentalities of transportation or communication in interstate commerce or use of the mails in furtherance of the scheme.

Now, to -- and I apologize in advance to Your Honor, but I think to make a full record, it is better to get into -- there are elements of the object and there are sub-elements within that and I think to make a full record I want to get into. In order to satisfy the first two elements of that test that I just described in an insider trading case, the

Government is required to prove, first, that the original tipper, in this case Richard Posey, possessed material nonpublic information regarding a publicly traded company; second, the original tipper, Rick Posey, disclosed this information to the intermediate tippee, in this case Eric Martin, who disclosed it to the remote tippee, in this case Mr. Megalli; third, the remote tippee, Mr. Megalli, traded in securities on the basis of the information; and fourth, the original tipper, Rick Posey, breached a fiduciary duty to the source of the information by disclosing it to the intermediate tippee, and the remote tippee, Mr. Megalli, knew that the original tipper had violated a fiduciary duty by providing the information to the intermediate tippee.

Now, in the Second Circuit there's currently an issue percolating that's related to some of the insider trading prosecutions up there as to whether there is a fifth element that the remote tippee in Mr. Megalli's position must also know that the original tipper received a personal benefit in exchange for disclosing the information to the intermediate tippee. The Government's position is that this element is not required. Nevertheless, the parties have discussed it; and the Government's position is that as a factual matter -- first, as a legal matter, it's not required. As a factual matter, if it was required, the Government could prove it based on circumstantial evidence that Mr. Megalli knew or consciously

avoided the knowledge that Martin was meeting with friends and contacts at Carter's and had friendships with one or more persons at Carter's, his former employer.

Finally, just so the Court is aware, conscious avoidance or deliberate ignorance is sufficient to articulate the knowledge and intent elements under this, under the securities fraud statutes that we're discussing.

BY THE COURT:

Q. Mr. Megalli, do you understand that those are the elements that would have to be proved to convict you of the charge?

A. I do.

THE COURT: Mr. Chaiken, if you will now review briefly what evidence the Government would expect to produce.

And after he does this, Mr. Megalli, I'll be asking you if you agree with these facts and if not, where you disagree. So the purpose of this is to determine if there's, in fact, a factual basis for me to accept this plea.

Mr. Chaiken.

MR. CHAIKEN: Yes, Your Honor. As Mr. Megalli indicated to the Court, he obtained undergraduate law and MBA degrees from Yale University, one of the top universities in the country. He briefly worked at top law and consulting firms before becoming a securities industry professional in around 2003 working for several different New York hedge funds.

In August 2009 he accepted a job at a firm known as

Level Global Investors, L.P., which was a multi-billion dollar New York hedge fund. Mr. Megalli joined Level Global as the portfolio manager responsible for managing --

THE COURT REPORTER: Excuse me. Would you slow down just a little, please.

MR. CHAIKEN: I apologize.

(Discussion off the record.)

MR. CHAIKEN: Mr. Megalli joined Level Global as the portfolio manager responsible for managing and making trading decisions on behalf of a multi-million dollar portfolio of securities of public companies in what is known as the consumer sector. That would include retail and apparel companies and other companies in the consumer discretionary space.

By the time he joined Level Global, Mr. Megalli had successfully completed the New York Bar examination and was admitted to practice law and also completed the Chartered Financial Analyst examination which is a rigorous three-part examination conducted over several years. It's also referred to as the CFA examination. And this is significant because it involves testing and instruction on a wide variety of securities industry compliance issues including insider trading and material nonpublic information.

In addition, as part of his employment at Level Global, Mr. Megalli was required to review and agreed to abide by numerous company policies including the firm's insider

trading policy which defined and described material nonpublic information in its various forms. Mr. Megalli would also have been required to do the same thing at the hedge funds that employed him prior to Level Global and was familiar with the rules relating to insider trading.

In mid-September 2009, Mr. Megalli caused Level Global to retain an individual named Eric M. Martin to be a paid outside consultant to the firm to advise Mr. Megalli on consumer stocks for $25,000 per quarter through Martin's Atlanta-based firm Mellon Advisors. That's M, as in Michael, E-L-L-O-N, as in November. At the time Mr. Megalli knew that Martin was the recently separated former vice president of investigator relations for Carter's, Inc. Carter's is a leading manufacturer of clothing and apparel for babies and young children. It is headquartered here in Atlanta, Georgia, in the Northern District of Georgia. It is also registered with the United States Securities and Exchange Commission, and its stock is listed on the New York Stock Exchange under the ticker symbol CRI.

Beginning in September 2009 and continuing through July 2010, Mr. Martin provided Mr. Megalli with material nonpublic information regarding Carter's quarterly and annual financial results and other events in advance of the public disclosure of that information. The information related to Carter's earnings per share, also referred to as EPS, forward

guidance, and other confidential internal financial performance information. Mr. Megalli, in turn, caused Level Global to buy, sell and short Carter's common stock based, in whole or in part, on this material nonpublic information. Mr. Megalli did so knowing or consciously avoiding the knowledge that Mr. Martin was obtaining the information from a Carter's insider in breach of that insider's duties of trust and confidence to Carter's.

Specifically, although Mr. Martin did not identify his source by name, Mr. Megalli knew that Mr. Martin had recently left the company, that he still had contacts at the company, and Mr. Megalli knew or consciously avoided the knowledge that Mr. Martin was meeting with, speaking with and interacting socially with someone at Carter's who was giving him information.

For example, in his initial proposal to Mr. Megalli on September 8th, 2009, regarding a consulting arrangement, Mr. Martin wrote in an email to Mr. Megalli that Mellon Advisors would give Level Global notes and research based on a variety of methods, including executive one-on-ones.

On September 30th, 2009, Martin sent two emails to Mr. Megalli regarding an upcoming meeting or dinner with someone at Carter's. The first email stated: We'll be meeting with CRI tomorrow. The second email stated: We'll call you Fri, for Friday, for my update on CRI and others after my

dinner meetings. Mr. Martin and Mr. Megalli then had an approximately 13-minute phone conversation on Friday, October 2nd, 2009, as Mr. Martin had promised.

Similarly, on February 22nd, 2010, Mr. Martin sent an email to Mr. Megalli requesting a call noting, quote, Got plus update on Atlanta on our pending question which I did not think that I would get, close quote. Mr. Martin would email Mr. Megalli periodically requesting a call-back noting in the email that he had a positive update on Carter's or other update regarding Carter's, particularly as the dates of Carter's quarterly or annual earnings releases approached.

While Mr. Megalli did not know the insider's identity, the evidence at trial would establish that Mr. Martin was actually obtaining this material nonpublic information from a Carter's employee Richard T. Posey. Mr. Posey at that time was employed as a vice president of operations for Carter's, and he was employed by Carter's between -- from about July 2002 until his termination in January 2013 and worked out of Carter's corporate headquarters in Atlanta.

Mr. Posey and Mr. Martin had developed a personal and professional relationship while Mr. Martin was still employed at Carter's between January 2003 and March 2009. This personal relationship included travel, golf outings, lunches and other work and social events; and it continued after Martin's separation from Carter's and while Mr. Posey remained employed

at Carter's.

In connection with his employment at Carter's, Mr. Posey had signed and agreed by various -- agreed to abide by various company policies requiring him to protect confidential information that had been entrusted to him by the company and prohibiting him from misusing confidential inside information for the benefit of himself or any other person, including a nondisclosure agreement, code of business ethics, conflict of interest policy and insider trading policy. In addition, this information was treated by the company as highly confidential. Conference calls in which it was discussed were password protected, documents discussing it were stamped confidential, and it was subject to limited dissemination within the company.

Mr. Posey disclosed the information to Mr. Martin over the phone, by text message, over drinks, and on the golf course. And he did so in exchange for reciprocal stock tips about other public companies to which Mr. Martin had access, future networking opportunities, friendship and other tangible and intangible benefits.

To give the Court an example of information provided to Mr. Megalli, Mr. Posey tipped Mr. Martin and Mr. Martin tipped Mr. Megalli and others in advance of Carter's October 27th, 2009, announcement that it was conducting an internal investigation into accounting irregularities and would

be delaying its earnings release for the third quarter of 2009 which was scheduled for October 27, 2009.

After business hours on October 22nd, 2009, Mr. Posey and Mr. Martin had an in-person meeting over drinks in Atlanta during which Mr. Posey disclosed inside information about the investigation and earnings delay to Mr. Martin. As soon as the meeting ended, Mr. Martin placed a telephone call to a former Wall Street equity research analyst previously identified as Cooperator Number 1 during which Mr. Martin passed on the information that he had received from Mr. Posey. Martin asked Cooperator Number 1 to wait to trade on the information until Martin could warn his clients.

The next morning at 9:42 a.m. on Friday, October 23rd, 2009, Mr. Martin sold his entire position in Carter's stock, over 35,000 shares valued at approximately $1 million. Later that morning at 11:23 a.m. on October 23rd, 2009, Mr. Martin placed a seven-minute call to Mr. Megalli during which Mr. Martin disclosed inside information about the investigation to Mr. Megalli. Less than two minutes into the call, Mr. Megalli sent an instant message to Level Global's head of trading in which Mr. Megalli ordered the liquidation of Level Global's entire position in Carter's stock which at that time was 300,000 shares valued at nearly $9 million.

The next trading day, Monday, October 26th, Cooperator Number 1 placed a 12-minute phone call to

Mr. Martin. Immediately after the call ended, Cooperator Number 1 sold his entire position in Carter's stock, 15,000 shares valued at over $400,000, and bought November 30th put options, correctly betting on Carter's stock price to decline significantly.

The next morning, Tuesday, October 27th, 2009, Carter's shocked the market with news of its internal investigation and earnings delay; and its stock price fell over 20 percent in one day. The internal investigation ultimately resulted in a multi-year financial restatement by Carter's, criminal indictments of two of its former top executives for securities fraud and related crimes, and three SEC enforcement actions.

The Government does not contend that Mr. Megalli knew about all of these other tippees and their trading and calls to them, but these facts are offered to provide a full picture of the facts as the Government would expect them to be presented at trial.

Finally, the Government is unaware of any evidence that Mr. Megalli traded personally for himself in his own accounts based on this information, but his bonus compensation at Level Global was linked to the performance of the consumer sector portfolio. In other words, he traded for the firm and for the possibility of better compensation.

BY THE COURT:

Q. Mr. Megalli, that's a lot of information, and I'm going to ask you not necessarily to go through everything that's been stated here. As Mr. Chaiken has stated, he doesn't suggest that you had knowledge of everything that's said there. But what I want to focus on was your particular role in this, your relationships with Mr. Martin, your knowledge of what was going on, based on your background the likelihood that you knew that insider information was being passed to you. As to those matters, the representations that have been made by Mr. Chaiken in terms of his evidence, with what part of that do you disagree, if any?

A. I mostly agree factually with pretty much everything he said. I'd like to make a couple of distinctions, if I may.

He stated I met Mr. Martin in mid-2009. I was introduced to him towards the end of August right after I started at Level Global, and I retained him in September. The main trade that happened in October which Mr. Chaiken outlined was just a few weeks after I had met him.

My understanding is, just to try to provide some context, the cooperator that he mentioned and some of the other tippees had known Eric Martin for many, many years. And I just wanted to draw that distinction that this was someone I had just been introduced to.

Q. Right.

A. Just as a very small factual correction.

The only other real thing I guess --

MR. MONNIN: Judge, just quickly, I think what's going to be very helpful for the record is for Mr. Megalli to really focus in on what his intent and knowledge was in relation to the October 23rd and October 26th trades. As the Court pointed out and as Mr. Chaiken very fairly pointed out, really what we're talking about here is an overall conspiracy. But what's important for the Court to accept Mr. Megalli's guilty plea is I think for Mr. Megalli to just tell the Court in his own words what happened on the 23rd, what happened on the 26th, what he heard from Mr. Martin, why he traded.

And Judge, I think what we're going to get to is that Mr. Megalli is going to say, Look, he gave me information which was confirmatory of the decision to trade and trade a significant position. It's 300,000 shares valued at $9 million, that's absolutely correct; but the nature of the information was not quite as concrete as what the Government would contend, but I consciously avoided stepping over that threshold and saying to Mr. Martin where did it come from, because he's a securities professional and he's not asking those questions for a reason.

So I'll let him address that.

THE COURT: Okay.

THE DEFENDANT: Right. So I have been advised not to get too much into the factual elements. So I want to be

respectful of the Court, and I don't want to minimize my own culpability here and I take full responsibility for everything going on. So we'll put that as a preface.

But just for the record, it was very important for me that the Government included language on conscious avoidance in the charging instrument. I would not have been here pleading guilty had they not done that because I was not willing to say that Eric Martin had given me a specific tip-off about the fact that there was going to be an accounting fraud or an earnings delay. He never -- he did not do that. I found out about the accounting delay on the morning of October 27th with everyone else in the world, and I've stated as such from day one.

