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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.**	**RESPONDENT MARK MEGALLI'S RULE 250(b) MOTION FOR SUMMARY DISPOSITION**

Respondent Mark Megalli, by and through his undersigned counsel, respectfully submits this motion for summary disposition in the above-captioned administrative proceeding pursuant to Rule 250(b) of the Securities and Exchange Commission's ("SEC" or the "Commission") Rules of Practice, stating as follows:

1. The Commission instituted this administrative proceeding through an Order Instituting Proceedings ("OIP") against Mr. Megalli dated October 12, 2017.

2. It is directed principally to whether the Commission should bar Mr. Megalli (i) from serving as a broker-dealer or associating with a broker-dealer pursuant to Section 15(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78o(b), and (ii) from serving as an investment adviser or associating with an investment adviser pursuant to Section 203(f) of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-3(f).

3. As stated in Mr. Megalli's memorandum of points and authorities accompanying this motion:

a. The Commission has waived any claim to Mr. Megalli's administrative debarment under Exchange Act Section 15(b) and Advisers Act Section 203(f) and any other employment bar under the federal securities laws;

b. The Commission is also judicially estopped from prosecuting any claim of administrative debarment against Mr. Megalli pursuant to Exchange Act Section 15(b) and Advisers Act Section 203(f) and any other employment bar under the federal securities laws;

c. Mr. Megalli is not subject to a collateral bar because his offense conduct ended before the July 22, 2010 effective date of the Dodd-Frank Wall Street Reform and Consumer Protection Act; and

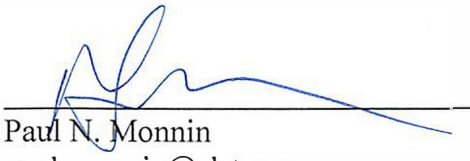
d. Because the employment sanctions at issue in this proceeding constitute punishment, any initial decision regarding Mr. Megalli's administrative debarment must account for the scope and substance of his misconduct and the fact that he has already been sufficiently punished in connection with the criminal and civil district court actions giving rise to this follow-on proceeding, such that no additional sanction is warranted here.

WHEREFORE, Mr. Megalli respectfully requests that the Court issue an initial decision granting this motion, specifically including by finding that: (i) the Commission has waived Mr. Megalli's administrative debarment, (ii) the Commission is judicially estopped from pursuing Mr. Megalli's administrative debarment, (iii) Mr. Megalli is not subject to a collateral bar as a matter of law, and (iv) the employment sanctions at issue herein are needlessly and excessively punitive in light of the scope and substance of Mr. Megalli's misconduct, as found by the district courts that adjudicated the criminal and civil actions underlying this administrative proceeding,

and the criminal and civil punishment Mr. Megalli has already received in connection with these actions.

Dated: December 15, 2017

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a true and correct copy of the foregoing document was delivered to the following via facsimile and by depositing it in the U.S. mail, first class postage prepaid:

Office of the Secretary
U.S. Securities and Exchange Commission
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Washington, DC 20549
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Attn: Secretary of the Commission Brent J. Fields
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A true and correct copy of the foregoing document was delivered to the following via email and by depositing it in the U.S. mail, first class postage prepaid:

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Dated: December 15, 2017

By: _____
Andrew T. Sumner

UNITED STATES OF AMERICA
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OFFICE OF THE SECRETARY

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In the Matter of	)	**RESPONDENT MARK MEGALLI'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF HIS RULE 250(b) MOTION FOR SUMMARY DISPOSITION**
MARK MEGALLI,	)	
Respondent.	)	

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I. INTRODUCTION

This follow-on administrative proceeding is directed principally to whether the Securities and Exchange Commission ("SEC" or the "Commission") should bar respondent Mark Megalli (i) from serving as a broker-dealer or associating with a broker-dealer pursuant to Section 15(b) of the Securities Exchange Act of 1934 (the "Exchange Act), 15 U.S.C. § 78o(b), and (ii) from serving as an investment adviser or associating with an investment adviser pursuant to Section 203(f) of the Investment Advisers Act of 1940 (the "Advisers Act"), 15 U.S.C. § 80b-3(f). Mr. Megalli does not deny that his criminal insider trading conviction, for which he was ordered to serve a year and a day in custody followed by three years of supervised release and to pay $50,000 in criminal restitution, and that a civil liability judgment for insider trading in a parallel SEC enforcement action, for which he was ordered to pay approximately $62,000 in disgorgement, prejudgment interest and a civil penalty, potentially expose him to administrative debarment under Exchange Act Section 15(b) and Advisers Act Section 203(f).

But the SEC has both waived and is judicially estopped from seeking the administrative relief claimed herein. This is because its counsel, in seeking approximately $9.2 million in disgorgement, prejudgment interest, and a three-times civil penalty from the district court overseeing its civil enforcement action, expressly represented to the district court that it would *not* be seeking Mr. Megalli's administrative debarment. Indeed, as justification for the permanent injunctive relief and highly substantial financial remedies it sought from the district court – which the SEC stated at the time and has since confirmed were required because, at least according to the SEC, Mr. Megalli's criminal punishment (including jail time) was purportedly too lenient – its counsel stated as follows to the district court:

> [SEC COUNSEL]: . . . *GIVEN THE FACT THAT WE ARE NOT SEEKING TO BAR THE MAN FROM THE SECURITIES INDUSTRY, NOR ARE WE SEEKING AN ORDER TO BAR HIM FROM BEING AN OFFICER OR DIRECTOR OF A*

> *PUBLIC COMPANY, WHICH IS ON THE TABLE IN SOME OF OUR CASES*, WE BELIEVE THAT INJUNCTIVE RELIEF IS EVEN MORE PROPER IN THIS CASE AS IT WILL BE THE ONLY COURT ORDER THAT HAS A CHANCE OF RESTRAINING HIM. THERE'S NOTHING ABOUT INSIDER TRADING THAT REQUIRES A SPECIAL OCCUPATION OR SPECIAL LICENSE. IT REQUIRES ACCESS TO THE INFORMATION, AND THAT'S IT.

(Ex. A, *SEC v. Megalli*, No. 1:13-CV-3783-AT (N.D. Ga.), Oct. 27, 2015 Hr'g Tr. (hereinafter, "Hr'g Tr.") at 119 (emphasis added)).

As shown below, the SEC's waiver of its debarment remedies is enforceable because such waiver was express, unambiguous, and, as the SEC represented on the record of its civil enforcement action and has since unequivocally affirmed in connection with this proceeding, designed to ensure that Mr. Megalli received maximum civil punishment when the SEC deemed his criminal punishment to be somehow lacking. For much the same reasons, the SEC is also judicially estopped from asserting administrative remedies it expressly disclaimed, again to secure maximum civil relief, before the district court. It is axiomatic that a party, in furtherance of a requested quid pro quo from a court, may not disclaim available rights in one forum, only to seek to resurrect them in another.

To the extent the Court disagrees with Mr. Megalli's waiver and estoppel arguments, he is nonetheless entitled to summary disposition with regard to any claim by the SEC that he is subject to a collateral bar. Mr. Megalli has never served as a registered representative, and his admitted misconduct, which occurred solely when he was associated with an investment adviser, ended before the effective date of the Dodd-Frank Act provisions authorizing collateral bars. Further, Mr. Megalli is entitled to summary disposition of the legal issue of whether the employment bars the SEC seeks constitute punishment. Because the Supreme Court has effectively ruled that administrative debarment under Exchange Act Section 15(b) and Advisers

Act Section 203(f) is inherently punitive, this Court's adjudication of the SEC's debarment claims and Mr. Megalli's opposition to such claims must account for the punitive nature of debarment by ensuring individualized assessment of Mr. Megalli's misconduct. In short, because debarment is punishment, this Court must ensure that the punishment fits the crime, including the notion that Mr. Megalli has already been sufficiently punished for his offense conduct.

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural History

On November 14, 2013, Mr. Megalli entered a negotiated guilty plea to a criminal information, docketed in the United States District Court for the Northern District of Georgia as *United States v. Megalli*, No. 1:13-CR-442-RWS (the "DOJ Case"), charging him with a single count of conspiracy to engage in insider trading in the securities of Carter's Inc. ("Carter's"), the Atlanta-based baby and children's clothing manufacturer, in violation of 18 U.S.C. § 371. (DOJ Case ECF Nos. 1 and 3).[1] He was sentenced in July 2014 by U.S. District Judge Richard W. Story of the Northern District of Georgia to a year and a day in custody and three years of supervised release. (DOJ Case ECF No. 29). He was also ordered to pay $50,000 in criminal restitution, which he satisfied prior to sentencing. *Id.* He has since completed the custodial portion of his sentence but remains on supervised release.

Following his sentencing, Mr. Megalli moved to vacate his conviction in light of the Second Circuit's ruling in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), *cert. denied*, __ U.S. __, 136 S. Ct. 242 (2015), which required government proof of a tangible insider benefit

[1] This Court is authorized to take official notice of the docket reports and the district courts' orders in the DOJ Case and the SEC's parallel civil enforcement action against Mr. Megalli in the Northern District of Georgia that form the judicial predicates to this follow-on proceeding. 17 C.F.R. § 201.323.

and a remote tippee's (which was Mr. Megalli's role in the charged insider trading conspiracy) culpable knowledge of such insider benefit to establish criminal insider trading in violation of Exchange Act Section 10(b) and Rule 10b-5 thereunder, 773 F.3d at 449. (DOJ Case ECF No. 40). Mr. Megalli moved for and obtained a stay of adjudication of his habeas petition to facilitate the U.S. Supreme Court's review of *Newman* in *Salman v. United States*, __ U.S. __, 137 S. Ct. 420 (2016). (DOJ Case ECF No. 54). Following the Supreme Court's issuance of its *Salman* ruling, which partially abrogated *Newman*, Judge Story adopted a magistrate judge's report and recommendation counseling denial of Mr. Megalli's habeas motion. (DOJ Case ECF No. 68). Mr. Megalli thereafter filed a certificate of appealability motion with the Eleventh Circuit, (DOJ Case ECF No. 70), which remains pending.

The SEC initiated a parallel enforcement action against Mr. Megalli, docketed in the United States District Court for the Northern District of Georgia as *SEC v. Megalli*, No. 1:13-CV-3783-AT (the "SEC Case"), on the same day as his criminal plea. Based largely on Mr. Megalli's guilty plea, and after rejecting Mr. Megalli's invocation of *Newman* as a legal bar to his civil liability, U.S. District Judge Amy Totenberg of the Northern District of Georgia entered partial summary judgment in the SEC's favor solely as to Mr. Megalli's insider trading liability on September 24, 2015. (SEC Case ECF No. 48). She set a separate hearing with regard to remedies for October 27, 2015. *Id.* Mr. Megalli testified at this hearing, and the parties also argued before Judge Totenberg about the amount of disgorgement, along with the factors in aggravation and mitigation going to the assessment of a civil penalty, if any, and entry of a permanent injunction. (*See* Ex. A, Hr'g Tr.).

For its part, the SEC sought disgorgement of nearly $2.7 million, which was comprised of insider trading gains and avoided losses realized exclusively by Level Global Investors, L.P.

("Level Global"), Mr. Megalli's former hedge fund employer, not by Mr. Megalli personally, plus a civil penalty of more than $6 million. (SEC Case ECF No. 29-1 at 23-25). Mr. Megalli countered that his disgorgement and civil penalty exposure was confined solely to his personal compensatory gain, insofar as he had not personally realized any of Level Global's profits, and that the assessment of a civil penalty, if any, should be based on his minimal compensatory gain, not the trading profits and avoided losses realized solely by the hedge fund that formerly employed him. (SEC Case ECF No. 39 at 26-40).

On December 17, 2015, Judge Totenberg agreed with Mr. Megalli by entering a final civil judgment in which she ordered him to pay $19,000 in disgorgement and a civil penalty of $38,000, which, after application of prejudgment interest, amounted to approximately $62,000. (SEC Case ECF No. 65). This was a fraction of the approximately $9.2 million in disgorgement, prejudgment interest, and a three-times civil penalty claimed by the SEC. (SEC Case ECF No. 29-1 at 23-25). Judge Totenberg further entered a permanent injunction against future securities law violations. (SEC Case ECF No. 65).

The SEC instituted this proceeding on October 12, 2017 by way of an Order Instituting Proceedings ("OIP") under Exchange Act Section 15(b) and Advisers Act Section 203(f). The Commission's OIP was issued more than three years after entry of final judgment in the DOJ Case and nearly two years after entry of final judgment in the SEC Case.

B. Relevant Facts

The following facts related to Mr. Megalli's underlying insider trading liability are drawn verbatim from Judge Totenberg's entry of partial summary judgment in the SEC Case:

> Mark Megalli was hired in 2009 by Level Global, a New York-based hedge fund, to launch a consumer group, hire analysts, and manage capital on behalf of the firm. (Defendant's Response to Plaintiff's Statement of Material Facts ("Def.'s Resp. SMF") ¶ 7.) On September 14, 2009, Megalli, on behalf of Level Global, entered into an agreement with a consulting firm owned by Eric M. Martin, a

former Vice President of the Atlanta-based children's clothing company, Carter's, Inc. ("Carter's) (Def.'s Resp. SMF ¶¶ 10-12.) Megalli knew that Martin had recently left Carter's and assumed that he continued to have relationships at Carter's. (Def.'s Resp. SMF ¶¶ 13-14, 17.)

Martin did in fact continue to have relationships at Carter's, including with Richard Posey, a vice president at the company. (Def.'s Resp. SMF ¶ 15.) Martin and Posey had worked at Carter's together, and developed a "personal and professional relationship." *U.S. v. Megalli,* No. 13-cr-442-RWS Doc. 9 at pp. 18:20-25; 19:15-20 (N.D. Ga., Nov. 25, 2013) ("Guilty Plea Transcript."); *see also* (Plaintiff's Response to Defendant's Statement of Material Facts ("Pl.'s Resp. SMF") ¶¶ 6-12.) Posey disclosed inside information to Martin concerning Carter's. (Defendant's Response to Plaintiff's Statement of Additional Material Facts ("Def.'s Resp. to SAMF") ¶ 15) (Doc. 39-1.) Martin, in turn, passed that inside information to Megalli, who then made trades in Carter's stock based in part on the inside information between September of 2009 and July of 2010. (Def.'s Resp. SMF ¶¶ 22, 36.)

More specifically, Martin made a call to Megalli on October 23, 2009, where he disclosed inside information and recommended Megalli sell any stock he had in Carter's. (Def.'s Resp. SMF ¶ 20.) While still on the telephone with Martin, Megalli messaged Level Global's head of trading and asked that individual to liquidate Level Global's Carter's holdings, which were valued at nearly $9 million dollars at the time. (Def.'s Resp. SMF ¶ 21; Guilty Plea Transcript at pp. 20:13-20, 25:1-2.) While Megalli relied in part on other information in deciding whether or not to sell Carter's stock, he stated at his plea hearing that the call with Martin during which he received inside information was "a catalyst ... to continue selling [Carter's] stock." (Guilty Plea Transcript at p. 26:1-2; *see also* Def.'s Resp. SMF ¶ 23.)

Megalli's insider trading continued beyond 2009. In July of 2010, Megalli sold short positions in Carter's stock based on inside information he had received from Martin, generating profits for Level Global of $648,655. (Def.'s Resp. SMF ¶¶ 33–34.) All told, these trades helped Megalli's employer Level Global avoid losses of $2,034,000.00 (Def.'s Resp. SMF ¶ 26, Ans. ¶ 24) and gain profits of $648,655. (Def.'s Resp. SMF ¶ 34; Ans. ¶ 42.) During the entirety of this time, Megalli consciously avoided knowledge concerning the source of Martin's inside information. (Def.'s Resp. SMF ¶ 36; Guilty Plea Transcript at p. 25:7-8 ("[w]hat I'm pleading guilty to here today is conscious avoidance").)

SEC v. Megalli, 157 F. Supp. 3d 1240, 1243-44 (N.D. Ga. 2015).

III. ARGUMENT AND CITATIONS OF AUTHORITY

A. Summary Disposition Standard

This is a 75-day proceeding. (OIP Section IV). SEC Rule of Practice 250(b) provides that in 75-day proceedings, "any party may make a motion for summary disposition on one or more claims or defenses, asserting that the undisputed pleaded facts, declarations, affidavits, documentary evidence or facts officially noted pursuant to Rule 323 show that there is no genuine issue with regard to any material fact and that the movant is entitled to summary disposition as a matter of law." 17 C.F.R. § 201.250(b). "The facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by him, by uncontested affidavits, or by facts officially noticed pursuant to Rule 323." *Gaeton S. Della Penna*, SEC Release No. 757, 2015 WL 1389049, at *1 (Mar. 27, 2015); *accord Garfield M. Taylor*, SEC Release No. 971, 2016 WL 792251, at *5 (Mar. 1, 2016).

B. The SEC Has Waived the Administrative Relief It Seeks

In seeking disgorgement of approximately $2.7 million in trading profits and avoided losses and a civil penalty of more than $6 million from Mr. Megalli, both of which corresponded to gains realized exclusively by Level Global, the SEC's trial counsel first advised Judge Totenberg at the outset of the remedies hearing in the SEC Case that an industry bar was *not* part of the SEC's enforcement plans:

> THE COURT: WE'RE GOING TO BE LOOKING AT THE CIVIL PENALTY ISSUE AND THE DISBARMENT ISSUE. IS THERE ANYTHING ELSE THAT WE'RE GOING TO HAVE TO – DISGORGEMENT AS WELL. GREAT. ANYTHING ELSE?
>
> [SEC COUNSEL] MR. HUDDLESTON: WE HAVEN'T PLED FOR DEBARMENT, AND SO THAT'S NOT PART OF THE CASE.
>
> THE COURT: THAT'S NOT PART OF THE CASE.

MR. HUDDLESTON: NO, YOUR HONOR.

[MEGALLI COUNSEL] MR. MONNIN: YOUR HONOR, WHAT I UNDERSTAND IS THAT THE SEC HAS PLED AN INJUNCTION AGAINST FUTURE VIOLATIONS, AS OPPOSED TO AN INDUSTRY BAR.

MR. HUDDLESTON: RIGHT, CORRECT.

THE COURT: ALL RIGHT. JUST EXPLAIN THAT AGAIN WHAT YOU JUST SAID. . . .

MR. HUDDLESTON: . . . WHAT WE PLED FOR FIRST IS A PERMANENT INJUNCTION AGAINST FUTURE VIOLATIONS. SECONDLY, FOR DISGORGEMENT AND PREJUDGMENT INTEREST. AND FINALLY FOR CIVIL PENALTIES.

THE COURT: OKAY. SO YOU'RE NOT LOOKING FOR DEBARMENT.

MR. HUDDLESTON: THAT IS CORRECT, YOUR HONOR.

THE COURT: ALL RIGHT. I MISUNDERSTOOD THAT, THEN.

(Ex. A, Hr'g Tr. at 3-4).

In addition, at the conclusion of the remedies hearing, the SEC's trial counsel expressly argued as follows in encouraging Judge Totenberg to punish Mr. Megalli through entry of $2.7 million of disgorgement, accompanied by a civil penalty in excess of $6 million and a permanent injunction:

MR. HUDDLESTON: . . . *GIVEN THE FACT THAT WE ARE NOT SEEKING TO BAR THE MAN FROM THE SECURITIES INDUSTRY, NOR ARE WE SEEKING AN ORDER TO BAR HIM FROM BEING AN OFFICER OR DIRECTOR OF A PUBLIC COMPANY, WHICH IS ON THE TABLE IN SOME OF OUR CASES*, WE BELIEVE THAT INJUNCTIVE RELIEF IS EVEN MORE PROPER IN THIS CASE AS IT WILL BE THE ONLY COURT ORDER THAT HAS A CHANCE OF RESTRAINING HIM. THERE'S NOTHING ABOUT INSIDER TRADING THAT REQUIRES A SPECIAL OCCUPATION OR SPECIAL LICENSE. IT REQUIRES ACCESS TO THE INFORMATION, AND THAT'S IT.

Id. at 119 (emphasis supplied).

Accordingly, in pursuing substantial remedial relief from the district court, the SEC voluntarily and unequivocally told Judge Totenberg several times that not only had it not pled an

employment bar, but that it would not be seeking to debar Mr. Megalli, either. Indeed, in petitioning for significant financial relief, the SEC advised Judge Totenberg expressly that hers would be the only court order that could prevent Mr. Megalli's future securities law violations. Now, despite the foregoing, unequivocal representations – on which the SEC clearly intended for Judge Totenberg to rely – the SEC has initiated a follow-on proceeding to bar Mr. Megalli from the securities industry. But the SEC may not pursue an administrative sanction it has already waived.

Mr. Megalli fully acknowledges that a claim of waiver of administrative remedies is legally disfavored. *See generally United States v. Noble Oil Co., Inc.*, 1988 WL 109727, at *10 (N.N.J. Oct. 14, 1988) ("A right created by federal law . . . may not be unintentionally waived."); *In re Minnesota Metal Finishing, Inc.*, 2007 WL 1219963, at *35 (EPA Jan. 9, 2007) ("A waiver of enforcement of a statute or its requirements to protect public health is not easily construed against the government."). But where, as here, an agency has evidenced its intent to waive its rights through clearly and unambiguously stated judicial admissions, such waiver is enforceable. *See, e.g., In re Borden Chemicals & Plastics Co.*, 1993 WL 70228, at *8 (EPA Feb. 18, 1993) (noting that to assert waiver by a federal agency, "it must be shown that the government waived its rights clearly, decisively and unambiguously"); *United States v. Olano*, 507 U.S. 725, 733 (1993) (defining waiver as "the intentional relinquishment of a known right") (internal quotations and citation omitted).

In this regard, "[a] defendant seeking to invoke the defense [of waiver of administrative sanctions] must show either an intentional relinquishment or abandonment of a known right or privilege, or, if alleging implied waiver, a clear, unequivocal and decisive act showing a purpose to abandon or waive the legal right." *United States v. Mottolo*, 695 F. Supp. 615, 628 (D.N.H.

1988) (internal quotations and citations omitted); *accord Griffin v. Coca-Cola Enterprises, Inc.*, 686 Fed. Appx. 820, 822 (11th Cir. 2017) ("[W]aiver is the intentional relinquishment of a known right, and requires (1) the existence of a right that may be waived, (2) the actual or constructive knowledge thereof, and (3) an intention to relinquish such right. Waiver may be express or implied, but if implied, the conduct or circumstances relied upon must make out a clear case for waiver.").

As an initial matter, any fair and objective reading of the foregoing SEC Case record makes clear that the SEC has waived initiation of the instant follow-on proceeding. When Judge Totenberg asked the SEC to enumerate its remedies, its counsel did not stop at telling her that an industry bar had not been pled (thereby fostering the misimpression that such remedy could have been claimed in a civil action), but rather went further by stating in open court that "we are not seeking to bar the man from the securities industry." (Ex. A, Hr'g Tr. at 119).

Moreover, the SEC is bound by this express waiver because the foregoing representations were stated, without any compulsion either by the district court or Mr. Megalli, in the context of justifying nearly $2.7 million in disgorgement, more than $6 million in civil penalties, and a permanent injunction against future securities law violations. In other words, in seeking millions of dollars in financial remedies and entry of a permanent injunction, the SEC affirmatively represented to Judge Totenberg that her entry of final judgment would be the last, best hope to punish Mr. Megalli and to restrain him from future insider trading violations. Representations like this serve to enjoin pursuit of the instant administrative proceeding under the aforementioned case law. If the SEC intended to proceed with its administrative remedies, it had no business telling Judge Totenberg that it was not seeking Mr. Megalli's debarment as a quid pro quo for her entry of its requested – and very substantial – civil relief.

Indeed, the SEC has itself conceded that the foregoing judicial representations were meant as a quid pro quo to secure maximum civil punishment from Judge Totenberg. In this regard, the undersigned wrote the SEC in advance of the parties' Rule 250 motion practice to request that it dismiss this proceeding. (Ex. B, Nov. 20, 2017 Letter from Paul Monnin to SEC Enforcement Division Co-Directors Stephanie Avakian and Steven Peikin). The SEC asserted in response that Mr. Megalli was deserving of substantial civil punishment because he had advised Judge Story in connection with his criminal sentencing that he intended to settle his civil liability, yet thereafter invoked *Newman* to move for summary judgment against the SEC's insider trading claims. (Ex. C, Nov. 22, 2017 Letter from SEC Regional Trial Counsel Graham Loomis to Paul Monnin, at 2-3).

It was not Mr. Megalli, however, who refused to settle his civil liability. Rather, and as detailed in a declaration and supporting exhibits submitted to Judge Totenberg, (SEC Case ECF No. 61-2), which was also attached to the undersigned's renewed request for voluntary dismissal, (Ex. D, Nov. 29, 2017 Letter from Paul Monnin to SEC Regional Trial Counsel Graham Loomis), it was the SEC that repeatedly required Mr. Megalli to admit to aggravating and unsubstantiated facts that were outside his guilty plea and sentencing as part of any proposed consent judgment. (*See, e.g.*, Ex. D, Dec. 7, 2015 Declaration of Paul N. Monnin (the "Declaration"), (SEC Case ECF No. 61-2), at ¶¶ 6-21). This was despite the fact that Mr. Megalli remained willing, both before and after his sentencing, to resolve his civil liability consistently with the facts he admitted at his guilty plea and sentencing, including that he had traded in reliance on material, non-public information in October 2009 and July 2010, the proceeds and

avoided losses of which had generated the approximately $2.7 million in trading gain to Level Global that the SEC proffered to Judge Totenberg in its pursuit of civil financial remedies.[2] *Id.*

Nor may Mr. Megalli be faulted for invoking *Newman* in support of his motion for summary judgment or for litigating the degree of his post-liability exposure to disgorgement and entry of a civil penalty. Aside from the fact that *Newman*'s issuance in December 2014 post-dated Mr. Megalli's July 2014 sentencing and his ensuing efforts to resolve his civil liability by agreement, *id.* at ¶¶ 19-21, both the Justice Department and the SEC had declared that *Newman* presented an unprecedented and disabling sea change in insider trading jurisprudence as a predicate to the filing of Mr. Megalli's summary judgment motion and corresponding habeas petition. With regard to remedies, the record is also abundantly clear that Mr. Megalli had always reserved his ability to litigate the appropriate measure of civil financial remedies. *See id.* at ¶¶ 6-10 and 17-18. This was certainly prudent insofar as the SEC's request for approximately $9.2 million in disgorgement, prejudgment interest, and a three-times civil penalty was nearly 150 times the $62,000 in financial remedies ultimately ordered by Judge Totenberg.

[2] The SEC's anticipated contention that Mr. Megalli obtained an unreasonably light custodial sentence based on misrepresentation of his intent to settle his civil liability is also nonsense. Aside from the fact that Mr. Megalli attempted in good faith and for months before and after his sentencing to resolve his civil liability by agreement, (*see* Ex. D, Declaration at ¶¶ 6-8 and 11-19), the reality here is that the undersigned's references to expected settlement of the SEC's parallel enforcement proceeding had very little to do with Judge Story's ultimate sentence. This is because, at the outset of the July 8, 2014 sentencing hearing involving Mr. Megalli and his co-conspirators and in plain view of the SEC's trial counsel herein (who attended the hearing), Judge Story elected, and so stated on the record, to reorder the sequencing of the defendants' individual sentencings from most to least culpable. This meant that Eric Martin and Richard Posey were first sentenced to respective custodial terms of 24 and 15 months, thereby effectively capping Mr. Megalli's custodial exposure at less than 15 months (he was sentenced to a year and a day in custody) before being called forward for his own sentencing.

But much of this is secondary to the fact that the SEC, in seeking to maximize the imposition of financial and injunctive relief, expressly advocated to Judge Totenberg that, because "we are not seeking to bar the man from the securities industry, nor are we seeking an order to bar him from being an officer or director of a public company, which is on the table in some of our cases," (Ex. A, Hr'g Tr. at 119), she should punish Mr. Megalli because the criminal judgment entered against him was, at least according to the SEC, too lenient. Moreover, the SEC's letter responding to Mr. Megalli's voluntary dismissal request expressly acknowledges this intended quid pro quo by declaring that the SEC's representations to Judge Totenberg were "part of Pat's [the SEC's trial counsel both in the SEC Case and herein] overall discussion of the misstatements we think you made at Mr. Megalli's sentencing hearing in the criminal case." (Ex. C at 2). To wit, "Pat was arguing that a stiff civil penalty was appropriate because Mr. Megalli received an unduly light sentence in his criminal case in part because of the misrepresentations at the sentencing hearing." *Id.*

Simply put, and as it has unabashedly acknowledged, the SEC represented to Judge Totenberg that it had waived Mr. Megalli's administrative debarment to secure maximum civil punishment. This unequivocal expression of administrative intent renders such waiver enforceable under the foregoing, well-settled legal authority.

C. The SEC is Judicially Estopped from Pursuing Administrative Debarment

The SEC's colloquys with Judge Totenberg during the remedies hearing in the SEC Case, accompanied by the parties' pre-motion correspondence, (Exs. B-D), also establishes that the SEC is judicially estopped from pursuing administrative debarment here. As has been documented, it is abundantly clear that realization of the SEC's objective of attaining maximum civil punishment was best accomplished by informing Judge Totenberg in no uncertain terms that the SEC would *not* be seeking his debarment. This was in lieu of disclosing, or even

intimating, that the SEC would pursue this result through a subsequent proceeding in the SEC's own administrative forum.

Judicial estoppel serves to "protect the integrity of the judicial process," *United States v. Levasseur*, 846 F.2d 786, 792 (1st Cir. 1988), and to prevent "knowing assault upon the integrity of the judicial system," *Reynolds v. Commissioner of Internal Revenue*, 861 F.2d 469, 474 (6th Cir. 1988). The doctrine's "classic" application prevents litigants from "assert[ing] inconsistent statements of fact or adopt[ing] inconsistent positions on combined questions of fact and law." *Patriot Cinemas v. General Cinema Corp.*, 834 F.2d 208, 214 (1st Cir. 1987). Further, courts have applied judicial estoppel, where, as here, "a party declares an intention not to pursue a claim." *Id.* Indeed, a party's assertion of inconsistent legal positions presents a "*stronger* argument than do the classic cases." *Id.* (emphasis in original). Such "intentional self-contradiction" may not be "used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice." *Levasseur*, 846 F.2d at 792.

While party privity and detrimental reliance are often present, "they are not required." *Burnes v. Pemco Aeroplex*, 291 F.3d 1282, 1286 (11th Cir. 2002); *accord Patriot Cinemas*, 834 F.2d at 214. The doctrine also applies between and among judicial and administrative proceedings. *See, e.g., Zapata Gulf Marine Corp. v. Puerto Rico Maritime Shipping Auth.*, 731 F. Supp. 747, 750 (E.D. La. 1990) ("The truth is no less important to an administrative body acting in a quasi-judicial capacity than it is to a court of law."). Additionally, unlike equitable estoppel, which rarely enjoins the government, courts have routinely found that judicial estoppel applies to inconsistent government representations. *See, e.g., Bronze Shields v. City of Newark*, 214 F. Supp. 2d 443, 450 n.5 (D.N.J. 2002) (noting that "special circumstances are not warranted when the party subject to judicial estoppel is the government"); *Reynolds*, 861 F.2d at 474 (judicially

estopping the IRS from "knowingly tak[ing] a position in one judicial proceeding, secur[ing] final judicial acceptance of that position, and then knowingly attempt[ing] to persuade a different court to accept a fundamentally inconsistent position").

Notably, the SEC did not stop at simply telling Judge Totenberg that it would not be seeking Mr. Megalli's administrative debarment here. Rather, it doubled-down on this misimpression by stating that a public company director or officer bar – which federal district courts plainly have jurisdiction to order on summary judgment – was also not part of the SEC's enforcement plans. (*See* Ex. A, Hr'g Tr. at 119 ("[N]or are we seeking an order to bar him from being an officer or director a public company, which is on the table in some of our cases.")); *see also, e.g.*, *SEC v. Miller*, 744 F. Supp. 2d 1325, 1346-47 (N.D. Ga. 2010) ("Section 21(d)(2) of the Exchange Act and Section 20(e) of the Securities Act provide for officer and director bars and penalties. [A district court] may enter such an order if it finds that [a] defendant's conduct demonstrates unfitness to serve as an officer or director of any . . . issuer. [A district court] has substantial discretion in determining whether to order such a bar.") (internal citations and quotations omitted); *SEC v. Aqua Vie Beverage Corp.*, No. CV-04-414-S-EJL, 2008 WL 1914723, at *2 (D. Idaho Apr. 29, 2008) (noting that on summary judgment a district court "has broad equitable powers to fashion appropriate relief for violations of the federal securities laws, which include the power to order an officer and director bar").