However, when he did call me on October 23rd, I did have 300,000 shares of Carter's. The stocks had recently risen from 25 to $29 which had been my price target which I wrote up in September. I had started to liquidate a position that was 350,000, and so I had already started selling the position when he called me. And he specifically said to me, as best I can remember, and these may not be the exact words, but the basic I think what was conveyed on that call was he said to me, Hey, do you still own stock in Carter's? And I said to him, Yes, but I've been selling it. What do you think? Is that a good idea or a bad idea? And he indicated to me that he thought it would be a good idea to sell it.

He did not talk about accounting delay. As

Mr. Chaiken pointed out, we were on the phone for less than two minutes before the trade was entered in; and we certainly didn't talk about vendor markdown and accommodations. And later I found it was Kohl's, and lots of the details that came out later. Specifically, though, the accounting problem we did not discuss on that call.

What I'm pleading guilty here today to is the conscious avoidance. When he said to me, Yes, good idea, sell the stock, that was a change from his prior opinion. And I did -- I should have probed and asked more questions about why are you telling me this, what are you basing this on. I did know he had worked at the company before. And that was a mistake and I'm going to be paying the consequences for that mistake for the rest of my life, and I apologize to the Court for that. But I just wanted to set the record straight.

MR. MONNIN: Tell Judge Story about the significance of Mr. Martin to the decision to trade. Were you talking to anyone else about Carter's?

THE DEFENDANT: The call with Eric Martin I would characterize as a catalyst to continue selling stock. The decision to buy and sell stock in Carter's was based on many other factors which we've gone into great lengths with the Government, and I think they're aware of our position in terms of lots of the buying and selling indicators from other sell-side research. But he was certainly, given, obviously,

the timing of the trade, a catalyst for me to continue selling stock.

THE COURT: Well, and actually to liquidate completely in one fell swoop is essentially what you did.

THE DEFENDANT: Yeah. I, you know, if I'm being honest, we often liquidate positions in front of earnings events. There was not anything that unusual really about liquidating a position. And a $9 million position is an enormous sum of money. But to put it in context, Level Global was a three-and-a-half billion dollar fund, and this was a very small position relative to some of the much larger positions that we had at Level Global. It was never more than one percent of the assets of Level.

So it was not -- I think my understanding is at one point Eric Martin characterized this as some huge enormous position that never would have been established had it not been for the inside information, and that is a mischaracterization.

THE COURT: And you certainly had reason to believe, based on his having left the company, that he continued to have relationships within the company.

THE DEFENDANT: Sure, yeah. I mean, I've left companies before and you do keep in touch with people there, and I assumed he probably did; although I would also like to just point out I never heard the name Richard Posey or that there was a V.P. of operation of anything specific like that

until after Mr. Posey pled guilty.

MR. MONNIN: And, Judge, we don't contend that that's necessary. That's not part of the Government's required showing.

THE DEFENDANT: And let me reiterate I'm not trying to minimize my culpability here. I'm just trying to be accurate.

MR. CHAIKEN: And let me -- I've spoken too much already, Your Honor. But just as to add a nuance to this, the Government does not contest Mr. Megalli's factual proffer that he did not have any personal relationship with Eric Martin or professional relationship really with him before September 2009.

However, the evidence at trial would prove that Mr. Martin, while the head of investor relations at Carter's, had many meetings scheduled with Mr. Megalli over the years while Mr. Megalli was working for various companies, including the previous hedge funds that he was employed at. And so what's important for us is not that they had a personal relationship prior to September 2009 but that Mr. Megalli was well aware of who Mr. Martin was at that time and where he had worked.

THE COURT: What are the potential penalties that he faces for the offense?

MR. CHAIKEN: Your Honor, the maximum term of

imprisonment is five years. There is no mandatory minimum term of imprisonment. The maximum term of supervised release is three years. The maximum fine is $250,000. The Court may impose full restitution to all victims of the offense and relevant conduct. There's a mandatory special assessment of $100 and forfeiture of any and all proceeds from the commission of the offense.

BY THE COURT:

Q. You understand that those are the potential penalties for this offense.

A. I do.

Q. And you understand that in deciding what sentence to actually impose, one of the factors I will consider will be the sentencing guidelines. You and the Government have reached agreement on how some of those guidelines should be applied.

A. Yes.

Q. And you understand, however, that those guidelines are no longer mandatory and I have the authority to impose a sentence that's greater or less than what the guidelines call for.

A. I do.

Q. Also in your plea agreement you have agreed to waive certain rights of review. Let me very briefly -- you know these rights as an attorney probably anyway, but I need to advise you of these on the record.

As a defendant in a criminal case in federal court, you

would typically have the right to file a direct appeal immediately after your conviction and sentence in which you could raise any errors that you believe had been committed by the Court to be reviewed by the Court of Appeals. You also would have the right at a subsequent time to file a 2255 motion, petition for writ of habeas corpus in which you could challenge the legality of your conviction and sentence. Those are the opportunities that a defendant has to have his case reviewed unless he gives those rights up.

In your plea agreement you've given up those rights essentially except for two very limited circumstances. One would be if I gave you a sentence greater than what the guidelines call for. The other would be if the Government filed an appeal for some reason. But except for those two circumstances, you essentially will be bound by whatever decision I make without any opportunity for any other court or judge to review those decisions. Do you understand that?

A. I do, sir.

THE COURT: And Mr. Monnin, have you discussed that with your client such that you're comfortable that he understands the waiver?

MR. MONNIN: Yes, sir.

BY THE COURT:

Q. You understand that supervised release is a period of supervision that would come after any period of incarceration.

It would include rules governing your conduct that if you violated could result in additional period of incarceration.

A. I do.

Q. You understand that you'll be required to pay a special assessment of a hundred dollars.

A. (Nods head affirmatively.)

Q. Is there anything we've talked about that you do not feel you fully understand?

A. No.

Q. Do you feel that you have had a sufficient opportunity to discuss your case with Mr. Monnin and to have him advise you concerning the entry of this plea before entering it here today?

A. Yes.

Q. Are you satisfied with the representation he's provided to you?

A. Extremely satisfied.

THE COURT: Mr. Chaiken, do you feel that you've had a -- I'm sorry. Mr. Monnin, do you feel that -- I was going to say you just took me out of my game here. Do you feel that you've had a sufficient opportunity to investigate your client's case and advise him concerning the entry of the plea?

MR. MONNIN: Yes, sir. The Government has been very forthcoming in providing its evidence and allowing us more than ample opportunity to present factual and legal challenges, and

it's been a very fair process.

THE COURT: Are you aware of any reason I should not accept this plea?

MR. MONNIN: No, sir.

THE COURT: Anything else you want me to address with your client on the record today?

MR. MONNIN: No, sir. The Government was very fair in stating the intent elements and the legal elements with which we agree, and Mr. Megalli was able to address those in his allocution.

THE COURT: Mr. Chaiken, anything else you wish the Court to address on the record today?

MR. CHAIKEN: Not for the Government, Your Honor. Thank you.

THE COURT: All right. I do find that the Defendant understands these charges and the consequences of his plea. I find that the plea has a factual basis, that it's free of any coercive influence of any kind. I find there have been no promises made to the Defendant except those set out in the plea agreement, so I find that the plea is freely and voluntarily entered and order that the plea be accepted.

You're hereby adjudged guilty of the charge contained in the criminal information.

The Court will set the matter for sentencing when we receive the presentence report. Mr. Goss will contact counsel

and arrange a sentencing at that time.

Any objection from the Government to the Defendant remaining on bond pending sentencing?

MR. CHAIKEN: No objection. However, he is not on bond. Actually, pretrial services recommended no supervision, and he's -- the Court has ordered that he surrender a United States and Egyptian passport, and the $10,000 signature bond; and the Government will recommend that those, that order remain in effect and unchanged.

THE COURT: Very well. Subject to those terms, you will be permitted to remain free and just to report back at the time of sentencing.

MR. CHAIKEN: I'm sorry, Your Honor. There was one thing that if I could address Mr. Monnin for a second.

THE COURT: Yes.

(Discussion off the record.)

THE COURT: All right if there's nothing further, we're adjourned. Thank you.

(Proceedings concluded.)

* * *

REPORTER'S CERTIFICATION

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

SHARON D. UPCHURCH, RPR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

DATE: November 25, 2013

Exhibit E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA, Plaintiff, -vs- MARK MEGALLI, Defendant.	)))))))	Criminal Information No. 1:13-CR-442-RWS

Transcript of the Sentencing Proceedings
Before the Honorable Richard W. Story,
United States District Court Judge
July 8, 2014
Atlanta, Georgia

APPEARANCES OF COUNSEL:

On behalf of the Government: David M. Chaiken, Stephen H. McClain, Assistant United States Attorneys

On behalf of the Defendant: Paul Monnin, Esq.

Reported stenographically by:
Amanda Lohnaas, RMR, CRR
Official Court Reporter
United States District Court
Atlanta, Georgia
(404) 215-1546

(Tuesday, July 8, 2014, 2:35 p.m.)

THE COURTROOM DEPUTY: Court calls the case of United States versus Mark Megalli, Criminal Number 1:13-CR-442.

THE COURT: All right, we are here for purposes of sentencing and the Court has received the presentence report, as well as submissions from the parties.

Based upon the presentence report, to which there are no objections, the probation officer found that the defendant was at a total offense level of 23 with a criminal history category of I, which places him at a 46- to 57-month custody guideline range. The government has requested a one-level downward variance, which the Court will approve, which would place the defendant at a 22 offense level with a criminal history category of I and a 41- to 51-month custody guideline range after that variance.

I suppose we should first address, though we've been around this several times, the restitution issue. The Court would be inclined to order the defendant to be responsible for restitution to Carter's in the amount of $50,000.

If anyone wishes to be heard on that further I will give you the opportunity now but otherwise that would be a part of the sentence. Anything from the government?

MR. CHAIKEN: Nothing for the government, Your Honor, thank you.

THE COURT: Anything from the defense?

MR. MONNIN: Judge, the only thing I would say is he's actually already deposited the $50,000. It's on deposit with the treasury of the court and we would suggest that's an additional mitigating factor that we have here.

THE COURT: Very well. All right, then let's address the 3553 factors.

MR. CHAIKEN: Thank you, Your Honor.

Your Honor spoke earlier about the difficulty in sentencing Mr. Posey because of the Court's view that, you know, he's one of us.

Well, this sentencing and this defendant is, I think of all the three, is the most heartbreaking. Mr. Megalli truly is or could be one of us.

He went to the same law school that a prosecutor in our office went to, was a classmate of his. He went to college with people that -- lawyers that we know. He has young children. He worked at the same law firm as a summer associate that several prosecutors in our office worked at. It is heartbreaking and tragic, I think.

At the same time, of these three defendants it's clear that Mr. Megalli is the smartest guy in the room. Of the three of them he's the one with the most experience in this industry, the most sophisticated, the most intelligent, the one who knew better to a far greater extent than the other two.

It's also his trading, liquidating an approximately

$9 million position on the eve of Carter's earnings release, I don't know how FINRA collects its information but I suspect that this is one of the major reasons this entire investigation ever started.

There's, you know, and there's counterbalancing factors, including the fact that Mr. Megalli, like Mr. Posey, agreed to waive formal indictment and come in and come clean and plead guilty to a criminal information. He even agreed to pay his restitution amount even before it was ordered by the Court. That's tremendous demonstration of acceptance of responsibility and attempting to make amends for his misconduct.

The major distinguishing -- there's two major distinguishing -- well, before I get to those, I did want to point out that to the extent that the Court believes this factor is relevant, as it mentioned with the sentencing of Mr. Posey, I don't believe that there has been any resolution of the SEC -- parallel SEC enforcement action yet as to Mr. Megalli. I'm not suggesting that he won't be able to amicably resolve that but, nevertheless, it's still pending.

There are two major distinguishing factors that I think the Court should consider as to Mr. Megalli.

The first and probably the most important is that he did not cooperate. The other defendants provided substantial assistance to the government and I think that was part of the

Court's calculus in varying downward to such a great degree. Mr. Megalli did not do that.

On the other side is the fact that I think Mr. Megalli rightly points out that he did not profit personally in a direct and tangible way from the misconduct. Mr. Posey traded in company stock during blackout periods for years. Maybe it's only thirty, forty, $50,000, but that's a lot of money to people. It's also a lot of money considering the salary that Posey made and the fact that it's not a very diversified investment strategy.

Mr. Martin, of course, traded repeatedly for years on inside information, including while he was at the company, and he made hundreds of thousands of dollars doing that.

Mr. Megalli did not benefit in that kind of a way. He benefited through increased status. He wanted to be a top performer at his firm; he was a new employee at the firm. And I'm sure he regrets every second that he ever dealt with Eric Martin because it's certainly not worth it.

That being said, as we pointed out in our papers, there's a problem with excusing tippers whose tips result in outsize profits, or traders at firms whose insider trading results in outsize profits to the firm but do not belong to them. And the Court needs to consider what, if any, deterrent value there is to not sort of excusing or immunizing those sorts of traders or tippers against the consequences of what

they've done.

We are somewhat hamstrung. We're obviously very cognizant of what the Court has done so far today, but, nevertheless, we are authorized only to recommend a sentence at the low end of the guidelines, which I believe is 41 months in this case, and we believe that is a reasonable sentence. If the Court is inclined to go lower than that we think 24 months would be an absolute basement for that in light of the fact that -- given all of the facts and circumstances of the offense. Thank you, Your Honor.

THE COURT: Thank you.

MR. MONNIN: Thank you, Judge. I do have some witnesses. I just wanted to address one point briefly that Mr. Chaiken had raised and I want to thank him for his professionalism, thank him for his statements and sentiments to the Court.

This has been an involved process. The Court, I know, has taken a look at our submissions. I know they're lengthy. I know that they're involved and I know the Court has read and wrestled with all of them.

The one point that I want to make before I start bringing witnesses up here is that the SEC settlement is absolutely coming, Judge. In fact, I spoke with Mr. Huddleston, who is still here in the courtroom, and said in light of my client's sentencing memorandum, which as succinctly

as possible says he did it, I mean in relation to the October 2009 trades, you were here for purposes of that Rule 11 colloquy, and my client said, yeah, absolutely, I traded and I'm a securities professional and I knew that the information that I was getting, that there were issues with it and I probably should have stepped across that threshold and pursued things further at that point, I'm just too intelligent of a person, you know, there's a lot of money that was at stake, not to have done that.

Conscious avoidance, Judge, is equally as culpable as actual knowledge but I'm here to tell you that we also have actual knowledge in this case. I do not dispute -- and I've had many conversations with the government about this -- that if exhibits appeared on the screen that are consistent with what we see in the PSR in terms of after-hours instant messaging, electronic mail, that on its face bespeaks inside information and the passage of inside information, there really isn't a defense to that. There's mitigation with it, which is what I've tried to explain to the Court in terms of our PSR objections, but there's not a liability defense to it.

And the point that I'm trying to make there is that because there's no liability defense to it and because we're on record in a plea hearing, because we're on record in a sentencing memorandum, my client is out of this industry, Judge, you know that.

We're going to work through a settlement with the SEC that is going to involve permanent debarment from the industry. This is an industry that my client has worked in for, effectively, his adult life, Judge.

And the other component of this, and again I know that I'm going to be calling witnesses up here and then I'll briefly cap things off because I know that the Court has made some decisions already today about things, the other part of this is that disgorgement with the SEC is absolutely a huge liability factor for my client and, Judge, that's as recently as 2014.

The state of the law prior to the Second Circuit returning a decision called *SEC v. Contorinis* was that where you have an individual trader who uses institutional trading accounts to trade there is an argument there that disgorgement goes only so far as the individual trader's personal gain. And you've seen what our position is with respect to personal gain. His variable compensation was based on a percentage of Level Global's incentive fees, and I've laid that out for the court.

Literally on the day that we were presenting that type of argument to Mr. Huddleston and Graham Loomis at the SEC, the Second Circuit came back with *SEC v. Contorinis* and said an individual trader can be liable in disgorgement for institutional gain.

And, Judge, the important consideration there, and

why I'm going to be asking for leniency as a result of that, is that we fully intend to litigate that issue, I don't want the Court not to understand that, and that issue is going to be in front of Judge Totenberg. But the Second Circuit opinion establishes that it could be likely that Mr. Megalli is facing economic liability in disgorgement of $3.17 million. And the way that the SEC is able to collect on disgorgement is through contempt. It's an equitable remedy. So what we're facing is that the burden is entirely on us to basically disprove disgorgement liability and then we're facing a contempt remedy when we're dealing with that.

So I think as you're factoring in to your decision process where Mr. Megalli should end up, that should be a significant component of this. Jail is not the be-all, end-all of deterrence here. And as I mentioned, I'll sum that up in a moment but I just wanted to let the Court know that we are going to be settling with the SEC, we will be litigating disgorgement. I suspect that that is going to be happening fairly quickly here.

With that, I just would like to recognize, I believe that most, other than the Carter's personnel and a few folks from, I believe, your staff, Judge, and the U.S. Attorney's Office, everyone else here on Mr. Megalli's side of the courtroom are friends and family of Mr. Megalli's and they actually flew down here. The vast majority of them came down

from New York of their own volition and on their own dime to support Mr. Megalli through this process and they've been very supportive of him throughout.

He's a remarkable person and he has generated an exceptional amount of love and affection from people who are incredibly supportive of him and who will continue to support him after this process is done.

So with that said, I would like to call his mom, Mrs. Viviane Megalli.

MR. CHAIKEN: Your Honor, may I make one point --

THE COURT: Yes.

MR. CHAIKEN: -- before we start with the witnesses?

We had discussed with respect to Mr. Martin and Mr. Posey the "why" factor. They draw comfortable salaries, they have loving, supportive families and children and parents, and I think that same consideration would apply with Mr. Megalli with one caveat.

Mr. Megalli did not cooperate in this case. But I suspect that if he ever did he would tell us -- and this is based on what I've seen, what has been publicly reported -- I suspect that he would tell us that there is tremendous pressure to succeed in the business in which he was involved and to get any edge that you can and in fact that some believe it is your duty to your clients to do the best you can for them. And so that may be one piece that sort of mitigates his culpability as

compared to Mr. Megalli -- I'm sorry, Mr. Martin and Mr. Posey.

THE COURT: Thank you.

Yes, ma'am, come on up, ma'am. If you will just state your name and then you may make your statement.

VIVIANE MEGALLI: I'm Viviane Megalli.

Your Honor, I stand in front of you as a mother that is hurting, helpless, and begging for your mercy.

Mark is a great person. He is actually an amazing person who would never hurt anyone. He always made us very proud. He worked very hard through his whole life, as a faithful husband and as a wonderful, wonderful father. He's always tried to help others and he's a perfect combination of brilliance, kindness, and generosity. I apologize for my --

THE COURT: It's okay.

VIVIANE MEGALLI: He took a misstep which he paid dearly for, losing everything he loves, absolutely loves.

Both my husband and I always lived by the rule of honesty and integrity. The kids were very young, we always make sure to tell them honesty, integrity, and kindness is the most important thing in a person's character and I know they live by that truth.

We were living the American dream. We immigrated to this country in 1968. We all worked very hard. My husband was a lieutenant colonel in the U.S. Army. We had wonderful children and wonderful grandchildren. I have four

grandchildren, two from each of my sons.

Last year has been a disaster for all of us. It started with Mark losing his job, being humiliated in a way that is really almost inhumane.

He had his passport confiscated. [redacted] and she lives in Egypt [redacted]

And I know God is not going to let me down. I pray every day for strength to be able to cope with this very hard period in our lives. I love my husband, I love my sons, and I adore my grandchildren. Please don't impose a sentence on these [redacted] May God guide you to do the right thing and we would like to be able to turn the page and end this nightmare. Thank you for hearing me out and I'm sorry for my emotion.

THE COURT: It's quite all right. Thank you.

MR. MONNIN: Judge, next is Dr. Mike Megalli, who is Mark's father.

DR. MEGALLI: Your Honor, after hearing you speak in the last two cases I was sitting through, I don't think that anything I'm going to say -- you said it better than I can say it about the children and grandchildren. Only thing I want to tell you, that we came here 46 years ago and it's been a wonderful experience. It was absolutely the American dream in

every which way.

We were blessed with two great boys and we had basically -- it's very simple, not just education, moral education and civic service. It was always those three things. You have to, you know, not just to be educated, but honesty, integrity and kindness. And I used to tell them you do to people what you like them to do to you, period, since they were five years old and that was basically what we told them all the time. So this was the model that we went with all our lives.

As for civic service, I don't want to keep listing the things, you have letters from everywhere where Mark has done, you know, all kind of things in his life. And his brother is no less than him, he was the head of the committee service in Andover and got an award from Brown University for community service. We've been always -- and was, humbly, I was also volunteer for the police department in Rye, New York for years.

As for the life got shattered and not any different than the other two people, it's a horrendous thing to happen to anybody. And I mean after I practice for 14 years I took an M.B.A. and went into healthcare management and ironically my job was mostly have to do with quality assurance and corporate compliance.

So for 25 years I worked with the Catholic Health System and its affiliated hospitals in New York. I didn't care

about making a lot of money in practice because I wanted to have my time with my family. We have no -- I have no brothers or sisters, nor my wife. So our boys were our family; there was nobody else.

And I only just, you know, keep repeating. Mark happened to be, and you can tell from all the letters you got and from all these wonderful people that flew all the way from New York and different places to support him, he is the most kind, the most honest, the most peaceful, nonconfrontation, which I think personally might even be a negative to be nonconfrontational and not to fight but that's different story.

Jenifer, his lovely wife who was his classmate at Yale, now had to take the children and Mark and moved to New Orleans. She might probably speak to that herself. But the [redacted] and [redacted], I can't imagine them not having their father around because it is just a close-knit family, like I'm sure almost everybody.

I just hope that you find that with a smart guy like this community service probably help society a lot more than incarceration, but that's up to you, Your Honor, and I leave it in your hand. Thank you.

THE COURT: Thank you.

MR. MONNIN: Judge, this is Michael Megalli, Mark's brother.

MICHAEL MEGALLI: Hello.

THE COURT: Good afternoon.

MICHAEL MEGALLI: Good afternoon. Thank you for the opportunity to speak to Your Honor.

Mark is my younger brother and my best friend. I know him better than I know anyone in the world. It's almost impossible to believe that I'm here today on his behalf just knowing what I know about him and the code with which he's conducted himself throughout his entire life.

You know, while we're here in this court today for Mark to be judged, no one is a tougher judge on Mark than he is on himself. I've never known anyone to hold themselves -- to push themselves harder or to hold themselves to a higher standard. But I've also learned some things about Mark watching him as he's grappled with the situation that is so difficult, I can only imagine.

And, you know, one of the things I think is just the bravery with which he's handled himself and I think he's had the courage to own up to the situation the way that I personally found inspirational.

Another is the incredible lack of self-pity or guile. I mean, this has never been about Mark or feeling sorry for himself or, you know, blaming others. He's taken full responsibility for it and I think his only consideration throughout the entire process has been the continuity of raising his children.

The other thing that I think for all of us has been such a blessing has been the outpouring of support. Mark is the kind of person who -- there are dozens of people from every chapter of his life who have come out and supported him and supported our family and I think without them this would have been that much harder, but it also would have been, you know, we might have been able to tell ourselves that it was just our own bias as a family that, you know, hold him up as such an extraordinary person.

That's basically all I have to say. Thank you for the opportunity to speak.

THE COURT: Thank you.

MR. MONNIN: Your Honor, next is Nell Wells, who is Mark's mother-in-law.

MS. WELLS: Good afternoon.

THE COURT: Good afternoon.

MS. WELLS: I'm Nell Wells. I live in Columbus, Georgia, and Mark is my son-in-law.

We've known Mark for at least 15 years and we are so proud of him. We think as much of him as we do our own children. And we just pray to the Lord that there will be a way for Mark to get out of this to get on with his life and we just know that there's a reason for this and we just pray for justice. Thank you so much.

THE COURT: Thank you.

MR. MONNIN: Your Honor, last is Jenifer Megalli, who is Mark's wife.

JENIFER MEGALLI: Your Honor, first I just wanted to say quickly thank you so much to my family and all of our friends for being here with Mark today and supporting us and to my cousins who are keeping the girls.

I've known Mark for almost 24 years and we've been married for 14 years. As a husband and a father and a best friend he is gentle, truthful, supportive, dedicated and very loyal and I love him so much. We are faced with this crisis which in many ways has put the very fabric of our family in jeopardy.

But most of all I am proud of the way Mark has handled it. He's been so brave and so strong for us, for me, and setting such a good example by being honest about the mistakes he has made and sincere about the remorse he feels.

The consequences of his mistakes for our lives have been very real for the last two years going through this and will continue to be. The practical implications, as you know, mean that Mark can't work in his chosen field.

Meanwhile I have been [redacted] for a while now and I -- Mark has been taking care of our girls full-time recently so that I can go back to school to complete my master's degree so that I can go back to work and support us financially going forward. Pursuing this is a big change for

us and requires a tremendous amount of hours per week, like 75 or 80 hours a week, and there's no way I could do it without him. He's been so supportive. Taking him away from me and from us during this time would be extremely punishing for me and for our daughters.

Finally, I just want you to consider Mark's character and the many ways that he can continue to do good in the world. I can't imagine that we will ever really move on from this experience but please consider Mark's talents and intelligence and kindness and give him the chance to remain with us and prove himself.

My children and I and our whole family can bear witness to his admission of guilt and his acceptance of the consequences, his respect for the law, which is very strong, his remorse at his wrongdoing, and most of all his determination to make better choices in the future. Thank you.

THE COURT: Thank you.

MR. MONNIN: Thank you, Your Honor. That concludes the witnesses that I have and let me just be very brief.

I know the Court said in the prior hearing that you reset the order of the hearings today to correspond to your perception of relative culpability and obviously I agree with you, Judge.

THE DEFENDANT: I would like to make a statement.

THE COURT: He definitely will let you.

MR. MONNIN: And that's what I was just going to say, that's kind of my client's nature, Judge.