The notion that the SEC's trial counsel was merely toeing a fine line with regard to Judge Totenberg's remedial jurisdiction (namely, that it could not legally misrepresent waiver of an administrative right – *i.e.*, debarment from serving as or associating with a broker-dealer or investment adviser – over which the district court had no subject matter jurisdiction) is thus belied on two accounts. First, after Judge Totenberg indicated at the outset of the remedies

hearing that she misunderstood the scope of the SEC's pleading, the SEC's trial counsel responded solely by stating that the SEC had not pled industry or associational debarment; *not* that such relief is legally unavailable in a civil enforcement action and that it was reserving Mr. Megalli's permanent debarment for a follow-on administrative proceeding:

THE COURT: OKAY, SO YOU'RE NOT LOOKING FOR DEBARMENT.

MR. HUDDLESTON: THAT IS CORRECT, YOUR HONOR.

THE COURT: ALL RIGHT, I MISUNDERSTOOD THAT, THEN.

(Ex. A, Hr'g Tr. at 4). Second, in asserting that it did not intend either to debar Mr. Megalli fifrom the securities industry or to prevent him from serving as a director or officer of a public company, the SEC's trial counsel chose to conflate an administrative debarment remedy over which the district court lacked jurisdiction with a separate debarment remedy for which civil jurisdiction plainly lies.

Accordingly, any unbiased reading of the subject colloquys between the SEC's trial counsel and Judge Totenberg demonstrates that, to achieve the SEC's stated goal of maximum civil punishment, its counsel first failed to disabuse Judge Totenberg of the impression that she had jurisdiction to entertain an employment bar. Instead, the SEC affirmatively fostered this misconception by claiming that it had simply declined to plead this sanction, rather than by supplementing its representation with the disclosure that Mr. Megalli's debarment would in fact be separately and administratively pursued. This misconception was then compounded at the hearing's conclusion by the SEC's unambiguous assertion that it did not intend to seek Mr. Megalli's exclusion from the securities industry, which was stated in the same breath as the SEC's equally unequivocal assertion that it had waived pursuit of a D&O bar that is "on the table" in its other civil enforcement actions.

It defies belief that Judge Totenberg parsed (or was even capable of parsing, given the SEC's unequivocal and conflated representations) the SEC's stated waiver of a D&O debarment remedy, over which a district court clearly has civil jurisdiction, from the SEC's bare disclaimer, unaccompanied by any notice that such disclaimer was merely temporary, of an associational bar that is solely for the SEC. More broadly, the SEC's admission that its fundamental objective was to secure maximum civil punishment from Judge Totenberg, and, in furtherance thereof, to represent to her that it had waived its other debarment remedies, is why the SEC is now judicially estopped from prosecuting the instant administrative claims. *See generally Patriot Cinemas*, 834 F.2d at 213 (holding that plaintiff's judicial representation that it did not intend to proceed with its antitrust claim to circumvent an adverse stay motion barred its later attempt to resurrect the claim: "Patriot can be said to have made a bargain with the superior court. It traded its chance for success on the antitrust claim for an increased pace in the proceedings on the remaining three counts"); *Wade v. Woodings-Verona Tool Works, Inc.*, 469 F. Supp. 465, 466-67 (W.D. Pa. 1979) (ruling that plaintiff's judicial admission that he neither had nor would sue the defendant for patent infringement estopped the defendant's assertion of entitlement to declaratory relief). It is fundamentally inequitable for the SEC to imply uniform civil jurisdiction over employment and D&O bars and then to assert waiver of both in no uncertain terms to further its self-acknowledged objective of maximizing Mr. Megalli's civil punishment. Accordingly, the SEC is judicially estopped from asserting in this forum the very same relief it intentionally and purposefully disclaimed before Judge Totenberg.

D. Mr. Megalli is Not Subject to a Collateral Bar and Entry of an Employment Bar, If Any, Must Account for the Degree to Which Mr. Megalli Has Already Been Punished

1. Collateral Debarment is Legally Unavailable

Mr. Megalli has never been registered as a broker-dealer or investment adviser. (Answer at II.A.1). At the time of his offense conduct, which occurred in relation to securities transactions in October 2009 and July 2010, *Megalli*, 157 F. Supp. 3d at 1243-44, Mr. Megalli was associated with Level Global, a registered investment adviser. But Level Global did not serve as a broker-dealer, municipal securities dealer, transfer agent, municipal advisor, or nationally recognized statistical rating organization. (*See* Ex. A, Hr'g Tr. at 7-14 (detailing Mr. Megalli's educational and employment history)).

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act") authorizes the Commission's imposition of collateral bars; namely, bars that prohibit a respondent from associating in a capacity in the securities industry with which the respondent was neither associated nor attempting to associate at the time of his securities law violation (or violations). In *Bartko v. SEC*, 845 F.3d 1217 (D.C. Cir. 2017), however, the D.C. Circuit held that administrative imposition of a collateral bar based on misconduct committed prior to the July 22, 2010 effective date of the Dodd-Frank Act constitutes an "impermissibly retroactive" application of the act's collateral debarment authority. *Id.* at 1223. The Commission has since codified *Bartko* by issuing a release authorizing the submission of petitions for SEC reconsideration of collateral bars based on securities law offenses committed prior to July 22, 2010. Commission Statement Regarding Decision in Bartko v. SEC (Feb. 23, 2017).

Here, Mr. Megalli's second and final insider trading violation accrued when, on July 19, 2010, Level Global acquired its final short position in Carter's shares based in part on material, non-public information supplied by Martin. (SEC Case ECF No. 29-2 at ¶ 32). Because Mr.

Megalli's securities law violations ended prior to the July 22, 2010 effective date of the Dodd-Frank Act, the Commission is prohibited, both as a matter of controlling law and its own publicly-announced policy, from imposing a collateral bar here.

2. Because They are Punitive, Employment Bars Must Account for Existing Punishment

The U.S. Supreme Court recently held in *Kokesh v. SEC*, ___ U.S. ___, 137 S. Ct. 1635 (2017), that disgorgement qualifies as a "penalty" for purposes of 28 U.S.C. § 2462, which prescribes a five-year limitations period applicable to any "action, suit or proceeding" directed to "the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise." 28 U.S.C. § 2462. *Kokesh* arose in the context of a civil SEC enforcement action and presented the issue of whether the SEC's disgorgement claims, which have traditionally been considered equitable, constitute a penalty for purposes of the five-year limitations period within which SEC enforcement proceedings must be brought under 28 U.S.C. § 2462.

As part of its analysis, the Supreme Court noted that "[s]anctions imposed for the purpose of deterring infractions of public laws are inherently punitive because deterrence [is] not [a] legitimate nonpunitive government objectiv[e]." *Kokesh*, 137 S. Ct. at 1638 (internal quotations and citation omitted). In particular, the Court held that disgorgement is a penalty because it is imposed to deter future infractions and because disgorged funds are not used to compensate victims. *Id.* Additionally, the Court held that because disgorgement is imposed on a gross basis, as opposed to net of expenses, it "does not simply restore the status quo; it leaves the defendant worse off and is therefore punitive." *Id.* at 1639.

Kokesh followed the Supreme Court's unanimous ruling in *Gabelli v. SEC*, ___ U.S. ___, 133 S. Ct. 1216 (2013), that civil monetary penalties are subject to Section 2462's five-year statute of limitations. It also followed the Eleventh Circuit's holding in *SEC v. Graham*, 823 F.3d

1357 (11th Cir. 2016), that declaratory relief sought by the SEC is a "penalty" for purposes of Section 2462 because it "goes beyond compensation and is intended to punish." *Id.* at 1362. In other words, it "serves neither a remedial nor a preventive purpose; it is designed to redress previous infractions rather than to stop any ongoing or future harm." *Id.*

These appellate decisions characterizing the SEC's suite of both economic and non-economic remedies as being inherently punitive apply with equal force to the SEC's pursuit of occupational bars in follow-on administrative proceedings. Indeed, in his concurring opinion in *Saad v. SEC*, 873 F.3d 297 (D.C. Cir. 2017), D.C. Circuit Judge Brett M. Kavanaugh invoked *Kokesh* for the proposition that employment bars imposed by the SEC are plainly punitive:

> In *Kokesh*, the Supreme Court ruled that disgorgement paid to the Government is a "penalty" subject to the five-year statute of limitations in 28 U.S.C. § 2462. 137 S. Ct. at 1643-45, slip op. at 7-11. The Court reasoned that the disgorged money often does not go to victims and, moreover, is not limited to the amount of harm to victims – both of which would be required if the sanction were truly remedial rather than punitive. *See id.* at 1644-45, slip op. at 9-11. The Court stated: "Sanctions imposed for the purpose of deterring infractions of public laws are inherently punitive because deterrence is not a legitimate nonpunitive government objective." *Id.* at 1643, slip op. at 8 (internal quotations omitted). And the Court added: "A civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Id.* at 1645, slip op. at 11 (internal quotations omitted). Notably the Supreme Court's decision in *Kokesh* overturned a line of cases from this Court that had concluded that disgorgement was remedial and not punitive. *See, e.g.*, *Zacharias v. SEC*, 569 F.3d 458, 471-72 (D.C. Cir. 2009).
>
> *As I see it, the* Kokesh *analysis matters here. The Supreme Court's reasoning in* Kokesh *was not limited to the specific statute at issue there. Like disgorgement paid to the Government, expulsion or suspension of a securities broker does not provide anything to the victims to make them whole or to remedy their losses. Therefore, in light of the Supreme Court's analysis in* Kokesh, *expulsion or suspension is a penalty, not a remedy.*

Saad, 873 F.3d at 304-05 (emphasis added); *see also SEC v. Jones*, 476 F. Supp. 2d 374, 385 (S.D.N.Y. 2007) (holding that a permanent injunction prohibiting the defendants from

committing future securities law violations qualified as a penalty, in part because "the potential collateral consequences of a permanent injunction are quite serious. . . . The practical effect of such an injunction here would be to stigmatize [the defendants] in the investment community and significantly impair their ability to pursue a career. . . . The severity of these collateral consequences indicate that the requested injunction would carry with it the sting of punishment.").

Judge Kavanaugh's legal reasoning, finding that broker-dealer expulsions imposed by FINRA that are in turn subject to SEC review are inherently punitive, applies with equal force to broker-dealer bars under Exchange Act 15(b) and advisory bars under Advisers Act Section 203(f). Moreover, if broker-dealer and advisory bars are inherently punitive, then their imposition is governed by considerations of proportionality and whether such sanctions are excessive or oppressive. Once again, as Judge Kavanaugh has aptly stated:

> In appeals from FINRA sanctions, the SEC must determine whether the FINRA-imposed sanctions are "excessive or oppressive." 15 U.S.C. § 78s(e)(2). Our pre-*Kokesh* cases in turn say that the SEC may uphold FINRA sanctions as not being excessive or oppressive if the sanctions are remedial, not punitive. And our pre-*Kokesh* cases further say than an expulsion or suspension can be considered remedial, not punitive.
>
> My sole point here is to cast doubt on our pre-*Kokesh* cases' characterization of an expulsion or suspension as remedial rather than punitive. My point is not to suggest that FINRA lacks power to impose punitive sanctions such as expulsions or suspensions. After all, FINRA Rule 8301 expressly allows FINRA to impose expulsions and suspensions in appropriate cases. And the SEC may still approve an expulsion or suspension if such a FINRA-imposed sanction is an appropriate (that is, not "excessive or oppressive") penalty in particular cases. The question here therefore is whether the lifetime expulsion of Saad – what our prior opinion in this case called the "securities industry equivalent of capital punishment," *Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013) – was a permissible and appropriate penalty under the relevant statutes and regulations.
>
> If FINRA and the SEC can still impose expulsions and suspensions in certain cases, why does the terminological distinction matter? In other words, why should we care that FINRA and the SEC must characterize certain sanctions as

> punitive rather than remedial? One answer is this: *If FINRA and the SEC must justify expulsions or suspensions as punitive (as I believe they must after* Kokesh*), they will have to explain why such penalties are appropriate under the facts of each case. FINRA and the SEC will have to reasonably explain in each individual case why an expulsion or suspension serves the purposes of punishment and is not excessive or oppressive. Over time, a fairer, more equitable, and less arbitrary system of FINRA and SEC sanctions should ensue.*

Saad, 873 F.3d at 306 (emphasis added and certain internal citations omitted).

To be clear, Mr. Megalli's invocation of *Kokesh* and its parents and progeny to assert that the employment bars the SEC is pursuing herein are inherently punitive[3] is not meant to supplant this Court's application of the public interest standard set forth in Exchange Act Section 15(b)(6)(A), 15 U.S.C. § 78o(b)(6)(A), as this standard is informed by consideration of the various *Steadman* factors going to aggravation and mitigation, including the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurance against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations. *See SEC v. Steadman*, 603 F.2d 1126, 1140 (5th Cir. 1979) (quoting *SEC v. Blatt*, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978)). Rather, Mr. Megalli is arguing, just as Judge Kavanaugh reasoned in his concurring opinion in *Saad*, that because *Kokesh* renders administrative debarment pursuant to Exchange Act Section 15(b) and Advisers Act Section 203(f) an exercise in retribution rather than remediation, this Court is obliged to ensure that the punishment here fits the crime.

---

[3] Notably, if the SEC truly believed that Mr. Megalli's debarment was necessary to protect investors and the securities markets, it had no business delaying the OIP until nearly two years after Judge Totenberg's entry of final judgment. The SEC's delay in instituting the instant follow-on proceeding demonstrates once again that its objective here is not investor protection, but rather punishment.

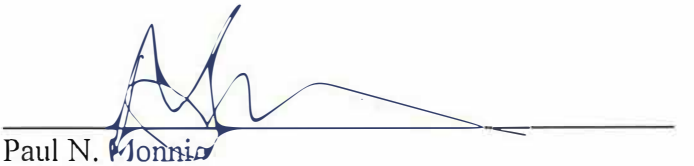
Clearly, Mr. Megalli's principal advocacy in this regard, including that he has been punished enough, will be made in response to the SEC's motion for summary disposition and in relation to the hearing on the Commission's OIP. But, as a matter of law, the Court's evaluation of whether to impose an employment bar here must account for Judge Story's and Judge Totenberg's individualized assessment of the scope, character and substance of Mr. Megalli's offense conduct in connection with resolution of the DOJ and SEC cases. In other words, *Kokesh* and the authority on which it is based and which it has generated stand for the proposition that an employment sanction in this case, if any, may not be entered by rote, but rather must account for the degree to which Mr. Megalli has already been severely punished.

IV. CONCLUSION

Based on the foregoing argument and authority, Mr. Megalli respectfully requests that the Court dismiss the instant administrative proceeding on grounds of waiver and estoppel. Should the Court decline to do so, it should nonetheless dispose of this motion by ordering that a collateral bar is legally unavailable here, and that the entry of an employment bar, if any, is as a matter of law subject to considerations of proportionality and fundamental fairness.

Dated: December 15, 2017

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a true and correct copy of the foregoing document was delivered to the following via facsimile and by depositing it in the U.S. mail, first class postage prepaid:

Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549
Mailstop 1090
Attn: Secretary of the Commission Brent J. Fields
703.813.9793 (fax)

A true and correct copy of the foregoing document was delivered to the following via email and by depositing it in the U.S. mail, first class postage prepaid:

Pat Huddleston
Senior Trial Counsel
U.S. Securities and Exchange Commission
950 E. Paces Ferry Road, NE, Suite 900
Atlanta, GA 30326
huddlestonp@sec.gov

Hon. Carol Fox Foelak
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549
alj@sec.gov

Dated: December 15, 2017

By: _____
Andrew T. Sumner

Exhibit A

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

SECURITIES AND EXCHANGE COMMISSION,

PLAINTIFF,

DOCKET NO. 1:13-CV-03783-AT

-VS-

MARK MEGALLI,

DEFENDANT.

TRANSCRIPT OF HEARING PROCEEDINGS
BEFORE THE HONORABLE AMY TOTENBERG
UNITED STATES DISTRICT JUDGE
TUESDAY, OCTOBER 27, 2015

APPEARANCES:

ON BEHALF OF THE PLAINTIFF:

PAT HUDDLESTON, II, ESQ.

ON BEHALF OF THE DEFENDANT:

PAUL MONNIN, ESQ.
ERIC DAVID STOLZE, ESQ.

ELIZABETH G. COHN, RMR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
ATLANTA, GEORGIA

I N D E X

(ATLANTA, GEORGIA; OCTOBER 27, 2015, AT 1:50 P.M. IN OPEN COURT.)

THE COURT: GOOD AFTERNOON. PLEASE HAVE A SEAT.

WE'RE HERE IN SEC VERSUS MARK MEGALLI, CIVIL ACTION NUMBER 1:13-CV-3783.

GOOD AFTERNOON, COUNSEL. THANK YOU FOR PERSISTING.

AND, MR. MEGALLI? GOOD TO SEE YOU.

WE'RE GOING TO BE LOOKING AT THE CIVIL PENALTY ISSUE AND THE DISBARMENT ISSUE. IS THERE ANYTHING ELSE THAT WE'RE GOING TO HAVE TO -- DISGORGEMENT AS WELL. GREAT.

ANYTHING ELSE?

MR. HUDDLESTON: WE HAVEN'T PLED FOR DEBARMENT, AND SO THAT'S NOT PART OF THE CASE.

THE COURT: THAT'S NOT PART OF THE CASE.

MR. HUDDLESTON: NO, YOUR HONOR.

MR. MONNIN: YOUR HONOR, WHAT I UNDERSTAND IS THAT THE SEC HAS PLED AN INJUNCTION AGAINST FUTURE VIOLATIONS, AS OPPOSED TO AN INDUSTRY BAR.

MR. HUDDLESTON: RIGHT, CORRECT.

THE COURT: ALL RIGHT. JUST EXPLAIN THAT AGAIN WHAT YOU JUST SAID. AND IF YOU COULD JUST GET A LITTLE CLOSER TO THE MICROPHONE SO THAT --

MR. HUDDLESTON: CERTAINLY, YOUR HONOR.

WHAT WE PLED FOR FIRST IS A PERMANENT INJUNCTION AGAINST FUTURE VIOLATIONS.

SECONDLY, FOR DISGORGEMENT AND PREJUDGMENT INTEREST.

AND FINALLY FOR CIVIL PENALTIES.

THE COURT: OKAY. SO YOU'RE NOT LOOKING FOR DEBARMENT.

MR. HUDDLESTON: THAT IS CORRECT, YOUR HONOR.

THE COURT: ALL RIGHT. I MISUNDERSTOOD THAT, THEN.

ALL RIGHT. VERY GOOD. WELL, LET ME HEAR FROM THE GOVERNMENT FIRST.

MR. HUDDLESTON: IF I MIGHT, YOUR HONOR, I WOULD CERTAINLY YIELD THE FLOOR TO THE DEFENDANTS. THEY PREPARED A PRESENTATION WHICH WILL DRAW OUT ALL THE FACTS.

THE COURT: THAT'S FINE. THAT'S FINE.

MR. HUDDLESTON: OKAY.

MR. MONNIN: YES, YOUR HONOR. WE'VE DONE THAT.

AND, JUST FOR THE RECORD, I'VE GIVEN YOUR LAW CLERK, MR. BARTHOLOMEW?

THE COURT: RIGHT.

MR. MONNIN: CORRECT. AND THAT MR. BARTHOLOMEW HAS THE ORIGINAL EXHIBITS 1 THROUGH 7 THAT THE SEC HAS STIPULATED TO.

THE COURT: ALL RIGHT.

MR. MONNIN: IN LIGHT OF THAT STIPULATION, I GUESS I'LL JUST GO AHEAD AND MOVE THOSE. AND I'LL CERTAINLY HAVE MY CLIENT TESTIFY ABOUT THE FOUNDATION AND WHAT THEY RELATE TO.

THE COURT: ALL RIGHT.

MR. HUDDLESTON: NO OBJECTIONS.

THE COURT: VERY GOOD. THEY ARE ADMITTED, THEN.

MR. MONNIN: AND I ALSO HAVE A SLIDE DECK THAT IS IN THE POCKET. YOUR HONOR HAS A BINDER OF THE EXHIBITS. AND WE HAVE A SLIDE DECK AS WELL THAT BOTH THE COURT AND MR. BARTHOLOMEW --

THE COURT: AS I UNDERSTAND, MINE ARE COPIES WHERE I CAN WRITE ON MINE.

MR. MONNIN: CORRECT.

THE COURT: ALL RIGHT. VERY GOOD. BECAUSE I'VE BEEN KNOWN TO WRITE ON ORIGINALS AND MAKE EVERYONE'S LIFE MISERABLE.

MR. MONNIN: NO, JUDGE. WE CAME PREPARED.

AND I HAVE EXPLAINED TO MY CLIENT THAT THE PURPOSE OF -- HE CERTAINLY UNDERSTANDS WHAT THE PURPOSE OF THE HEARING IS. HE ABSOLUTELY UNDERSTANDS THAT YOU MAY BE ASKING HIM QUESTIONS AS WELL --

THE COURT: ALL RIGHT.

MR. MONNIN: -- WITH REGARD TO HIS COMPENSATION AND THE BENEFITS HE RECEIVED FROM LEVEL GLOBAL. SO IT WILL BE OBVIOUS WHERE WE'RE HEADED.

WHAT WE'RE REALLY TRYING TO DO, JUDGE, IS THAT WE'RE TALKING ABOUT A TWO-YEAR COURSE OF CONDUCT HERE FROM 2009 TO 2010. AND WHAT I AM GOING TO HAVE MY CLIENT TESTIFY ABOUT IS THE COMPENSATORY BENEFITS THAT HE RECEIVED CONTRACTUALLY FROM HIS EMPLOYER, LEVEL GLOBAL, DURING THAT TIME.

ONCE WE GET THROUGH THOSE COMPENSATORY BENEFITS, I'M THEN GOING TO HAVE MY CLIENT, THROUGH HIS TESTIMONY, ILLUSTRATE WHAT WE BELIEVE IS THE IMMATERIALITY OF THE CARTER'S TRADING IN 2009. WHAT WE'RE TALKING ABOUT IS OCTOBER OF 2009, THE SALE OF CARTER'S RELATED -- CARTER'S STOCK IN OCTOBER 2009, OCTOBER 26TH OF 2009, JUDGE.

AND THE OTHER SALES OR THE OTHER SECURITIES TRADING THAT WE'RE TALKING ABOUT IS JULY 2010, SHORT SALES DURING THAT PERIOD OF TIME. SO WE'RE GOING TO ELICIT THE COMPENSATORY BENEFIT THAT MY CLIENT RECEIVED ASSOCIATED WITH THE 2009 TRADES, OR TRADE, WHICH WE BELIEVE THERE WAS REALLY NO COMPENSATORY BENEFIT WHATSOEVER TO MY CLIENT DURING THAT TIME. AND THEN WE'RE GOING TO MOVE INTO THE 2010 TIME FRAME, AND WE'RE GOING TO SHOW THE COURT THAT THERE WAS A PROFIT THAT WAS MONETIZED, IF YOU WILL, DURING THAT TIME FRAME IN JULY 2010.

BUT THE AMOUNT OF THE PROFIT, WHEN IT'S COMPARED TO THE OVERALL PROFITABILITY OF THE HEDGE FUND WHERE MY CLIENT WAS EMPLOYED, THAT THAT OVERALL PROFITABILITY DWARFS THE PROFITS OR PROCEEDS THAT MY CLIENT REALIZED -- OR NOT MY CLIENT REALIZED, THAT THE HEDGE FUND REALIZED FROM THE TRADING ACTIVITY IN ISSUE.

SO WE'D EXPECT THAT, HOPEFULLY, WE SHOULD BE MAYBE ABOUT 45 MINUTES OR SO.

THE COURT: ALL RIGHT.

MR. MONNIN: AND THEN WE'LL YIELD TO THE SEC.

AND SO WITH THAT, I'LL CALL MARK MEGALLI.

THE COURTROOM DEPUTY: MR. MEGALLI, PLEASE RAISE YOUR RIGHT HAND.

MARK MEGALLI,

HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

THE COURTROOM DEPUTY: THANK YOU. PLEASE BE SEATED.

DIRECT EXAMINATION

BY MR. MONNIN:

Q. MR. MEGALLI, COULD YOU PLEASE GIVE THE COURT A SENSE OF YOUR, JUST STARTING OFF, YOUR EDUCATIONAL BACKGROUND?

A. YES. SURE. SO I ATTENDED YALE UNIVERSITY AS AN UNDERGRAD. I GRADUATED IN 1994, MAJORED IN POLITICAL SCIENCE. GRADUATED PHI BETA KAPPA AND MAGNA CUM LAUDE AND THEN ATTENDED YALE LAW SCHOOL AND THE YALE SCHOOL OF MANAGEMENT AND RECEIVED A J.D. AND MBA DEGREE IN 1999.

Q. DID YOU PASS THE BAR?

A. I PASSED THE BAR IN NEW YORK, YES.

Q. DID YOU EVER PRACTICE LAW?

A. ONLY AS A 2L. IN MY 2L SUMMER I WORKED AT DEBEVOISE AND PLIMPTON IN NEW YORK FOR ABOUT JUST THE SUMMER.

Q. SO YOUR CAREER HAS BEEN MORE FOCUSED ON FINANCIAL SERVICES IN THE HEDGE FUND INDUSTRY?

A. CORRECT. WELL, WHEN I GRADUATED FROM --

THE COURT: LET ME INTERRUPT YOU FOR ONE SECOND.

I HAVE CASEVIEW HERE.

(WHEREUPON, AN OFF-THE-RECORD DISCUSSION WAS HAD.)

THE COURT: ALL RIGHT. GO AHEAD, CONTINUE.

MR. MONNIN: THANK YOU, JUDGE.

Q. (BY MR. MONNIN) SO, MR. MEGALLI, I THINK THAT WE WERE TO THE POINT WHERE YOU WERE TALKING ABOUT WHEN YOU ENTERED THE FINANCIAL SERVICES INDUSTRY.

A. RIGHT. SO AFTER GRADUATE SCHOOL, I BEGAN MY CAREER REALLY AT MCKINSEY AND COMPANY AND WORKED AS A MANAGEMENT CONSULTANT IN THE FINANCIAL SERVICES FIELD FOR ABOUT FOUR YEARS FROM '99 UNTIL 2003.

AND THEN STARTING IN 2003, I HAD A CAREER CHANGE AND ENDED UP STARTING TO WORK AT A HEDGE FUND ON WALL STREET AND ENDED UP WORKING FOR A FEW DIFFERENT HEDGE FUNDS FROM 2003 UNTIL A COUPLE OF YEARS AGO.

Q. JUST SO THE COURT IS AWARE OF THIS, HOW OLD ARE YOU CURRENTLY?

A. FORTY-THREE YEARS OLD.

Q. AND YOU STARTED IN THE HEDGE FUND INDUSTRY ABOUT 12 YEARS AGO?

A. ABOUT 12 YEARS AGO.

Q. TAKE THE COURT FORWARD FROM WHEN YOU FIRST GOT INTO THE HEDGE FUND INDUSTRY TO THE POINT WHERE YOU WERE THINKING ABOUT WORKING WITH LEVEL GLOBAL.

A. SURE. OKAY. SO MY FIRST JOB WAS WORKING FOR A COMPANY

CALLED JOHN LEVIN AND COMPANY. AND I WAS HIRED TO BE AN ANALYST FOR ONE OF THEIR HEDGE FUNDS THERE. AND THEY WANTED ME TO SPECIALIZE IN THE CONSUMER DISCRETIONARY SPACE. THE CONSUMER DISCRETIONARY SPACE BASICALLY IS COMPRISED OF THE RETAILERS, THE RESTAURANTS, GAMING COMPANIES, LODGING COMPANIES, THINGS THAT CONSUMERS SPEND DISCRETIONARY DOLLARS ON. AND SO THAT WAS THE SECTOR THAT I REALLY STARTED WITH AND ENDED UP SPENDING MY WHOLE CAREER SPECIALIZING IN. AND THAT WOULD INCLUDE APPAREL AND FOOTWEAR-TYPE COMPANIES.

SO I STARTED WORKING AT JOHN LEVIN AND COMPANY IN '03, ENDED UP MOVING TO A DIFFERENT COMPANY IN AROUND, OH, END OF '07, BEGINNING OF '08 CALLED BUCKINGHAM CAPITAL. AND BUCKINGHAM CAPITAL SPECIALIZED IN THE CONSUMER DISCRETIONARY SECTOR. AND THAT WAS A BIG PART OF WHY THEY RECRUITED ME TO GO IN AND SORT OF BE A JUNIOR PORTFOLIO MANAGER FOR THEM.

SO I HAD BEEN WORKING THERE FOR ABOUT A YEAR AND A HALF WHEN I WAS CONTACTED BY LEVEL GLOBAL IN THE SUMMER OF 2009. AND LEVEL -- GO AHEAD.

Q. MR. MEGALLI, LET ME JUST STOP YOU THERE. BRIEFLY TELL THE COURT WHAT YOUR JOB RESPONSIBILITIES WERE AT JOHN LEVIN. HOW MUCH MONEY DID YOU MANAGE OR HAVE INVESTMENT DISCRETION OVER, THINGS LIKE THAT?

A. SO REALLY JOHN LEVIN HAD TWO PIECES TO IT. THE FIRST HALF OF THE TIME THAT I WORKED THERE WAS FOR A HEDGE FUND, HEDGE FUND CALLED SR CAPITAL. AND I REALLY DIDN'T HAVE MUCH

DISCRETION. I HAD VIRTUALLY NO DISCRETION THERE. SO I WAS REALLY JUST A CONSUMER ANALYST. AND I WOULD HELP THE PORTFOLIO MANAGERS WITH SOURCING IDEAS, BUILDING FINANCIAL MODELS, MEETING WITH COMPANY MANAGEMENT, ATTENDING CONFERENCES, YOU KNOW, THIS SORT OF DUE DILIGENCE THAT YOU WOULD THINK OF AN ANALYST DOING.

JOHN LEVIN EVENTUALLY SPUN OUT THIS SR CAPITAL GROUP INTO ANOTHER COMPANY CALLED SEAROCK CAPITAL. AND THAT WAS THE FIRST TIME I HAD SOME DISCRETION OVER, YOU KNOW, THE MONEY THAT WAS BEING MANAGED BY SEAROCK CAPITAL. AND, OVERALL, WE WERE ABOUT A $700 MILLION FUND, IF I REMEMBER. AND I, I HAD DISCRETION OVER SOMEWHERE AROUND 50 TO $100 MILLION IN THAT FUND.

Q. HOW ABOUT AT BUCKINGHAM, SAME TYPES OF --

A. WHEN I, WHEN I GOT TO BUCKINGHAM, BUCKINGHAM MANAGED A LITTLE BIT MORE CAPITAL THAN THAT. IT WAS MORE LIKE 800 MILLION TO A BILLION DOLLARS. AND THE WAY THAT IT WORKED AT BUCKINGHAM IS THAT THERE WERE FOUR PORTFOLIO MANAGERS. AND WE ALL HAD, NOT EQUAL SAY, BUT WE ALL CONTRIBUTED TO THE MANAGEMENT OF THE PORTFOLIO. SO I WAS SORT OF A CO-PORTFOLIO MANAGER IN THE SENSE OF BEING, YOU KNOW, A JUNIOR GUY THERE. BUT I GAVE INPUT INTO BUYING AND SELLING DECISIONS ON THE OVERALL PORTFOLIO.

Q. NOW, TAKING US FORWARD TO LEVEL GLOBAL, WAS THAT MORE OF A PUSH ON YOUR PART, A PULL ON LEVEL'S PART? TELL US ABOUT THAT.

A. NO. I HAD REALLY NEVER HEARD OF LEVEL GLOBAL. IN THE

SUMMER OF 2009, THEY CONTACTED ME. AND LEVEL GLOBAL HAD TRADITIONALLY FOCUSED ON TECHNOLOGY STOCKS. THE TWO MAIN COFOUNDERS HAD DONE TECH THEIR WHOLE CAREERS BASICALLY. AND THEY WANTED TO START UP A CONSUMER VERTICAL, IF YOU WILL, WITHIN LEVEL GLOBAL WHERE THEY WANTED TO HIRE ME TO BE THE PORTFOLIO MANAGER WITHIN THAT CONSUMER VERTICAL AND THEN HIRE A TEAM OF ANALYSTS, HIRE CONSULTANTS AND SO FORTH AND REALLY BUILD OUT AN EFFORT WITHIN CONSUMER. AND THEY HAD ALREADY DONE THIS SUCCESSFULLY IN A COUPLE OF OTHER VERTICALS. THEY HAD DONE FINANCIALS. THEY HAD DONE INDUSTRIALS. THEY WERE ALREADY IN TECHNOLOGY.