I met Mark in August of last year and his wife Jenifer when I went up to New York and they were considering having me represent them, or Mark was considering having me represent him in relation to this case. And other than the Rule 11 colloquy, most of our communications have been by phone; he's been living up in New York.

But I can tell you from those interactions that I really haven't met a more serious-minded, intelligent person as it comes to what he has done, how he is punishing himself, how he knows that he has taken a terrific life of achievement, of merit, and in certain respects really damaged that. And he understands that and I know that that has weighed on him heavily.

And it's also been a pleasure to be able to meet Mark's family members and extended family and friends through this process and to read their letters on my client's behalf.

The Court well knows that, I've been at this courthouse for quite a period of time, and it's easy to look at mitigation letters and kind of just glaze over them and perhaps not take them as seriously as maybe they should, or is it more just kind of Monday morning quarterbacking, so to speak, in terms of rationalizing conduct.

I think what the Court is able to appreciate from

this and what I want to convey to the Court and recommend to the Court is that there are two aspects of sentencing. One aspect of it is looking backward to decide what type of punishment should be imposed, both specifically related to the offender that's before the Court, as well as generally, and I know you're struggling with that.

I had a conversation with Mr. Chaiken last night where I said that I know that what Judge Story is going to be struggling with in sentencing is how do you generally deter the next Mark Megalli when you're talking about someone who controls millions, billions of dollars of capital who works at a hedge fund. And Mr. Chaiken is exactly right, these hedge funds operate on very, very quick trading, profitability and analysis and there's absolute pressures there. And I submit to the Court that what the facts show here is that you've got an analytical person who stepped over the line in terms of accepting as data points illegal material, nonpublic information. And he knows that and he's here to accept responsibility for that. And, frankly, he's here to be punished for that.

But I think another part of sentencing, and I don't presume to, you know, speak for what's in your mind, Judge, but I think another part of sentencing is looking forward. And you said in the prior two sentencings here: "I don't have any doubt with respect to Mr. Martin and Mr. Posey that you won't

re-offend." Obviously, there's incapacitation that my client has where he clearly cannot re-offend. And I would add that includes disbarment as well. He's a lawyer, Judge, and he's going to be disbarred.

So what I would like to convey to the Court is that I think there is justice that should be tempered with some thoughtfulness as to the future life of Mr. Megalli. And I know how seriously you take this and I know that you've looked at all of these materials. And I respectfully submit that Mr. Megalli, through his family members, his close-knit family network, his obligations to his children and his unquestioned intelligence, his unquestioned compassion, his unquestioned positive personality, is going to turn the corner on this.

And I would just -- I believe that certainly Mr. Megalli in terms of culpability and an appropriate punishment is within the other two offenders that you have sentenced and I am confident that the Court is thinking the same way on that. And I would just ask you to please consider returning Mr. Megalli to his family and to his obligations to allow him to get to the next stage of his life and I think he's going to make you proud if you allow him to do that.

THE DEFENDANT: Thank you very much, Your Honor.

First of all, I just want to say thank you to all the people who have traveled here today. If there's been a silver lining in this ordeal, it's been the tremendous and unwavering

support of friends and family, which I certainly do not feel worthy of today but I'd wanted to acknowledge them.

My whole life I've always tried to do the right thing, and obviously with respect to the events here I got it completely and utterly wrong and I'm not going to make excuses today. Obviously the advice that he was providing to his clients and me was over the line, I knew it was wrong and I should not have traded on it, and obviously I wish I had stopped myself from doing that early on in this process and I didn't.

We're paying a tremendous price for that bad decision or series of bad decisions: financially, emotionally, psychologically. I know I'm not a victim but it feels like we're paying a tremendous amount for my mistakes and I want to apologize to my family in particular for putting them into this position.

I also just want to make clear I do fully accept responsibility for my actions. I will honor and respect whatever decision you make here today, of course, and, you know, I just am ready to accept the consequences of my behavior.

They say it's not our mistakes that define us but how we learn from those mistakes and grow. And that's, you know, that's really what matters and that's the lesson -- sorry -- that's the lesson that I tell my daughters and that's the

guiding principle for me for the rest of my life, how do you grow from this, how do you learn from this.

I can assure you I'll never be in a position like this again. I'm eager to get back to being that person that people graciously wrote about in their letters who lives a life with honor and dignity and has something to contribute.

And finally, it's probably obvious to you, I'm extremely, extremely close to my family and I'm terrified for the well-being of my daughters, for my wife. She's an amazing person. She's doing everything she can to try to keep us going. She hasn't complained a single time since the beginning of this, you know, process, really, and she's just a woman of incredible strength and I'm terrified for her, for my kids, and I just ask you to consider them when you make your decision. Thank you.

THE COURT: Thank you.

(Pause in the proceedings.)

THE COURT: You mentioned the silver lining, if there is one, and I would have to say that I agree with you. And this might sound odd on a day like today but you are a fortunate man because to have people who would travel the distance these folks have to be here to stand by you today makes you a very lucky person, but it also speaks to your character as well. And so you are certainly fortunate in that regard.

You have been the beneficiary of a wonderful life and it's always difficult when parents are here for an occasion like this. I know your parents have been with you on many other momentous days that were of the other kind in your life, with the record that you have built in terms of accomplishments. And I know, I think both your parents in their letters offered could they just please take your place, which speaks to their love and devotion to you, obviously. And parents have a way of at times like this, I think sometimes they start questioning themselves, you know, maybe if we had done this this wouldn't have happened.

But it's clear, and it comes from you as well as from all of them that know you and your family, that your parents are remarkable people. They reflect a richness in this nation brought by people who come from other lands and bring their dreams and desires and fulfill them in this country and become truly remarkable citizens who contribute in significant ways the way that they have to the society and it speaks for you and for them and it's good for all of us.

All of that ties into the character of you as a person. It's one of the factors I'm supposed to consider in this process, is the character of the person. Certainly the letters that have been written on your behalf, I've done a lot of reading in preparation for this sentencing, not just of the 70-page brief your lawyer submitted and the letters along with

it, but also of other cases of this type.

And I've mentioned the *Gupta* case a couple of times but the judge in that case mentioned the number of letters that were sent in on behalf of the defendant in that case and that some might suggest that because of his position and power and et cetera perhaps that's why these folks would write these kinds of letters. But it was clear when one looked deeper into the letters that they were a true reflection of the person and that this was truly a remarkable person. And I find that to be the case with you. You've had letters written by a number of folks and looking behind just the words, it's clear that you have had a remarkable life and have made a number of substantial contributions and, as you mentioned, I expect that you will make many more in the future.

So your character bespeaks itself. You are not judged by just your mistakes; you're judged by your accomplishments as well.

I won't belabor the seriousness of the offense. Just so there's something in the record for this case, I will say the Court views this as a very serious crime. It is not a victimless crime. Society as a whole, in fact, is a victim when these type crimes occur because of the impact that it does have on the confidence of people in our economic system. So there is a seriousness to this offense.

There is a need to deter others. Mr. Monnin

mentioned he doesn't think you need any further deterrence. Again, I agree, as with the other gentlemen, well, one thing you won't be able to work in this field, but I'm speaking deterrence broader than that. You've not been a person committing crimes all your life to this point and I don't expect you to commit another one from this point forward. So it's not about deterring you. It comes down more in the area of deterrence as what do we do so that others don't allow themselves to find themselves in the position where you are. Certainly the need for avoiding disparity.

There's no need for additional training for you, you obviously have wonderful credentials.

And to provide restitution, I've already indicated I will adopt the agreement of the parties to require $50,000 of restitution, which you are also to be commended for having already paid that into the registry of the court.

The question arises as to what does it take to deter others and I've struggled with it throughout this. You've heard me talk about it with the other defendants. You're in a little different position than they are. They were the insiders. And I've been given so much information from these lawyers about other sentences and I've looked at that because I look for anything to hang my hat on for why I do whatever I do.

But I'll be honest with you, one of the things that troubled me was I noticed in many instances tippees, like

yourself, are actually punished more severely than tippers and I found that counterintuitive for myself. I find the tipper more culpable because you have betrayed the confidence of your employer and the person who's entrusted you with information for your own benefit and given that out to others who have used it for their benefit, as opposed to a person who simply receives that information, not that either is good, but to me, in terms of culpability, the person who is disclosing confidential information of his employer is more culpable than the one who receives it. Again, not excusing either but my view of deterrence is it's a little different for the both of those just because I think the culpability is different.

Nonetheless, there's a huge incentive for folks in the place where you were to hedge the line. I mean to -- there's so much pressure, obviously, to succeed and to act quickly and on limited amount of information and so there needs to be a disincentive to engage in the conduct. And as I've said, the question for me is what is that line, where does one draw it.

Let me hasten to say, as I have said to the others who were here today, that the collateral damage of sentencing is the worst part of it, the effect that it has, as you have already mentioned on your wife and your girls, that is the worst part of this.

And I want to thank you for not bringing your

daughters today. Some people do that to make it even worse for me than it has to be. I think it's horribly unfair to a child to use them in that way and I thank you, and I meant to thank Mr. Posey earlier for not having done that. I think it shows character again and a certain amount of class that it's not about you; it's about them and that's why you don't bring them. I think your younger daughter [redacted]

THE DEFENDANT: [redacted] and the other [redacted].

THE COURT: The [redacted], there's no way to explain this and I know that. You've mentioned there are life lessons that can be taught from this and I appreciate that you will do that but I also recognize that for a [redacted] it's all pretty incomprehensible and that bothers me a whole lot and I hate that from her perspective.

There's no way to make this easy. There's no way for me to reduce the impact of this in the way that I did for Mr. Posey. I mean, it is what it is and it's just a matter that you've got to work through but I am going to impose a custodial sentence in the case. I'm going to impose a sentence of 12 months and one day. Your lawyer will explain to you why there's one day, it's actually to your benefit.

I will allow you to voluntarily surrender to serve the sentence. And I don't know if you can still do it, but if you can get a ticket for the flight to see your grandmother I'll let you have your passport back to make the trip to see

your grandmother.

I will request that you be allowed to serve the sentence in New York or as close -- is that where --

MR. MONNIN: Judge, he is living with his wife and daughters in New Orleans.

THE COURT: I'm sorry, I didn't realize you had moved.

MR. MONNIN: He has. I believe Pensacola is the closest camp.

THE DEFENDANT: If I may, we relocated to New Orleans where my wife is doing a master's in architecture. You know, we researched this a little bit. Her family is from Columbus, Georgia. Pensacola is almost directly between Columbus and New Orleans. For us it would be terrific to have that.

THE COURT: I will recommend that.

MR. MONNIN: Thank you.

THE COURT: And you will be placed on supervised release for a term of three years. You'll have to pay a $100 special assessment.

In light of the restitution and the other matters that I fully expect you are going to have to do with the SEC I will not impose a fine or cost of incarceration.

You will be required to pay $50,000 to Carter's and it's my understanding that is in the registry of the court and the Court will issue an order to release that to Carter's.

Since that's in the registry I'm not going to make the provisions about monthly payments and so forth, it's there.

You will, as I said, be under standard conditions of supervised release, which include periodic testing, not illegally possessing drugs.

I'm going to require 100 hours of community service and that's because I've read so much about the things that you could do to help other folks that I want to tap into that. I'd rather you do that than pay a fine to the government. I'd like for you -- I think you're a creative enough person that you can come up with some ways that will repay society far more than a check would and I think you can help people in ways that I can't think of that you would be able to and so I hope and I would encourage probation to be open-minded about ways that that could be accomplished that serves the public good.

And you have to submit to the collection of the DNA sample, you can't possess a weapon, and you have to submit to searches and confiscation of contraband.

Under the terms of the plea agreement that you entered into with the government you would not have a right to appeal your conviction or sentence. If you believe there are rights that are reserved that appeal would have to be filed within 14 days or you've waived it. Mr. Monnin, I'll ask you to protect his rights in that regard.

I've been sitting on this all day and I'm going to

read it to you because it just struck me late last night sitting in my den at home when I was reading these things and reading cases, and I've referred several times to Judge Rakoff's decision in this *Gupta* case. And he made a comment there, he made a lot of comments there that made a lot of sense to me as I was struggling with this decision, and I will add he gave a 24-month sentence in that case.

But he was talking about the 3553 factors and he says: "Perhaps the most difficult one of those, but the most important one, is the concept of just punishment. While all other factors under Section 3553 partake to a lesser or greater degree of policy considerations, just punishment taps a deeper vein. Human beings, as social animals, are programmed to respect moral values. That is why people without shame or guilt are considered psychopaths and also why violations of the moral order raise such deep passions in the human breast. As people have come to understand that insider trading is not only a sophisticated form of cheating but also a fundamental breach of trust and confidence, they have increasingly internalized their revulsion for its commission."

And that I think says pretty well what my thoughts are on this. But he goes on to say, and this reflects my feelings as well, that "no defendant should be made a martyr to public passion."

And that is not what this is. In my view this is a

crime like fraud or other crimes for which there needs to be an appropriate punishment but not more than is necessary.

I know particularly your family and friends and perhaps you feel that this could have been accomplished with a lot less than 12 months and a day, and I appreciate those feelings, and were I sitting out there and you were my brother or son I would feel exactly the same way, I know that. But I hope in quiet reflection somewhere down the road they will look back and realize that under the guidelines that are supposed to direct our thinking on these matters it's supposed to be 41 months and that what I have tried to temper that with is all of these things we've just talked about and I have tried to get to a just punishment.

At the end of the day I have to go home and lie down on my bed and be able to go to sleep. And the only way I can do that is if I think I've done justice. There's not a paper grading to let me know, it's just got to be taking all the things we've talked about into consideration.

Mr. Megalli, I've tried to do justice for you and I do believe that you will be able to take this and turn it into something good. I think you've got a tremendous future ahead of you and that you will put this behind you and I suspect that you will be a model, in some ways that you wouldn't have wanted to be, but in ways that will change other people's lives and hopefully will avoid the heartache and hurt for a lot of people

that might have gone down this same road.

I wish you nothing but the absolute best for you and your family and some day when it's the right time to do it -- don't do it now because this wouldn't be the right time -- tell your daughters that I'm terribly sorry this had to happen.

Objections from the government?

MR. CHAIKEN: Yes. The government objects to preserve the record on the basis of substantive and procedural unreasonableness. Thank you, Your Honor.

THE COURT: From the defense?

MR. MONNIN: No objections.

THE COURT: Good luck to you, sir.

(Proceedings concluded at 3:30 p.m.)

C E R T I F I C A T E

UNITED STATES DISTRICT COURT:

NORTHERN DISTRICT OF GEORGIA:

I hereby certify that the foregoing pages, 1 through 33, are a true and correct copy of the proceedings in the case aforesaid.

This the 21st day of July, 2014.

/s/ Amanda Lohnaas

Amanda Lohnaas, CCR-B-580, RMR, CRR
Official Court Reporter
United States District Court

Exhibit F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. Mark Megalli, Defendant	Civil Action No. 1:13-CV-_____-____

COMPLAINT

Plaintiff Securities and Exchange Commission (the "Commission"), hereby files this Complaint alleging the following:

Overview

1. On at least four occasions between September 2009 and July 2010, Mark Megalli ("Megalli"), traded shares of Carter's, Inc. ("Carter's") (NYSE: CRI), an Atlanta-based public issuer and clothing marketer, based on material non-public information. Megalli executed these trades on behalf of Level Global

Investors, L.P. ("Level Global"), a now-defunct investment adviser, generating profits and/or losses avoided of approximately $3 million.

2. Megalli received the material non-public information from Eric Martin, a former Carter's employee. Martin received the information from Richard Posey, who was Carter's Vice President of Operations ("Posey" or "Carter's VP").

3. In every instance of trading tipping described below, Megalli knew or should have known that the material non-public information he received was communicated in breach of a duty of trust or confidence that a Carter's insider owed Carter's.

4. By the conduct described herein Megalli violated Section 17(a) of the Securities Act of 1933 (the "Securities Act"), Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rules 10b-5(a) and 10b-5(c) thereunder.

Jurisdiction and Venue

5. The Commission brings this action pursuant to Sections 20 and 22 of the Securities Act [15 U.S.C. §§ 77t and 77v] and Sections 21(d), 21(e), and 21A of the Exchange Act [15 U.S.C. §§ 78u(d), 78u(e), and 78u-1] to enjoin Defendant 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.

6. This Court has jurisdiction over this action pursuant to Section 22 of the Securities Act [15 U.S.C. § 77v] and Sections 21(d), 21(e), 21A and 27 of the Exchange Act [15 U.S.C. §§ 78u(d), 78u(e), 78u-1, and 78aa].

7. Defendant, directly and indirectly, made use of the mails, the means and instruments of transportation and communication interstate commerce, and the means and instrumentalities of interstate commerce in connection with the transactions, acts, practices, and courses of business alleged in this Complaint.

8. Venue is proper because certain of the transactions, acts, practices, and courses of business constituting violations of the Securities Act and the Exchange Act occurred in the Northern District of Georgia. Carter's principal place of business lies within this district and the tipping of material, non-public information to Megalli occurred within this district.

9. Defendant, 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 transactions, acts, practices, and courses of business of similar purport and object.

The Defendant

10. Mark Megalli, 41, resides in New York City. Between 2003 and July 2009, Megalli was a registered representative of several broker dealer firms. Between August 2009 and approximately November 2011, he was associated with Level Global.

Issuer

11. Carter's, Inc., an Atlanta-based public issuer, is the self-proclaimed "largest branded marketer in the U.S. of apparel exclusively for babies and young children." The company sells clothing under the *Carter's* and *OshKosh* brand names as well as private label apparel through its own stores and other retailers. Since October 2003, Carter's common stock has been registered with the Commission under Section 12(b) of the Exchange Act and listed on the NYSE.

Related Persons and Entity

12. Eric M. Martin ("Martin"), 42, resides in Roswell, Georgia. From March 5, 2003, until his termination on March 24, 2009, Martin served Carter's as its Director and later, Vice President of Investor Relations. On December 18, 2012, Martin pled guilty to Count One of an eleven-count indictment charging him

with tipping others to material non-public information while employed at Carter's. He is awaiting sentencing. On September 11, 2013, an Order of Permanent Injunction and Officer and Director Bar was entered as to Martin in the U.S. District Court for the Northern District of Georgia based upon his trading and tipping of Carter's inside information.

13. Level Global was an unregistered investment adviser located in Greenwich, Connecticut and New York, New York that managed hedge funds with approximately $4 billion worth of assets in 2010.

Megalli Joins Level Global and
Engages Eric Martin as a Consultant

14. On August 10, 2009, Megalli joined Level Global as head of its consumer sector. On September 14, 2009, Megalli, on behalf of Level Global, entered into a consulting agreement with a firm owned by Martin, a former Carter's executive. The consulting agreement provided for an initial six month term and a payment of $50,000.

15. Beginning on the same day the consulting agreement was executed, Martin began providing Megalli with material non-public information regarding Carter's anticipated financial results and Megalli began directing and causing Level Global to trade on that information.

16. Martin was no longer employed by Carter's when the consulting agreement was executed, and received the material non-public information about Carter's from Posey. Posey provided the information to Martin in exchange for reputational benefit, i.e. to show that Posey was a source of valuable information, to further their friendship, and in expectation of future business contacts and benefits.

17. Based upon the nature, repeated instances, specificity and timing of the information he received from Martin, Megalli knew or had reason to know that Martin was receiving it improperly from a Carter's insider and that the insider was receiving some benefit from leaking the information to Martin.

18. Megalli's trading in Carter's stock on behalf of Adviser took place in advance of at least four earnings related releases and/or announcements, including Carter's October 27, 2009 delayed earnings announcement related to an accounting investigation, which later was the subject of a Commission enforcement action.

Trading before Carter's October 27, 2009 Announcement of a Delayed Earnings Release Pending Investigation into Its Accounting Practices

19. Between September 14 and 17, 2009, Megalli directed the purchase of 350,000 shares of Carter's stock on behalf of Adviser, at a cumulative cost of over

$9 million, based on explicit positive earnings information that he received from Martin.

20. In fact, Megalli's first trade in Carter's shares, on September 14, occurred while on the phone with Martin.

21. On October 23, 2009, Megalli again spoke to Martin in a telephone conversation. During that call, Martin advised Megalli about an unexpected accounting issue that had been uncovered at Carter's. Martin had been tipped about the issue by Posey.

22. While still on the phone, after hearing this information, Megalli ordered the sale of 100,000 shares and instructed Level Global's trader to continue selling the firm's entire position in Carter's. The trader thus sold an additional 100,000 of Carter's shares that day. The trader finished liquidating Level Global's position on October 26, 2009.

23. On October 27, 2009, right at the market open, Carter's announced a "delaying earnings release to complete a review of its accounting for margin support to its wholesale customers."

24. That day, Carter's closed at $21.66 per share, down $6.78 per share from its previous day's close at $28.44. By selling 300,000 shares prior to the negative announcement, the Level Global avoided losses of $2,110,910.

Trading before Carter's November 9, 2009 Announcement of Restated Earnings due to Improper Accounting Practices

25. After closing out of the stock in late October 2009, Megalli instructed Level Global to purchase Carter's shares at the newly depressed price. Consequently, Level Global accumulated a position of 600,000 shares by the first week of November 2009.

26. On November 9, during the middle of the trading day, Megalli spoke with Martin by telephone. During that call, Martin told Megalli that Carter's would soon announce that it would be restating its earnings for the years 2007-2009 because of the accounting issue it had identified. Martin was tipped as to that information by Posey.

27. While on that call, Megalli instructed Level Global to "lighten up" in Carter's shares "without killing the stock." As a result, Level Global sold 150,000 shares of Carter's stock at a price of $23.70 per share.

28. That same day, after the market closed, Carter's announced that it would be restating its earnings for the years 2007-2009 because of the accounting issue it had announced on October 27.

29. When the market opened the next day, Carter's stock opened at $24.04, a $2.13 decline from its price before the announcement at market close the

day earlier. The loss avoidance for Level Global by selling ahead of the negative news was $268,500.

30. Megalli's trader, noting the incredible timing of this trade and the similar timing of the trade they had completed in late October in front of another negative announcement emailed Megalli and asked, "haven't we done this before?"

Trading Ahead of Carter's December 23, 2009 Announcement of a Restatement of its Earnings

31. Megalli again spoke to Martin by telephone call on November 10, 2009, during which Martin advised that Carter's upcoming quarterly earnings would be favorable. Martin had been tipped as to that information by Posey.

32. The next day, Megalli directed Level Global to buy 50,000 Carter's shares and commented, in an instant message to a colleague, that he was bullish on the stock and had "100% conviction" and a "ton of recon on" Carter's. The shares were purchased at a price of $22.67 per share.

33. Throughout the rest of November and early December, Megalli continued to receive positive information from Martin about Carter's prospects.

34. On December 22, Megalli spoke to Martin and communicated by e-mail regarding Carter's prospects. In one email, Martin hinted that Carter's would be updating investors regarding its already announced accounting issues "tomorrow." Martin was tipped as to that information by Posey.

35. The next day, December 23, before the market opened, Carter's announced the results of its restatement of earnings. The market reacted positively to the news.

36. That same trading day, shortly after Carter's announcement, Megalli ordered Level Global to sell Carter's shares, and Level Global sold a total of 100,000 shares at a price of $26.77 per share.

37. As a result of this trading, Level Global profited on the 50,000 shares purchased on the basis of inside information by $205,000.

Trading Ahead of Carter's July 29, 2010 Earnings Release

38. Megalli and Martin had another telephone conversation on July 8, 2010. During this call, Martin told Megalli that Carter's earnings for the quarter would be below expectations. Martin had been tipped as to this information by Posey.

39. Subsequently on that same day, Megalli told Level Global to begin accumulating a short position in Carter's, and Level Global initially sold 150,000 shares short.

40. At Megalli's direction, Level Global continued to build up this short position over the next few days, ending up with a short position of 300,000 shares by July 19, at an approximate value of $7,800,000.

41. On July 29, before the market opened, Carter's issued an earnings release that contained negative future guidance. The announcement caused Carter's stock to decline $2.47 per share, from $26.01 before the announcement to $23.54.

42. Right at the market open, Level Global covered its entire short position of 300,000 shares at a price of $23.87, generating profits of $648,655.

43. After the trade, Megalli bragged to colleagues in instant messages of being "max short" Carter's before the negative announcement and, in return, received hearty congratulations from his colleagues on the trading profits from his short position.

COUNT I – FRAUD
Violations of Section 17(a)(1) of the Securities Act
[15 U.S.C. § 77q(a)(1)]

44. Paragraphs 1 through 43 are hereby re-alleged and are incorporated herein by reference.

45. Between approximately September 2009 and July 2010, Defendant, in the offer and sale of securities described herein, by the use of the means and instruments of transportation and communication in interstate commerce and by use of the mails, directly and indirectly, employed devices, schemes, and artifices to defraud, all as more particularly described above.

46. Defendant knowingly, intentionally, and/or recklessly engaged in the aforementioned devices, schemes and artifices to defraud, made untrue statements of material facts and omitted to state material facts, and engaged in fraudulent acts, practices and courses of business. In engaging in such conduct, Defendant acted with scienter, that is, with intent to deceive, manipulate or defraud or with a severely reckless disregard for the truth.

47. By reason of the foregoing, Defendant, directly and indirectly, has violated and, unless enjoined, will continue to violate Section 17(a) of the Securities Act [15 U.S.C. § 77a(q)].

COUNT II – FRAUD
Violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act
[15 U.S.C. §§ 77q(a)(2) and 77q(a)(3)]

48. Paragraphs 1 through 43 are hereby re-alleged and are incorporated herein by reference.

49. Between approximately September 2009 and July 2010, Defendant, in the offer and sale of securities described herein, by the use of the means and instruments of transportation and communication in interstate commerce and by use of the mails, directly and indirectly

a. obtained money and property by means of untrue statements of material fact and omissions to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and

b. engaged in transactions, 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.