THE COURT: WHEN YOU SAY A VERTICAL TEAM, I KNOW WHAT THAT MEANS FOR ANTITRUST PURPOSES. BUT I DON'T KNOW THAT IT'S THE SAME, WHAT IT MEANS HERE FOR SURE. SO WHY DON'T YOU JUST CLARIFY WHAT YOU MEAN BY, THEY HAD A NUMBER OF OTHER VERTICALS.

THE WITNESS: SURE. BASICALLY JUST A GROUP WITHIN THE COMPANY THAT WOULD SPECIALIZE IN A CERTAIN SECTOR. SO IT WOULD BE RUN BY, SAY, IN THE INDUSTRIALS GROUP, THEY HAD AN INDUSTRIALS PORTFOLIO MANAGER. THEY HAD INDUSTRIAL ANALYSTS, AND THEY WOULD BASICALLY CARVE OUT A PIECE OF THE OVERALL PORTFOLIO TO JUST FOCUS ON THAT INDUSTRIAL SPACE.

SO IT WAS REALLY JUST A TEAM OF SPECIALISTS WITHIN INDUSTRIALS THAT WOULD MANAGE MONEY ON BEHALF OF LEVEL GLOBAL WITHIN THAT SECTOR.

Q. (BY MR. MONNIN) WITH WHOM WERE YOU MEETING AT LEVEL

GLOBAL REGARDING ITS RECRUITMENT OF YOU?
A. WELL, REALLY, THE HEAD OF THE FIRM, DAVID GANEK, WAS THE ONE ULTIMATELY WHO HIRED ME. AND BASICALLY WHAT HE SAID IS, WE -- YOU KNOW, THEY MANAGED ABOUT THREE TO THREE AND A HALF BILLION DOLLARS, ROUGHLY, WHEN THEY WERE RECRUITING ME. AND HE SAID, LOOK, YOU KNOW, IF YOU LEAVE BUCKINGHAM TO COME HERE, WE'LL GIVE YOU ABOUT $250 MILLION TO MANAGE WITHIN THE CONSUMER SPACE. IF YOU'RE SUCCESSFUL WITH THAT, WE'LL INCREASE IT OVER TIME. IT WILL BE AN OPPORTUNITY FOR YOU TO TAKE A MORE SENIOR ROLE THAN YOU HAVE, YOU KNOW, PRIOR TO THIS, IN THE SENSE THAT YOU CAN, YOU KNOW, YOU CAN HIRE ANALYSTS TO HELP YOU MANAGE THE MONEY; YOU CAN HAVE MORE DISCRETION OVER THE TRADING AND SO FORTH.

AND SO, ULTIMATELY, I DECIDED TO LEAVE BUCKINGHAM TO GO TO THEM. BUT, I MEAN, THE ANSWER TO YOUR QUESTION IS, THEY RECRUITED ME.

Q. LAST POINT ON BUCKINGHAM. IN GENERAL TERMS, WHAT WAS YOUR COMPENSATION THERE? HOW MUCH MONEY DID YOU MAKE, LET'S SAY, IN THE LAST FULL YEAR AND THEN THE STUB YEAR?

A. WELL, BEFORE I, BEFORE I WENT TO LEVEL. SO, LET'S SEE. I GUESS --

Q. JUST GENERALLY.

A. IN 2008, I BELIEVE I MADE $700,000.00 THAT YEAR.

Q. AND YOU WERE --

A. AND IN 2009, TO BE CLEAR, I LEFT IN THE MIDDLE OF THE

YEAR. AND SO WHEN YOU LEAVE A HEDGE FUND IN THE MIDDLE OF THE YEAR, YOU REALLY LEAVE BEHIND YOUR COMPENSATION. SO I MADE SOME SALARY THAT YEAR, BUT I DIDN'T GET ANY KIND OF A BONUS FROM BUCKINGHAM THAT YEAR.

Q. DO YOU HAVE A SENSE OF WHAT YOUR SALARY WAS?

A. OH, SURE. MY SALARY AT BUCKINGHAM WAS $500,000.00 A YEAR.

Q. SO LET'S --

THE COURT: SO YOU RECEIVED A PORTION OF YOUR SALARY, BECAUSE YOU WEREN'T THERE THE WHOLE YEAR?

THE WITNESS: THAT'S CORRECT.

THE COURT: AND YOU DIDN'T RECEIVE A BONUS?

THE WITNESS: CORRECT.

THE COURT: ALL RIGHT.

Q. (BY MR. MONNIN) AND, JUST TO BE CLEAR, MR. MEGALLI, WERE YOU TRADING IN CARTER'S SECURITIES AT BUCKINGHAM?

A. THERE WAS TRADING IN CARTER'S, NOT BY ME, NECESSARILY, BECAUSE OF THE WAY THAT BUCKINGHAM WAS MANAGED IN A CO-PORTFOLIO MANAGER STRUCTURE. SO SINCE THE FOUR OF US WERE ALL GIVING INPUT INTO DECISIONS, YOU KNOW, THERE WERE SORT OF GROUP DECISIONS BEING MADE. BUT, YES, THERE WAS TRADING IN CARTER'S, GIVEN THAT IT WAS AN APPAREL COMPANY, AND WE WERE A CONSUMER-FOCUSED FUND.

Q. WERE YOU ALWAYS AN EMPLOYEE AT BUCKINGHAM?

A. AT THAT TIME, I WAS AN EMPLOYEE, YEAH.

Q. DIRECTING YOUR ATTENTION -- WE CAN PULL UP THE SLIDE DECK.

DIRECTING YOUR ATTENTION TO THE FIRST SLIDE OF THE DECK, AS WELL AS DEFENSE EXHIBIT NUMBER 1, WHICH IS YOUR EMPLOYMENT AGREEMENT, COULD YOU PLEASE WALK THE COURT THROUGH THE, ESSENTIALLY, THREE BUCKETS OR CATEGORIES OF COMPENSATION THAT YOU WERE ELIGIBLE TO RECEIVE IN 2009 AND 2010?

A. SURE. SO THE FIRST COMPONENT WAS MY SALARY, WHICH WAS MEANT TO BE $250,000.00 PER YEAR. BECAUSE I WENT IN THE MIDDLE OF THE YEAR IN 2009, IT ENDED UP WORKING OUT TO THAT NUMBER THAT YOU SEE THERE, THE 111,000, WHICH INCLUDED SOME DE MINIMIS BENEFITS, I GUESS.

Q. WHEN DID YOU START AT LEVEL GLOBAL?

A. I STARTED AUGUST 9TH OF 2009, I BELIEVE.

Q. SO THIS IS THE PRO RATA AMOUNT OF $250,000.00?

A. FOR AUGUST, SEPTEMBER, OCTOBER, NOVEMBER, DECEMBER, CORRECT. AND THEN FOR 2010, IT WAS MY SALARY OF 250,000. AND AS I THINK WE'LL SEE LATER, THERE WAS ANOTHER 31,000 OF ADDITIONAL BENEFITS, WHICH THEY TERMED PSP BENEFITS, WHICH I BELIEVE IT WAS A PROFIT-SHARING DESIGNATION.

Q. HOW ABOUT SIGNING BONUS, WHAT DOES THAT REFER TO?

A. SO THE SECOND COMPONENT WAS, I GUESS, AS AN ENTICEMENT TO GET ME TO LEAVE BUCKINGHAM TO GO TO LEVEL GLOBAL, THEY OFFERED ME A $500,000.00 SIGNING BONUS, WHICH WAS TO VEST OVER A THREE-YEAR PERIOD. SO I JOINED IN AUGUST OF 2009, AND THE AGREEMENT STIPULATED THAT AS LONG AS I WAS AN EMPLOYEE, AS LONG AS I WAS EMPLOYED AT LEVEL GLOBAL, ON DECEMBER 31ST OF 2010, I

WOULD GET THE FIRST THIRD OF THAT SIGNING BONUS. AND THEN DECEMBER 31ST OF 2011, I WOULD GET THE SECOND THIRD. AND DECEMBER 31ST OF 2012, I WOULD GET THE FIRST -- THE LAST THIRD. AND ALL OF THAT WOULD BE PAID OUT IN FEBRUARY OF 2013.

SO THAT REPRESENTED -- THE 178,000 YOU SEE THERE IS THE FIRST THIRD THAT VESTED OF MY SIGNING BONUS. AND BECAUSE THEY INVESTED IT IN THE FUND, IT WORKED OUT TO 178,000. IT WASN'T 166,667.

Q. JUST SO THE COURT KNOWS, WHEN WERE YOU ACTUALLY PAID THE 178,000?

A. I WAS PAID THAT IN FEBRUARY OF 2013. I NEVER RECEIVED THE SECOND AND THIRD PORTIONS OF THE SIGNING BONUS BECAUSE LEVEL GLOBAL CEASED TO BE AN ONGOING CONCERN SOMETIME IN 2011.

Q. SO YOU HAD A BASE SALARY OF $250,000.00. YOU HAD A SIGNING BONUS OF 500,000 THAT VESTED PERIODICALLY STARTING IN 2010.

A. CORRECT.

Q. SO YOU DIDN'T RECEIVE ANY SIGNING BONUS IN 2009. CORRECT?

A. CORRECT. AND I DIDN'T RECEIVE THE FINAL TWO-THIRDS OF MY SIGNING BONUS FOR '11 AND '12.

Q. LET ME ASK YOU THIS. WE'LL GET TO IT IN A MOMENT. BUT DID YOUR INVESTMENT MANAGEMENT PERFORMANCE HAVE ANY IMPACT ON YOUR BASE SALARY OR YOUR SIGNING BONUS?

A. NO, IT DID NOT.

Q. LET'S TALK ABOUT INCENTIVE PAYMENTS. WHAT DOES THAT MEAN

GENERALLY?
A. INCENTIVE PAYMENTS -- SO LET ME TAKE A STEP BACK.
THE COURT: MAKE SURE I UNDERSTAND. THE TWO REMAINING $1,850.00 WAS THE FULL SALARY, BASE SALARY YOU RECEIVED?
THE WITNESS: IT WAS 250,000 IN SALARY PLUS 31,850 OF BENEFITS, WHICH WERE CALLED PSP. AND I BELIEVE THEY HAD TO DO WITH A PROFIT-SHARING PROGRAM.
THE COURT: ALL RIGHT.
Q. (BY MR. MONNIN) WHAT WAS THE INTENT OF THE ROUGHLY 31,000?
A. TO BE HONEST, I DON'T KNOW.
THE COURT: SO YOU ACTUALLY TOOK A SUBSTANTIAL PAY CUT IN TERMS OF THE ACTUAL SALARY WHEN YOU MOVED THERE FROM BUCKINGHAM.
THE WITNESS: CORRECT. THAT'S EXACTLY RIGHT.
THE COURT: ALL RIGHT.
Q. (BY MR. MONNIN) WHY DID YOU DO THAT, MR. MEGALLI?
A. I THOUGHT OVER THE LONG RUN IT WOULD BE A GOOD INVESTMENT IN MY FUTURE TO ADVANCE, YOU KNOW, TO MAYBE A SLIGHTLY MORE SENIOR ROLE THAN WHERE I WAS AT BUCKINGHAM.
Q. YOU MAY NEED TO SPEAK MORE INTO THE MICROPHONE.
A. I'M SORRY. I APOLOGIZE.
YEAH, I THOUGHT IT WOULD BE A GOOD CAREER MOVE, I GUESS.
Q. WAS THERE A PERCEPTION ON YOUR PART THAT YOU WOULD HAVE

MORE INCENTIVE-BASED COMPENSATION WITHIN THE SUBJECT MATTER AREA THAT YOU DO?

A. CAN YOU REPEAT THAT? I'M SORRY, PAUL.

Q. WAS THERE A THOUGHT THAT YOU MIGHT HAVE MORE OF AN INCENTIVE-BASED UPSIDE AT LEVEL, AS OPPOSED TO BUCKINGHAM?

A. YOU KNOW, I ASSUMED THAT, BECAUSE LEVEL MANAGED MORE ASSETS THAN BUCKINGHAM, THAT AS YOU BECAME MORE SENIOR AT LEVEL, THERE WAS POTENTIAL TO EARN MORE. BUT, TO BE HONEST, YOU KNOW, HAD I STAYED AT BUCKINGHAM, MY COMPENSATION, YOU KNOW, ULTIMATELY PROBABLY WOULD HAVE BEEN BETTER IN THE SHORT RUN. SO I WASN'T TRYING TO MAKE, YOU KNOW, DIRECT DECISIONS BASED ON WHAT IS MY INCENTIVE COMPENSATION GOING TO BE AT A VERSUS B. I WAS JUST TRYING TO THINK KIND OF LONGER TERM ABOUT, YOU KNOW, WHERE AM I BETTER SITUATED.

Q. OKAY. YOU WERE STARTING TO DESCRIBE FOR THE COURT IN GENERAL TERMS -- AND WE'LL GET INTO THIS FURTHER -- BUT WHAT WAS THE INCENTIVE COMPONENT OF YOUR COMPENSATION?

A. WELL, THAT WAS THE LAST, THE 1.2 MILLION, ROUGHLY, THAT YOU SEE THERE.

Q. BUT IN TERMS OF THE CONTRACT, HOW WAS IT DEFINED, JUST IN BROAD TERMS?

A. WELL, LET ME, LET ME JUST MAYBE DESCRIBE WHAT INCENTIVE COMPENSATION IS. HEDGE FUNDS ARE PAID REALLY IN TWO WAYS. THEY COLLECT A MANAGEMENT FEE EVERY YEAR, WHICH, FOR MOST HEDGE FUNDS, TENDS TO BE ABOUT TWO PERCENT A YEAR OF THE ASSETS UNDER

MANAGEMENT. AND THAT TWO PERCENT TYPICALLY IS USED TO PAY FOR SALARIES AND RENT AND COSTS OF RUNNING THE BUSINESS.

THE SECOND WAY HEDGE FUNDS ARE COMPENSATED TYPICALLY IS THROUGH AN INCENTIVE FEE, WHICH, FOR LEVEL GLOBAL AT THE TIME, WAS ABOUT A TEN PERCENT INCENTIVE FEE. AND BASICALLY WHAT THAT MEANS IS THAT WHEN YOU, WHEN YOU INVEST MONEY ON BEHALF OF YOUR INVESTORS, YOU'RE GOING TO HOPEFULLY GENERATE A RETURN ON THOSE FUNDS. OF THAT RETURN, 90 PERCENT WOULD BE RETURNED TO THE INVESTORS, AND LEVEL GLOBAL WOULD KEEP TEN PERCENT IN THE FORM OF AN INCENTIVE FEE. OF THAT TEN PERCENT THAT WE KEPT, THE SENIOR MANAGEMENT WOULD USE THAT TO PAY OUT PEOPLE'S BONUSES AT THE END OF THE YEAR. SO THAT 1.2 MILLION REFLECTS MY PORTION OF THE TEN PERCENT INCENTIVE FEE THAT LEVEL GLOBAL RETAINED.

Q. AND WE WILL GET INTO IN A MOMENT WHAT PERCENTAGE OF LEVEL GLOBAL'S INCENTIVE FEE YOU WERE ENTITLED TO.

A. RIGHT.

Q. SO WHAT WE'VE GOT FOR 2009 IS ROUGHLY 111,000 IN COMPENSATION AND, FOR 2010, ROUGHLY 1.65 MILLION. DID YOU RECEIVE, TO THE BEST OF YOUR RECOLLECTION, ANY OTHER AMOUNTS OTHER THAN WHAT'S REFLECTED ON THE SCREEN?

A. NO. THAT'S EVERYTHING.

Q. DID YOU HAVE ANY OTHER INCOME, ANY OTHER EMPLOYMENT --

A. NO.

Q. -- DURING THIS TIME FRAME?

A. NO.

Q. SO LET'S MOVE ALONG TO THE NEXT SLIDE, WHICH --

MR. MONNIN: AND WE'LL RUN THROUGH THIS VERY QUICKLY, YOUR HONOR.

Q. (BY MR. MONNIN) -- WHICH IS YOUR BASE SALARY.

A. RIGHT.

Q. AND WHAT I'D LIKE YOU TO DO, MARK, IS REFER TO EXHIBIT NUMBER 1 IN FRONT OF YOU, WHICH IS YOUR EMPLOYMENT AGREEMENT.

A. I THINK YOU NEED TO -- DO I NEED THE HANDOUT? I'LL JUST GO OFF THE SCREEN. THAT'S FINE. DON'T WORRY.

Q. WELL, YOU KNOW WHAT? I'LL JUST HAND THEM TO YOU. SO LET ME --

MR. MONNIN: MAY I APPROACH THE WITNESS, YOUR HONOR?

THE COURT: YES.

Q. (BY MR. MONNIN) LET ME SHOW YOU EXHIBITS 1, 2, AND 3 FOR THIS HEARING. AND LET ME DIRECT YOU SPECIFICALLY, MR. MEGALLI, TO PARAGRAPH 4(A) OF YOUR EMPLOYMENT AGREEMENT.

WELL, FIRST OF ALL, LET ME ASK YOU, WHAT IS EXHIBIT NUMBER 1?

A. THIS WAS MY EMPLOYMENT CONTRACT WITH LEVEL GLOBAL.

Q. AND IS THAT A COMPLETE COPY OF YOUR AGREEMENT SIGNED BY YOU AND SIGNED BY LEVEL?

A. I BELIEVE IT IS, YES.

Q. DID YOU HAVE ANY OTHER EMPLOYMENT AGREEMENT WITH LEVEL GLOBAL DURING 2009 AND 2010?

A. THIS WAS THE ONLY AGREEMENT I EVER HAD WITH LEVEL GLOBAL.

Q. AND DIRECTING YOU TO PARAGRAPH 4(A), IS THAT THE PARAGRAPH THAT PERTAINS TO YOUR BASE SALARY?
A. YES, IT IS.
Q. AND, IN ESSENCE, WHAT DOES IT -- I'M NOT ASKING YOU TO CALL FOR OR TESTIFY ABOUT A LEGAL CONCLUSION, BUT WHAT DOES IT PROVIDE WITH REGARD TO YOUR BASE SALARY?
A. PROVIDES FOR ANNUALIZED BASE SALARY OF $250,000.00, SUBJECT TO ANNUAL REVIEW AND ADJUSTMENT BY THE INVESTMENT MANAGER AT ITS SOLE DISCRETION.
Q. AND LET ME DIRECT YOU OVER TO EXHIBIT 2 AS WELL. WHAT'S THAT DOCUMENT?
A. EXHIBIT 2 IS WHAT I ENDED UP MAKING WHILE I WAS WORKING AT LEVEL GLOBAL. AND IT INCLUDES BOTH AN ESTIMATE OF WHAT I WAS GOING TO BE PAID AND THEN AN ACTUAL IN TERMS OF WHAT I WAS ACTUALLY PAID FOR '09, '10, AND THE FIRST LITTLE BIT OF '11.
Q. IS EXHIBIT 2 ACCURATE IN TERMS OF WHAT YOU ACTUALLY MADE IN TERMS OF BASE SALARY FROM LEVEL GLOBAL?
A. YES, IT IS.
Q. AND JUST WALK THE COURT VERY BRIEFLY THROUGH WHAT YOUR BASE SALARY WAS FOR 2009 AND YOUR BASE SALARY FOR 2010.
A. IT WAS $250,000.00.
Q. AND THEN, BUT WHAT WERE YOU ACTUALLY PAID ON THE BASE SALARY?
A. SO ON THE BASE SALARY IN '09, I WAS PAID $98,558.00 PLUS THE BENEFITS WE DISCUSSED EARLIER, PSP BENEFITS OF $12,733.00.

IN 2010, I WAS PAID A BASE SALARY OF $250,000.00, AND THE PSP BENEFITS WERE $31,850.00.

Q. WAS ANY OF THE COMPENSATION, EITHER THE 111,000 OR THE 281,000, DID THAT VARY AT ALL BASED ON YOUR PERFORMANCE AS A MANAGER?

A. NO, IT DID NOT.

Q. AND SINCE I'M THERE, TELL THE COURT BASICALLY, WHAT WERE YOU HIRED TO DO? WHAT WERE YOU RESPONSIBLE FOR AT LEVEL GLOBAL?

A. MY ROLE WAS TO START UP A CONSUMER DISCRETIONARY-FOCUSED EFFORT WITHIN LEVEL GLOBAL. AND WHEN I SAY EFFORT, WHAT I MEAN IS, I WAS MEANT TO MANAGE MONEY, HIRE A TEAM OF ANALYSTS, HIRE CONSULTANTS, AND CONDUCT DUE DILIGENCE ON THAT PORTION OF LEVEL GLOBAL THAT I WAS INVESTING.

Q. HOW MUCH MONEY WERE YOU MANAGING, OR HOW MUCH CAPITAL DID YOU HAVE AVAILABLE TO YOU?

A. WHEN I BEGAN, IT WAS 250 MILLION OF CAPITAL. AND THAT WAS AUGUST OF 2009 WHEN I BEGAN WORKING THERE. AND THEN IN JANUARY OF 2010, THAT WAS INCREASED TO 500 MILLION OF TOTAL CAPITAL.

THE COURT: WHEN IN 2010?

THE WITNESS: JANUARY 1ST, 2010.

THE COURT: OKAY.

Q. (BY MR. MONNIN) LET'S MOVE ON TO PARAGRAPH 4(B) OF EXHIBIT 1, MR. MEGALLI. IS THIS THE PARAGRAPH THAT RELATES TO YOUR SIGNING BONUS?

A. YES, IT IS.
Q. AND YOU TESTIFIED ABOUT THIS EARLIER. BUT WHAT'S THE ESSENCE OF THE CONTRACTUAL PROVISION RELATED TO YOUR SIGNING BONUS?
A. THE SIGNING BONUS WAS MEANT TO BE $500,000.00, AND IT WAS TO VEST OVER THREE YEARS. SO, AS I SAID EARLIER, IT WAS TO VEST AT THE END OF 2010, 2011, 2012. AND THEN WHATEVER AMOUNT WAS VESTED WOULD BE PAID IN 2013.
Q. SO DOES THE CONTRACT PROVIDE THAT ANY OF THE VESTING WAS BASED ON YOUR PERFORMANCE? COULD THE VESTING CHANGE IF YOU DIDN'T DO WELL AS A PORTFOLIO MANAGER?
A. NO. IT WAS NOT RELATED.
Q. IS THAT A PRETTY COMMON TYPE OF PROVISION IN THE HEDGE FUND INDUSTRY IN TERMS OF THE SIGNING BONUS?
A. YES, IT IS.
MR. MONNIN: JUDGE, WE CAN GO, MOVE ALONG --
THE COURT: OKAY.
MR. MONNIN: -- WITH OUR HARD COPY, IF YOU LIKE.
THE COURTROOM DEPUTY: I CAN BRING IT BACK UP.
THE COURT: IT WON'T TAKE A SECOND.
THERE WE GO.
Q. (BY MR. MONNIN) OKAY. AND, AGAIN, THIS AMOUNT FOR 2010, THAT'S NOT A THIRD OF 500,000. RIGHT?
A. CORRECT. SO A THIRD WOULD BE ABOUT 167,000. AND THE REASON IT'S DIFFERENT IS BECAUSE, AS IT SAYS IN THE CONTRACT,

DURING THE VESTING PERIOD, THAT BONUS SHALL BE INDEXED TO THE FUND, TO THE OFFSHORE FUND. SO BASICALLY THE FUND WAS UP A LITTLE BIT, AND THAT'S WHY IT INCREASED FROM 167,000 TO 178,000.

Q. AND THIS WAS PAID WHEN?

A. THAT WAS PAID IN FEBRUARY OF 2013.

Q. SO WE'VE TALKED ABOUT YOUR BASE SALARY. WE'VE TALKED ABOUT YOUR SIGNING BONUS. IN EITHER OF THOSE TWO CATEGORIES, WAS YOUR PERFORMANCE AS A PORTFOLIO MANAGER RELEVANT TO WHAT YOU GOT PAID WITHIN THOSE CATEGORIES?

A. NO.

Q. LET ME DIRECT YOU TO PARAGRAPH 4(C) OF YOUR EMPLOYMENT AGREEMENT. WHAT DOES THAT RELATE TO?

A. 4(C) SAYS, 2009 DISCRETIONARY BONUS. AND BASICALLY WHAT THIS SAYS IS THAT IT WOULD BE UP TO THE INVESTMENT MANAGER, WHO WOULD BE THE HEAD OF LEVEL GLOBAL, THAT, AT HIS SOLE DISCRETION, THAT YOU WOULD BE ELIGIBLE TO RECEIVE A DISCRETIONARY BONUS. BUT IT WAS REALLY AT HIS SOLE DISCRETION.

Q. DID YOU GET A DISCRETIONARY BONUS IN 2009?

A. I DID NOT.

Q. LET ME ASK YOU A COUPLE OF QUESTIONS ABOUT THAT. LET ME SHOW YOU WHAT HAS BEEN ADMITTED IN EVIDENCE AS DEFENSE EXHIBIT 4. COULD YOU PLEASE TELL THE COURT WHAT THAT DOCUMENT IS?

A. THIS DOCUMENT IS A SUMMARY OF WHAT MY PERFORMANCE WAS IN EACH OF THE TWO YEARS THAT I MANAGED MONEY AT LEVEL GLOBAL.

AND SO THIS PARTICULAR DOCUMENT RELATES TO MY PERFORMANCE IN 2009. AND IT'S A YEAR-END SUMMARY THAT DISCUSSES STATISTICS OF MY MONEY MANAGEMENT, I GUESS, INCLUDING HOW MUCH MONEY I INVESTED, WHAT MY PROFIT WAS ON THOSE INVESTMENTS, WHAT MY BATTING AVERAGE WAS, WHAT MY RETURN ON EQUITY WAS, WHAT MY WINNERS AND LOSERS WERE, ALL THOSE SORTS OF STATISTICS THAT WOULD HELP THE INVESTMENT MANAGER ANALYZE MY PERFORMANCE.

Q. WHAT WERE THE MOST IMPORTANT CONSIDERATIONS IN YOU BEING EVALUATED BY LEVEL GLOBAL?

A. I WOULD SAY PROBABLY THE MOST IMPORTANT WOULD BE HOW MUCH PROFIT YOU WERE CONTRIBUTING OR NOT CONTRIBUTING RELATIVE TO THE AMOUNT OF CAPITAL THAT YOU WERE GIVEN.

Q. IS THAT HIGHLIGHTED IN EXHIBIT 4?

A. IT IS.

Q. WHERE IS IT HIGHLIGHTED, AND WHAT'S THE AMOUNT?

A. IT'S HIGHLIGHTED UNDER TOTAL P&L. AND THE AMOUNT IS $7,964,238.00.

Q. SO, MR. MEGALLI, IF THAT'S THE NUMERATOR, WHAT WAS THE DENOMINATOR?

THE COURT: I'M LOOKING AT EXHIBIT 4. ARE YOU LOOKING AT SOMETHING ELSE?

MR. MONNIN: NO, JUDGE. IT'S THE FIRST LINE OF EXHIBIT 4, THE TOP LINE.

THE COURT: ALL RIGHT. AND SO YOU'RE LOOKING AT?

MR. MONNIN: TOTAL P&L, WHICH HAS BEEN HIGHLIGHTED IN

7.9 MILLION.

THE COURT: ALL RIGHT.

Q. (BY MR. MONNIN) SO, MARK, YOU MADE -- SO, BASICALLY, YOU MADE A TRADING PROFIT OR GAIN OF RETURN OF 7.9 MILLION FOR THAT YEAR. IS THAT CORRECT?

A. THAT'S CORRECT.

Q. AND THE PERIOD WE'RE TALKING ABOUT IS SEPTEMBER THROUGH THE END OF THE YEAR?

A. AUGUST THROUGH THE END OF THE YEAR, UH-HUH.

Q. AND TELL THE COURT WHAT TYPE OF -- WHAT PERCENTAGE RETURN, HOW MUCH CAPITAL YOU HAD INVESTED.

A. WELL, THE AVERAGE CAPITAL IS WRITTEN IN HERE AS 189,876,000. IF YOU SEE, IT'S ABOUT THE THIRD, FOURTH COLUMN OVER.

Q. AND THAT'S UNDER THE INITIALS GMV?

A. YEAH. THAT STANDS FOR GROSS MARKET VALUE. AND IF YOU LOOK, THERE'S ALSO THE CURRENT MARKET VALUE WHICH, AT THE END OF THE YEAR, WAS $239,649,000.00. SO BECAUSE I WAS RAMPING UP OVER THE COURSE OF THAT FIVE-MONTH PERIOD OF TIME, IT TOOK ME A WHILE TO GET TO THE 250-ROUGHLY MILLION DOLLARS. SO THAT'S WHY THE AVERAGE WAS 189 MILLION. AND IF YOU LOOK AT THE EIGHT MILLION ON BASE OF -- THERE ARE REALLY TWO WAYS YOU CAN LOOK AT IT. YOU CAN LOOK AT IT UNDER -- AND I DON'T WANT TO GET TOO TECHNICAL HERE -- THE GROSS MARKET VALUE, WHICH WOULD BE THE LONGS PLUS THE SHORTS, WHERE THERE'S SOMETHING CALLED YOUR

ASSETS UNDER MANAGEMENT, WHICH IS THAT $113 MILLION NUMBER. AND THAT WAS SORT OF AN ESTIMATE OF THE EQUIVALENT EQUITY THAT YOU WOULD BE MANAGING IF YOUR FUND WERE A SEPARATE FUND.

SO THE BOTTOM LINE, YOU ASKED THE QUESTION ABOUT, WHAT WAS THAT RETURN. AND IT SAYS ROE, THAT'S RETURN ON EQUITY, SEVEN PERCENT. SO THAT WAS ROUGHLY THE EQUIVALENT RETURN THAT I GENERATED, ABOUT A SEVEN PERCENT RETURN.

Q. SO JUST TO SUM UP, WHAT WE'RE TALKING ABOUT IS BASICALLY A SEVEN PERCENT RETURN ON THE CAPITAL THAT YOU HAD INVESTED. AND THE ECONOMIC VALUE OF THAT WAS ROUGHLY EIGHT MILLION.

A. CORRECT.

Q. NOW, JUDGE TOTENBERG, IN HER LIABILITY ORDER ON SUMMARY JUDGMENT, HAS FOUND YOU LIABLE FOR INSIDER TRADING ASSOCIATED WITH THE LIQUIDATION OF A CARTER'S LONG POSITION. IS THAT CORRECT?

A. THAT'S CORRECT.

Q. SO TELL THE COURT WHAT'S, WHAT'S THE VALUE HERE OF 2.034 MILLION? WHAT DOES THAT REFER TO?

A. THAT REFERS TO WHAT I GUESS IS CALLED AN AVOIDED LOSS. SO I SOLD 300,000 SHARES OF STOCK IN CARTER'S DURING THE RUN-UP, A COUPLE OF DAYS DURING THE RUN-UP INTO AN EARNINGS ANNOUNCEMENT. AND WHEN THEY ANNOUNCED THEIR EARNINGS, THEY SAID THAT THEY HAD FOUND AN ACCOUNTING PROBLEM, AND THAT CAUSED THE STOCK TO GO DOWN APPROXIMATELY 20 OR 25 PERCENT THE DAY THAT THEY WERE SUPPOSED TO REPORT EARNINGS. AND BECAUSE THAT EQUATED TO ABOUT

A SIX- OR SEVEN-DOLLAR DROP IN THE STOCK, HAD WE NOT SOLD THE 300,000 SHARES LEADING UP TO THAT EARNINGS EVENT, WE WOULD HAVE LOST $2,034,000.00. AND THAT'S WHY IT'S NOT CALLED A DIRECT PROFIT, BUT IT'S AN AVOIDED LOSS. AND THAT'S WHAT THAT REPRESENTS IS THE SALE OF THOSE 300,000 SHARES IN THE DAYS BEFORE THAT EARNINGS EVENT.

THE COURT: SO WHERE IS THAT ON THIS PAGE? I AM MISSING THAT. I UNDERSTAND THE CONCEPT. I JUST DON'T UNDERSTAND WHERE I SEE THAT FIGURE, THE 2.43.

Q. (BY MR. MONNIN) MARK, IS THE LOSS AVOIDED REFLECTED ON YOUR ANALYST DOCUMENT?

A. NO, BECAUSE THAT WOULD HAVE BEEN ONE TRADING RESULT OUT OF MANY DOZENS OR HUNDREDS OF TRADING RESULTS. SO IT WOULDN'T BE BROKEN DOWN.

THE COURT: ALL RIGHT. SO OF THE 2.43, THE PART OF THE 7.9 MILLION, APPROXIMATELY, ARE YOUR PROFITS AND LOSS?

THE WITNESS: THAT'S CORRECT.

THE COURT: OKAY.

Q. (BY MR. MONNIN) SO IF YOU HAD NOT SOLD THE LONG POSITION IN CARTER'S IN OCTOBER 2009, YOUR PROFIT ON THE PORTFOLIO WOULD HAVE BEEN REDUCED BY TWO MILLION.

A. CORRECT. IT WOULD HAVE BEEN ABOUT SIX MILLION INSTEAD OF ABOUT EIGHT MILLION.

Q. AND WE'VE DONE THE MATH HERE FOR THE COURT. THE LOSS AVOIDED ON THE CARTER'S POSITION WAS APPROXIMATELY 25.5 PERCENT

OF YOUR OVERALL PROFIT. IS THAT RIGHT?
A. THAT'S CORRECT.
Q. NOW, I GUESS THE QUESTION IS, SINCE YOU HAD THE ABILITY TO GET A DISCRETIONARY BONUS FOR 2009 UNDER SECTION FOUR POINT -- OR 4(C) OF YOUR CONTRACT, IS THAT CORRECT, YOU WOULD HAVE GOTTEN A BONUS?
A. UH-HUH.
Q. WHY DIDN'T YOU PURSUE A SIGNING -- OR NOT A SIGNING BONUS, BUT WHY DIDN'T YOU SEEK TO MONETIZE OR SEEK TO GET SOME TYPE OF RETURN BASED ON YOUR PROFIT FOR 2009?
A. I DIDN'T THINK I WAS ENTITLED TO IT IN THE SENSE THAT MY -- AND WE'LL GET INTO MY EQUITY POINTS, I GUESS, SHORTLY. BUT MY EQUITY PARTICIPATION AT LEVEL GLOBAL REALLY STARTED IN 2010. 2009, I JOINED IN AUGUST, AND IT WAS A STUB YEAR. AND TYPICALLY WHEN THAT HAPPENS, YOU DON'T HAVE AN EXPECTATION OF PARTICIPATING IN THE PROFITABILITY OF THE FUND BECAUSE IT'S CONSIDERED UNFAIR TO PEOPLE WHO HAVE BEEN THERE FOR THE FULL YEAR OR WHO HAVE BEEN THERE FOR LONGER PERIODS OF TIME. SO, YOU KNOW, IT JUST WAS NOT SOMETHING THAT WE REALLY CONSIDERED WAS GOING TO BE PART OF MY OVERALL COMPENSATION PACKAGE.
Q. SO MY QUESTION IS -- AND YOU ANSWERED MY QUESTION. MY NEXT QUESTION IS, DID YOU GET ANY COMPENSATORY BENEFIT IN TERMS OF A BONUS FOR THE LOSS AVOIDED RELATED TO THE CARTER'S SALE?
A. NO, I DID NOT.
Q. WERE YOU CONTRACTUALLY ELIGIBLE, POTENTIALLY, TO GET A

BONUS?

A. POTENTIALLY, UH-HUH.

THE COURT: WHAT DOES IT SAY, $2.34 MILLION, $3,334,000.00, AND THEN PLUS SEVEN MILLION I THOUGHT WERE PART OF THE --

MR. MONNIN: I'M SORRY, JUDGE. THAT'S A DIVISION SYMBOL.

THE COURT: OH. THAT'S WHAT HAPPENS WHEN YOU'RE GOING BACK AND FORTH HERE. SORRY.

MR. MONNIN: SO THE NUMERATOR IS THE LOSS AVOIDED. DENOMINATOR IS THE PROFITABILITY. AND WHAT WE'RE SAYING IS IS THAT 25.5 PERCENT IS LOSS AVOIDED.

THE COURT: I SEE.

MR. MONNIN: AND HE DIDN'T GET ANY COMPENSATORY BENEFIT FROM THAT.

THE COURT: OKAY.

Q. (BY MR. MONNIN) SO MOVING ON, MR. MEGALLI, LET'S GO TO THE NEXT SLIDE HERE. DIRECTING YOUR ATTENTION TO PARAGRAPHS 4(D) AND 4(E) OF YOUR EMPLOYMENT AGREEMENT, COULD YOU JUST WALK THE COURT THROUGH? THIS IS WHERE WE'RE GETTING TO WHAT YOUR INTEREST WAS IN LEVEL GLOBAL'S PROFITS OR LEVEL GLOBAL'S INCENTIVE FEES. JUST DESCRIBE IN BASIC TERMS WHAT THE CONTRACT PROVIDES.

A. SURE. OKAY. SO I DESCRIBED THE INCENTIVE FEES EARLIER THAT LEVEL GLOBAL WOULD RECEIVE AT THE END OF THE YEAR FROM THE

INVESTORS, WHICH WAS TEN PERCENT OF THE COMPANY'S PROFITS. AND I WAS ELIGIBLE TO RECEIVE A PORTION OF THAT TEN PERCENT DEPENDING ON HOW MY CONSUMER DISCRETIONARY FUND DID.

SO IF MY CONSUMER DISCRETIONARY FUND IN 2010 -- AND, AGAIN, IT WAS A $500 MILLION FUND -- IF I WAS UP ZERO TO $50 MILLION, I WAS TO RECEIVE SOMEWHERE BETWEEN ONE AND THREE PERCENT OF LEVEL GLOBAL'S INCENTIVE FEES. AND IF I WAS UP 50 MILLION OR MORE DOLLARS, I WAS TO RECEIVE THREE TO FIVE PERCENT OF LEVEL GLOBAL'S INVESTMENT FEES. AND THE REASON THERE'S A RANGE WAS TO GIVE THE INVESTMENT MANAGER DISCRETION OVER WHERE I ENDED UP WITHIN THAT.

Q. SO LET'S BREAK THAT DOWN A LITTLE BIT. WHAT WE'RE TALKING ABOUT IN THESE GREY BOXES, THIS IS YOUR PERFORMANCE. CORRECT?

A. CORRECT. IT'S HOW I DID ON THE 500 MILLION THAT I WAS RESPONSIBLE FOR.

Q. SO IF YOU -- I KNOW YOU WEREN'T ELIGIBLE FOR AN INCENTIVE BONUS IN 2009, BUT JUST TO ILLUSTRATE, THE RETURN DURING THAT YEAR WAS 7.9 MILLION. CORRECT?

A. THAT'S CORRECT.

Q. SO UNDER THE CONTRACT, WHERE, CONCEIVABLY, WOULD THAT HAVE PLACED YOU IN TERMS OF POINTS?

A. HAD I BEEN ELIGIBLE, IT WOULD HAVE BEEN IN THAT FIRST CATEGORY, ONE TO THREE PERCENT.

Q. AND LET ME SHOW YOU EXHIBIT 5, WHICH IS YOUR PERFORMANCE DOCUMENT FOR 2010. TELL THE COURT WHAT, WHAT PROFITABILITY DID

YOU RETURN TO LEVEL GLOBAL FOR 2010?
A. SO ON THE 500 MILLION, MY PROFITS WERE $39,198,356.00.
Q. AND WHAT WAS THE PERCENTAGE RETURN THAT YOU WERE GENERATING?
A. WELL, HERE IT HAS RETURN ON ASSETS UNDER MANAGEMENT ABOUT 15.6 PERCENT.
Q. WAS THAT A PRETTY FAVORABLE PERFORMANCE IN RELATION TO THE OTHER PORTFOLIO MANAGERS?
A. YEAH. I MEAN, IT WAS PRETTY GOOD.
Q. BUT THAT $39 MILLION PROFIT THAT YOU HAD, WHAT DID THAT POTENTIALLY ENTITLE YOU TO IN TERMS OF POINTS AGAINST LEVEL GLOBAL'S PROFITS?
A. WELL, BECAUSE IT WAS BETWEEN ZERO AND $50 MILLION, THEN I WOULD BE ENTITLED TO GET ONE TO THREE PERCENT OF LEVEL GLOBAL'S INCENTIVE FEES.
Q. AND WHO DECIDED AS BETWEEN THE ONE TO THREE PERCENT?
A. DAVID GANEK, THE INVESTMENT MANAGER.
Q. HOW DID THAT DISCUSSION WORK?
A. THERE WAS NO DISCUSSION. I WAS TOLD IT WOULD BE THREE PERCENT.
Q. DO YOU HAVE ANY INSIGHT AS TO WHY IT WAS SET AT THREE PERCENT AS OPPOSED TO TWO PERCENT?
A. MY GUESS IS BECAUSE IT WAS TOWARDS THE VERY HIGH END OF THAT RANGE.
Q. SO, BASED ON YOUR PERFORMANCE IN 2010, THE MAXIMUM POINTS

THAT YOU HAD WERE THREE PERCENT. CORRECT?
A. CORRECT.
Q. NOW, WE'VE DONE THE SAME ANALYSIS FOR 2010. IN 2009, WE WERE TALKING ABOUT A LOSS AVOIDED OF 2.043 MILLION. WHAT HAS JUDGE TOTENBERG FOUND YOU LIABLE FOR IN TERMS OF AN ILLEGAL PROFIT IN 2010?
A. $648,655.00.
Q. WHAT DOES THAT RELATE TO, SIR?
A. THAT RELATES TO A SHORT SALE IN CARTER'S THAT OCCURRED IN JULY OF 2010 WHERE WE SHORTED STOCK AT THE BEGINNING OF JULY. WE COVERED THAT STOCK AT THE END OF JULY AND GENERATED A PROFIT ON THAT TRADE OF 648,000, ROUGHLY, DOLLARS.
Q. AND JUST SO I'M CLEAR FOR THE RECORD, SO IN 2009, THE SALE OF THE CARTER'S LONG POSITION, FOR WHICH JUDGE TOTENBERG HAS FOUND YOU LIABLE, CONSTITUTED 25.5 PERCENT OF THE PROFIT THAT YOU RETURNED. IS THAT RIGHT?
A. CORRECT.
Q. AND WHAT PERCENT OF THE PROFIT THAT YOU RETURNED IN 2010 DID THE SHORT SALE COMPRISE?
A. IT WAS 1.65 PERCENT, WHICH IS THE 650,000 OVER THE 39.2 MILLION OF TOTAL RETURN WITHIN MY CONSUMER FUND.
Q. SO, IN ESSENCE, IN TERMS OF JUDGE TOTENBERG'S LIABILITY ORDER, YOU HAD A 25.5 PERCENT IMPACT IN 2009. OR THE TRADING DID.
A. CORRECT.

Q. AND IT HAD A 1.65 PERCENT IMPACT IN 2010.
A. CORRECT.
Q. DID YOU GET PAID ON THE CARTER'S PROFITS IN 2010?
A. WELL, I GOT PAID ON HOW LEVEL GLOBAL DID OVERALL. I DIDN'T GET PAID DIRECTLY ON MY CONSUMER FUND PERFORMANCE. MY CONSUMER FUND PERFORMANCE WAS MEANT TO BE A TRIGGER TO GET ME INTO THE ONE TO THREE PERCENT OR THE THREE TO FIVE PERCENT. BUT I WAS NOT MEANT TO GET PAID DIRECTLY ON HOW THE CONSUMER FUND DID. MY COMPENSATION HAD TO DO WITH HOW LEVEL GLOBAL DID OVERALL.
Q. SO LET'S RUN THE ILLUSTRATION. LET'S MOVE FORWARD. TELL THE COURT AGAIN, THIS IS ESSENTIALLY A SUMMARY OF YOUR PERSONAL INTEREST IN LEVEL GLOBAL'S PROFIT. CORRECT?
A. CORRECT. SO LEVEL GLOBAL WOULD COLLECT INCENTIVE FEES, WHICH WERE TEN PERCENT OF THE RETURNS GENERATED BY THE FUND, THE PARENT COMPANY.
Q. IS THAT PRETTY STANDARD?
A. YEAH. THAT'S STANDARD. IT COULD BE TEN TO 20. WE WERE AT TEN BECAUSE THE COMPANY, BEFORE I JOINED, HAD GONE UNDER WHAT THEY CALL A HIGH-WATER MARK. AND IT WAS ONLY GOING TO COLLECT INCENTIVE FEES AT A RATE OF TEN PERCENT UNTIL IT GOT BACK TO THE HIGH-WATER MARK, PLUS AN ADDITIONAL AMOUNT. SO, YOU KNOW, IT WAS TEN PERCENT OF WHATEVER THE RETURN WAS.
AND THEN, AS WE SAID EARLIER, I WAS TO RECEIVE THREE PERCENT, ULTIMATELY, OF THE TEN PERCENT. SO THAT'S THE 0.3

PERCENT OF THE TOTAL INCENTIVE FEES AT THE COMPANY.

MR. MONNIN: AND, YOUR HONOR, I APOLOGIZE IF THIS IS BASIC, BUT WE'VE GOT IN THE NEXT SLIDE A VERY BASIC ILLUSTRATION.

THE COURT: BASIC IS GOOD.

MR. MONNIN: THAT'S WHAT I FIGURED.

Q. (BY MR. MONNIN) SO LET'S MOVE FORWARD. SO YOU'RE ENTITLED TO POINT THREE PERCENT ESSENTIALLY OF WHAT LEVEL GLOBAL PROFITS. IS THAT RIGHT?

A. CORRECT.

Q. SO LET'S RUN THE ILLUSTRATION. SO IF THE OVERALL FUND RETURNS $10.00, WALK THE COURSE OF WHAT YOU REALIZED.

A. SURE. WELL, LET ME TAKE A STEP BACK. LET'S JUST ASSUME THAT LEVEL GLOBAL MANAGED $100.00 IN TOTAL. AND LET'S SAY ON THAT $100.00, THEY WERE UP TEN PERCENT FOR THE YEAR. SO NOW THEY'VE GENERATED $10.00 OF PROFITS. SO THE WAY IT WORKS IS, THE $9.00 OF THOSE $10.00 WOULD GO BACK TO THE INVESTORS. AND LEVEL GLOBAL WOULD RETAIN $1.00 OF THAT $10.00 AS AN INCENTIVE FEE. AND THAT'S THE TEN PERCENT I TALKED ABOUT EARLIER THAT WE TALKED ABOUT.

NOW, OF THAT $1.00 THAT'S RETAINED BY LEVEL GLOBAL, I WAS TO GET THREE PERCENT OF THE $1.00 AND THE COMPANY WOULD USE THE OTHER 97 CENTS FOR OTHER PURPOSES. SO FOR EVERY $10.00 THAT THE COMPANY GENERATED IN PROFITS, I WAS TO RECEIVE THREE CENTS OF THE $10.00 BY CONTRACT.

Q. AND THAT'S ASSUMING THAT YOUR PERSONAL PERFORMANCE PUTS YOU -- GAVE YOU THREE POINTS, IF YOU WILL?
A. CORRECT. AND THAT COULD HAVE BEEN ONE PERCENT. IT COULD HAVE BEEN AS HIGH AS FIVE, BUT ULTIMATELY IT WAS THREE.
Q. SO IF THE COURT IS GOING BACK TO CHAMBERS TO TAKE A LOOK AT YOUR EMPLOYMENT AGREEMENT TO FIND THE BASIS FOR THIS ILLUSTRATION, IS THAT IN PARAGRAPHS 4(D) AND 4(E)?
A. YES, IT IS.
THE COURT: SO WHAT DOES THAT MEAN, OTHER PEOPLE WERE RECEIVING MONEY AND MAKING THIS ALL WORK? I MEAN, YOU'RE GETTING THREE CENTS ON THE DOLLAR. HOW MANY OTHER PEOPLE WERE RECEIVING MONEY?
THE WITNESS: WELL, THERE WERE ABOUT -- I BELIEVE THERE WERE ABOUT 60 TO 70 EMPLOYEES AT LEVEL GLOBAL, BUT NOT ALL OF THOSE EMPLOYEES WERE INVESTMENT PROFESSIONALS. THEY WERE, YOU KNOW, TRADERS AND ADMINISTRATIVE PERSONNEL AND SO FORTH. I DON'T KNOW HOW MANY PEOPLE EXACTLY WERE ELIGIBLE TO RECEIVE INCENTIVE COMPENSATION, BUT I CAN TELL YOU THERE WERE FOUR SECTOR VERTICALS. AND THOSE PEOPLE WOULD HAVE BEEN ELIGIBLE. THERE WAS DAVID GANEK, OF COURSE, THE HEAD OF THE FIRM. THERE WAS HIS COFOUNDER, ANTHONY CHIASSON, WHO WOULD HAVE BEEN ELIGIBLE. I WOULD ESTIMATE, ESTIMATE THAT THERE WERE PROBABLY ABOUT 20 PEOPLE, BUT THAT'S REALLY AN ESTIMATION.
Q. (BY MR. MONNIN) AND THE BEST THAT YOU COULD POSSIBLY EVER DO, IF YOU WERE ABOVE 50 MILLION IN TERMS OF YOUR OWN SECTOR'S

PROFITABILITY, WOULD BE .5 PERCENT. CORRECT?
A. WOULD BE .5 PERCENT OF THE COMPANY, YEAH, RETURNS, THAT'S CORRECT.
Q. SO THE BEST YOU COULD DO ON A $10.00 PROFIT WOULD BE FIVE CENTS.
A. THAT'S CORRECT.
Q. WERE YOU EVER -- DID YOU EVER HAVE AN EQUITY STAKE OR OWNERSHIP INTEREST IN LEVEL GLOBAL?
A. NO, I DID NOT.
Q. WERE YOU ALWAYS AN EMPLOYEE OF LEVEL GLOBAL?
A. YES, I WAS.
Q. TELL THE COURT WHERE, TO YOUR KNOWLEDGE, THE MAJORITY OF THE 97 CENTS WENT, OR THE .97?
A. WELL, THE MAJORITY WENT TO THE FOUNDER, THE TOP TWO OR THREE PEOPLE IN THE COMPANY, YOU KNOW. THEY KEPT THE MAJORITY OF THAT. AND THEN ANOTHER PORTION WOULD GO TO --
Q. WHO WERE THE TOP THREE?
A. DAVID GANEK WAS THE NUMBER ONE GUY. ANTHONY CHIASSON WAS THE NUMBER TWO GUY AND ALSO A COFOUNDER. AND WILL MCCLANAHAN WAS THE NUMBER THREE GUY.
THE COURT: AND WHO WAS HE?
THE WITNESS: HE WAS THE HEAD OF THE FINANCIALS SECTOR VERTICAL AND ONE OF THE FIRST EMPLOYEES THERE.
Q. (BY MR. MONNIN) TO YOUR KNOWLEDGE, MARK, DID ANY OF THE PORTFOLIO MANAGERS HAVE A BETTER DEAL THAN WHAT YOU HAD UNDER

PARAGRAPHS 4(D) AND 4(E)?
A. I HAVE NO IDEA WHAT OTHER DEALS PEOPLE HAD, TO BE HONEST. I JUST DON'T KNOW.
Q. NOW, LET'S MOVE ON TO WHAT YOU ACTUALLY GOT PAID IN TERMS OF INCENTIVE COMPENSATION. ROUGHLY, WHAT WE'RE TALKING ABOUT IS 1.2 MILLION?
A. THAT'S CORRECT.
Q. NOW, THERE'S A REFERENCE IN PARAGRAPH 4(E) OF YOUR EMPLOYMENT AGREEMENT TO LEVEL RADAR. AND THE COURT IS GOING TO SEE THAT AS SHE REVIEWS THE CONTRACT. WHAT IS LEVEL RADAR, AS OPPOSED TO LEVEL GLOBAL?
A. LEVEL RADAR WAS A TECHNOLOGY-FOCUSED FUND MANAGED BY ANTHONY CHIASSON, ONE OF THE COFOUNDERS OF THE FIRM, THAT FOCUSED EXCLUSIVELY ON TECHNOLOGY-RELATED STOCKS. I DON'T KNOW EXACTLY HOW MUCH OF THE THREE TO THREE AND A HALF BILLION WAS IN RADAR, SO IT'S HARD FOR ME TO KNOW EXACTLY. BUT THE VAST MAJORITY WAS IN LEVEL GLOBAL.
Q. DID YOUR CARTER'S TRADING OR YOUR CONSUMER PORTFOLIO TRADING IMPACT LEVEL RADAR'S PROFITABILITY IN ANY WAY?
A. NO, IT DID NOT.
Q. WHY IS IT THAT YOU STILL GOT AN INCENTIVE BONUS BASED ON LEVEL RADAR'S PERFORMANCE?
A. BECAUSE MY INCENTIVE BONUS WAS MEANT TO BE ON HOW THE OVERALL COMPANY WHOLISTICALLY DID, AND NOT JUST LEVEL GLOBAL OR JUST LEVEL RADAR. IT WAS MEANT TO BE HOW THE COMPANY DID. AND

LEVEL RADAR WAS PART OF THE COMPANY, EVEN THOUGH I REALLY HAD NOTHING TO DO WITH IT.

MR. MONNIN: AND LET ME REFER YOU IF I MAY, YOUR HONOR, TO EXHIBIT -- JUST SO THAT WE'VE GOT IT CLEAR IN THE RECORD, EXHIBIT 3.

Q. (BY MR. MONNIN) COULD YOU PLEASE TELL THE COURT WHAT THAT DOCUMENT IS?

A. SURE. THIS WAS AN ESTIMATE OF WHAT MY COMPENSATION WAS TO BE FOR THE YEAR 2010. AND I GUESS WHAT IT ILLUSTRATES IS THAT, ULTIMATELY, I WAS PAID 3.00 POINTS OR PERCENT OF THE COMPANY'S PROFITS.

THE COURT: THAT'S NOT -- YOU'RE LOOKING AT THAT.

THE WITNESS: YEAH.

Q. (BY MR. MONNIN) SO JUST FOR THE COURT'S REFERENCE, WHAT I AM REALLY FOCUSING YOU IN ON, MARK, IS THE 3.00. WHAT DOES THAT REFER TO?

A. THAT WAS MY THREE PERCENT THAT WE DISCUSSED EARLIER, THREE PERCENT OF THE COMPANY INCENTIVE FEES.

Q. SO YOU RECEIVED THREE POINTS, IF YOU WILL, RELATED TO LEVEL GLOBAL'S INCENTIVE FEES, AS WELL AS LEVEL RADAR'S INCENTIVE FEES?

A. CORRECT. AND SO YOU SEE IT'S LISTED AS LG. IT'S LEVEL GLOBAL. AND THEN BELOW THAT WHERE IT SAYS LR, THAT STANDS FOR LEVEL RADAR.

Q. AND THEN GOING BACK TO THE POWERPOINT DECK, WHAT'S IN

EXHIBIT 3 WERE ESTIMATED NUMBERS. WHAT'S IN THIS, I GUESS IT'S EXHIBIT 2, AS WELL, WERE ACTUAL -- OUR ACTUAL NUMBERS?

A. TRUE. THAT'S ACTUAL NUMBERS, CORRECT.

Q. AND TO THE BEST OF YOUR RECOLLECTION, IS 1.195 MILLION WHAT YOU RECEIVED IN 2010 IN TERMS OF INCENTIVE-BASED COMPENSATION?

A. THAT'S CORRECT. AND IF I MAY JUST POINT ONE OTHER THING OUT, GOING BACK TO THE OTHER SLIDE WITH THE THREE PERCENT ON IT?

Q. SURE. LET'S DO THAT.

A. THERE IS A MISTAKE IN HERE IN THE SENSE THAT IT INCLUDES MY ENTIRE SIGNING BONUS AS PART OF MY COMPENSATION, WHICH IS OBVIOUSLY WRONG BECAUSE IT HADN'T VESTED. I AM TALKING ABOUT THE 486,300. YOU KNOW, THEY SORT OF THREW THAT IN THERE AS PART OF YOUR COMPENSATION. BUT TWO-THIRDS OF THAT HAD NOT VESTED AT THAT POINT. SO THAT'S WHY THE NUMBERS AREN'T GOING TO BE THE SAME AS THE NUMBERS WE WERE SHOWING EARLIER. I JUST WANT TO MAKE THAT CLEAR.

Q. BUT THE NUMBERS THAT ARE IN THE SLIDE DECK -- WE'VE MET OVER THE LAST NUMBER OF WEEKS; WE MET YESTERDAY -- THOSE NUMBERS, TO THE BEST OF YOUR KNOWLEDGE, ARE ACCURATE IN TERMS OF YOUR COMPENSATION?

A. CORRECT. CORRECT.

Q. ALL RIGHT. LET'S MOVE ON. WHAT I WANT TO GET TO HERE IS REVERSING THE THREE-PENNY COMPUTATION, BECAUSE WHAT I WANT THE

COURT TO UNDERSTAND IS, WHAT WAS THE OVERALL, YOUR PORTFOLIO PROFITABILITY, AS WELL AS LEVEL GLOBAL'S OVERALL PROFITABILITY FOR 2010, BECAUSE WE'RE GOING TO RUN SOME ARITHMETIC.

A. RIGHT. SO IF YOU REVERSE ENGINEER MY $1.2 MILLION YEAR-END INCENTIVE BONUS, THAT WAS THREE PERCENT, AS WE'VE DISCUSSED, OF THE COMPANY'S INCENTIVE FEES. SO THAT'S THREE PERCENT OF THAT $39.9 MILLION NUMBER RIGHT BELOW IT. SO THAT IS ROUGHLY WHAT LEVEL GLOBAL COLLECTED IN 2010 IN THE FORM OF INCENTIVE FEES. AND BECAUSE THEIR INCENTIVE FEES COMPRISE TEN PERCENT OF THE TOTAL RETURNS, THE TOTAL RETURNS TO THE COMPANY WERE $398.6 MILLION. SO, IN OTHER WORDS, OF THE THREE AND A HALF OR SO BILLION THAT LEVEL WAS INVESTING, THEY GENERATED 398 MILLION OF RETURN. AND OF THE 398 MILLION OF RETURN, THEY RETAINED 39.8 MILLION IN THE FORM OF INCENTIVE FEES. AND OF THE 39.8 MILLION IN INCENTIVE FEES, I WAS PAID THREE PERCENT OF THAT, WHICH IS 1.2 MILLION.

Q. SO WE RAN A COMPUTATION EARLIER FOR THE COURT. THE 648 GRAND IS THE PROFIT THAT HER HONOR HAS FOUND YOU LIABLE FOR IN INSIDER TRADING. CORRECT?

A. CORRECT.

Q. AND WHAT PERCENTAGE WAS THAT OF THE ROUGHLY 40 MILLION IN PROFIT THAT YOU RETURNED TO LEVEL GLOBAL?

A. WELL, OF THE 400 MILLION TO LEVEL GLOBAL HERE, IT WAS .1627 PERCENT.

Q. RIGHT. SO ROUGHLY WHAT WE HAVE IS THAT THE 648,000 WAS

1.65 PERCENT OF YOUR PERSONAL PROFIT.
A. RIGHT.
Q. AND IT'S .1627 OF LEVEL GLOBAL OVERALL?
A. OF LEVEL GLOBAL, RIGHT, UH-HUH.
Q. SO JUST TO SUM UP, LET'S MOVE ALONG TO THE NEXT SLIDE. YOU HEARD ME INTRODUCE OUR PRESENTATION TO THE COURT WHEN I INITIALLY STOOD UP. WHAT I'D LIKE TO DO NOW IS, WHAT I ADVISED THE COURT WAS THAT YOU REALLY DIDN'T RECEIVE ANY COMPENSATORY BENEFIT FOR THE 2.034 MILLION IN LOSS AVOIDED IN 2009. CORRECT?
A. CORRECT.
Q. WALK THE COURT THROUGH WHY THAT'S THE CASE IN 2009.
A. THAT'S THE CASE BECAUSE I DIDN'T RECEIVE ANY YEAR-END BONUS IN 2009.
Q. WHAT WAS THE CONTRACTUAL MEANS THAT YOU MAY HAVE HAD TO RECEIVE A BONUS OR SOME TYPE OF COMPENSATORY BENEFIT FOR WHAT HER HONOR HAS FOUND YOU DID ILLEGALLY IN 2009?
A. THAT MECHANISM WOULD HAVE BEEN 4.C IN MY CONTRACT, WHICH IS CALLED 2009 DISCRETIONARY BONUS, WHICH WAS NEVER EXERCISED OR OFFERED.
Q. AND YOUR ALL-IN COMPENSATION FOR 2010 INCLUDES WHAT?
A. SO THE THREE COMPONENTS WE DISCUSSED, MY SALARY, MY FIRST YEAR OF MY SIGNING BONUS, AND MY INCENTIVE BONUS AT THE END OF THE YEAR. AND THAT AMOUNTS TO 1.65 MILLION ROUGHLY.
MR. MONNIN: JUDGE, WHAT I'D LIKE TO DO NOW IS RUN

THROUGH WHAT WE BELIEVE ARE APPROPRIATE DISGORGEMENT MODELS BASED ON THE CASE LAW AND THE AUTHORITY. AND WE'LL DO THOSE MATHEMATICALLY. AND, REALLY, WHAT WE'RE TRYING TO GET TO IS WHAT WAS MR. MEGALLI'S DIRECT COMPENSATORY BENEFIT, WHICH WAS A PART OF OUR SUMMARY JUDGMENT BRIEFING. BUT WE'RE GOING TO DO IT MATHEMATICALLY NOW FOR THE COURT'S REFERENCE IN THE SLIDE DECK.

THE COURT: OKAY.

Q. (BY MR. MONNIN) SO, MR. MEGALLI, YOU'VE HELPED ME RUN SOME OF THESE COMPUTATIONS. AND YOU'RE THE WITNESS UP THERE. IF YOU COULD PLEASE WALK THE COURT THROUGH WHAT IS BEING ILLUSTRATED IN THIS NEXT SLIDE.

A. SURE. THE $648,655.00 WAS THE PROFITS ON THE SHORT SALE IN JULY OF 2010, WHICH WE'VE ALREADY DISCUSSED. AND SO THIS CALCULATION SHOWS THAT IF YOU TAKE TEN PERCENT OF THE 648,000, THAT'S $64,865.00. THAT'S THE PORTION THAT LEVEL GLOBAL, THE PARENT COMPANY, WOULD RETAIN OF THOSE PROFITS. THE REMAINING 90 PERCENT WOULD BE RETURNED TO THE INVESTORS. SO LEVEL GLOBAL WOULD RETAIN TEN PERCENT OF -- I'M JUST GOING TO SAY 648,000. SO THAT'S $64,000.00, ROUGHLY. AND OF THAT $64,000.00, I WAS TO BE PAID THREE PERCENT, WHICH IS $1946.00 ROUGHLY.

Q. SO IS IT FAIR TO SAY THAT, ESSENTIALLY WHAT YOU'VE DONE HERE IS RUN -- OR WHAT WE'VE DONE HERE IS RUN THE WATERFALL UNDER 4(D) AND 4(E) OF YOUR EMPLOYMENT AGREEMENT?

A. CORRECT.

Q. SO YOU WERE ENTITLED TO THREE PERCENT OF LEVEL GLOBAL'S TEN PERCENT.
A. CORRECT.
Q. AND THE TOP LINE NUMBER IS THE ILLEGAL PROFIT.
A. CORRECT.
Q. LET'S LOOK AT IT ANOTHER WAY BASED ON YOUR PERCENTAGE CONTRIBUTION OR THE PERCENTAGE CONTRIBUTION OF YOUR ILLEGAL CONDUCT OR THE CONDUCT THAT THE COURT HAS FOUND TO BE ILLEGAL --
A. RIGHT.
Q. -- IN TERMS OF LEVEL GLOBAL'S OVERALL PROFITABILITY.
A. RIGHT. SO, AGAIN, I WAS PAID ON LEVEL GLOBAL'S OVERALL PROFITABILITY, WHICH WAS APPROXIMATELY $398 MILLION THAT YEAR. THE CARTER'S TRADE, THAT SHORT SALE TRADE IN JULY OF '10, REPRESENTED 648,000 OUT OF 400 MILLION, WHICH WAS .1627 PERCENT OF LEVEL GLOBAL'S PROFITS. AND IF YOU LOOK AT .1627 PERCENT OF MY BONUS, WHICH, AGAIN, WAS BASED ON LEVEL GLOBAL'S TOTAL PROFITS, IT WAS THE SAME, $1946.00.
Q. NOW, LET ME ASK YOU, THIS $1.2 MILLION FIGURE, DOES THAT INCLUDE LEVEL RADAR INCENTIVE COMPENSATION?
A. YES, IT DOES.
Q. WOULD THERE HAVE BEEN A BASIS TO EXCLUDE LEVEL RADAR FROM THIS COMPUTATION?
A. PERHAPS, YES, YOU COULD EXCLUDE THAT IN THE SENSE THAT I HAD NOTHING TO DO WITH IT. SO PERHAPS.