50. By reason of the foregoing, the Defendant, directly and indirectly, has violated and, unless enjoined, will continue to violate Sections 17(a)(2) and 17(a)(3) of the Securities Act [15 U.S.C. §§ 77q(a)(2) and 77q(a)(3)].

COUNT III – FRAUD
Violations of 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]

51. Paragraphs 1 through 43 are hereby re-alleged and are incorporated herein by reference.

52. Between approximately September 2009 and July 2010, Defendant, in connection with the purchase and sale of securities described herein, by the use of

the means and instrumentalities of interstate commerce and by use of the mails, directly and indirectly:

a. employed devices, schemes, and artifices to defraud; and

b. 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.

53. Defendant knowingly, intentionally, and/or recklessly engaged in the aforementioned devices, schemes and artifices to defraud, and engaged in fraudulent acts, practices and courses of business. In engaging in such conduct, Defendant acted with scienter, that is, with intent to deceive, manipulate or defraud or with a severely reckless disregard for the truth.

54. By reason of the foregoing, Defendant, directly and indirectly, has 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].

PRAYER FOR RELIEF

WHEREFORE, Plaintiff SEC respectfully prays for:

I.

Findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure, finding that Defendant committed the violations alleged herein and that the relief defendant was unjustly enriched.

II.

A permanent injunction enjoining Defendant, his agents, servants, employees, and attorneys from violating, directly or indirectly, Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5(a) and (c) thereunder.

III.

An order requiring the disgorgement by Defendant of all ill-gotten gains or unjust enrichment (including amounts received by Level Global as a result of Megalli's actions) with prejudgment interest, to affect 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 Defendant.

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.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, the Commission demands trial by jury in this action of all issues so triable.

Dated: November 14, 2013.

Respectfully submitted,

/s/M. Graham Loomis
Regional Trial Counsel
Georgia Bar Number 457868

Pat Huddleston
Senior Trial Counsel
Georgia Bar Number 373984

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Exhibit G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SECURITIES AND EXCHANGE COMMISSION,	:	
Plaintiff,	:	Civil Action No.
v.	:	1:13-CV-03783-AT
MARK MEGALLI,	:	
Defendant	:	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S MOTION FOR SUMMARY JUDGMENT

The Securities and Exchange Commission ("SEC" or "Commission") alleges that Defendant Mark Megalli ("Megalli") violated Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder through trading in the stock of Carter's Inc. while in possession of material nonpublic information. The Defendant admitted doing so when he pled guilty to a Criminal Information[1] [Crim. Docket No. 1] (attached to SEC's Statement of Material Facts ("SOF") as Exhibit 1) detailing trading described in the SEC's Complaint [Docket No. 1] (attached to SOF as Exhibit 3) and further admitted to doing so in his Answer [Docket No. 13] (attached to SOF as Exhibit 4) to the Commission's Complaint.[2] Because Defendant is collaterally estopped from relitigating the issue, the SEC is entitled to summary judgment.s

FACTS

Megalli graduated from Yale College, Yale Law School, and Yale School of Management. Defendant's Sentencing Memorandum (hereafter "Sent. Mem.") [Crim. Docket No. 26] (excerpts attached to SOF as Exhibit 5) p. 9; SOF ¶¶1-2. Following graduate school, Megalli worked for several Wall Street firms before landing, in 2009, at Level Global, a Manhattan-based hedge fund, which hired

[1] U.S. v. Megalli, 1:13-cr-00442-RWS-1. Citations will be to "Crim. Docket No. ___". Judgment of conviction [Crim. Docket No. 29] (attached to SOF as Exhibit 2).

[2] While the SEC's Complaint details other instances of insider trading, the Commission limits this motion to those instances described both in the Commission's Complaint and the Criminal Information to which the Defendant pled guilty.

Megalli to launch a consumer group, hire analysts, and manage capital. Sent. Mem. pp. 9-10; SOF ¶3-7. Level Global managed hedge funds worths approximately $4 billion in 2010. Complaint ¶13; Answer ¶13; SOF ¶9. Megallis worked there between August 2009 and March 2011. Complaint ¶10; Answer ¶10; SOF ¶8.s

Carter's, Inc. ("Carter's"), an Atlanta-based public issuer, is the self-proclaimed "largest branded marketer in the U.S. of apparel exclusively for babies and young children." Since October 2003, Carter's common stock has been registered with the Commission under Section 12(b) of the Exchange Act and listed on the NYSE. Complaint ¶11; Answer ¶11; SOF ¶10.

From March 5, 2003, until his termination on March 24, 2009, Eric M. Martin ("Martin") served as Carter's Director of Investor Relations and Vice President of Investor Relations. On December 18, 2012, Martin pled guilty to tipping others to material nonpublic information while employed at Carter's.[3] Complaint ¶12; Answer ¶12; SOF ¶11.

[3] On September 11, 2013, an Order of Permanent Injunction and Offic nd Director Bar was entered as to Martin in the U.S. District Court for the Northern District of Georgia based upon his trading and tipping of Carter's inside information. Complaint ¶12; Answer ¶12; SOF ¶11.

On September 14, 2009, Megalli caused Level Global to retain Martin, whom Megalli knew had separated from his position at Carter's, to be a consultant to Level Global, through Martin's firm, Mellon Advisors. Crim. Info. p. 3; Guilty Plea and Plea Agreement as to Mark Megalli (hereafter "Guilty Plea") [Crim. Docket No. 3-1] (attached to SOF as Exhibit 6); SOF ¶17. Megalli assumed that Martin continued to have relationships at Carter's. Transcript of Guilty Plea (hereafter "Plea Tr.") [Crim. Docket No. 9] (excerpts attached to SOF as Exhibit 7) p. 26, lines 18-23; SOF ¶14. The agreement provided for a payment of $50,000 to Martin's firm. Complaint ¶14; Answer ¶14; SOF ¶12.

Richard T. Posey ("Posey") was employed as a Carter's Vice President from 2002 until early 2013. Posey worked in the Company's Atlanta headquarters in a position that afforded him access to material nonpublic information. Crim. Info. pp. 2-3; Guilty Plea; SOF ¶15. Martin and Posey developed a personal and professionala relationship during their employment at Carter's — including travel, golf outings, lunches, and other work and social events — which continued after Martin'sa separation from Carter's and while Posey remained employed at Carter's. Crim. Info. p. 3; Guilty Plea; SOF ¶16.

On or about October 22, 2009, after the close of business, Posey had a meeting with Martin in Atlanta during which Posey disclosed inside information to Martin relating to an internal investigation of accounting irregularities at Carter's, the possibility of a financial restatement, and a potential delay in the issuance of Carter's quarterly earnings release. Crim. Info. pp. 6-7; Guilty Plea; SOF ¶18. On or about October 23, 2009, at approximately 11:23 a.m., Martin made a seven-minute cellular telephone call to Megalli, during which Martin disclosed to Megalli certain inside information that he had received from Posey. Crim. Info. p. 7; Guilty Plea;o Complaint ¶22; Answer ¶¶21-22; SOF ¶19. During his October 23, 2009 call witho Megalli, Martin indicated that he thought it would be a good idea for Megalli to sell Carter's stock. Answer ¶21; Sentencing Transcript (hereafter "Sent. Tr.") [Crim. Docket No. 31] (excerpts attached to SOF as Exhibit 8) p. 24, lines 23-24;o SOF ¶20. On or about October 23, 2009, at approximately 11:25 a.m., Megallio ordered the sale of 300,000 shares of Carter's common stock in an account controlledo by Level Global. Crim. Info, p. 7; Guilty Plea; SOF ¶21. Megalli relied on Martin'so inside information. Sent. Mem. p. 56; SOF ¶22. Martin's October 23, 2009o telephonic tip was the catalyst for Megalli to order the sale of Carter's stock duringo the same phone call. Sent. Mem. p. 56; SOF ¶23. Megalli's conduct in Octobero

2009 involved, at least, conscious avoidance as to the source and legitimacy of certain information imparted by Martin. Sent. Mem. pp. 4, 25, and 30; SOF ¶24.

On October 27, 2009, Carter's announced a "delaying earnings release to complete a review of its accounting for margin support to its wholesale customers." Complaint ¶23; Answer ¶23; SOF ¶25. By selling 300,000 shares prior to the negative announcement, Level Global avoided losses of no less than $2,034,000. Answer ¶24; SOF ¶26.

On or about July 7, 2010, Posey met with Martin in Atlanta and disclosed inside information to Martin relating to Carter's financial performance for the second quarter of 2010 and changes in its outlook. Crim. Info. p. 7; Guilty Plea; SOF ¶27. On or about July 8, 2010, at approximately 10:39 a.m., Martin made a nineteen-minute telephone call to Megalli. During the call, Martin disclosed to Megalli certain inside information that he had received from Posey. Crim. Info. p. 7; Guilty Plea; SOF ¶28. On or about July 8, 2010, at approximately 11:01 a.m., Megalli ordered the short sale of 150,000 shares of Carter's common stock in an account controlled by Level Global. Crim. Info. p. 7; Guilty Plea; Complaint ¶39; Answer ¶39; SOF ¶29.

Between July 8 and July 19, 2010, Martin and Megalli had telephone conversations during which certain inside information was discussed. Crim. Info. p. 8; Guilty Plea; SOF ¶30. Between July 12 and July 19, 2010, Megalli ordered the short sale of an additional 150,000 shares of Carter's common stock in an account controlled by Level Global. Crim. Info. p. 8; Guilty Plea; SOF ¶31. At Megalli's direction, Level Global continued to build up this short position over the next few days, ending up with a short position of 300,000 shares by July 19, at an approximate value of $7,800,000. Complaint ¶40; Answer ¶40; SOF ¶32.

Megalli sold short positions in Carter's stock in July 2010 based on actuals knowledge of inside information that had been disclosed by Martin. Sent. Mem. pp. 10-11, 25, and 29-30; SOF ¶33. On July 29, 2010, Level Global covered its entire short position, generating profits of $648,655. Complaint ¶42; Answer ¶42; Crim. Info. p. 8; Guilty Plea; SOF ¶34.

Megalli does not deny factual liability for the misconduct alleged in the Commission's Complaint to which he pleaded guilty in the parallel Criminal Action. Answer p. 2; SOF ¶35. Megalli caused Level Global to trade Carter's securities in September-October 2009 and July 2010 based in whole or in part on material, nonpublic information disclosed by Martin, knowing and consciously

avoiding knowledge as to the source of Martin's information. Answer ¶¶1, 3, 4, 17, and 18; SOF ¶36.

The inside information provided to Megalli was obtained in violation of (1) fiduciary and other duties of trust and confidence that Posey owed to Carter's, (2) expectations of confidentiality held by Carter's, (3) written policies of Carter's regarding the use and safekeeping of confidential business information, and (4) Posey's agreements to maintain Carter's confidential business information in confidence and to refrain from using any inside information of Carter's for his own benefit, from trading on the basis of such information, and from disclosing any inside information to others for personal benefit. Crim. Info. p. 5; Guilty Plea; SOF ¶38.

Posey disclosed the inside information to Martin with the understanding thate Martin would purchase and sell securities based on the information and, beginning in or about September 2009, that Martin would disclose the information to certain financial institutions and investment firms for which Martin was employed as a consultant. Posey did so for his own benefit, which included but was not limited to stock tips about other publicly-traded companies to which Martin had access, future networking opportunities, friendship, and other tangible and intangible benefits. Crim. Info. p. 5; Guilty Plea; SOF ¶39.

Martin in turn purchased and sold Carter's securities on the basis of this information knowing that it had been provided by Posey in violation of Posey's duties of trust and confidence to Carter's, earning illegal profits and illegally avoiding losses. Beginning in or about September 2009 and continuing through in or about July 2010, Martin also disclosed inside information to Megalli with the understanding that Megalli would purchase and sell securities based on the information. Crim. Info. pp. 5-6; Guilty Plea; SOF ¶40.

Megalli in turn caused Level Global to purchase and sell Carter's securities on the basis of, in whole or in part, certain inside information provided by Martin, knowing and consciously avoiding the knowledge that the inside information had been obtained from a Carter's insider in violation of the insider's duties of trust and confidence, earning illegal profits and illegally avoiding losses for Level Global.[4] Crim. Info. p. 6; Guilty Plea; Criminal Information[5] as to Richard T. Posey ("Posey Crim. Info.") [Posey Crim. Docket No. 1] (attached to SOF as

[4] Megalli, directly and indirectly, made use of the mails, the means and instruments of transportation and communication in interstate commerce, and the means and instrumentalities of interstate commerce in connection with the transactions, acts, practices, and courses of business alleged in the SEC's Complaint. Complaint ¶7; Answer ¶7; SOF ¶42.

[5] U.S. v. Richard T. Posey, Crim. Info. No. 1:13-CR-239-RWS. Citations to the record in the criminal case against Posey will be to "Posey Crim. Docket No. ___". Judgment of Conviction [Posey Crim. Docket No. 29] (attached to SOF as Exhibit 11).