Q. BUT YOU STILL GOT BONUSED ON IT.
A. CORRECT.
Q. SO YOU STILL GOT BONUSED ON IT. SO IT'S BEEN INCLUDED HERE IN TERMS OF THE CALCULATION.
A. CORRECT.

MR. MONNIN: AND, YOUR HONOR, THESE ARE THE TWO NUMBERS THAT WE ARE -- THE NUMBER THAT WE INCLUDED IN OUR SUMMARY JUDGMENT BRIEFING ESSENTIALLY RUNNING THE WATERFALL OF WHAT THE ILLEGAL PROFIT WAS FOR 2010 AND REDUCING THAT TO HIS ACTUAL COMPENSATORY BENEFIT. THAT'S THE FIRST SLIDE. THAT'S, THAT'S SLIDE NUMBER 14.

SLIDE NUMBER 15 IS TAKING HIS OVERALL INCENTIVE-BASED COMPENSATION AND RUNNING THE PERCENTAGE OF PROFITABILITY CONTRIBUTED BY MR. MEGALLI'S ILLEGAL CONDUCT AS FOUND BY THE COURT. SO TAKING THE 648 GRAND PROFIT, ILLEGAL PROFIT, RUNNING THAT INTO THE OVERALL PROFITABILITY OF LEVEL GLOBAL, AND THEN MULTIPLYING THAT PERCENTAGE TIMES HIS BONUS. SO I THINK, EITHER WAY, WE COME UP WITH THE SAME NUMBER, JUDGE. WE'RE KIND OF TALKING ABOUT THE SAME TYPES OF FACTORS. BUT IT'S JUST A DIFFERENT WAY ANALYTICALLY TO LOOK AT IT, WHICH WE BELIEVE, MR. MEGALLI BELIEVES IS WELL SITUATED WITHIN THE DISGORGEMENT AUTHORITY.

GIVEN THE COURT'S COMMENTARY IN YOUR HONOR'S ORDER, WE HAVE RUN ANOTHER COMPUTATION, JUDGE, WHICH IS SLIDE 16.

Q. (BY MR. MONNIN) SO, MR. MEGALLI, WHY DON'T YOU TAKE THE

COURT THROUGH THE TOP LINE COMPUTATION.
A. SURE.
Q. WHAT ARE YOU DOING?
A. THE 648,000, AGAIN, IT'S THE PROFIT ON THE SHORT SALE FROM JULY OF 2010. THE 39.2 MILLION IS THE AMOUNT THAT MY CONSUMER DISCRETIONARY FUND RETURNED IN 2010. AND, THEREFORE, THE 648,000 WAS ABOUT 1.65 PERCENT OF THE PROFITS THAT WERE GENERATED IN MY CONSUMER-FOCUSED FUND THAT YEAR.
Q. AND WHEN YOU RUN -- SO WE'RE APPLYING THAT 1.65 PERCENT FIGURE AGAINST YOUR INCENTIVE COMP?
A. CORRECT.
Q. AND THE TOTAL IS 19,000?
A. CORRECT, YEAH, $19,790.00.
MR. MONNIN: SO, YOUR HONOR, WHAT WE HAVE ATTEMPTED TO DO, OR WHAT WE'VE DONE IN SLIDE 15 VERSUS SLIDE 16 IS, WE'VE TAKEN MR. MEGALLI'S ILLEGAL TRADING ACTIVITY AS FOUND BY THE COURT, AND WE'VE RUN IT THROUGH HIS PORTFOLIO'S INDIVIDUAL PROFITABILITY OF 40 MILLION, AS WELL AS THE OVERALL LEVEL GLOBAL PROFITABILITY OF 398 MILLION.
THE COURT: I KNOW YOU'VE GIVEN ME DISCRETIONARY INCENTIVE PAY IN 2009, ARE YOU JUST BASICALLY WIPING 2009 OUT OF THE PICTURE?
MR. MONNIN: YES, YOUR HONOR. FROM A DISGORGEMENT PERSPECTIVE, GIVEN OUR ARGUMENT THAT WHAT DISGORGEMENT IS GETTING AT IS, WHAT DID MY CLIENT PERSONALLY PROFIT FROM HIS

ILLEGAL ACTIVITY, AND WHAT WAS HIS PERSONAL COMPENSATORY BENEFIT, GIVEN THAT THE CASE LAW IS DIRECTED TO HOW ARE YOU GOING TO RETURN HIM TO THE POSITION PRIOR TO THE ILLEGAL ACTIVITY. AND OUR ARGUMENT WITH RESPECT TO THE 2009 TRADE IS THAT, BECAUSE HE DIDN'T GET ANY COMPENSATORY BENEFIT FOR IT, IT ESSENTIALLY REALLY DOESN'T FACTOR INTO THE DISGORGEMENT ANALYSIS.

I UNDERSTAND THAT THE COURT MAY WANT TO CONSIDER IT IN TERMS OF AN APPROPRIATE CIVIL PENALTY IN TERMS OF A FACTOR IN AGGRAVATION OR MITIGATION, WHICH IS A SEPARATE ISSUE. BUT OUR POSITION WITH RESPECT TO -- AND I'LL JUST SAY IT -- OUR POSITION WITH RESPECT TO APPROPRIATE DISGORGEMENT, YOUR HONOR, IS THE $1900.00 FIGURE, THE 1945.97 FIGURE, WHICH IS, WHAT DID MR. MEGALLI'S ILLEGAL CONDUCT IN 2010 CONTRIBUTE TO HIS PERSONAL COMPENSATION DURING THAT YEAR, AND THE WAY WE GET THERE IS THAT, SO MANY OF THE OTHER CONTRIBUTORS TO HIS COMPENSATION DURING 2010 WERE FIXED, REALLY DIDN'T -- HIS PERFORMANCE REALLY ONLY CAME INTO PLAY WITH RESPECT TO THE INCENTIVE-BASED COMPENSATION.

SO WE BELIEVE UNDER THE DISGORGEMENT CASE LAW, ALL HE SHOULD BE LIABLE FOR IN DISGORGEMENT IS WHERE, IS WHERE THAT TRADING ACTIVITY, THAT ILLEGAL TRADING ACTIVITY AS FOUND BY THE COURT ACTUALLY FACTORED IN AND HAD AN IMPACT ON HIS VARIABLE COMPENSATION. AND, CERTAINLY, YOU KNOW, WE WANT --

THE COURT: SO WHY THE FIGURE 1945 RATHER THAN 19,790

ON SLIDE 15.

MR. MONNIN: WELL --

THE COURT: CONCEPTUALLY.

MR. MONNIN: CONCEPTUALLY, JUDGE, I THINK THAT THE IDEA THERE IS THAT, IN REALITY, UNDER HIS EMPLOYMENT AGREEMENT, THE OPERATIVE FACTOR THAT GOVERNS WHAT HE WAS SUPPOSED TO BE PAID IS ACTUALLY LEVEL GLOBAL'S OVERALL PROFITABILITY, WHICH IS THE $398 MILLION FIGURE, AS OPPOSED TO HIS PERSONAL PROFITABILITY, WHICH WAS REALLY ONLY RELEVANT TO SETTING THE POINT TOTAL, THE THREE POINTS VERSUS THE FIVE POINTS UNDER SECTIONS 4(D) AND 4(E). SO WHAT WE'RE TALKING ABOUT, JUDGE, IS THAT THE 648 GRAND IN 2010 HAD A 1.65 PERCENT IMPACT ON MR. MEGALLI'S CONSUMER PORTFOLIO'S RETURN OF APPROXIMATELY 40 MILLION.

SO, YOU KNOW, WE WOULD CONTEND THAT THE REASONABLE INFERENCE FROM THAT MATH IS THAT THE VAST MAJORITY OF WHAT MR. MEGALLI WAS DOING DID NOT AT ALL RELATE TO CARTER'S, DID NOT AT ALL RELATE TO ANY CRIMINAL ACTIVITY, AND, REALLY, THE ONLY WAY THAT IT FACTORS INTO HIS PERSONAL COMPENSATORY BENEFIT IS IN SETTING THE POINT TOTAL UNDER SECTIONS 4(D) AND 4(E) OF HIS AGREEMENT.

WHEN YOU'RE REALLY LOOKING TO SEE WHAT HIS PERSONAL COMPENSATORY BENEFIT WAS IN TERMS OF RETURNING HIM TO THE STATUS QUO ANTE BEFORE HE ENGAGED IN THIS CONDUCT, YOU LOOK AT WHAT HE PUT IN HIS POCKET. AND OUR POSITION THERE IS THAT IT'S

THE 1945 FIGURE, AS OPPOSED TO THE 19,000 FIGURE. BUT, YOU KNOW, WE UNDERSTAND THAT IT MAY BE LOGICAL FOR THE COURT, AS AN ALTERNATIVE, TO SAY, WELL, YOU KNOW, HE IMPACTED HIS OWN PERSONAL PROFITABILITY OR HIS OWN CONSUMER PORTFOLIO PROFITABILITY TO THE TUNE OF 1.65 PERCENT. AND 1.65 PERCENT OF HIS BONUS IS THE $19,000.00 FIGURE.

ANOTHER THING THAT I'D LIKE TO POINT THE COURT TO AND, FRANKLY, ANOTHER ANALYTIC, JUDGE, IS --

Q. (BY MR. MONNIN) MR. MEGALLI, LET ME POINT YOU TO PARAGRAPH 4(F) OF YOUR EMPLOYMENT AGREEMENT. WERE YOU ENTITLED TO A MINIMUM AMOUNT OF COMPENSATION DURING 2010?

A. YES.

Q. AND PLEASE TELL THE COURT WHAT, WHAT THAT AMOUNT WAS.

A. THE MINIMUM COMPENSATION FOR CALENDAR YEAR 2010 SHALL BE NO LESS THAN $750,000.00.

Q. SO TELL THE COURT WHAT, WHAT'S BEING ILLUSTRATED IN SLIDE 17.

A. SLIDE 17 SHOWS THAT, IF YOU LOOK AT MY TOTAL COMPENSATION IN 2010, WHICH WAS ABOUT $1.65 MILLION --

Q. AND THAT'S NOT THE 1.2 INCENTIVE-BASED COMPENSATION.

A. CORRECT, BECAUSE THAT INCLUDES MY FIXED -- MY SALARY AND MY FIXED BONUS, MY SIGNING BONUS. BUT THAT'S MY ALL-IN COMPENSATION, INCLUDING FIXED AND VARIABLE. BUT IF YOU DEDUCT THE 750,000 GUARANTEE, THEN THAT LEAVES A REMAINDER OF $906,000.00, WHICH WAS ABOVE AND BEYOND WHAT MY GUARANTEE WAS

FOR THAT YEAR.

Q. SO, IN ESSENCE, WHAT'S BEING ILLUSTRATED IS THAT YOU HAD A MINIMUM AMOUNT OF COMPENSATION. AND THE DELTA BETWEEN WHAT YOU ACTUALLY MADE VERSUS THE MINIMUM AMOUNT IS 900 GRAND?

A. RIGHT.

Q. APPROXIMATELY? AND THEN WHAT ARE THE MULTIPLIERS THERE, THE .1627?

A. THESE ARE THE SAME ONES YOU JUST DISCUSSED. BUT THE .1627 PERCENT IS THE 648,000 FROM THE SHORT SALE, DIVIDED BY THE $398 MILLION OF TOTAL PROFITS FOR LEVEL GLOBAL. SO, IN OTHER WORDS, THE CARTER'S PROFITS REPRESENTED POINT SIX -- POINT 1627 PERCENT OF WHAT LEVEL GLOBAL MADE THAT YEAR. THE 1.65 PERCENT IS THE SAME $648,000.00 EXCEPT AS A PERCENTAGE OF WHAT MY CONSUMER FUND CONTRIBUTED IN PROFITS THAT YEAR, WHICH WAS $39.2 MILLION.

SO THESE ARE THE TWO DIFFERENT WAYS YOU JUST SUGGESTED LOOKING AT CARTER'S AS A PERCENTAGE OF PROFITS. THE FIRST WAY IS CARTER'S AS A PERCENTAGE LEVEL GLOBAL'S PROFITS. AND THE SECOND WAY IS CARTER'S AS A PERCENTAGE OF THE CONSUMER FUND PROFITS.

MR. MONNIN: SO, YOUR HONOR, WHAT WE'VE DONE BETWEEN SLIDES 14 THROUGH 17 IS, 14 THROUGH 16, WHAT WE'RE ACCOUNTING FOR IS MR. MEGALLI'S INCENTIVE-BASED COMPENSATION OF 1.2 MILLION FOR 2010. WHAT WE'RE ACCOUNTING FOR ON SLIDE 17 IS THAT HE HAD A MINIMUM AMOUNT OF COMPENSATION BY CONTRACT,

WHICH, BY THE WAY AND FOR THE RECORD --

Q. (BY MR. MONNIN) DID YOUR PERFORMANCE AS A PORTFOLIO MANAGER IN ANY WAY IMPACT WHETHER YOU WERE ENTITLED TO A MINIMUM AMOUNT OF 750 GRAND?

A. NO.

MR. MONNIN: SO WE'RE ESSENTIALLY FILTERING OUT EITHER MR. MEGALLI'S INCENTIVE-BASED COMPENSATION OF 1.2 MILLION OR HIS COMPENSATION ABOVE AND BEYOND WHAT HE WAS CONTRACTUALLY ENTITLED TO IN 2010 AND THEN EFFECTIVELY RUNNING THE SAME PERCENTAGES, HOW MATERIAL WAS HIS CRIMINAL CONDUCT OR HIS ILLEGAL TRADING ACTIVITY AS FOUND BY THE COURT, HOW MATERIAL WAS THAT AND WHAT IMPACT DID THAT HAVE ON WHAT HE PUT IN HIS POCKET. SO, LARGELY, THE SAME TYPE OF ANALYSIS, JUDGE, WHETHER YOU USE THE -- HIS CONSUMER PORTFOLIO PROFIT VERSUS LEVEL GLOBAL'S OVERALL PROFIT.

I'LL WRAP UP HOPEFULLY FAIRLY QUICKLY WITH THE LAST PART OF MY PRESENTATION, JUDGE, WHICH IS, WHAT WAS THE MATERIALITY OF THE CARTER'S TRADING ACTIVITY. AND THIS IS REALLY MORE DIRECTED TO THE CIVIL PENALTY DETERMINATION, ALTHOUGH, I DON'T KNOW, IT MAY HAVE SOME IMPACT ON THE COURT'S DISGORGEMENT ANALYSIS.

Q. (BY MR. MONNIN) BUT, MR. MEGALLI, WERE YOU ABLE TO OBTAIN EVIDENCE OF YOUR OVERALL TRADING ACTIVITY AT LEVEL GLOBAL IN THE COURSE OF THE CRIMINAL INVESTIGATION?

A. YES.

Q. AND HOW WAS THAT DOCUMENTATION SORTED?
A. THESE ARE THE DOCUMENTS THAT WE TALKED ABOUT EARLIER THAT SHOWED THE EIGHT MILLION PROFIT IN THE CONSUMER FUND IN '09 AND THE 39.2 MILLION OF PROFIT IN THE CONSUMER FUND IN 2010. IN THOSE DOCUMENTS, IT ALSO INCLUDES A LIST OF ALL OF THE STOCKS THAT I TRADED IN EACH OF THOSE YEARS.
Q. AND THE EXHIBIT NUMBER FOR 2009 IS WHAT?
A. FOR '09, IT'S EXHIBIT 4. AND FOR '10, IT'S EXHIBIT 5.
Q. SO THE COURT ASKED YOU ABOUT THIS EARLIER. CAN YOU POINT THE COURT TO WHERE THE CARTER'S TRADING IS REFLECTED IN EXHIBITS 4 AND 5?
A. YEAH. TOWARDS THE END OF THE DOCUMENT ON -- I DON'T THINK THESE HAVE PAGE NUMBERS, BUT IT'S ABOUT THE THIRD-TO-LAST PAGE.
Q. AND ARE YOU TALKING ABOUT EXHIBIT 4?
A. I'M TALKING ABOUT EXHIBIT 4.
Q. SO THIS IS THE LIQUIDATION OF THE LONG POSITION?
A. WELL, IT'S NOT THE LIQUIDATION, PER SE. IT'S THE SUM OF ALL OF THE PROFITS IN CARTER'S FOR THAT GIVEN YEAR. REALLY WHAT IT'S MEANT TO BE IS A SUMMARY OF ALL THE STOCKS YOU TRADED IN A GIVEN YEAR. AND I GUESS THE POINT HERE IS THAT THERE WERE 105 STOCKS THAT WERE ON THIS LIST IN 2009. AND IN THE SIMILAR DOCUMENT FOR 2010, EXHIBIT 5, THERE WERE 98 STOCKS THAT I TRADED. SO IT WAS ONE OUT OF ROUGHLY 100 STOCKS THAT I HAD TRADED IN EACH OF THOSE TWO YEARS.
Q. SO IN TERMS OF JUST THE OVERALL NUMBER OF ISSUERS THAT YOU

WERE TRADING IN, CARTER'S WAS BASICALLY ONE PERCENT?
A. CORRECT.
Q. AND YOU'RE GETTING -- THE BASIS FOR THAT IS EXHIBITS 4 AND 5, YOU JUST MANUALLY COUNTED?
A. CORRECT.
Q. LET'S TALK ABOUT THE CARTER'S TRADES.
THE COURT: WHAT ARE ALL THESE INITIALS HERE?
THE WITNESS: THOSE ARE STOCK TICKERS FOR DIFFERENT COMPANIES IN THE CONSUMER SPACE THAT I TRADED IN A GIVEN YEAR. SO, FOR EXAMPLE, COH IS COACH, THE HANDBAG COMPANY. GPS IS GAP STORES. YOU KNOW, THEY ARE TICKERS FOR STOCKS.
THE COURT: OKAY.
Q. (BY MR. MONNIN) AND THEY ARE ALPHABETICAL, CORRECT?
A. THEY ARE ALPHABETICAL, UH-HUH.
THE COURT: IS THAT THE SAME IN THE -- ALL THE INITIALS ON THE FIRST PAGE OF EXHIBIT 4 WHERE IT SAYS TOP FIVE SKEW PROSPECT COST WILL BE UTILIZED? WHAT ARE THOSE?
THE WITNESS: A SKEW IS A RISK-REWARD RATIO. SO, IN OTHER WORDS, IF I THINK A STOCK MIGHT BE WORTH SOMEWHERE BETWEEN 100 IN THE WORST CASE AND 200 IN THE BEST CASE, IF THE STOCK IS TRADING AT 150, YOU WOULD SAY THAT'S $50.00 OF DOWNSIDE RISK AND $50.00 OF UPSIDE POTENTIAL. SO THE RATIO THERE IS 1.0. IT'S ONE-TO-ONE UPSIDE VERSUS DOWNSIDE. SO WHEN I CREATE PRICE TARGETS FOR THESE CONSUMER NAMES, THIS IS LOOKING TO SEE WHICH HAS THE BEST AND WORST RISK REWARDS ON A

SHORT SIDE AND LONG SIDE.

MR. MONNIN: AND, JUDGE, WE HAVE OTHER HOPEFULLY MORE USER-FRIENDLY EXTENSIONS OF MATERIALITY. SO --

THE COURT: ASSUMING, MAKING NO ASSUMPTIONS WITH THE MATH SKILLS HERE, I APPRECIATE IT.

Q. (BY MR. MONNIN) LET'S MOVE ON TO SLIDE 19. SO LET'S TALK ABOUT --

MR. MONNIN: AND, JUDGE, I'M GOING TO REFER THE COURT AND MR. MEGALLI TO EXHIBIT 6 AND 7 FOR THE UNDERLYING DATA ON THIS SLIDE.

Q. (BY MR. MONNIN) SO DID YOU UNDERTAKE AN ANALYSIS OF HOW MANY TIMES YOU HAD POSITIONS OR TRADED POSITIONS IN CARTER'S VERSUS ALL OF YOUR CONSUMER PORTFOLIO TRADING?

A. YES.

Q. AND TELL THE COURT HOW YOU DID THAT, WHAT YOU REFERRED TO.

A. WELL, IN THE PARALLEL CRIMINAL INVESTIGATION, WE WERE PROVIDED WITH A MICROSOFT EXCEL SPREADSHEET, WHICH LISTED EVERY TRADE I DID OR THAT I WAS RESPONSIBLE FOR DURING THE ROUGHLY ONE-AND-A-HALF-YEAR PERIOD THAT I WORKED AT LEVEL GLOBAL. AND IT AMOUNTED TO 1861 INDIVIDUAL TRADES IN COMPANY STOCK.

Q. AND WAS THAT JUST -- REFERRING TO EXHIBIT 6, YOU JUST MANUALLY COUNTED THEM UP? I KNOW IT'S AN EXCEL SPREADSHEET AND IT WILL DO IT FOR YOU.

A. WELL, IN MICROSOFT EXCEL, IT WILL COUNT FOR YOU HOW MANY CELLS THERE ARE, SO, YES.

Q. AND THIS IS EXHIBIT 6?
A. UH-HUH.
Q. WHAT'S, WHAT'S BEING HIGHLIGHTED ON THE DOCUMENT?
A. EACH TIME THERE WAS A TRADE EXECUTED IN CARTER'S IN MY CONSUMER FUND.
Q. WHAT DOES LGMO REFER TO?
A. THAT'S LEVEL GLOBAL. I'M NOT -- SOMETHING ABOUT THE OPERATE -- IT'S AN OPERATIONAL TERM, LEVEL GLOBAL MANAGEMENT OPERATIONS. IT'S A TRADING BOILERPLATE TERM.
Q. SO IF THE COURT REFERS TO EXHIBIT 6, HAVE WE -- WHAT HAVE WE HIGHLIGHTED IN EXHIBIT 6?
A. TRADING IN CARTER'S. CRI IS THE TICKER.
Q. AND THEN HOW DID YOU BUILD ON EXHIBIT 6 TO CREATE EXHIBIT 7?
A. WELL, EXHIBIT 6 IS VERY HARD TO ANALYZE BECAUSE IT'S NOT SORTED BY COMPANY. IT'S SORTED BY TRADING DATE. SO I JUST TOOK EXHIBIT 6, AND I SORTED IT BY COMPANY SO THAT ALL OF THE CARTER'S STOCKS WOULD BE NEXT TO EACH -- ALL OF THE CARTER'S TRADES WOULD BE NEXT TO EACH OTHER; ALL OF THE MCDONALD'S TRADES WOULD BE NEXT TO EACH OTHER AND SO FORTH.
Q. SO EXHIBIT 7 REFLECTS CONTIGUOUSLY, IF YOU WILL, ALL OF THE CARTER'S TRADING.
A. RIGHT. SO, FOR EXAMPLE, IN EXHIBIT 7, WHICH IS, AGAIN, A SUMMARY OF EXHIBIT 6, IF YOU OWNED 100,000 SHARES OF CARTER'S AND YOU BOUGHT AN ADDITIONAL 100,000 SHARES OF CARTER'S, IT

WOULD SHOW AS OWNING 200,000 TOTAL CUMULATIVE SHARES OF CARTER'S. IN OTHER WORDS, IT WOULD KEEP TRACK OF THE TOTAL POSITION SIZE IN EACH OF THE NAMES.

Q. AND, JUST FOR THE RECORD AND SO THAT WE'RE CLEAR, TELL THE COURT, WHAT ARE THE THUMBNAILS OF THE TRADES THAT SHE'S FOUND YOU LIABLE FOR IN INSIDER TRADING? WHAT'S --

THE COURT: WHAT LINE IS THE BEGINNING PART OF THIS? BECAUSE I DON'T THINK GIVING ME -- THE HIGHLIGHTING DOESN'T APPEAR ON MINE.

MR. MONNIN: IT SHOULD BE EXHIBIT 7, YOUR HONOR.

THE COURT: YES. I'M ON SEVEN.

MR. MONNIN: SHOULD BEGIN ON PAGE SEVEN.

THE COURT: I SEE IT. THANK YOU.

Q. (BY MR. MONNIN) SO, REALLY, MARK, WHAT I AM ASKING YOU TO TELL THE COURT IS, DESCRIBE THE TWO TRADES. I MEAN, I'VE BEEN REFERRING TO A LONG POSITION. I'VE BEEN REFERRING TO SHORT SALES. JUST TELL THE COURT WHAT WE'RE TALKING ABOUT.

A. SURE. SO THE FIRST POSITION IN CARTER'S THAT I HAD I INITIATED ON SEPTEMBER 14TH OF 2009. AND THAT WAS THE LONG POSITION, MEANING WE BOUGHT STOCK IN THE COMPANY. AND WE LIQUIDATED THAT POSITION ABOUT A MONTH AND A HALF LATER. I THINK THE LAST SALE THERE WAS AROUND OCTOBER 26TH OF 2009. AND THAT POSITION ULTIMATELY BECAME A 350,000-SHARE POSITION, I BELIEVE. AND IT WAS -- WE SOLD OUT OF THAT POSITION AROUND THE END OF OCTOBER. AND THAT'S WHAT YOU COULD CALL THE LONG

POSITION IN CARTER'S BECAUSE THE SECOND TRADE YOU WERE ASKING ABOUT WAS A SHORT POSITION IN CARTER'S WHICH WAS INITIATED IN JULY OF 2010 AND COVERED -- WHICH MEANS GOTTEN OUT OF -- IN JULY, THE SAME MONTH, OF 2010.

Q. SO I'M SURE THE COURT PROBABLY WANTS TO KNOW, WHAT ARE THE INTERVENING CARTER'S TRADES?

A. WELL, THE INTERVENING CARTER'S TRADES WAS, AFTER THE STOCK WENT DOWN FOLLOWING THE ACCOUNTING ANNOUNCEMENT, WE BOUGHT BACK STOCK BECAUSE IT WAS VERY DEPRESSED AND HELD THAT STOCK FROM LATE OCTOBER OF 2009 THROUGH ABOUT MAY OF 2010. HOWEVER, THE PROFIT FROM THAT PERIOD OF TIME FOR PURPOSES OF TODAY WAS NOT ALLEGED TO HAVE WRONGLY TO BE ASSOCIATED WITH.

Q. SO WE ESSENTIALLY HAVE THREE BUCKETS OF TRADES.

A. RIGHT.

Q. THERE'S A FIRST LONG POSITION?

A. CORRECT.

Q. THERE'S A SECOND -- FIRST LONG POSITION INITIATED IN SEPTEMBER 2009, LIQUIDATED IN OCTOBER 2009.

A. CORRECT.

Q. SECOND LONG POSITION --

A. AND THAT RESULTED IN THE 2,034,000 OF LOSS AVOIDANCE PROFIT.

Q. SECOND LONG POSITION OCTOBER OF 2009 UNTIL WHEN?

A. APPROXIMATELY MAY OF 2010.

Q. AND SHORT POSITION --

THE COURT: WHERE DID THE SECOND ONE BEGIN?

MR. MONNIN: IT SHOULD BE OCTOBER 29.

THE WITNESS: THE SECOND ONE WOULD BE --

THE COURT: OCTOBER 29?

THE WITNESS: RIGHT, OCTOBER 29.

THE COURT: IT SAYS SHORT. YOU DON'T SAY LONG. OR AM I MISSING IT? IT SAYS SHORT ON MAY 28TH, 2010. I GUESS IT SAYS, SHOULD BE SHORT ON JULY 8TH, 2010.

THE WITNESS: RIGHT. SO --

THE COURT: HOW DO I DISTINGUISH?

THE WITNESS: SURE. RIGHT. SO WHEN YOU, WHEN YOU BUY STOCK IN A COMPANY, EFFECTIVELY YOU'RE BETTING THAT THE STOCK IS GOING TO RISE IN PRICE.

THE COURT: RIGHT.

THE WITNESS: AND SO THE TRADING TERMINOLOGY THERE IS BUY OR SELL. SO WHEN YOU ADD TO YOUR POSITION, YOU'RE BUYING STOCK IN THAT COMPANY. WHEN YOU'RE LIQUIDATING YOUR POSITION, YOU'RE SELLING STOCK IN THAT COMPANY. WHEN YOU SHORT A STOCK, YOU'RE BETTING THAT THE STOCK PRICE IS GOING TO DECLINE. AND SO WHEN YOU BUILD A POSITION, THAT'S CALLED SHORTING A STOCK. AND WHEN YOU'RE EXITING THAT POSITION, IT'S CALLED COVERING A STOCK.

THE COURT: RIGHT.

THE WITNESS: COVERING A SHORT. AND SO, FOR EXAMPLE, IF YOU BELIEVED THE STOCK WAS OVERVALUED AND IT WAS TRADING AT

$50.00 A SHARE AND YOU BELIEVED THAT IT WAS WORTH 40, YOU MIGHT SHORT IT AT 50. AND WHEN THE STOCK GETS TO 40, YOU MIGHT COVER IT. AND IN THAT CASE, YOU WOULD MAKE A $10.00 PROFIT. IT'S SORT OF THE FLIP SIDE OF BEING LONG IN STOCK. IT'S A BET THAT A STOCK WILL DECLINE.

MR. MONNIN: OKAY. AND, YOUR HONOR, WE'RE NOT HERE AT ALL TO CONTEST --

THE COURT: ALL RIGHT.

MR. MONNIN: -- THE LOSS AVOIDED WAS 2.034 MILLION ON THE INITIAL LONG POSITION, AND HIS PROFIT -- OR NOT HIS, BUT LEVEL GLOBAL'S PROFIT IN JULY 2010 WAS 648,000. WE'RE JUST TRYING TO DRIVE DOWN TO COMPENSATORY BENEFIT.

THE COURT: I UNDERSTAND. JUST TRYING TO UNDERSTAND THE DATA.

Q. (BY MR. MONNIN) WELL, AND JUST TO HIT THE HIGH POINT HERE, I MEAN, HOW OFTEN WERE YOU TRADING IN CARTER'S VERSUS THE OTHER CONSUMER PORTFOLIO STOCKS?

A. A TOTAL OF 46 TRADES IN CARTER'S RELATIVE TO 1861 TRADES OVERALL. NOW, LET ME THROW IN A CAVEAT, WHICH IS, SOMETIMES IF YOU PLACE AN ORDER TO SELL 100,000 SHARES, IT MIGHT TAKE THE TRADER TWO BLOCKS OF SHARES TO SELL THAT 100,000. SHE MIGHT SELL 50,000 AND THEN ANOTHER 50,000. THAT WOULD BE COUNTED AS TWO TRADES, EVEN THOUGH IT WAS ONLY ONE TRADING ORDER. SO I JUST WANT TO BE CLEAR. THERE WEREN'T 46 SEPARATE ORDERS TO TRADE CARTER'S, BUT THERE WERE 46 INSTANCES OF TRADING IN

CARTER'S.

Q. UNDERSTOOD. SO LET'S MOVE ON TO THE NEXT SLIDE. AND WE'RE DRIVING TOWARD THE END HERE. SO WE TALKED ABOUT THE INITIAL CARTER'S LONG POSITION IN ROUGHLY SEPTEMBER 2009?

A. RIGHT.

Q. WHERE DOES THAT FIT IN IN TERMS OF OVERALL SIZE IN TERMS OF THE OTHER CONSUMER PORTFOLIO LONG POSITIONS?

A. SO THIS IS A LIST OF NAMES WITHIN MY CONSUMER-FOCUSED FUND. AND IT SHOWS THEIR AVERAGE AND MAXIMUM POSITION SIZES. SO, FOR EXAMPLE, DOLLAR TREE WAS ABOUT A $33 MILLION POSITION ON AVERAGE AND GOT TO BE AS BIG AS A $68 MILLION POSITION. FOSSIL WAS 37 MILLION AND ULTIMATELY GOT TO BE AT ITS MAXIMUM POSITION 63.9 MILLION. AND THESE ARE EXAMPLES OF STOCKS THAT I WOULD SAY I WAS MORE FOCUSED ON, FRANKLY, THAN CARTER'S. CARTER'S WAS AT THE BOTTOM. I MEAN, THIS ISN'T A COMPREHENSIVE LIST, BUT THIS IS SORT OF A SAMPLING JUST TO PROVIDE SOME CONTEXT WHERE IT SHOWS THAT CARTER'S IN THAT FIRST PERIOD, THAT SEPTEMBER-OCTOBER OF '09 PERIOD, WAS ABOUT A $6 MILLION POSITION ON AVERAGE AND GOT TO BE ABOUT A $9.2 MILLION POSITION, ROUGHLY, AT ITS MAXIMUM POINT. SO I GUESS --

THE COURT: SO THIS IS '09, PAGE 20?

THE WITNESS: THIS IS '09, YEAH.

Q. (BY MR. MONNIN) AND YOU REFERENCED IT BRIEFLY, IT'S FAIR TO SAY THAT YOU WERE SPENDING THE MAJORITY OF YOUR ANALYTICAL ATTENTION ON THE BIGGER POSITIONS. RIGHT?

A. WELL, CORRECT. I MEAN, NOT ONLY WERE THEY BIGGER POSITIONS, I WOULD ALSO ADD ONE OTHER THING, JUST FOR CONTEXT, WHICH IS, SOMETIMES IF YOU REALLY WERE FOCUSED ON AN IDEA, YOU WOULD GO TO THE INVESTMENT MANAGER, MR. GANEK, AND YOU WOULD SUGGEST THAT HE ALSO BUY STOCK ALONG WITH YOU AND ISSUE IN A COMPANY. SO A LOT OF THOSE BIGGER NAMES, FOR EXAMPLE, LET'S TAKE MCDONALD'S, I HAD ABOUT A 30 -- 29 AND A HALF MILLION, $30 MILLION POSITION IN MCDONALD'S IN MY FUND. BUT DAVID ALSO HAD AN ADDITIONAL ROUGHLY $150 MILLION AT MCDONALD'S BASED ON MY RECOMMENDATION IN HIS FUND. AND IT WAS CALLED A CENTER BOOK WHERE HE CHERRY-PICKS EVERYONE'S BEST IDEAS. AND IF HE SOUNDS LIKE YOU'RE CONFIDENT AND, YOU KNOW, FOCUSED ON SOMETHING, HE WOULD BUY IT ALONG WITH YOU IN HIS OWN CENTER BOOK, IT WAS CALLED.

NOW, A LOT OF THOSE TOP NAMES THERE WERE NAMES THAT I WOULD PITCH TO DAVID GANEK TO GO INTO HIS CENTER BOOK. CARTER'S I NEVER PITCHED TO HIM BECAUSE IT JUST WASN'T A BIG FOCUS FOR ME.

Q. HOW ABOUT WITH RESPECT TO THE SECOND LONG POSITION THAT WAS INITIATED IN OCTOBER 2009?

A. NEVER PITCHED IT TO HIM. HE NEVER TRADED IN CARTER'S.

Q. DID YOU EVER PERSONALLY TRADE IN CARTER'S?

A. I NEVER PERSONALLY TRADED IN ANY STOCK WHEN I WAS AT LEVEL GLOBAL FOR MYSELF.

Q. INCLUDING THE CONSUMER STOCKS IN WHICH YOUR PORTFOLIO HAD

LARGER POSITIONS THAN CARTER'S.

A. CORRECT.

Q. NOW, LET'S DO ESSENTIALLY THE SAME ANALYSIS WITH RESPECT TO THE SHORT POSITION FROM JULY 2010. TELL THE COURT WHAT'S ILLUSTRATED.

A. SO THESE ARE SAME EXACT THING, EXCEPT THESE ARE SHORT POSITIONS RATHER THAN LONG POSITIONS. AND WHEN YOU LOOK AT -- AND THESE ARE IN BILLIONS OF DOLLARS, OBVIOUSLY. I GUESS I SHOULD SAY THAT. WHEN YOU LOOK AT A SHORT POSITION, TYPICALLY YOU LIST IT AS A NEGATIVE NUMBER. THAT'S WHY YOU SEE ALL THESE NEGATIVE NUMBERS THERE. BUT, FOR EXAMPLE, WITH TIFFANY'S, WE WERE SHORT IN MY FUND ABOUT $19 MILLION WORTH OF TIFFANY STOCK. AND THAT WAS A PRETTY BIG BET THAT TIFFANY WAS OVERVALUED AT THE TIME. AND IT WAS AS BIG AS A $35 MILLION BET IN MY ROUGHLY $500 MILLION PORTFOLIO.

AND CARTER'S, WHEN I SHORTED CARTER'S IN JULY OF 2010, IT WAS ABOUT A FIVE -- LOOKS LIKE SIX TO $7 MILLION POSITION AVERAGE IN MAXIMUM. SO, I MEAN, IT WAS SMALLER THAN OTHER NAMES I WAS SHORT.

Q. IS IT ACCURATE OR FAIR TO SAY THAT SHORT POSITIONS ARE RISKIER? THERE'S MORE RISK THAT'S INHERENT IN THEM BECAUSE YOU HAVE TO COVER?

A. CONCEPTUALLY YOU COULD ARGUE THEY ARE RISKIER BECAUSE YOU HAVE UNLIMITED LOSS. FOR MOST HEDGE FUND MANAGERS, YOU DON'T PARTICULARLY CONSIDER THEM TO BE RISKIER THAN A LONG BECAUSE

YOU'RE TRYING TO BALANCE ALL YOUR LONGS WITH ALL YOUR SHORTS, AND YOU NEED A COMBINATION OF BOTH. SO, FOR ME, I WAS PRETTY AGNOSTIC ON WHETHER I WAS GOING LONG SOMETHING OR GOING SHORTED. I WAS JUST TRYING TO FIND THINGS THAT WERE OVERVALUED OR UNDERVALUED.

Q. NOW LET'S TALK ABOUT AS THE LAST TOPIC THE PERCENTAGE OF THE CONSUMER PORTFOLIO CAPITAL THAT WAS ASSOCIATED WITH THE CARTER'S LONG AND SHORT POSITIONS.

A. WELL, BASED ON THOSE NUMBERS THAT WE JUST HAD ON THE SCREEN, WHEN I WAS LONG CARTER'S, IT WAS ABOUT A TWO AND A HALF POSITION, TWO AND A HALF PERCENT POSITION OUT OF MY CONSUMER FUND, AND IT GOT AS BIG AS A 3.67 POSITION, 3.67 PERCENT POSITION. AND ON THE SHORT SIDE, IT WAS ABOUT 1.15 PERCENT IN TERMS OF THE SIZE RELATIVE TO THE ASSETS I WAS MANAGING, AND THAT WAS ABOUT A ONE AND A HALF PERCENT POSITION AT ITS MAXIMUM.

Q. SO CARTER'S WAS NEVER -- ON THE LONG SIDE, CARTER'S WAS NEVER MORE THAN 3.7, 3.67 PERCENT OF YOUR CAPITAL?

A. FOR THAT LONG, YEAH, UH-HUH.

Q. AND THE SHORT POSITION WAS NEVER GREATER THAN 1.5 PERCENT OF THE SHORT POSITIONS?

A. CORRECT, FOR THAT SHORT, UH-HUH.

THE COURT: I'M NOT SURE WHAT YOU'RE SAYING WITH THIS PARTICULAR CHART, BECAUSE YOU'RE TALKING ABOUT IN TERMS OF CARTER'S, OR YOU'RE TALKING ABOUT IN TERMS OF SHORT, BECAUSE

GENERALLY, SHORT AND LONG, I'M JUST STARTING. SO WHEN YOU SAY INITIATED 9/14/09, IS THAT RELATING TO THE CARTER'S DEAL AT THAT POINT THAT WAS LONG?

THE WITNESS: THAT WAS THE FIRST DAY THAT I BOUGHT STOCK IN CARTER'S. SO, IN OTHER WORDS, I INITIATED A LONG POSITION IN IT, AND THEN I SOLD OUT OF THAT LONG POSITION ON OCTOBER 26TH.

THE COURT: UH-HUH.

THE WITNESS: SO DURING THAT ROUGHLY SIX-WEEK PERIOD, OF THE CAPITAL THAT I WAS MANAGING, IT WAS -- IT REPRESENTED ABOUT TWO AND A HALF PERCENT OF THE CAPITAL THAT I WAS SUPPOSED TO BE INVESTING.

THE COURT: OKAY.

THE WITNESS: SO WE CALL THAT A TWO AND A HALF PERCENT POSITION. AND IT GOT TO BE AS BIG AS A 3.7 PERCENT POSITION AT ITS MAXIMUM POINT.

MR. MONNIN: SO, YOUR HONOR, REALLY WHAT WE'RE TRYING TO GET TO HERE IS THAT IF -- IN CONNECTION WITH A CIVIL PENALTY OR A CIVIL PENALTY ANALYSIS OR POTENTIAL FACTORS IN AGGRAVATION ASSOCIATED WITH THE COURT'S LIABILITY FINDING, REALLY, CARTER'S WAS NOT A MEANINGFUL, MATERIAL, SIGNIFICANT AMOUNT OF THE CAPITAL THAT MY CLIENT HAD INVESTED, A SIGNIFICANT AMOUNT OF THE STOCK THAT MY CLIENT PURCHASED IN THE CONSUMER PORTFOLIO, AND CERTAINLY NOT A SIGNIFICANT PART OF THE PROFITABILITY, EITHER ON A PORTFOLIO BASIS OR CERTAINLY ON A FUND BASIS.

AND THOSE ANALYTICS ARE ALL IN THE LAST SLIDE THAT WE HAVE HERE, JUDGE, WHICH IS ESSENTIALLY A SUMMARY OF WHAT -- I KNOW I'VE BEEN ADVOCATING THROUGH THE COURSE OF THE HEARING. AND I APPRECIATE MR. HUDDLESTON'S CONSIDERATION ON THAT AND THE COURT'S CONSIDERATION AS WELL.

SO, AS I SAID AT THE OUTSET OF THE HEARING, WE BELIEVE, JUDGE, THAT MR. MEGALLI IN DISGORGEMENT SHOULD ONLY BE LIABLE FOR THE 2010 VARIABLE PERIOD AND REALLY, IN CONNECTION WITH THAT, ONLY AT A $1900.00 FIGURE, $1945.00 FIGURE.

WE UNDERSTAND THAT THERE ARE OTHER POTENTIAL MEASURES THAT ARE OUT THERE, AND WE'VE GONE THROUGH THOSE FOR THE COURT. CERTAINLY, AS A MAXIMUM, IF WE'RE TALKING ABOUT THE CONTRIBUTION OF THE ILLEGAL SHORT SALES IN JULY 2010 TO THE CONSUMER PORTFOLIO PROFITABILITY, AT A MAXIMUM, AT THE OUTER MARKER, WE BELIEVE THAT $19,000.00 IS APPROPRIATE.

AND THEN IN TERMS OF, REALLY, OUR POSITION, JUDGE, IS THAT THE COURT SHOULD REALLY ORDER NO CIVIL PENALTY HERE GIVEN THE DE MINIMIS IMPACT OF THE ILLEGAL TRADING ACTIVITY AND ALSO THE FACT THAT MY CLIENT WAS FAR MORE -- I MEAN, CERTAINLY A REASONABLE INFERENCE IS THAT HE WAS FAR MORE FOCUSED ON OTHER LEGITIMATE TRADING THROUGHOUT THIS TIME FRAME FROM 2009 TO 2010.

AS A HOUSEKEEPING MATTER, I JUST WOULD LIKE TO MAKE SURE THAT OUR EXHIBITS HAVE BEEN RECEIVED IN EVIDENCE. THOSE ARE EXHIBITS 1 THROUGH 7.

THE COURT: YES.

MR. MONNIN: AND, JUDGE, I GUESS, I BELIEVE THAT OUR SLIDES REALLY ARE JUST SUMMARY DOCUMENTATION FOR THE COURT'S REFERENCE. SO I WOULD LIKE TO MARK MY SLIDE DECK AS EXHIBIT 8. I GUESS I'D MOVE THAT INTO EVIDENCE, AS WELL, FOR THE HEARING.

MR. HUDDLESTON: I WON'T OBJECT, YOUR HONOR.

THE COURT: ALL RIGHT. EIGHT IS ADMITTED.

MR. MONNIN: THANK YOU. AND I APOLOGIZE FOR GOING LONG. AND I TENDER THE WITNESS.

THE COURT: NO. THAT'S QUITE ALL RIGHT. BUT I THINK WE SHOULD TAKE A TEN-MINUTE BREAK, ONLY BECAUSE OF THE NUMBER BASIS. FOR THAT I'D LIKE TO BE SURE I ABSORB WHATEVER YOU'RE GOING TO START. SO IT'S -- WE'LL JUST START BACK AT 25 OF. ALL RIGHT?

THE COURTROOM SECURITY OFFICER: ALL RISE. COURT IS IN RECESS FOR TEN MINUTES.

(WHEREUPON, A BRIEF RECESS WAS HAD FROM 3:25 P.M. TO 3:40 P.M.)

THE COURT: OKAY. HAVE A SEAT.

MR. HUDDLESTON, I DO APPRECIATE THAT YOU HAVE A TRIAL COMING UP, AND I APPRECIATE THAT YOU HAVE GOTTEN YOURSELF FOCUSED FOR THIS.

MR. HUDDLESTON: YES, YOUR HONOR, MY PLEASURE.

THE COURT: WELL, PROBABLY NOT, BUT NEVERTHELESS.

MR. HUDDLESTON: I CERTAINLY DON'T MIND. I'LL BE

GLAD TO HAVE THIS BEHIND US. THANK YOU SO MUCH.

I AM CERTAINLY HERE TO ELICIT EVIDENCE FOR YOUR HONOR TO CONSIDER.

THE COURT: ALL RIGHT.

MR. HUDDLESTON: BUT I SHOULD MENTION THAT I'M GOING TO TAKE IT IN REVERSE ORDER, CIVIL PENALTIES, DISGORGEMENT, AND THE INJUNCTIVE RELIEF.

THE COURT: THAT'S FINE. AND I WANT TO START OFF BY SIMPLY SAYING, I DID NOTE THE POINT THAT YOU ALL MADE ABOUT THE MULTIPLES. AND I DO RECOGNIZE THAT THE -- THAT FOR PURPOSES OF THE CIVIL PENALTY, I AM AUTHORIZED TO DO MORE THAN JUST SIMPLY BASED ON THE INDIVIDUAL'S PROFITS. I AM NOT MANDATED TO, BUT I DO UNDERSTAND THE POSITION THAT YOU'RE ADVOCATING AND THE BASIS OF THAT.

MR. HUDDLESTON: YES. THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT.

MR. HUDDLESTON: I WOULD SUGGEST THAT SINCE DEFENSE COUNSEL AND THE SEC HAVE SUCH FUNDAMENTAL DISAGREEMENTS OVER WHAT SHOULD BE CONSIDERED FOR CIVIL PENALTY PURPOSES, WE ARE CERTAINLY WILLING AND IT MIGHT BE WISE TO GET SOME ADDITIONAL BRIEFING ON THAT. WE'RE CERTAINLY HAPPY TO DO THAT.

FOR EXAMPLE, STARTING AT THE END, I WILL TELL YOU THAT I DON'T BELIEVE THERE'S ANY AUTHORITY FOR THE PROPOSITION THAT MATERIALITY IS RELEVANT, MATERIALITY THAT THE ILLEGAL TRADES WERE ONE OF HUNDREDS, THAT THAT IS PROPER TO CONSIDER

FOR CIVIL PENALTY PURPOSES. SO JUST WITH THAT STATED, I WILL JUST OFFER THAT WE'D CERTAINLY LOVE TO PROVIDE MORE AUTHORITY TO SHOW THE COURT, IF NEEDED.

THE COURT: ALL RIGHT.

CROSS-EXAMINATION

BY MR. HUDDLESTON:

Q. ALL RIGHT. YOU HAVE THE DEFENDANT'S EXHIBITS IN FRONT OF YOU, SIR. IF YOU WOULDN'T MIND PULLING UP EXHIBIT NUMBER 2.

MR. HUDDLESTON: YOUR HONOR, DO YOU HAVE THAT THERE?

THE COURT: EXHIBIT 2?

MR. HUDDLESTON: YES.

THE COURT: THANK YOU VERY MUCH.

Q. (BY MR. HUDDLESTON) AND WHAT I WANT TO FOCUS ON, MR. MEGALLI --

THE COURT: YOU WANT TO PUT THEM UP?

Q. (BY MR. HUDDLESTON) WHAT I'D LIKE TO FOCUS ON, SIR -- THANK YOU SO MUCH -- IS THE BOTTOM PART THERE WHERE WE SEE, IT LOOKS LIKE PAYMENT DATE. AND IT'S A PAYMENT THAT'S IN 2011. COULD YOU EXPLAIN TO US WHAT THOSE ARE, PLEASE?

A. THOSE ARE THE INCENTIVE PAYMENTS, THE $1.2 MILLION THAT WE DISCUSSED FOR 2010. AND THEY WERE PAID OUT AT THE BEGINNING OF 2011, I BELIEVE, BECAUSE, FOR TAX PURPOSES, BONUSES MAY HAVE BEEN PAID THE BEGINNING PART OF THE FOLLOWING YEAR.

Q. THANK YOU. I JUST WANTED TO CLARIFY. SO THOSE SHOULDN'T BE MOVED UP HERE. ALL OF THESE ARE REFLECTED IN THIS COLUMN,

IN THE 2010 COLUMN?
A. THAT'S MY UNDERSTANDING.
Q. MY CONFUSION IS THAT I DON'T SEE ANY NUMBERS THAT MATCH UP, SIR. ARE YOU CERTAIN THAT YOU DID NOT RECEIVE THESE AMOUNTS IN 2011?
A. WELL, THE REASON THEY DON'T ADD IS BECAUSE YOU'RE -- IT'S BROKEN INTO 90 PERCENT AND TEN PERCENT. BUT IF YOU ADD THE 90 AND THE TEN TOGETHER TO GET TO 100 PERCENT, THEN IT WOULD ADD TO THE SAME NUMBERS. THEY PAID OUT 90 PERCENT IN FEBRUARY, BUT THE LAST TEN PERCENT WAS PAID OUT IN MARCH. DOES THAT MAKE SENSE?
Q. I THINK I UNDERSTAND, YES, SIR.
A. SO, IN OTHER WORDS, IF YOU LOOK AT THE 785 AND ADD IT TO THE 87, I'M GUESSING IT ADDS TO APPROXIMATELY 873,000.
Q. I UNDERSTAND. THANK YOU VERY MUCH. YEAH. THAT CLEARS THAT UP. THANK YOU.
A. SURE.
Q. LET'S TURN OVER TO EXHIBIT NUMBER 1 NOW, PLEASE. AND THAT IS YOUR EMPLOYMENT AGREEMENT, I BELIEVE? COULD WE PLEASE TURN OVER TO PAGE FIVE OF THAT AGREEMENT, PLEASE. AND I WANT TO LOOK AT THE -- TOWARDS THE BOTTOM, PARAGRAPH NUMBER SIX, WHERE IT SPEAKS OF TERMINATION OF EMPLOYMENT. DO YOU SEE THAT THERE?
A. YES, SIR.
Q. AND YOU WOULD AGREE WITH ME THAT THE AGREEMENT THAT YOU HAD WITH LEVEL GLOBAL DISTINGUISHES BETWEEN TERMINATIONS FOR

CAUSE AND TERMINATIONS WITHOUT CAUSE? YES?

A. RIGHT.

Q. IF WE CAN READ ALONG AS WE LOOK AT SUB- -- SUBPART A THERE AT THE BOTTOM OF PAGE FIVE. PLEASE MAKE SURE I GET THIS RIGHT. IN THE EVENT THAT YOUR EMPLOYMENT RELATIONSHIP WITH THE INVESTMENT MANAGER ENDS AT ANY TIME AS A RESULT OF YOUR TERMINATION FOR CAUSE AS DEFINED BELOW, ALL OBLIGATIONS OF THE INVESTMENT MANAGER AND ITS AFFILIATES TO, INCLUDING ANY VESTING OF ANY DEFERRED AMOUNTS OR OTHER COMPENSATION DESCRIBED IN PARAGRAPH FOUR -- TURNING OVER TO THE NEXT PAGE -- SHALL CEASE, PROVIDED THAT YOU SHOULD BE PAID ANY ACCRUED AND UNPAID BASE SALARY THROUGH YOUR LAST DATE OF EMPLOYMENT.

NOW, WHAT I WANT TO ASK, IS YOUR UNDERSTANDING OF THAT, DID THAT MEAN THAT IF YOU WERE TERMINATED FOR CAUSE, SIR, THAT ALL YOU WOULD BE ENTITLED TO FROM NOW ON OUT WAS ANY BASE PAY THAT YOU HAD COMING FOR THAT PAY PERIOD?

A. THAT WOULD BE MY UNDERSTANDING.

Q. OKAY. NOW, LET'S LOOK -- STAY ON PAGE NUMBER SIX, PLEASE. AND LET'S LOOK AT WHAT'S LAID OUT AS THE DEFINITION OF CAUSE FOR PURPOSES OF TERMINATION. AND, REALLY, WHAT I WANT TO GET TO, SIR, IS TO IDENTIFY HOW MANY OF THESE APPLIED. LET'S ASSUME -- LET'S TAKE YOUR GUILTY PLEA AND THE JUDGE'S FINDINGS REGARDING YOUR OCTOBER 2009 CONDUCT AS A GIVEN. I WANT TO FIND OUT, IF WE TAKE THOSE AS A GIVEN, HOW MANY OF THESE APPLY TO THAT CONDUCT AND WOULD HAVE BEEN CAUSE FOR, FOR TERMINATION.

SO, REFERRING TO YOUR OCTOBER 2009 TRADING -- WELL, FIRST OF ALL, LET ME ESTABLISH, DID LEVEL GLOBAL HAVE AN INSIDER TRADING POLICY?

A. I BELIEVE ALL HEDGE FUNDS ADDRESSED INSIDER TRADING COMPLIANCE GUIDELINES. I DON'T KNOW IF WE HAD A SPECIFIC POLICY THAT WAS SPECIFIC TO LEVEL GLOBAL.

Q. I SEE. BUT YOU WERE -- YOU UNDERSTOOD AT THE TIME THAT THE COMPANY PROHIBITED TRADING ON MATERIAL NONPUBLIC INFORMATION?

A. CORRECT.

Q. OKAY. SO LET'S TAKE A LOOK AT SUBPART ONE THERE. CAUSE INCLUDES YOUR VIOLATION OF THE INVESTMENT MANAGER'S CODE OF ETHICS OR REQUIREMENTS SET FORTH IN THE INVESTMENT MANAGER'S COMPLIANCE MANUAL AS MAY BE --

THE COURT: GO A LITTLE SLOWER SO THAT THE COURT REPORTER CAN GET THAT. I CAN READ IT, BUT --

MR. HUDDLESTON: I'M SORRY, ELIZABETH.

THANK YOU.

THE COURT: THANK YOU.

Q. (BY MR. HUDDLESTON) WE'RE PICKING UP, AS MAY BE AMENDED FROM TIME TO TIME, INCLUDING BUT NOT LIMITED TO THE FIRM'S INSIDER TRADING AND PERSONAL TRADING POLICIES. AND MY QUESTION IS, IF WE CREDIT THE JUDGE'S FINDING IN YOUR GUILTY PLEA AS TO OCTOBER 2009, WHETHER THE CONDUCT ALLEGED REGARDING THAT MONTH WOULD HAVE VIOLATED SUBPART ONE THERE?

A. I MEAN, YOU'RE ASKING ME TO SPECULATE. BUT I ASSUME IT WOULD.
Q. SO THAT UNDER THAT SUBPART, THAT WOULD HAVE BEEN REASON ENOUGH TO TERMINATE YOU FOR CAUSE IN OCTOBER 2009. RIGHT?
A. ASSUMING THAT I WERE CONVICTED OF AN INSIDER-TRADING-RELATED CRIME, I WOULD AGREE WITH YOU.
Q. I DON'T WANT TO QUIBBLE WITH YOU, SIR. BUT NUMBER ONE DOESN'T SPEAK OF CONVICTION.
A. RIGHT. I'M SORRY. YOU'RE CORRECT.
Q. MOVING DOWN TO NUMBER TWO, MATERIAL BREACH OF THIS AGREEMENT, I'LL SKIP OVER THAT ONE.
NUMBER THREE, RATHER THAN ME READ IT INTO THE RECORD, EVERYBODY'S GOT IT UP HERE, WHY DON'T YOU READ NUMBER THREE AND TELL ME WHEN YOU'RE FINISHED.
A. YOUR DISHONESTY, GROSS NEGLIGENCE, OR WILLFUL MISCONDUCT WITH RESPECT TO THE PERFORMANCE OF YOUR DUTIES FOR THE INVESTMENT MANAGER OR ITS AFFILIATES.
Q. AND MY QUESTION WOULD BE, WOULD YOUR OCTOBER 2009 CONDUCT, AS FOUND BY THE COURT AND PURSUANT TO YOUR GUILTY PLEA, HAVE BEEN CAUSE UNDER THAT SUBPARAGRAPH?
A. I DON'T KNOW HOW TO ANSWER THAT, SIR. I'M NOT TRYING TO OBFUSCATE YOU. I JUST DON'T KNOW. I CAN ASSUME THAT IT WOULD, BUT YOU'RE ASKING ME TO SPEAK ON BEHALF OF THE EXECUTIVES AT LEVEL GLOBAL WHO WOULD MAKE THAT DETERMINATION.
Q. WELL, NO. THIS IS -- YOU'RE ONE PARTY TO THIS AGREEMENT.

I'M ASKING FOR YOUR UNDERSTANDING.

LET'S DO IT THIS WAY. YOU PLED GUILTY TO WILLFUL MISCONDUCT. YES?

A. OKAY.

Q. YES?

A. I THINK I PLED GUILTY TO CONSPIRACY TO COMMIT SECURITIES FRAUD. I DON'T KNOW IF WILLFUL MISCONDUCT --

Q. WELL, YOU'RE AN ATTORNEY. WAS THERE A MENTAL ELEMENT TO THAT? WAS A MENS REA REQUIRED TO CONVICT YOU?

A. THERE WAS A MENS REA.

Q. AND IT REQUIRED AT THE MINIMUM THAT YOU ACT WILLFULLY. YES?

A. I ASSUME SO, YES.

Q. ALL RIGHT. READ NUMBER FOUR, IF YOU WOULD, PLEASE, SIR.

A. YOUR CONDUCT TENDING TO BRING THE INVESTMENT MANAGER, ITS AFFILIATES INTO SUBSTANTIAL PUBLIC DISGRACE OR DISREPUTE.

Q. THANK YOU. NOW, I'M CREDITING THE JUDGE'S FINDING AND YOUR GUILTY PLEA, COULD YOU HAVE BEEN TERMINATED FOR CAUSE AS YOU UNDERSTAND IT UNDER THAT SUBPARAGRAPH?

A. AS I UNDERSTAND IT, PROBABLY. BUT, AGAIN, I CAN'T SPEAK FOR THEIR FINAL DECISION.

Q. POINT TAKEN.

AND THEN THE NEXT ONE, NUMBER FIVE? WOULD YOU READ THAT, PLEASE?

A. UH-HUH. COMMISSION OF ANY FELONY, CRIME, OR FRAUD. I

WOULD AGREE WITH THAT.
Q. AND THAT WOULD -- AS YOU UNDERSTAND IT, YOUR OCTOBER 2009 CONDUCT WOULD BE INCLUDED IN THAT. YES?
A. THAT WOULD BE MY UNDERSTANDING.
Q. ALL RIGHT. AND SO WHAT I WANT TO GET TO IS, YOU COULD HAVE, HAD YOU CHOSEN TO, HAD YOU BEEN REMORSEFUL ABOUT 2009, YOU COULD HAVE GONE TO YOUR EMPLOYER AND SAID, GUYS, I'M VERY SORRY, BUT I HAVE VIOLATED THREE OR FOUR OF THESE. AND THEY COULD HAVE TERMINATED YOU FOR CAUSE. IS THAT RIGHT?
A. I'M GOING TO SAY YES. I'M NOT SURE. BUT, OKAY, I'LL GO WITH THAT.
Q. AND IF YOU HAD BEEN TERMINATED FOR CAUSE, YOU WOULD HAVE RECEIVED NONE OF THE COMPENSATION THAT WE'VE SEEN IN YOUR SLIDES FOR 2010. CORRECT?
A. HAD I BEEN TERMINATED FOR CAUSE, YEAH, I BELIEVE THAT'S CORRECT.
Q. FAIR ENOUGH.
THE WAY YOU DESCRIBE WHAT YOU DID AT LEVEL GLOBAL, DID I HEAR IT CORRECTLY THAT YOU SORT OF CREATED THIS CONSUMER DISCRETIONARY BUSINESS THERE?
A. I WOULDN'T CALL IT A SEPARATE BUSINESS, BUT I WAS RESPONSIBLE FOR THE CONSUMER DISCRETIONARY-RELATED TRADING AND INVESTMENTS THAT WENT ON AT LEVEL GLOBAL. IT WASN'T A SEPARATE BUSINESS.
Q. DID I HEAR YOU SAY THAT YOU HIRED THE ANALYSTS?

A. I RECOMMENDED ANALYSTS TO BE HIRED. IT WASN'T REALLY UP TO ME TO PULL THE TRIGGER FINALLY ON WHO WE HIRED. BUT I WOULD RECOMMEND TO DAVID GANEK, THE HEAD OF THE FIRM, LET'S HIRE THIS GUY, LET'S HIRE THAT GUY.

Q. AND DID HE TAKE THOSE RECOMMENDATIONS?

A. ULTIMATELY WHAT ENDED UP HAPPENING WAS, I USED AN INTERNAL ANALYST TO BE THE MAIN ANALYST WITHIN THE CONSUMER SECTOR. I THEN RECOMMENDED ONE OTHER GUY WHO WE DID END UP HIRING. BUT THOSE WERE THE ONLY TWO PEOPLE THAT WERE DIRECTLY ON MY TEAM.

Q. YOU ANTICIPATED MY NEXT QUESTION. SO HOW MANY ANALYSTS DID YOU HAVE REPORTING TO YOU? TWO?

A. TWO.

Q. AND TRADERS AS WELL, DID YOU -- WERE YOU RESPONSIBLE --

A. THERE WAS A SHARED TRADING DESK. I'M SORRY. I DIDN'T MEAN TO STOP YOU.

Q. THAT'S OKAY.

A. I BELIEVE THERE WERE FOUR TRADERS ON A SHARED TRADING DESK. AND THEY WOULD MAKE TRADES ON BEHALF OF WHOEVER WAS AN INVESTMENT PROFESSIONAL DIRECTING TRADES AT THE COMPANY.

Q. SO WERE YOU INVOLVED IN HIRING ANY OF THOSE PEOPLE?

A. NO, I WAS NOT.

Q. YOU ALSO MENTIONED ANOTHER CATEGORY, I BELIEVE, CONSULTANTS. CAN YOU TELL US ABOUT HOW MANY CONSULTANTS YOU WERE RESPONSIBLE FOR BRINGING IN.

A. I DON'T KNOW THE EXACT NUMBER OF CONSULTANTS. SO I DON'T

KNOW HOW TO ANSWER THAT QUESTION. THERE WERE MULTIPLE PEOPLE THAT WE WOULD USE FOR RESEARCH AND ANALYSIS THAT WERE THIRD PARTIES TO LEVEL GLOBAL WHO WERE EITHER SELL-SIDE STOCK RESEARCHERS OR THEY HAD CONSULTING COMPANIES AND SO FORTH. BUT YOU ASKED ME HOW MANY. AND I DON'T KNOW.

THE COURT: PEOPLE WHO WERE NOT EMPLOYEES.

THE WITNESS: CORRECT, UH-HUH.

Q. (BY MR. HUDDLESTON) WOULD YOU INCLUDE IN THAT CATEGORY ERIC MARTIN? WAS HE A CONSULTANT?

A. YEAH. HIS COMPANY WAS CALLED MELLON ADVISORS, SO IT WOULD INCLUDE MELLON AS A THIRD-PARTY EXTERNAL CONSULTANT.

Q. AND HE BROUGHT YOU -- YOU BROUGHT HIM IN AS A CONSULTANT FOR LEVEL GLOBAL. YES? HIS COMPANY, RATHER?

A. THAT'S CORRECT, YEAH. SUSAN REUBEN WAS OUR HEAD OF COMPLIANCE. AND WE HAD TO VET ANY RECOMMENDATIONS THROUGH THE COMPLIANCE DEPARTMENT. SO THEY WOULD CHECK TO MAKE SURE THAT A CONSULTANT WAS APPROPRIATE FOR OUR INVESTMENT PROCESS. ONCE THEY APPROVED IT IN COMPLIANCE, WE WOULD GO AHEAD AND SIGN A CONTRACT WITH WHOEVER THE PERSON WAS.