Exhibit 9); Posey Guilty Plea [Posey Crim. Docket 6-1] (attached to SOF as Exhibit 10);[6] SOF ¶41.

SUMMARY JUDGMENT AND COLLATERAL ESTOPPEL STANDARDS

Summary judgment is appropriate where the moving party establishes that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). A trial judge should enter summary judgment "if, under the governing law, there can be but ones reasonable conclusion." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 s(1986). The SEC, as the party seeking summary judgment, has the initial burden.s See Fed. R. Civ. P., Rule 56(c); Celotex Corp. v. Catrett, 466 U.S. 317, 325, 106s S.Ct. 2548, 2553-54, 91 L. Ed. 2d 265 (1986). Once the Commission carries thats burden, the Defendant must demonstrate that a triable issue of fact exists; he mays not rest upon mere allegations or denials. Anderson v. Liberty Lobby, Inc., 477s U.S. 242, 248, 106 S. Ct. at 2510 (1986).s

Courts routinely use collateral estoppel to grant summary judgment in SEC enforcement actions following a criminal conviction for the conduct giving rise to the SEC's action. See, for example, SEC v. Quinlan, 373 Fed. Appx. 581 (6th Cir. 2010);

[6] Which states, "The Defendant admits that he is pleading guilty because he is in fact guilty of the crime charged in the Information."

SEC v. Resnick, 604 F. Supp. 2d 773 (D. Md. 2009); SEC v. Gruenberg, 989 F.2d 977 (8th Cir. 1993). "[T]he prevalence of estoppel in civil cases following their criminal counterparts is due in part to the court's desire to avoid inconsistent verdicts in light of the higher burden of proof required in the prior criminal case." SEC v. Blackwell, 477 F. Supp. 2d 891, 899 (S.D. Ohio 2007).

The Eleventh Circuit articulated the standards for application of collateral estoppel in Irvin v. United States, 335 Fed. Appx. 821 (11th Cir. 2009):

> Collateral estoppel refers to the concept of 'issue preclusion,' whereby the re-litigation of an issue that has been previously litigated and decided is precluded. [citation omitted]. To apply collateral estoppel, the court must find that the following four prerequisites have been satisfied: (1) the issue at stake is identical to the one involved in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the determination of the issue in the prior litigation must have been 'a critical and necessary part' of the judgment in the first action; and (4) the party against whom collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Irvin, 335 Fed. Appx. at 822-823. Each of the elements required for application of collateral estoppel is present here.

Identical Issues

The Criminal Information to which Megalli pled guilty specifically charges conspiracy to violate Title 15, United States Code, Section 78j(b), also known as

Section 10(b) of the Exchange Act. Crim. Info. p. 1. The Commission has alleged violation of the same statute. Comj laint ¶¶ 51-54. As Defendant acknowledged at his plea allocution, to secure a conviction on that charge the Government was required to prove beyond a reasonable doubt "that during the conspiracy one of the conspirators knowingly **engaged in at least one overt act** as described in the Criminal Information; . . ." Plea Tr. p. 11, line 21 through p. 12, line 5 (emphasis added). The overt acts detailed in the Criminal Information are two of the instancess of insider trading (October 2009 and July 2010), described above, and also detaileds in the Commission's Complaint. Crim. Info. ¶¶ 4(a) - 5(i) pp. 4-8; Complaint ¶¶ 19-24 and 38-42.s

At Defendant's plea allocution, Assistant United States Attorney David Chaiken ("AUSA Chaiken") recited the elements required to prove the insider trading charged as the overt acts of the conspiracy. After quoting the text of Exchange Act Rule 10b-5 [17 C.F.R. § 240.10b-5], AUSA Chaiken continued:

> In order to satisfy the first two elements of that test that I just described in an insider trading case, the Government is required to prove, first, that the original tipper, in this case Richard Posey, possessed material nonpublic information regarding a publicly traded company; second, the original tipper, Rick Posey, disclosed this information to the intermediate tippee, in this case Eric Martin, who disclosed it to the remote tippee, in this case Mr. Megalli; third, the remote tippee, Mr. Megalli, traded in securities on the basis of

> the information; and fourth, the original tipper, Rick Posey, breached a fiduciary duty to the source of the information by disclosing it to the intermediate tippee, and the remote tippee, Mr. Megalli, knew that the original tipper had violated a fiduciary duty by providing the information to the intermediate tippee. . . . Now, in the Second Circuit there's currently an issue percolating . . . as to whether there is a fifth element that the remote tippee in Mr. Megalli's position must also know that the original tipper received a personal benefit ine exchange for disclosing the information to the intermediate tippee. The Government's position is that this element is not required. Nevertheless, the parties have discussed it; and the Government'se position is that as a factual matter – first, as a legal matter, it's note required. As a factual matter, if it was required, the Government could prove it based on circumstantial evidence that Mr. Megalli knew or consciously avoided the knowledge that Martin wase meeting with friends and contacts at Carter's and had friendships with one or more persons at Carter's, his former employer. Finally,e just so the Court is aware, conscious avoidance or deliberatee ignorance is sufficient to articulate the knowledge and intent elements under this, under the securities fraud statutes that we'ree discussing.e

Plea Tr. p. 12, line 10 through p. 14, line 7. AUSA Chaiken's recitation of what the Government would have to prove mirrors the text of Exchange Act Rule 10b-5 [17 C.F.R. § 240.10b-5], and the well-established elements of a violation of that Rule ine the insider trading context. The issues in the instant case are identical to issuese presented in the criminal case.[7]

[7] Moreover, Defendant's conviction on charges of violating Section 10(b) of the Exchange Act are sufficient to collaterally estop him from litigating the Commission's claims under Section 17(a) of the Securities Act of 1933 ("Securities Act"), which applies to insider trading involving the sale of securities (Defendant's October 2009 trades). See SEC v. Clay Capital Management LLC, 2013 U.S. Dist. LEXIS 159130 (D.N.J. 2013) (granting summary judgment to the SEC under both provisions in an insider trading case); SEC v. Nanen, 2004 U.S. Dist. LEXIS 19611 at *11 (S.D.N.Y. 2004) (holding that a guilty plea to violations of Section 17(a) of the Securities Act may have a collateral estoppel effect on Rule 10b-5 claims); SEC v. Quinlan, 2008 U.S. Dist. LEXIS 95789 at *12-13 (E.D. Mich. 2008) (holding that, even when a defendant did not plead guilty to securities violations, a

Issue Actually Litigated

Defendant Megalli admitted all of the elements of the charged violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Montalbano v. Commissioner of IRS, 307 Fed. Appx. 322, 323 (11th Cir. 2009), quoting McCarthy v. United States, 394 U.S. 459, 466, 89 S. Ct. 1166, 1170, 22 L. Ed. 2d 418 (1969) ("A guilty plea is an 'admission of all the elements of a formal criminal charge.'"). "'[F]or purposes of applying the doctrine of collateral estoppel, there is no difference between a judgment of conviction based upon a guilty plea and a judgment rendereds after a trial on the merits. The conclusive effect is the same.'" Montalbano, 307 Fed. Appx. at 323, quoting Blohm v. C.I.R., 994 F.2d 1542, 1554 (11th Cir. 1993). Given the above-referenced recitation of the elements of insider trading necessary to thes Government's case, and Defendant's admission that he "is in fact guilty" [Guilty Pleas p. 1] of those charges, the issue of his liability was actually litigated.s

As to Defendant's recent claim that the Second Circuit's decision in Newman v.sUnited States, 773 F.3d 438 (2d Cir. 2014)[8] raises an issue not actually litigated ins the criminal case, the Guilty Plea Transcript proves otherwise. AUSA Chaiken

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commonality of factual issues in the causes of action justified application of collateral estoppel, which "preclude[s] parties from contesting matters that they have had a full and fair opportunity to litigate, protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent judgments."

[8] Motions for rehearing and rehearing en banc pending.

notified the Court of the issues percolating in the Second Circuit, including the Government's position — discussed with the defense — that the fifth element set forth by the Newman Court (requiring a tippee's knowledge of a pecuniary or similar benefit to the insider/tipper) was not required for conviction, but that the Government could prove that element through Defendant's conscious avoidance of the knowledge required by that element. Defendant said he understood that the Government would have to prove the elements recited. Plea Tr. p. 14, lines 9-10.

The Second Circuit panel in Newman recognized that conscious avoidance of the knowledge at issue would have been material to its decision, noting that the Government in that case offered no evidence that the defendants "consciously avoided learning of these facts," Newman, 773 F.3d at *33. In contrast, Defendant Megalli has *insisted* repeatedly that he consciously avoided learning about the "source and legitimacy" of the tips at issue. At his plea allocution, the Defendant stated:

> What I'm pleading guilty here today is the conscious avoidance. When [Martin] said to me, Yes, good idea, sell the stock, that was a change from his prior opinion. And I did – I should have probed and asked more questions about why are you telling me this, *what are you basing this on? I did know that he had worked at the company before.*

Plea Tr. p. 25, line 7-12 (emphasis added).

At Megalli's sentencing, Counsel for the Defendant underscored the significance of the admitted conscious avoidance, stating, "Conscious avoidance, Judge, is equally as culpable as actual knowledge but I'm here to tell you that we also have actual knowledge in this case." Sent. Tr. p. 7, lines 10-12.[9] In his Sentencinge Memorandum, Counsel underscored the point yet again:

> In addition, Mr. Megalli's offense conduct involved . . . conscious avoidance as to the source and legitimacy of certain information imparted by Eric Martin (which Mr. Megalli certainly admits is nonetheless criminally actionable) . . .."

Sent. Mem. at p. 4.[10e]

Finally, the issue upon which Newman turned was the defendants' intent to engage in insider trading. Summing up, the Second Circuit said: "Because the

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[9] Again underscoring the sufficiency of his conscious avoidance for establishing criminal liability, the Defendant and his Counsel engaged in the following dialogue with the Court:

> THE COURT: And you certainly had reason to believe, based on his having left the company, that he continued to have relationships within the company.
>
> THE DEFENDANT: Sure, yeah. I mean, I've left companies before and you do keep in touch with people there, and I assumed he probably did; although I would also like to just point out I never heard the name Richard Posey or that there was a V.P. of operation of anything specific like that until after Mr. Posey pled guilty.
>
> MR. MONIN: And, Judge, we don't contend that that's necessary. **That's not part of the Government's required showing.**

Plea Tr. p. 26, line 18 through p. 27, line 4 (emphasis added).

[10] Later in that Memo, Counsel correctly observes: "Applicable tipper-tippee insider trading authority has long countenanced criminal liability based either on a tippee's actual knowledge of the tipper's direct or derivative fiduciary breach or deliberate avoidance of learning the truth." Sent. Mem. p. 35 (emphasis added). Also in that Memo, Defense Counsel wrote, "In particular, Mr. Megalli acknowledged that certain of the information imparted by Martin on October 23, 2009 was sufficiently suspicious to render his conscious choice not to divine its source and nature criminally actionable. (*See* 11/14/13 Guilty Plea Hr'g Tr. at 24-25); *see also Svoboda*, 347 F.3d at 480 (deliberate actions to avoid knowledge are sufficient to confer criminal liability). Most importantly, given that conscious avoidance is just as actionable as actual knowledge, the Court correctly accepted Mr. Megalli's allocution testimony in adjudicating him guilty . . .." Sent. Mem. pp. 36-37.

Government failed to demonstrate that [defendants] had the intent to commit insider trading, it cannot sustain the convictions . . .." Newman, 773 F.3d at *39. In contrast, as cited above, Defendant Megalli has consistently admitted his culpable mental state.[11] The issue that drove Newman is not present here.

Critical and Necessary Part of Judgment in First Action

The specific instances of insider trading detailed in the criminal case weres indeed critical and necessary to the judgment in the first action. They constituted the "overt acts" required to be proven by the Government. Crim. Info. pp. 4-8. AUSA Defendant understood that. Plea Tr. p. 14, line. 11. s

Full and Fair Opportunity to Litigate

The Guilty Plea Transcript leaves no doubt that the Defendant made a fully informed decision to surrender his liberty rather than contest the Government's case. In fact, the plea colloquy establishes that the Court gave the Defendant several opportunities to walk away from his guilty plea. The Court verified Megalli's signature on the Guilty Plea and Plea Agreement which contains his admission that, "The Defendant admits that he is pleading guilty because **he is in fact guilty** of the

[11] "I got it completely and utterly wrong and I'm not going to make excuses today. Obviously the advice that he was providing to his clients and me was over the line, I knew it was wrong and I should not have traded on it . . .." Sent. Tr. p. 22, lines 4-10 (emphasis added).

crime charged in the information." Guilty Plea p. 1 (emphasis added); Plea Tr. p. 2, line 17 through p. 3, line 2. Then, the Court continued with the full plea colloquy.[12] Having been taken through an exhaustive recitation of his rights and the privileges afforded him in a criminal trial, Defendant willingly gave up each of those rights and proceeded to plead guilty.