Q. VERY GOOD.

THE COURT: ON THE INTERNAL ANALYST, YOU USED ONE WHO WAS ALREADY EMPLOYED, AND THEN YOU HIRED ONE?

THE WITNESS: CORRECT.

Q. (BY MR. HUDDLESTON) CAN YOU BALL-PARK IT FOR US HOW MANY PEOPLE LIKE MR. MARTIN'S COMPANY YOU WERE RESPONSIBLE FOR

RECOMMENDING AND SUCCESSFULLY BRINGING IN AS CONSULTANTS FOR LEVEL GLOBAL?

A. YOU KNOW, I -- THERE WERE -- I'D HAVE TO GUESS BECAUSE I DON'T REMEMBER THE EXACT NUMBER. THERE WERE A FEW. THERE WERE A HANDFUL. THERE WAS ONE CALLED RETAIL EYE PARTNERS. THERE WAS ONE CALLED JANET J. KLOPPENBURG ADVISORS. THERE WAS ONE CALLED J AND K RESEARCH. SO THERE WERE MAYBE, I'M GOING TO GUESS, HALF A DOZEN OR SO LIKE THAT. BUT I DON'T KNOW THE EXACT NUMBER.

Q. I THINK EXHIBIT 6 AND 7, YOU DON'T NEED TO TURN THERE NOW, BUT I BELIEVE THAT THEY ARE LISTS OF SOME OF THE TRADES THAT WERE MADE INSIDE YOUR PART OF LEVEL GLOBAL. CORRECT?

A. CORRECT.

Q. NOW, I'D LIKE TO HAVE YOU JUST TAKE US INSIDE THE TYPICAL TRADE, IF YOU COULD. MY QUESTION TO YOU IS, IF THE IDEA COMES TO SOMEBODY, DID IT ALWAYS GENERATE WITH YOU, OR WAS IT ONE OF THE ANALYSTS COMING TO YOU?

A. ALL OF THE ABOVE. SOMETIMES IT CAME FROM ME AND SOMETIMES IT CAME FROM ONE OF MY ANALYSTS. AND SOMETIMES IT CAME FROM A THIRD-PARTY SALES-SIDE ANALYST, SOMEONE WHO MIGHT WORK AT A GOLDMAN SACHS OR A MORGAN STANLEY WHO WAS MAKING STOCK RECOMMENDATIONS TO WALL STREET. IT COULD HAVE BEEN ANY OF THOSE CATEGORIES, OR A CONSULTANT.

Q. THANK YOU.

OKAY. NOW, WERE THE ANALYSTS AUTHORIZED TO ORDER TRADES

ON THEIR OWN?
A. NO. NO.
Q. WHO DID THEY GO TO FOR PERMISSION?
A. THEY WOULD EITHER GO TO ME OR THEY WOULD GO TO DAVID GANEK OR THEY WOULD GO TO ONE OF THE OTHER INVESTMENT MANAGERS.
Q. ALL RIGHT. AND CAN YOU GIVE US WHAT THE TYPICAL SCENARIO WAS? WERE YOU THE PERSON WHO USUALLY CLEARED TRADES IN THE CONSUMER DISCRETIONARY SPACE?
A. IT DEPENDED. I MEAN, YES, GENERALLY. I WOULD SAY THAT'S FAIR. BUT SOMETIMES THE ANALYSTS WOULD GO DIRECTLY TO DAVID WITH AN IDEA THAT WAS WITHIN THE CONSUMER SPACE. AND DAVID MIGHT DO IT FOR HIS BOOK, AND THEN I MIGHT DO IT LATER WITHIN OUR FUNDS. SO IT REALLY VARIED. BUT --
Q. UNDERSTOOD.
OKAY. AND IF YOU HAD AN IDEA THAT DIDN'T GENERATE FROM THE ANALYST, DID YOU HAVE TO GO TO DAVID AND GET HIS PERMISSION BEFORE YOU ENTERED THAT TRADE?
A. YOU DIDN'T HAVE TO GO TO HIM TO GET PERMISSION. BUT HE WOULD ALMOST ALWAYS WANT TO DISCUSS WHAT YOUR THINKING WAS ON AN IDEA, FOR A COUPLE OF REASONS, SO HE COULD UNDERSTAND YOUR THOUGHT PROCESS AND SO HE COULD MAKE A DECISION WHETHER IT WAS SOMETHING HE WANTED TO TRADE FOR HIMSELF IN THE CENTER BOOK THAT I DESCRIBED.
Q. THE REASON I ASKED THOSE QUESTIONS, I'M TRYING TO GET TO THIS ISSUE OF CONTROL. MY QUESTION TO YOU WOULD BE, IS IT FAIR

TO SAY THAT YOU CONTROLLED THE TRADING FOR LEVEL GLOBAL UNDER THE CONSUMER DISCRETIONARY SPACE?

A. I THINK IT'S FAIR TO SAY I CONTROLLED IT. I DIDN'T HAVE ULTIMATE CONTROL IN THE SENSE OF, IF WE HAD A VIOLENT DISAGREEMENT, IT WAS REALLY UP TO HIM TO TAKE OFF A POSITION THAT HE JUST PLAIN DIDN'T AGREE WITH.

Q. UNDERSTOOD.

NOW, I WANT TO GET TO SOMETHING YOU DESCRIBED FOR US WITH REGARD TO YOUR EQUITY POINTS OR YOUR EQUITY PARTICIPATION. I BELIEVE IT WAS THREE PERCENT, CORRECT, IN 2010?

A. IT WAS THREE PERCENT FOR THE ONE YEAR OF 2010. AND THEN IT WAS NOTHING AFTER THAT.

Q. UNDERSTOOD. BUT I THINK I HEARD YOU SAY IT WAS THREE PERCENT ON THE WHOLE COMPANY'S BUSINESS, INCLUDING THE LEVEL RADAR. IS THAT RIGHT?

A. IT WAS THREE PERCENT OF THE COMPANY'S INCENTIVE FEES FOR LEVEL GLOBAL AND LEVEL RADAR, YEAH.

Q. AND I THINK I REMEMBER YOU SAYING YOU DIDN'T HAVE ANYTHING TO DO WITH LEVEL RADAR.

A. HARDLY ANYTHING TO DO WITH IT. I MEAN, MAY I EXPLAIN --

Q. YEAH, SURE.

A. -- FOR A SECOND? SO ANTHONY CHIASSON, IN ADDITION TO BEING THE COFOUNDER OF THE FIRM, WAS ALSO THE DIRECTOR OF RESEARCH. WE USED TO HAVE OCCASIONAL MEETINGS WHERE THE TOP TEN PEOPLE WOULD GET IN A ROOM OF THOSE 60 OR 70 PEOPLE, AND WE

WOULD TALK ABOUT THE MARKET, AND WE WOULD TALK ABOUT IDEAS AND SO FORTH.

WITHIN THE CONTEXT OF THOSE MEETINGS, ANTHONY MIGHT SAY, WE'RE BUYING SUCH-AND-SUCH A STOCK WITHIN RADAR. AND I WOULD BE PRIVY AND LISTEN TO MAYBE A DEBATE HE WOULD HAVE WITH ONE OF HIS TECH ANALYSTS. SO IN THAT SENSE, I MIGHT BE IN THE ROOM. BUT IN THE SENSE THAT I WOULD NEVER GO AND PITCH A CONSUMER STOCK TO BE BOUGHT OR SOLD WITHIN THAT RADAR FUND. IT WAS JUST SEPARATE FROM WHAT I WAS DOING. SO I'M NOT GOING TO SAY I WAS NEVER IN A MEETING WITH ANTHONY CHIASSON WHERE RADAR DIDN'T COME UP. BUT IT WASN'T REALLY MY ROLE TO INFLUENCE RADAR OR TO PITCH IDEAS TO RADAR.

Q. SO YOU WEREN'T RESPONSIBLE FOR THE SUCCESS OR FAILURE OF HOW RADAR DID. RIGHT?

A. NO.

Q. AND, YET, YOU GOT PAID. YOUR INCENTIVE COMPENSATION WAS INCLUDED IN THE INCENTIVE FEES THAT HAD BEEN EARNED ON THAT.

A. THAT'S CORRECT, BECAUSE THEY WANTED TO VIEW IT AS WHOLISTICALLY, THE PARENT, HOW IS THE PARENT COMPANY DOING, SO THAT INCLUDED BOTH OF THE FUNDS.

Q. AND WHAT I WANT TO GET TO IS, EVEN THOUGH YOU MAY NOT HAVE BEEN AN OWNER OF LEVEL GLOBAL, YOU WERE PAID AS IF YOU OWNED THREE PERCENT OF THE COMPANY IN 2010. YES?

A. I WAS PAID AS IF I HAD A THREE PERCENT POINT SHARING FOR THE ONE YEAR, YEAH, THAT'S RIGHT.

CAN I MAKE ONE OTHER CLARIFYING POINT?

Q. I THINK YOUR ATTORNEY IS GOING TO TALK TO YOU AFTER I'M FINISHED.

MR. HUDDLESTON: YOUR HONOR, WOULD YOU LIKE TO HEAR WHAT HE HAS TO SAY NOW?

THE COURT: IS IT ABOUT THIS TOPIC?

THE WITNESS: IT'S ON THE TOPIC OF OWNERSHIP. YEAH.

THE COURT: PROCEED.

THE WITNESS: I WAS JUST GOING TO SAY -- I'LL BE BRIEF -- AT SOME POINT IN 2010, LEVEL GLOBAL SOLD A PORTION OF THE COMPANY TO AN AFFILIATE OF GOLDMAN SACHS CALLED PETERSHILL. THEY SOLD ABOUT TEN TO 15 PERCENT OF THE COMPANY FOR, MY UNDERSTANDING WAS IT WAS ROUGHLY $50 MILLION. THAT MONEY WAS USED TO PAY OUT EQUITY OWNERS AND SENIOR PEOPLE AT LEVEL GLOBAL. I NEVER RECEIVED A DIME OF THAT BECAUSE I WAS NOT, IN FACT, AN EQUITY OWNER, NOR WAS I A SHAREHOLDER. I WAS A, YOU KNOW, BASICALLY A NEW -- IN MY TECHNICAL ROLE IN MY CONTRACT IS ANALYST. SO I'LL JUST USE THAT TERM. EVEN THOUGH I WAS AN INVESTMENT MANAGER, I WAS NOT A TRADITIONAL, WHAT YOU WOULD THINK OF AS AN EQUITY OWNER IN A BUSINESS OR A SHAREHOLDER WHERE, WHEN THE COMPANY GETS SOLD, YOU ARE ENTITLED TO RECEIVE A SHARE OF THOSE PROCEEDS.

Q. UNDERSTOOD. UNDERSTOOD.

NOW, LET'S GO BACK TO 2009, BECAUSE IF I UNDERSTOOD IT CORRECTLY, THERE WAS SOME -- YOU HAD A RIGHT TO ASK FOR SOME

DISCRETIONARY BONUS IN 2009, BUT YOU DID NOT ASK FOR IT. AM I GETTING THAT RIGHT?

A. YOU KNOW, IT SAID IN THE CONTRACT THAT -- I'M SORRY, THAT AT THE SOLE DISCRETION OF THE INVESTMENT MANAGER, HE COULD PAY OUT A 2009 DISCRETIONARY BONUS. IT WAS FRANKLY ASSUMED, AND THIS IS VERY FREQUENT ON WALL STREET BECAUSE PEOPLE MOVE AROUND FROM ONE FUND TO THE NEXT FUND PRETTY FREQUENTLY, WHEN YOU ARE IN A STUB YEAR, WHEN YOU ARE IN A HALF-YEAR, YOU'RE NOT GOING TO BE BONUSED ON THAT YEAR BECAUSE OF THE REASONS I SAID EARLIER. PEOPLE VIEW IT AS A LITTLE BIT, YOU'RE NEW. YOU ARE IN A STUB YEAR. YOU ARE NOT MEANT TO BE COMPENSATED ON THIS LITTLE PERIOD OF TIME. WE'LL FOCUS ON YOUR FIRST FULL YEAR.

AND THAT WAS MY UNDERSTANDING. AND THAT'S WHY I DIDN'T THREATEN, YOU KNOW, TO LEAVE OR MAKE A BIG ISSUE OUT OF THE FACT THAT, YOU KNOW, WHY WAS THIS PART OF MY CONTRACT NOT BEING EXERCISED. I HAD SORT OF ASSUMED THAT IT WOULD NOT BE, TO BE CLEAR.

Q. SO I JUST WANT TO GET CLEAR ON THAT. YOU ASKED FOR IT AND WERE TOLD YOU WOULDN'T BE PAID IT, OR DID THE TOPIC JUST NEVER COME UP?

A. I NEVER EVEN HAD A MEETING ABOUT IT. I SORT OF WAS WONDERING. AT SOME POINT YOU HAVE A MEETING TO GO OVER A REVIEW, LIKE A YEAR-END REVIEW, BECAUSE MOST OF THE COMPANIES I'VE WORKED FOR, IN DECEMBER, YOU GO AND MEET WITH THE HEAD OF THE COMPANY, AND THEY SAY, THIS IS WHAT YOU'RE DOING WELL, THIS

IS WHAT YOU'RE DOING POORLY. I NEVER REALLY HAD THAT MEETING. AND THAT WOULD BE THE TYPE OF MEETING WHERE THEY WOULD SAY, HERE'S WHAT YOUR SHARE OF THE PROFITS IS GOING TO BE FOR THE YEAR.

SO THAT MEETING NEVER EVEN REALLY OCCURRED. AND I NEVER WENT BACK AND, YOU KNOW, DEMANDED TO BE PAID OR REQUESTED TO BE PAID.

Q. AND IS IT THE FACT THAT YOU DID NOT MAKE THAT DEMAND THAT LEADS YOU TO SAY THAT YOU SHOULD NOT HAVE TO PAY ANY DISGORGEMENT ON THE TWO-MILLION-PLUS LOSS AVOIDED THAT OCCURRED IN 2009?

A. WELL, TO BE CLEAR, I MEAN, I THINK THE ARGUMENT IS TO SAY THAT NONE OF THE TWO MILLION FLOWED DIRECTLY INTO MY COMPENSATION OR INTO MY POCKET, I GUESS YOU COULD SAY.

Q. LET ME SEE IF I CAN SAY SOMETHING THAT I THINK IS FAIR. IS IT FAIR TO SAY THAT THE $2,034,000.00 IN LOSS AVOIDED, THAT THERE WERE PEOPLE ON THE OTHER SIDE OF THOSE TRADES, ON THE LOSING SIDE OF THOSE TRADES?

A. YOU MEAN LIKE OTHER TRADERS?

Q. WELL, THERE WAS A COUNTERPARTY FOR EACH --

A. COUNTERPARTY, YEAH, SURE.

Q. FOR EACH OF THE TWO HUNDRED -- I MEAN, $2,034,000.00, THERE WAS SOMEBODY WHO LOST THAT $2,034,000.00. RIGHT?

A. THEORETICALLY, YEAH.

Q. ALL RIGHT. AND THE SAME IS TRUE FOR THE, FOR THE PROFITS

MADE IN 2010. YOU MADE A SIX-HUNDRED-THOUSAND-DOLLAR-PLUS GAIN ON BY COVERING A SHORT POSITION. THERE WAS SOMEBODY WHO IS ON THE LOSING END OF THAT TRADE, RIGHT, OR THOSE TRADES?

A. YEAH. I'M NOT SURE I WOULD CHARACTERIZE IT AS SOMEONE. IT WAS PROBABLY, YOU KNOW, SPREAD ACROSS SORT OF THOUSANDS OF DIFFERENT TRADING.

Q. YES. NOT A SINGLE PERSON.

A. RIGHT.

Q. ON THAT POINT, IF YOU COULD TURN TO EXHIBIT NUMBER 7, PLEASE. I BELIEVE THAT IS THE -- A LIST THAT HAS THE HIGHLIGHTING. AM I RIGHT?

A. UH-HUH.

Q. WHAT I'M TRYING TO GET CLEAR ON IS JUST HOW MANY SEPARATE TRADES MAKE UP THE, THE TRADING ALLEGED IN OUR COMPLAINT AND THAT THE JUDGE HAS FOUND YOU LIABLE FOR? I BELIEVE IN OCTOBER 2009, WERE THERE TWO TRADES?

A. WELL, I WOULD CHARACTERIZE THE ORDER TO SELL THE 300,000 SHARES AS ONE TRADING ORDER.

Q. OKAY.

A. I THINK THAT WHEN I LOOK AT THE DATA, IT WAS -- IT TOOK TWO SEPARATE TRADES TO ACTUALLY SELL THE 300,000. AND THE REASON I SAY THAT IS BECAUSE IT SHOWS THAT 200,000 SHARES WERE SOLD ON OCTOBER 23RD, AND THE LAST HUNDRED THOUSAND SHARES WERE SOLD ON OCTOBER 26TH. IT WAS A -- FRIDAY WAS THE 23RD, AND MONDAY WAS THE 26TH. WHEN YOU GO BACK AND LOOK AT THE RECORD,

THAT WAS ACTUALLY ONE TRADING ORDER THAT WENT INTO THE TRADERS TO SAY, SELL THE 300. SOMETIMES IT TAKES A COUPLE DAYS. SO IT SHOWS UP AS TWO TRADES.

Q. OKAY. BUT IN TERMS OF THE NUMBER OF DECISIONS YOU MAKE --

A. ONE DECISION.

Q. IT AFFECTED THERE, IT WAS A SINGLE DECISION THAT GOT IT ROLLED OUT OF THE TWO DAYS.

A. YES AND NO. THE ONLY OTHER POINT I WOULD MAKE IS, IF YOU GO RIGHT ABOVE THAT, IT SHOWS THAT WE HAD 350,000 SHARES BEFORE, BEFORE I HAD EVEN SPOKEN TO ERIC MARTIN. AND --

THE COURT: I'M SORRY. IT'S GOING TO BE HELPFUL TO ME IF WE COULD PRETEND WE ARE DEALING WITH LINE NUMBERS, WHICH WE DON'T HAVE. WE'RE TALKING ABOUT THE LAST GROUP? I'M SORRY. I WANT TO KNOW WHERE WE ARE ON THIS PAGE.

MR. HUDDLESTON: 322 AND 323, I BELIEVE, YOUR HONOR. FAR LEFT COLUMN. UP HERE ON THE SCREEN.

THE COURT: I SEE. ALL RIGHT.

Q. (BY MR. HUDDLESTON) LET'S ACTUALLY MOVE DOWN TO THE BOTTOM OF THE PAGE NOW TO THE JULY SHORT --

A. WELL, CAN I JUST FINISH MY LAST POINT ON THAT?

Q. OF COURSE. GO AHEAD.

A. SO WE HAD -- YOU'RE ASKING ME ABOUT HOW MANY TRADING DECISIONS WAS IT. WE HAD 350,000 SHARES AT THE PEAK. AND THAT'S UNDER THE COLUMN CUMULATIVE SHARES. AND IT SHOWS AS 350,000 SHARES. I HAD STARTED LIQUIDATING THE POSITION AND HAD

ACTUALLY SOLD 50,000 SHARES BEFORE I HAD GOTTEN THE PHONE CALL FROM ERIC MARTIN.

Q. I WANT TO ASK YOU TO LIMIT THE ANSWER TO THE PHONE CALLS THAT ARE AFTER YOU SPEAK TO MR. MARTIN.

A. OKAY.

Q. WHAT I'M TRYING TO GET TO ARE THE THINGS THAT ARE DESCRIBED IN THE JUDGE'S ORDER.

SO THAT WOULD HAVE BEEN ONE TRADING DECISION.

A. CORRECT.

Q. AND IN JULY 2010, HOW MANY TRADING DECISIONS? BECAUSE AS I COUNT THEM, ONE, TWO, THREE, FOUR, AM I CORRECT THAT THERE ARE FOUR SHORT SALES AND ONE COVER?

A. FOUR SHORT SALES AND A COVER. IT'S NOT CLEAR TO ME. LIKE, FOR EXAMPLE, WHEN IT SAYS JULY 8TH AND JULY 12TH, I DON'T REMEMBER IF THAT WOULD HAVE BEEN ONE TRADING ORDER TO SHORT 200 THAT WAS BROKEN INTO 150 AND 50 OR IF THAT WAS TWO TRADING ORDERS. SO I DON'T KNOW.

Q. I BELIEVE THE WAY IT'S DESCRIBED IN THE PLEADINGS, WE'VE GOT AN INITIAL 150 THAT WERE SHORTED, FOLLOWED BY A DECISION TO ACCUMULATE A FURTHER SHORT POSITION UP TO 300. DOES THAT RING A BELL?

A. I BELIEVE THAT IS CORRECT. I'M NOT SURE. AND THE DECISION TO LIQUIDATE WOULD HAVE BEEN ONE DECISION TO COVER THE 300,000 SHARES.

Q. VERY GOOD. THANK YOU.

MR. HUDDLESTON: YOUR HONOR, WE MOVE NOW, IF I MAY, TO THE FACTORS RELEVANT TO DISGORGEMENT. AND I SHOULD SAY THAT THESE ARE ALSO FACTORS THAT ARE RELEVANT TO CIVIL PENALTIES, THE STEADMAN FACTORS.

Q. (BY MR. HUDDLESTON) WE'LL GO THROUGH THEM IN ORDER, IF WE COULD, MR. MEGALLI. THE FIRST FACTOR IS THE SERIOUSNESS OF THE VIOLATION. CAN WE AGREE THAT THE VIOLATIONS THAT THE JUDGE HAS FOUND YOU LIABLE FOR ARE SERIOUS VIOLATIONS?

A. OF COURSE. LOOK AT THE RESULT ON MY LIFE. SURE, IT FEELS VERY SERIOUS.

Q. AND THEN WE TALKED ABOUT THE REPEATED OR THE ISOLATED NATURE OF IT. AND THAT'S WHY I HAD YOU GO THROUGH THE NUMBER OF DIFFERENT DECISIONS. THIS ISN'T SOMETHING YOU DID ONLY ONCE, CORRECT?

A. WELL, I MEAN, I WOULD CONSIDER THERE TO BE TWO SEPARATE TRADING DECISIONS ULTIMATELY. ONE WAS TO SELL STOCK IN OCTOBER OF '09.

Q. RIGHT.

A. AND THE OTHER ONE WAS TO SHORT STOCK IN JULY OF 2010. BUT I WOULDN'T CONSIDER THE FACT THAT IT WAS BROKEN INTO THREE OR FOUR TRADES AS THREE OR FOUR SEPARATE SHORTING INCIDENTS.

Q. UNDERSTOOD.

A. BECAUSE THEY WERE WITHIN A COUPLE OF DAYS OF EACH OTHER, AND IT WAS MORE OR LESS IN MY MIND THE SAME DECISION TO SHORT THE STOCK.

Q. I SEE.

WHAT I AM TRYING TO GET TO IS THAT YOU UNDERSTOOD, AT LEAST, I BELIEVE YOUR TESTIMONY FROM YOUR SENTENCING HEARING IS THAT YOU UNDERSTOOD IN OCTOBER 2009 THAT THE INFORMATION YOU WERE GETTING WAS OVER THE LINE, AND YOU SHOULD NOT HAVE ACTED ON IT. YOU UNDERSTOOD THAT IN OCTOBER. YES?

A. WHAT I HAVE DESCRIBED, WHAT I DESCRIBED AT MY PLEA HEARING, I'M GOING TO NECESSARILY REPEAT THE FRAMEWORK OF THAT, WHICH IS THAT ERIC MARTIN ALLEGED THAT HE TOLD ME THERE WAS GOING TO BE AN ACCOUNTING ISSUE AT CARTER'S. THAT'S A LIE. HE DID NOT EVER TELL ME THERE WAS GOING TO BE AN ACCOUNTING PROBLEM THAT WAS ABOUT TO BE ANNOUNCED. HE DID HAVE A CHANGE IN OPINION ON HIS STOCK. AND WHEN HE CALLED TO SAY THAT HE NO LONGER LIKED THE STOCK, I HAD ALREADY BEEN IN THE PROCESS OF SELLING IT. AND HIS PHONE CALL ACTED AS A CATALYST FOR ME TO CONTINUE SELLING THE STOCK.

HE -- WHEN I PLED, WHEN I SAID I PLEAD GUILTY TO CONSCIOUS AVOIDANCE, WHAT THAT MEANT TO ME WAS, I WISH I HAD PROBED FURTHER TO ASK HIM, WHY ARE YOU CHANGING YOUR OPINION ON THE STOCK. I DIDN'T PROBE HIM ENOUGH. AND HAD I PROBED HIM, PERHAPS HE COULD HAVE SAID, I HAVE AN INSIDE SOURCE AT THE COMPANY WHO'S TELLING ME THERE'S GOING TO BE AN ACCOUNTING FRAUD. AND THAT WOULD HAVE HELPED ME AVOID THIS TRADE.

BY CONSCIOUSLY AVOIDING THE FACT THAT HE CHANGED HIS OPINION AND NOT PROBING HIM FURTHER, THAT ULTIMATELY LED TO

WHAT I PLED TO IN THE PARALLEL CRIMINAL PROCEEDING.

Q. ARE YOU SAYING NOW THAT YOU DO NOT BELIEVE YOU VIOLATED THE LAW IN OCTOBER OF 2010?

A. I AM NOT SAYING I DID NOT VIOLATE THE LAW. WHAT I AM SAYING IS, I JUST WANT TO BE CLEAR ABOUT WHAT I PLED TO BECAUSE WHEN YOU SAID IN THE OCTOBER '09 INSTANCE, WHEN HE GAVE ME INSIDE INFORMATION, I JUST WANT TO MAKE SURE THAT'S CHARACTERIZED PROPERLY.

Q. WHAT I WANT TO --

MR. MONNIN: YOUR HONOR, CAN I JUST -- I GUESS WHAT I'D LIKE TO SAY IS THAT I UNDERSTAND THAT THE SEC HAS AN INTEREST IN GETTING INTO THE UNDERLYING TRADING ACTIVITY FOR PURPOSES OF ADDRESSING ISSUES POTENTIALLY IN AGGRAVATION, FOR PURPOSES OF THE COURT'S CIVIL PENALTY ANALYSIS. MR. MEGALLI KNEW THIS GOING INTO THIS PROCEEDING THAT THESE ISSUES WOULD BE POTENTIALLY PUT TO HIM. THERE IS A PARALLEL 2255 PETITION THAT IS PENDING.

THE COURT: ALL RIGHT.

MR. MONNIN: THAT PETITION, WE HAVE STATED, AND MR. CHAIKEN, THE ASSISTANT UNITED STATES ATTORNEY WHO PROSECUTED MR. MEGALLI, IS HERE IN COURT. WE HAVE STATED IN THAT 2255 PETITION THAT -- LET ME STEP UP TO THE MICROPHONE.

THE COURT: THANK YOU.

MR. MONNIN: THAT WE ARE NOT AT ALL INTENDING TO REVISIT THE ISSUE OF MR. MEGALLI'S LIABILITY AS A MATTER OF

EXISTING 11TH CIRCUIT LAW OR AS A MATTER OF EXISTING LAW AT THE TIME OF HIS GUILTY PLEA. I DO, HOWEVER, BELIEVE THAT HE SHOULD NOT BE ASKED QUESTIONS THAT GET INTO HIS FAMILIARITY WITH THE RELATIONSHIP BETWEEN MR. POSEY, THE INSIDER, AND MR. MARTIN, THE INTERMEDIATE TIPPEE, WHO THEN BECAME MR. MEGALLI'S TIPPER. AND I DON'T BELIEVE THAT THE SEC IS INTENDING TO GET INTO THOSE INCREMENTAL ISSUES OF MR. MEGALLI'S KNOWLEDGE OF A POTENTIAL BENEFIT BETWEEN THOSE TWO INDIVIDUALS. AND IF --

MR. HUDDLESTON: THAT IS CORRECT.

MR. MONNIN: IF THAT'S TRUE, I DON'T NEED TO OBJECT ON FIFTH AMENDMENT GROUNDS OR INSTRUCT MY CLIENT NOT TO ANSWER.

I DO, HOWEVER, BELIEVE THAT MR. MEGALLI'S GUILTY PLEA PROCEEDING, THE POSITION THAT HE'S TAKEN IN HIS ANSWER, ALL THE OTHER BASES THAT THE COURT HAD TO FIND HIM LIABLE WHERE HE HAS ADMITTED TO THIS MISCONDUCT, ARE ALREADY A PART OF THE RECORD. AND I GUESS I'M NOT REALLY SURE WHY WE NEED TO GO MUCH FURTHER THAN THAT IN CONNECTION WITH THIS HEARING.

MR. HUDDLESTON: IF I MAY?

THE COURT: YES.

MR. HUDDLESTON: WE DON'T NEED TO GO MUCH FURTHER. WE ARE ADDRESSING THE SECOND FACTOR, WHICH IS WHETHER THE CONDUCT WAS ISOLATED OR REPEATED. HAD MR. MEGALLI NOT GIVEN SUCH A LONG ANSWER ABOUT THE OCTOBER TRADES, WE'D BE BEYOND IT NOW.

Q. (BY MR. HUDDLESTON) WHAT I AM TRYING TO ESTABLISH IS,

THIS IS NOT SOMETHING YOU DID ONCE, SIR. YOU DID IT TWICE. RIGHT?

A. I THINK THAT'S FAIR.

THE COURT: ALL RIGHT.

Q. (BY MR. HUDDLESTON) I BELIEVE AT YOUR SENTENCING HEARING YOU SAID THAT YOU KNEW IT WAS WRONG, YOU SHOULDN'T HAVE DONE IT. IS THAT TRUE THEN? IS THAT TRUE AT THE TIME?

A. YEAH. I SAID THAT, AND THAT IS TRUE.

Q. I WANT TO GET INTO WHETHER YOU THOUGHT ABOUT THE PEOPLE ON THE OTHER SIDE OF THE TRADE, EITHER IN OCTOBER 2009 OR JULY OF 2010.

A. I DIDN'T -- I DON'T THINK OF THEM NECESSARILY AS PEOPLE ON ANOTHER SIDE OF THE TRADE. YOU THINK OF IT AS A MARKETPLACE. SO I'M NOT QUITE SURE HOW TO ANSWER THAT QUESTION. IF YOU WERE SELLING A CAR TO YOUR COUSIN FRED, YOU MAYBE THINK ABOUT THAT PERSON AS A VICTIM OF A FRAUDULENT CAR SALE. I'M NOT SURE HOW YOU WOULD THINK ABOUT A MARKETPLACE THAT'S HUNDREDS OF THOUSANDS OF TRADERS.

Q. WELL, THAT'S WHAT I'M GETTING TO. WHAT I AM TRYING TO UNDERSTAND IS, IN YOUR MIND, WAS YOUR CONDUCT VICTIMLESS? DID YOU BELIEVE THAT AT THE TIME?

A. I MEAN, I GUESS. I THINK THAT WOULD PROBABLY BE A FAIR CHARACTERIZATION.

Q. DO YOU THINK OTHERWISE NOW?

A. WELL, I'VE LEARNED MORE ABOUT IT NOW. YOU KNOW, I CAN

DEFINITELY UNDERSTAND YOUR POSITION, WHICH IS THE OTHER SIDE, WHICH IS THAT THERE ARE PEOPLE WHO, WHEN YOU SELL STOCK AND THEY ARE BUYING THAT STOCK, THAT EVEN IF THEY END UP NOT BEING DIRECTLY HURT BECAUSE THEY SELL IT LATER TO SOMEONE ELSE, YOU'RE SETTING OFF SORT OF A CHAIN OF EVENTS THAT COULD RESULT IN SOMETHING BAD HAPPENING TO THAT COUNTERPARTY.

MR. HUDDLESTON: YOUR HONOR, THAT'S A MATTER --

Q. (BY MR. HUDDLESTON) AM I HEARING YOU SAY THAT YOU'RE GIVING JUDGE TOTENBERG ASSURANCES THAT YOU WON'T RE-OFFEND IN THIS MANNER?

A. THERE IS ZERO CHANCE OF ME RE-OFFENDING. IF YOU KNEW WHAT MY WIFE -- WHO'S BACK THERE -- AND I'VE BEEN THROUGH THE LAST THREE YEARS, YOU WOULD KNOW THAT IT'S BEEN SO DEVASTATING TO OUR FAMILY THAT THE IDEA THAT SOMETHING LIKE THIS WOULD EVEN HAVE A TENTH OF A PERCENT CHANCE OF HAPPENING AGAIN IS JUST IMPOSSIBLE.