But the Defendant had more than a long recitation of his rights with which to make a full and fair decision about his plea. He had the knowledge that another Circuit was considering adding another element to what the Government is required to prove to secure an insider trading conviction, and knew the details of what that new element would be, i.e., knowledge of a pecuniary or similar benefit to the insider/tipper. Yet he still chose to plead guilty rather than have a jury hear that evidence. Defendant had a full and fair opportunity to litigate. Collateral estoppel applies, and Defendant cannot now relitigate his liability. As he represented to Judge Story, the Defendant "is in fact guilty." Guilty Plea p. 1.

Beyond the application of collateral estoppel, Defendant's admissions in answering the SEC's Complaint prove the SEC's entitlement to summary judgment here. Five times in his Answer, Defendant repeats:

[12] See Plea Tr. pp. 4-7.

> Megalli caused Level Global to trade Carter's securities in September-October 2009 and July 2010 based in whole or in part on material, non-public information disclosed by Martin, knowing and consciously avoiding knowledge as to the source of Martin's information.

Answer ¶¶1, 3, 4, 17, and 18. He admits that he had Level Global enter into a consulting agreement with Martin's firm, paying the firm $50,000. Complaint ¶14; Answer ¶14. He admits that during a telephone call on October 23, 2009, Martini disclosed inside information to Defendant that Martin had received from Posey.i Complaint ¶22; Answer ¶21-22. Specifically, Megalli admits that during that call,i Martin indicated that he thought it would be a good idea for Megalli to sell Carter'si stock. Complaint ¶21; Answer ¶21. He admits that, by selling 300,000 afteri receiving that information, Level Global avoided losses of no less than $2,043,000.i Answer ¶24.i

Turning to the July trades, Megalli admits that on July 8, 2010 he ordered the short sale of 150,000 shares of Carter's common stock in an account controlled by Level Global. Complaint ¶39; Answer ¶39. He admits that at Megalli's direction, Level Global continued to build up this short position over the next few days, ending up with a short position of 300,000 shares by July 19. Complaint ¶40; Answer ¶40. Megalli admits that Level Global covered its entire short position, generating profits of $648,655. Complaint ¶42; Answer ¶42. He further

admits that he engaged in all of the above conduct making use of jurisdictional means. Complaint ¶7; Answer ¶7.

Early in his Answer, before responding to the specific paragraphs, Megalli states that he "does not deny factual liability for the misconduct alleged in the Commission's complaint to which he pleaded guilty in the parallel Criminal Action." Answer p. 2. He pled guilty to insider trades in October 2009 and July a2010, which he admits generated illicit profits gained/losses avoided totaling a $2,691,655. Complaint ¶42; Answer ¶¶24, 42. Wholly apart from application of a a collateral estoppel, therefore, Megalli's admissions entitle the SEC to summarya judgment.a

As established above, the Newman decision does not create a fact issue precluding summary judgment. There was no evidence of conscious avoidance in Newman. The Defendant has admitted it here. Numerous courts have recognized the absurdity of requiring proof that a defendant knew something that he deliberately avoided learning. SEC v. Obus, 693 F.3d 276, 287 (2d Cir. 2012) ("[T]ippee liability may also result from conscious avoidance."); SEC v. Musella, 678 F. Supp. 1060, 1063 (S.D.N.Y. 1988) ("[The defendants] did not ask because they did not want to know. I cannot accept that conscious avoidance of knowledge

defeats scienter in a stock fraud case any more than is does in the typical *mens rea* criminal context."); U.S. v. Whitman, 904 F. Supp. 2d 363, 373 (S.D.N.Y. 2012) ("Moreover, where appropriate (as here) the Government is entitled to a 'willful blindness' or 'conscious avoidance' instruction to the jury on the issue of such knowledge."). Defendant Megalli deliberately avoided knowledge of the sourcet and legitimacy of the information provided by Martin. He cannot claim now that this lack of knowledge entitles him to avoid judgment.t

RELIEF

Permanent Injunction

Unlike a private litigant, the SEC must show only two things to carry its burden when seeking an injunction: (1) a prima facie violation of the federalt securities laws, and (2) the likelihood of future violations. SEC v. Unifund Sal et al, 910 F.2d 1028, 1037 (2d Cir. 1990). "The Commission is *not* required to make at specific showing of irreparable injury or inadequacy of other remedies which private litigants must make." CFTC v. Smith, 2012 U.S. Dist. LEXIS 119125 at *33. The criminal conviction establishes much more than a prima facie case of securities lawt violations, but not less. That leaves only an inquiry into the likelihood of futuret misconduct.

District courts consider a number of factors in determining whether there exists a reasonable likelihood that the defendant, if not enjoined, will violate securities laws in the future. [citation omitted]. These factors include: (1) the seriousness of the original violation; (2) the isolated or recurrent nature of the infraction; (3) the degree of scienter involved on the part of the defendant; (4) the defendant's recognition of his unlawful conduct and the sincerity of his assurances against future violations; and (5) the likelihood that the defendant's occupation will present opportunities for future violations." Steadman v. SEC, 603 F.3d 1126, 1140 (5th Cir. 1979).

Considering these factors, we see that a strong likelihood of future misconduct requires the entry of a permanent injunction. First, the "original violations" were serious, involving millions of dollars and a publicly traded company. Next, the violations were recurrent, involving multiple trading on two separate pieces of insider information separated by nine months. Answer ¶¶ 1, 3, 4, 17, and 18. Next, as Defendant admits, his scienter level was high. He "knew it was wrong." Sent. Tr. p. 22, lines 4-10. He "knew" that in October 2009. Yet, he did it again in July 2010.

Next, we consider "the defendant's recognition of his unlawful conduct and the sincerity of his assurances against future violations." At this point it is fair to consider the sincerity of previous assures given by Megalli. At his sentencing

hearing, with Judge Storey still weighing what punishment to impose, the Defendant misrepresented to the Court that "the SEC settlement is absolutely coming," (Sent. Tr. p. 6, lines 22-23), and "we are going to work through a settlement with the SEC that involves permanent debarment from the industry," (Sent. Tr. p. 8, lines 1-2), and "disgorgement with the SEC is absolutely a huge liability factor," (Sent. Tr. p. 8, lines 8-10), and "I just wanted to let the court know that we are going to be settling with the SEC." Sent. Tr. p. 9, lines 16-17. Judge Storey found those representations significant, saying, "In light of the restitution and the other matters that I fully expect you are going to have to do with the SEC, I will not impose a fine or cost of incarceration." Sent. Tr. p. 29, lines 20-22. Bottom line, when it was in his interest to appear contrite, Defendant made assurances about a settlement with the SEC. Now that he has been or will soon be released from prison, he is much less contrite. To avoid a permanent injunction, the SEC expects the Defendant to once again make assurances of good behavior. The Court should consider them in light of the pattern described above.

Finally, in considering a permanent injunction, courts consider the likelihood that the defendant's occupation will present opportunities for future violations. Insider trading requires no special license nor occupation. Given his many years in the securities industry, some of Defendant's contacts will have material nonpublic

information. Wherever he is employed he will be able to exploit it, as he did here. All he needs is a brokerage account. The public needs a permanent injunction against Megalli.

Disgorgement and Prejudgment Interest

Generally, once a district court has found federal securities laws violations, it has broad equitable power to fashion appropriate remedies, including ordering that culpable defendants disgorge profits. SEC v. First Jersey Securities, Inc., 101 F.3d 1450, 1474 (2d Cir. 1996); SEC v. Lorin, 76 F.3d 458, 461-62 (2d Cir. 1996); SEC v. Patel, 61 F.3d 137, 139 (2d Cir. 1995); SEC v. Manor Nursing Centers, Inc., 458 F.2d at 1104. The primary purpose of disgorgement as a remedy for violation of the securities laws is to deprive violators of their ill-gotten gains, thereby effectuating the deterrence objectives of those laws. SEC v. First Jersey Securities, Inc., 101 F.3d at 1474; SEC v. Wang, 944 F.2d 80, 85 (2d Cir. 1991); SEC v. Commonwealth Chemical Securities, Inc., 574 F.2d 90, 102 (2d Cir. 1978). Furthermore, as set forth in the Manor Nursing Centers, Inc. decision:

> The effective enforcement of the federal securities laws requires that the SEC be able to make violations unprofitable. The deterrent effect of an SEC enforcement action would be greatly undermined if securities laws violators were not required to disgorge illicit profits.

SEC v. Manor Nursing Centers, Inc., 458 F.2d at 1104. Those profits include profits generated for a fund for which a defendant directed illegal trades. SEC v. Contorinis, 743 F.3d 296 (2d Cir. 2014)[13]. Defendant admits that his illegal October 2009 trades generated losses avoided of no less than $2,034,000, (Answer ¶24; SOF ¶26), and that his illegal July 2010 trades generated profits of $648,655 (Complaint ¶42; Answer ¶42; Crim. Info. p. 8; Guilty Plea; SOF ¶34), for a total of s $2,682,655.

Total prejudgment interest on the above disgorgement amount as set forth in the Huddleston Declaration (attached to SOF as Exhibit 12) totals $414,761, for a total of disgorgement plus prejudgment interest of $3,097,416. (See, Huddleston Dec., ¶4.). The amount of prejudgment interest sought is reasonable, in that it is based upon the same quarterly interest rates used by the Internal Revenue Service for unpaid taxes.

Civil Penalties

Section 21A of the Exchange Act allows the Court in an insider trading case to impose a civil penalty of up to three times the profits gained and losses avoided. 15 U.S.C. § 78u-1. In making the determination, Court's consider factors similar

[13] "[U]njust enrichment may also be prevented by requiring the violator to disgorge the unjust enrichment he has procured for the third party. . . .[T]o fail to impose disgorgement on such violators would allow them to unjustly enrich their affiliates." Contorinis, 743 F.3d at 307.

to those considered in determining whether to grant injunctive relief, SEC v. Kinnucan, 9 F. Supp. 3d 370 (S.D.N.Y. 2014),[14] and have imposed the full penalty allowed in cases involving parallel criminal proceedings such as this one. Kinnucan, 9 F. Supp. 3d at 377. In light of those factors, including the Defendant's securing of a more lenient monetary sentence by representing to the sentencing Court that he would be settling this action, (Sent. Tr. p. 6, lines 22-23; p. 8, lines 8-10; p. 9, lines 16-17; and p. 29, lines 20-22), the full penalty allowed by law is appropriate. The Commission, therefore, asks that the Court impose a civil penalty of $6,102,000 (three times the above-referenced disgorgement amount).

CONCLUSION

For the foregoing reasons, the SEC asks the Court to enter summary judgment in its favor and order the relief detailed above.

Respectfully submitted this 3rd day of February, 2015.

Respectfully submitted,

/s/ Pat Huddleston II
Pat Huddleston II

[14] "(1) [T]he egregiousness of the defendant's conduct; (2) the degree of the defendant's scienter; (3) whether the defendant's conduct created substantial losses or the risk of substantial losses to other persons; (4) whether the defendant's conduct was isolated or recurrent; and (5) whether the penalty should be reduced due to the defendant's demonstrated current and future financial condition." Kinnucan, 9 F. Supp. 3d at 377.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1D, I hereby certify that the foregoing has been prepared using Times New Roman 14-point font, as allowed by Local Rule 5.1C.

This 3rd day of February 2015.

/s/ Pat Huddleston II
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Exhibit H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA, Respondent, v. MARK MEGALLI, Movant.	CRIMINAL INFORMATION NO. 1:13-CR-00442-RWS-AJB CIVIL ACTION FILE NO. 1:15-CV-01433-RWS-AJB

NOTICE OF APPEAL

Notice is hereby given in accordance with Rule 3 of the Federal Rules of Appellate Procedure that Movant Mark Megalli in the above-captioned habeas action hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the Order and Final Judgment entered on September 25, 2017 (ECF Nos. 68-69). Pursuant to Eleventh Circuit Rule 22-1(b), this Notice shall be "construe[d] . . . as an application to the court of appeals for a certificate of appealability." Once his appeal has been docketed with the Eleventh Circuit, Mr. Megalli will supplement this Notice by filing a formal Application for Certificate of Appealability.

Dated: October 10, 2017.

s/ Paul N. Monnin
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LOCAL RULE 7.1D CERTIFICATION

The undersigned hereby certifies that the foregoing document has been prepared in Times New Roman font, 14-point type, in compliance with Local Rule 5.1B

s/ Paul N. Monnin
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Counsel for Movant Mark Megalli

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of October, 2017, I electronically filed the foregoing Notice of Appeal with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to counsel of record.

/s Paul N. Monnin
Paul N. Monnin
Georgia Bar No. 516612

Counsel for Movant Mark Megalli

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LOCAL RULE 7.1D CERTIFICATION

The undersigned hereby certifies that the foregoing document has been prepared in Times New Roman font, 14-point type, in compliance with Local Rule 5.1B

s/ Paul N. Monnin
Paul N. Monnin
Georgia Bar No. 516612

Counsel for Movant Mark Megalli

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of October, 2017, I electronically filed the foregoing Notice of Appeal with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to counsel of record.

/s Paul N. Monnin
Paul N. Monnin
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Counsel for Movant Mark Megalli