Q. WHAT I WANT TO GET TO, THEN, IS YOU MADE CERTAIN ASSURANCES TO THE SENTENCING COURT ON THE DAY YOU WERE SENTENCED. RIGHT?

A. CORRECT.

Q. YOU REPRESENTED THAT YOU WOULD BE SETTLING WITH THE SEC. RIGHT? YOU HEARD YOUR ATTORNEY SAY THAT AT THE TIME?

A. I HEARD PAUL SAY THAT.

Q. WAS HE AUTHORIZED TO SPEAK FOR YOU AT THE TIME?

MR. MONNIN: YOUR HONOR, LET ME OBJECT TO THIS LINE

OF QUESTIONING. FIRST OF ALL, I SHOULDN'T BE MADE A WITNESS IN CONNECTION WITH THE PROCEEDING. WHAT WAS SAID PRIOR TO A FUNDAMENTAL CHANGE IN THE LAW WITH REGARD TO OUR SETTLEMENT POSTURE IS LEGAL ADVOCACY. IT'S NOT ANYTHING THAT SHOULD NEGATIVELY IMPACT MY CLIENT.

IT IS ABSOLUTELY TRUE THAT, AT THE TIME OF MY CLIENT'S SENTENCING, THE CASE LAW UNDER WHICH WE ARE RELYING FOR PURPOSES OF THE 2255 PETITION, AS WELL AS OUR SUMMARY JUDGMENT ARGUMENT WITH RESPECT TO THIS COURT, DID NOT EXIST. AND BY VIRTUE OF IT NOT EXISTING, THERE WERE CERTAIN REPRESENTATIONS MADE ABOUT THE FACT THAT MY CLIENT WOULD LIKELY BE SETTLING WITH THE SEC, WHICH IS CONSISTENT WITH HIS ANSWER, WHICH IS CONSISTENT WITH THE WAY THE PLEADINGS WERE FORMED IN THIS CASE, AS WELL AS HIS -- THE POSITION THAT I ADVOCATED ON HIS BEHALF IN CONNECTION WITH THE SENTENCING PROCEEDING.

JUDGE, THE LAW CHANGED, AND WE DIDN'T SETTLE AS A RESULT. AND NOW WE'RE HERE FOR PURPOSES OF ESTABLISHING WHAT DISGORGEMENT IN A CIVIL PENALTY MAY BE IN RELATION TO MY CLIENT'S MISCONDUCT, WHICH WAS NEVER A PART OF ANY SETTLEMENT DISCUSSION. AND I KNOW I'M NOT SWORN HERE, AND I'M NOT INTENDING TO MAKE MYSELF A WITNESS. BUT SETTLING MY CLIENT'S LIABILITY VERSUS SETTLING DISGORGEMENT IN A CIVIL PENALTY ARE TWO SEPARATE THINGS.

AND IF SETTLEMENT OF LIABILITY WAS DISCUSSED WITH JUDGE STORY, THAT'S ABSOLUTELY TRUE. THE LAW CHANGED. WE

BELIEVE THAT MY CLIENT IS NOT LIABLE FOR THAT, AND IT WAS NEVER A PART OF THE DISCUSSION WITH THE SEC THAT WE WOULD BE SETTLING ECONOMICALLY WITH THE SEC. WE WERE ALWAYS GOING TO LITIGATE THOSE ISSUES.

THE COURT: ALL RIGHT. WELL, MR. HUDDLESTON, LET ME JUST GIVE YOU NARROW RANGE HERE. YOU CAN ASK TWO OR THREE QUESTIONS, BUT LET'S NOT GET STUCK HERE.

MR. HUDDLESTON: UNDERSTOOD, YOUR HONOR. AND ASSISTANT U.S. ATTORNEY CHAIKEN IS HERE. AND IF THE JUDGE IS INTERESTED, HE CAN TELL YOU WHAT THE STATUS OF THE DISCUSSIONS WAS, WHICH WAS NOT UNKNOWN AT THE TIME.

THE COURT: I'VE READ THE TRANSCRIPT. I REMEMBER READING THE TRANSCRIPT. AND I UNDERSTAND YOU SPOKE FOR THE FACT I BELIEVE THAT IT HAD BEEN DISCUSSED AS WELL BUT HADN'T BEEN DECIDED AT THAT POINT BY THE SECOND CIRCUIT. IT WAS DECIDED A FEW DAYS LATER.

Q. (BY MR. HUDDLESTON) YOU WORKED ON WALL STREET FOR HOW MANY YEARS, SIR?

A. APPROXIMATELY TEN YEARS.

Q. YOU MET OTHER HEDGE FUND MANAGERS DURING THAT TIME?

A. I'M SORRY?

Q. YOU MET OTHER HEDGE FUND MANAGERS DURING THAT TIME?

A. OF COURSE, YEAH.

Q. OTHER ANALYSTS?

A. YES.

Q. YOU KNOW A LOT OF PEOPLE WHO ARE STILL IN THE BUSINESS.
A. NOT MANY THAT STILL TALK TO ME, BUT, YES, I DO KNOW PEOPLE.
Q. YOU DIDN'T FAIL TO KNOW THOSE PEOPLE AFTER THE JUDGE ENTERED AN ORDER OF LIABILITY. RIGHT?
A. I STILL KNOW THOSE PEOPLE AND THEY STILL KNOW ME, UH-HUH.
Q. AND YOU ARE AWARE THAT THE COURT IS NOT ALLOWED TO PROHIBIT YOU FROM EVER TRADING ON THE STOCK MARKET AGAIN. RIGHT?
A. THAT'S MY UNDERSTANDING.
Q. WHETHER OR NOT YOU DECIDE TO ENGAGE IN INSIDER TRADING LIABILITY IN THE FUTURE IS PURELY A MATTER THAT YOU WILL DECIDE IN YOUR JUDGMENT. YES?
A. LIKE I SAID, THE ODDS OF IT HAPPENING ARE ZERO. BUT THEORETICALLY YOU ARE CORRECT. IT WOULD BE WITHIN MY POWER TO DECIDE THAT.
Q. AND IS IT TRUE THAT MORE THAN THE AVERAGE PERSON, YOU KNOW PEOPLE WHO MIGHT BE IN POSSESSION OF MATERIAL NONPUBLIC INFORMATION?
A. I DON'T BELIEVE THAT'S TRUE BECAUSE I HAVEN'T SPOKEN TO PEOPLE WHO WORK ON WALL STREET SINCE THIS WHOLE THING HAPPENED. MAYBE A COUPLE. BUT I'M JUST SAYING OF YOUR NETWORK OF MAYBE THE DOZENS OF PEOPLE YOU ARE ENVISIONING, THOSE ARE NOT RELATIONSHIPS THAT CONTINUE TO THIS DAY. PEOPLE DON'T TALK TO SOMEONE WHO HAS GONE THROUGH A CRIMINAL PROCEEDING AND A CIVIL

PROCEEDING LIKE THIS.

Q. I'M JUST TALKING ABOUT, YOU KNOW THOSE FOLKS.

A. IN THE SENSE, YEAH, SURE, I KNOW WHO THEY ARE, THEY KNOW ME, SURE. BUT THESE ARE NOT ONGOING RELATIONSHIPS, I GUESS I WOULD SAY.

MR. HUDDLESTON: THAT'S ALL THE EVIDENCE WE'LL ELICIT ON THE APPROPRIATENESS OF INJUNCTIVE RELIEF, YOUR HONOR. IS THERE ANYTHING ELSE?

IF YOU GIVE ME JUST ONE MOMENT, PLEASE.

THE COURT: ALL RIGHT.

MR. HUDDLESTON: YOUR HONOR, THAT'S ALL WE HAVE, EXCEPT TO REITERATE OUR WILLINGNESS TO FURTHER BRIEF THE ISSUE OF CIVIL PENALTIES AND RELEVANT EVIDENCE.

THE COURT: SO WHAT WOULD YOU LIKE FROM ME IN TERMS OF CIVIL PENALTIES. I WOULD LIKE SOME CLARITY ABOUT THAT.

MR. HUDDLESTON: SPECIFICALLY I WANT TO ESTABLISH FOR YOU THAT THE MATERIALITY SLIDES THAT THE DEFENDANT PUT UP HAVE ABSOLUTELY NOTHING TO DO, THAT YOU DON'T CONSIDER THAT FOR PURPOSES OF THE CIVIL PENALTY. AND I THINK IT'S, IT'S A MISSTATEMENT OF THE LAW. AND I WANT TO MAKE SURE THAT THE JUDGE HAS THE CORRECT LAW IN FRONT OF HER WHEN SHE DECIDES.

THE COURT: AND IS THERE ANYTHING ELSE THAT YOU PARTICULARLY WANTED TO DISCUSS?

MR. HUDDLESTON: NOTHING OTHER THAN WHAT YOU'VE ALREADY ACKNOWLEDGED THAT YOU KNOW FULL WELL.

THE COURT: SO LET'S JUST -- LET ME ASK A FEW QUESTIONS TO YOU.

ARE WE THROUGH, OR DO YOU WANT TO ASK SOME OTHER QUESTIONS?

MR. MONNIN: JUST A COUPLE OF THINGS.

THE COURT: ALL RIGHT. WHY DON'T YOU SIT DOWN, AND HE'LL ASK YOU A FEW QUESTIONS. THANK YOU SO MUCH.

REDIRECT EXAMINATION

BY MR. MONNIN:

Q. MR. MEGALLI, WE HAVE UP ON THE SCREEN ESSENTIALLY THE TERMINATION FOR CAUSE PROVISIONS OF YOUR EMPLOYMENT AGREEMENT. YOU'VE SIGNED OTHER HEDGE-FUND-RELATED EMPLOYMENT AGREEMENTS, CORRECT?

A. I'VE SIGNED -- THE ONLY OTHER ONE I HAD SIGNED WAS A TERM SHEET AT BUCKINGHAM. IT WASN'T A FULL CONTRACT IN THE SENSE THAT IT HAD ALL THESE SORTS OF PROVISIONS. BUT, YES, I HAVE SIGNED THOSE TYPE.

Q. DID YOU HAVE AN UNDERSTANDING AT BUCKINGHAM THAT, IF YOU ENGAGED IN INSIDER TRADING OR OTHER ILLEGAL TRADING ACTIVITY, THAT YOU COULD BE TERMINATED?

A. YES.

Q. DID YOU UNDERSTAND THAT IN RELATION TO YOUR EMPLOYMENT AT LEVEL GLOBAL AS WELL?

A. YES.

Q. ARE THESE PROVISIONS THAT MR. HUDDLESTON TOOK YOU THROUGH,

ARE THOSE FAIRLY STANDARD IN THE INDUSTRY?

A. I WOULD CONSIDER THOSE TO BE STANDARD.

Q. NOW, TELL THE COURT, WHAT HAPPENED TO LEVEL GLOBAL IN 2011?

A. WELL, IN NOVEMBER OF 2010, THE FIRM WAS CHARGED -- IT WAS ACTUALLY RAIDED BY THE FBI. AND IT WAS CHARGED WITH VIOLATING INSIDER TRADING LAWS -- NOT THE FIRM, BUT ANTHONY CHIASSON, WHO I MENTIONED EARLIER, WHO WAS THE COFOUNDER AND THE DIRECTOR OF RESEARCH, WAS CHARGED WITH ILLEGAL TRADING IN SOME TECHNOLOGY-RELATED NAMES. AND AS A RESULT OF THAT, THE FIRM CLOSED DOWN AT THE BEGINNING OF 2011.

Q. WAS THERE A PARALLEL SEC INVESTIGATION AS WELL?

A. AGAINST ANTHONY CHIASSON?

Q. AGAINST LEVEL GLOBAL.

A. AGAINST LEVEL GLOBAL, YEAH, I BELIEVE THERE WAS, YEAH.

Q. DID YOU PARTICIPATE IN ANY WAY FACTUALLY IN THE SEC'S INVESTIGATION OF LEVEL GLOBAL?

A. NO, I DID NOT.

THE COURT: THERE WAS BOTH A CRIMINAL AND A CIVIL PROCEEDING?

THE WITNESS: I'M SORRY?

THE COURT: THERE WAS BOTH A CRIMINAL AND A CIVIL PROCEEDING?

THE WITNESS: THAT'S CORRECT.

THE COURT: AND THE CIVIL ONE WAS AGAINST THE FIRM OR

AGAINST MR. CHIASSON OR BOTH?

THE WITNESS: IT WAS AGAINST THE FIRM, WHICH SETTLED. AND IT WAS ALSO AGAINST MR. CHIASSON, WHICH IS STILL IN LITIGATION, I BELIEVE, BECAUSE OF THE OVERTURNING OF HIS CONVICTION IN NEWNAN.

Q. (BY MR. MONNIN) TO YOUR KNOWLEDGE, WAS LEVEL GLOBAL REPRESENTED IN THE SEC'S INVESTIGATION?

A. WAS LEVEL, WAS IT REPRESENTED --

Q. REPRESENTED BY COUNSEL?

A. BY COUNSEL, YES.

Q. HAS ANYONE, EITHER DIRECTLY FROM LEVEL GLOBAL OR AS AN AGENT OF LEVEL GLOBAL, EVER COME TO YOU SEEKING TO EXERCISE ANY TERMINATION RIGHTS?

A. NO.

Q. HAS ANYONE FROM LEVEL GLOBAL, EITHER DIRECTLY OR IN AN AGENCY CAPACITY, SOUGHT TO CALL BACK YOUR COMPENSATION?

A. NO.

Q. DO YOU HAVE ANY KNOWLEDGE AS YOU SIT HERE WHEN LEVEL GLOBAL SETTLED WITH THE SEC?

A. I BELIEVE -- I DON'T KNOW THE EXACT DATE. IT WOULD HAVE PROBABLY BEEN IN '11 OR '12, BUT I REALLY DON'T KNOW.

Q. DID ANYONE FROM -- LET ME STRIKE THAT AND ASK, WERE YOU EVER INVOLVED IN ANY WAY IN THE SEC'S INVESTIGATION OF LEVEL GLOBAL?

A. NO.

Q. WERE YOU EVER SUBPOENAED FOR TESTIMONY?
A. NO.
Q. WERE YOU EVER CONTACTED BY ANYONE AT A LAW FIRM?
A. NO.
Q. DO YOU KNOW THE ECONOMIC TERMS OF LEVEL GLOBAL'S SETTLEMENT WITH THE SEC?
A. IF I RECALL, I BELIEVE THEY PAID OUT ABOUT A $10 MILLION FINE PLUS ANOTHER TEN MILLION PENALTY. IT WAS ABOUT A $20 MILLION TOTAL SETTLEMENT. THAT'S MY UNDERSTANDING. BUT I'M NOT 100 PERCENT SURE.
Q. DO YOU KNOW IF YOUR TRADING ACTIVITY THAT THE COURT HAS FOUND YOU LIABLE FOR WAS INVOLVED AT ALL --
A. NO.
Q. -- IN THAT SETTLEMENT?
A. NO, IT WAS NOT.
Q. WHY DO YOU SAY THAT?
A. WELL, I DON'T KNOW. YOU ASKED ME DO I KNOW. I'M NOT -- I GUESS I'M NOT SURE. THE REASON I SAY I DON'T THINK IT WAS IS BECAUSE THAT SETTLEMENT SEEMED TO BE MORE FOCUSED ON THE CHIASSON AND TECHNOLOGY-TYPE TRADING.
Q. MR. MEGALLI, LET ME SHOW YOU WHAT'S BEEN MARKED FOR IDENTIFICATION AS EXHIBIT 9. DO YOU RECOGNIZE THAT?
A. I'D HAVE TO JUST LOOK AT IT. GIVE ME A MINUTE, PLEASE.
OKAY.
Q. SO MY QUESTION IS, DO YOU RECOGNIZE IT?

A. IT LOOKS LIKE THE SETTLEMENT AGREEMENT WITH LEVEL GLOBAL AND THE SEC.
Q. HAVE YOU REVIEWED THAT DOCUMENT BEFORE YOUR APPEARANCE HERE IN COURT TODAY?
A. I DON'T KNOW THAT I'VE REVIEWED THIS DOCUMENT, PER SE, BUT I KNOW THAT I SAW THE RESULTS OF THE SETTLEMENT IN THE PRESS AND SO FORTH.
Q. WHAT'S THE DATE OF THE SETTLEMENT IN THAT EXHIBIT?
A. THE 5/31/13 DATE OR --
Q. SO MAY 31ST OF 2013?
A. CORRECT.
Q. AND FOLLOWING MAY 31ST OF 2013, HAS ANYONE FROM THE SEC EVER SOUGHT TO RECOVER FROM YOU PERSONALLY OR DIRECTLY PURSUANT TO THAT SETTLEMENT AGREEMENT?
A. NOT PURSUANT TO THE DOLLARS IN THIS $21 MILLION REFERENCED IN THIS.
Q. SO, TO YOUR KNOWLEDGE, IS THE 20 MILLION, $21 MILLION THAT'S REFERENCED IN THE SETTLEMENT DOCUMENT, SPECIFICALLY ROMAN THREE AT PAGE THREE, DOES THAT INCLUDE ANY OF YOUR CARTER'S-RELATED TRADING?
A. WELL, AGAIN, I MEAN, MY, MY UNDERSTANDING IS THAT THIS SETTLEMENT HAD TO DO MORE WITH THE CHIASSON SORT OF TECHNOLOGY ARENA AND NOT CONSUMER OR CARTER'S. THAT'S MY UNDERSTANDING.
Q. OKAY. AND, REALLY, MY QUESTION IS -- AND I UNDERSTAND THAT THERE ARE OTHER INDIVIDUALS WHO ARE INVOLVED IN THE

SETTLEMENT WITH LEVEL GLOBAL, THERE WERE OTHER INDIVIDUALS WHO LITIGATED THAT. TO YOUR KNOWLEDGE, AS MARK MEGALLI, ARE YOU A PART OF THIS SETTLEMENT AGREEMENT AT ALL? IS YOUR CONDUCT FOR WHICH THE COURT HAS FOUND YOU LIABLE, IS IT A PART OF THE SETTLEMENT AGREEMENT?

A. I DON'T KNOW, BUT I DON'T THINK SO.

Q. WHEN DID THE INVESTIGATION IN RELATION TO YOU BEGIN SPECIFICALLY HERE IN ATLANTA?

A. THE INVESTIGATION WOULD HAVE BEGUN, I BELIEVE THE LAWSUIT WAS FILED THE SAME DAY AS MY PLEA HEARING, WHICH WOULD HAVE BEEN IN NOVEMBER OF 2013.

Q. ARE YOU AWARE, BASED ON YOUR REVIEW OF DOCUMENTATION THAT YOU RECEIVED IN DISCOVERY, CRIMINAL DISCOVERY, THAT THE INVESTIGATION BEGAN PRIOR TO YOUR CRIMINAL PLEA, IN THE FALL OF 2013?

A. YEAH. IT WOULD HAVE BEGUN PRIOR, SURE.

Q. DO YOU KNOW IF THE INVESTIGATION RELATED TO YOU BEGAN PRIOR TO MAY 2013?

A. WITH RESPECT TO THE SEC?

Q. YES.

A. I BELIEVE THAT IT DID, BECAUSE THE REASON I KNOW THAT ACTUALLY IS BECAUSE THE CRIMINAL INVESTIGATION, THE FIRST I HAD LEARNED OF IT WAS IN FEBRUARY OF 2012. AND I BELIEVE THAT I LEARNED OF THE SEC INVESTIGATION, YOU KNOW, SOMEWHAT SHORTLY AFTER THAT. IT WASN'T I DON'T THINK MORE THAN A YEAR AFTER

THAT.

MR. MONNIN: JUDGE, I DON'T HAVE A CERTIFIED COPY OF THE SETTLEMENT AGREEMENT. I CAN CERTAINLY OBTAIN ONE. I'D LIKE TO MOVE THE SETTLEMENT AGREEMENT INTO EVIDENCE. I UNDERSTAND --

THE COURT: FILED JUDGMENT, ARE YOU REFERRING TO THE SETTLEMENT?

MR. MONNIN: I'M SORRY, THE FINAL JUDGMENT.

THE COURT: THAT'S FINE.

ARE THERE ANY OBJECTIONS?

MR. HUDDLESTON: NO OBJECTION.

Q. (BY MR. MONNIN) NOW, LET'S, LET'S MOVE OVER TO YOUR -- THE 2009 DISCRETIONARY BONUS PROVISION OF YOUR EMPLOYMENT AGREEMENT, PARAGRAPH 4(C). I KNOW WE'VE BEEN OVER IT, AND I DON'T WANT TO BELABOR IT. DID YOU MAKE A CONSCIOUS CHOICE NOT TO SEEK A DISCRETIONARY BONUS PURSUANT TO THAT PROVISION?

A. I GUESS I WOULD SAY WHAT I SAID EARLIER. IT WAS ASSUMED THAT WHEN YOU'RE THERE FOR A STUB YEAR THAT YOU'RE NOT GOING TO BE GETTING BONUSED OUT ON THAT YEAR, AND BECAUSE MY CONTRACT REALLY OFFERED THESE PARTICIPATION POINTS FOR THE YEAR 2010, IT WAS UNDERSTOOD THAT THAT'S WHEN MY INCENTIVE PARTICIPATION WOULD REALLY BE KICKING IN, I GUESS.

Q. DID ANYONE TELL YOU ON THE FRONT END THAT YOU WERE INELIGIBLE FOR A DISCRETIONARY BONUS IN 2010?

A. I WOULDN'T SAY SOMEBODY -- I DON'T THINK THAT THAT

CONVERSATION OCCURRED AT ALL, WHETHER YOU'RE ELIGIBLE OR INELIGIBLE. I JUST STARTED WORKING, AND THEN THE YEAR FINISHED, AND WE STARTED 2010, AND WE MOVED ON TO THE NEXT YEAR.

Q. LAST FEW QUESTIONS. MR. HUDDLESTON WALKED YOU THROUGH THE SERIOUSNESS OF THE OFFENSE CONDUCT HERE AND WHAT YOU PLED GUILTY TO. CAN YOU JUST SUMMARIZE FOR THE COURT, FIRST OF ALL, HOW MUCH TIME DID YOU SERVE IN PRISON?

A. I WAS SENTENCED TO ONE YEAR AND ONE DAY AND ENDED UP SERVING EIGHT MONTHS AND ONE WEEK IN A PRISON AND ABOUT AN ADDITIONAL COUPLE OF MONTHS IN A HALFWAY HOUSE WHERE YOU'RE BASICALLY STILL INCARCERATED, SO TOTAL ABOUT TEN AND A HALF MONTHS.

Q. WHERE WAS YOUR FAMILY -- WHERE WERE YOU LOCATED DURING THIS TIME AND WHERE WAS YOUR FAMILY LOCATED?

A. I WAS IN PENSACOLA, FLORIDA, FOR THE PRISON PART OF IT AND A NEW ORLEANS HALFWAY HOUSE FOR THE HALFWAY HOUSE PART OF IT THE LAST COUPLE OF MONTHS.

Q. THE -- HOW ABOUT THE FINANCIAL --

THE COURT: YOU LIVE IN NEW YORK?

THE WITNESS: WELL, WE'RE ACTUALLY --

THE COURT: LIVING HERE, BECAUSE I KNOW YOU CAUGHT A PLANE.

THE WITNESS: WE'RE TEMPORARILY LIVING IN NEW ORLEANS SO MY WIFE CAN GET -- SHE'S A STUDENT AT TULANE. SHE'S TRYING

TO GET A MASTER'S IN ARCHITECTURE SO SHE CAN BECOME AN ARCHITECT. SO WE'RE TEMPORARILY IN NEW ORLEANS WHILE SHE DOES HER DEGREE.

Q. (BY MR. MONNIN) HOW ABOUT THE FINANCIAL SIDE OF THE CASE, WHAT DID YOU PAY IN RESTITUTION?

A. FIFTY THOUSAND DOLLARS IN RESTITUTION.

Q. AND SUFFICE IT TO SAY YOU'VE BEEN DEFENDED BY COUNSEL THROUGHOUT AND YOU'VE PAID SUBSTANTIAL LEGAL FEES?

A. THE LEGAL BILLS HAVE BEEN EASILY IN EXCESS OF A MILLION AND A HALF AND PROBABLY IN EXCESS OF $2 MILLION AT THIS POINT. MY COMPENSATION FOR THE LAST TWO YEARS SINCE I HAVEN'T BEEN EMPLOYED HAS BEEN ZERO. AND MY WIFE'S NOT EARNING MONEY. SO FROM A FINANCIAL POINT OF VIEW, IT'S BEEN OBVIOUSLY DEVASTATING.

Q. HAVE YOU FUNDED YOUR REPRESENTATION YOURSELF?

A. I HAVE, YEAH. WE DIDN'T HAVE INSURANCE.

Q. THE -- I KNOW THERE WAS A BACK-AND-FORTH IN TERMS OF SOME OBJECTIONS BEING INTERPOSED, BUT WAS SETTLING FINANCIALLY WITH THE SEC EVER A PART OF YOUR DEFENSE STRATEGY?

A. I WOULD HAVE LOVED TO HAVE SETTLED WITH THE SEC IF THEY WOULD HAVE BEEN AMENABLE TO SETTLE FOR AN AMOUNT I COULD PAY. BUT IF SOMEONE IS SUING YOU FOR MILLIONS OF DOLLARS, AND I DON'T HAVE THAT, I DON'T KNOW HOW -- IF THAT'S THE ONLY ANSWER THEY WILL ACCEPT, I DON'T SEE HOW I CAN DO THAT. IT'S -- SETTLEMENT HAS TO BE SOMETHING MANAGEABLE THAT YOU ACTUALLY

HAVE THE FUNDS TO SETTLE. SO I WOULD HAVE LOVED TO. SURE, I WOULD HAVE LOVED TO HAVE SETTLED. AND I THINK, AS I AM SURE YOU REMEMBER, WE DID TRY.

MR. MONNIN: YOUR HONOR, I THINK THAT'S ALL I HAVE. I APPRECIATE IT.

THE COURT: ANYTHING FURTHER FROM THIS WITNESS?

MR. HUDDLESTON: YES.

RECROSS-EXAMINATION

BY MR. HUDDLESTON:

Q. SINCE IT'S BEEN BROUGHT UP THAT YOU BELIEVED YOU TRIED TO SETTLE AND IT BROKE DOWN OVER MONEY, SIR, I'LL ASK YOU THE DATES OF THOSE CONVERSATIONS.

A. I DON'T KNOW THE EXACT DATES. BUT I BELIEVE THAT TOWARDS THE BEGINNING OF THE PROCESS -- AND I WAS NOT IN THESE CALLS, BUT, PAUL, MAYBE YOU CAN ADDRESS THIS BETTER THAN ME -- ATTEMPTS WERE MADE TO SETTLE. I DON'T KNOW THE EXACT DATES.

Q. BEFORE YOUR CRIMINAL CASE WAS RESOLVED, YOU MEAN?

A. BY THE CRIMINAL CASE BEING RESOLVED, YOU MEAN BEFORE MY SENTENCING HEARING?

Q. YES.

A. BEFORE THE SENTENCING HEARING, RIGHT.

Q. DO YOU RECALL AT THE SENTENCING HEARING JUDGE STORY FINDING IT SIGNIFICANT THAT YOU HAD AN UPCOMING SETTLEMENT WITH THE SEC AND THAT YOU WOULD BE EXPECTED TO PAY RESTITUTION AND THAT, AS A RESULT, HE WAS NOT GOING TO ORDER YOU TO PAY A FINE

OR COST OF INCARCERATION.

A. I DO RECALL THAT. THE OTHER THING, THOUGH, THAT I ALSO RECALL IS THAT HE MADE A POINT TO SAY HE BELIEVES THAT A REMOTE TIPPEE IS IN A VERY DIFFERENT POSITION THAN A TIPPER WHO STEALS COMPANY SECRETS, SUCH AS ERIC MARTIN AND RICHARD POSEY. AND, THEREFORE, HE SENTENCED THEM FIRST; SENTENCED ERIC MARTIN TO 24 MONTHS, SENTENCED RICHARD POSEY TO 15 MONTHS, AND THEN ULTIMATELY SENTENCED ME TO A YEAR AND A DAY. AND ALL OF THAT SENTENCING HAD HAPPENED BEFORE THOSE REPRESENTATIONS WERE MADE.

SO I AGREE THAT HE DID ELICIT THAT AS A FACTOR, BUT I JUST WANT TO BE CLEAR THAT WAS CERTAINLY NOT THE ONLY FACTOR THAT HE WAS RELYING ON.

THE COURT: THANK YOU.

Q. (BY MR. HUDDLESTON) SO I AM HANDING WHAT WE WILL MARK AS PLAINTIFF'S EXHIBIT 1. AND WE HAVE MARKED PAGE ON WHICH JUDGE STORY MAKES HIS COMMENTS. AND I'LL SHOW IT TO YOU SO -- HAND YOU EXHIBIT 1 NOW, IF YOU CAN SEE, STARTS, IN LIGHT.

A. YEAH. I REMEMBER THIS, UH-HUH.

Q. COULD YOU READ THAT INTO THE RECORD, PLEASE?

A. 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.

MR. HUDDLESTON: THAT'S ALL. WE'LL MOVE TO ADMIT NUMBER 1.

THE COURT: THAT'S FINE. I THINK IT'S REALLY PART OF

THE RECORD. IT'S PART OF THE RECORD ANYWAY IN THIS MATTER. BUT I'M HAPPY TO HAVE IT AS PART OF THE RECORD OF THIS HEARING.

ARE THERE ANY OBJECTIONS?

MR. MONNIN: NO, YOUR HONOR.

THE COURT: ALL RIGHT. IT'S ADMITTED.

MR. HUDDLESTON: THANK YOU, YOUR HONOR.

I BELIEVE YOU HAD SOME QUESTIONS FOR ME?

THE COURT: I DO. ALL RIGHT. I HAVE SOME QUESTIONS FOR THE DEFENDANT FIRST.

NOW, YOU SAID BASICALLY YOU PAID THE LEGAL FEES, PAID THE -- I DON'T KNOW. HAVE YOU PAID THE $50,000.00 RESTITUTION?

THE WITNESS: YES. YES, MA'AM.

THE COURT: ALL RIGHT. AND YOUR WIFE'S IN SCHOOL. WHAT HAVE Y'ALL BEEN LIVING ON, AND WHAT ARE THE FINANCIALS? OBVIOUSLY VERY DIFFERENT THAN WHAT THEY ONCE WERE.

THE WITNESS: YEAH. WE'VE BEEN LIVING ON OUR SAVINGS. AND SO, BASICALLY, I HAVE REALLY THREE THINGS OF ANY VALUE, I GUESS. ONE IS OUR LIQUID ASSETS, WHICH WOULD BE THINGS IN OUR CHECKING AND SAVINGS ACCOUNTS. AND MY UNDERSTANDING IS THAT IT'S APPROXIMATELY $800,000.00 BEFORE SOME UPCOMING LEGAL BILLS THAT I'M SURE WE'LL BE GETTING ANY DAY NOW. BUT AS OF TODAY, I BELIEVE THAT'S ABOUT $800,000.00.

AND THEN THE SECOND COMPONENT OF THAT I WOULD SAY IS IRA AND 401(K) KIND OF SAVINGS, RETIREMENT ACCOUNTS. AND THE TOTAL IN PRETAX DOLLARS IN THE TWO -- I BELIEVE I HAVE ACTUALLY

THREE ACCOUNTS -- IS APPROXIMATELY $400,000.00. BUT AS I'M SURE YOU KNOW, WHEN YOU LIQUIDATE AND PAY PENALTIES, IT'S PROBABLY HALF OF THAT IN TERMS OF AN AFTER-TAX LIQUIDATION VALUE.

AND THEN THE FINAL ASSET THAT WE HAVE IS OUR PRIMARY RESIDENCE, WHICH IS AN APARTMENT IN NEW YORK THAT I BOUGHT IN 2005 WITH MY WIFE, WHICH WE ARE HOPING NOT TO HAVE TO SELL.

THE COURT: ALL RIGHT. SO OF THE LIQUID ASSETS, THE $800,000.00, DO YOU HAVE ANY BALL PARK FIGURE OF WHAT PORTION OF THOSE LIQUID ASSETS THAT YOU POSSESSED AT THE POINT THAT YOU WENT TO WORK FOR LEVEL GLOBAL?

THE WITNESS: THAT'S -- LET ME THINK FOR A SECOND ABOUT THAT. SO I STARTED WORKING FOR THEM IN AUGUST OF 2009. AND I BELIEVE IT WAS SOMETHING IN THE MID-HUNDRED-THOUSAND-DOLLAR RANGE, IF I HAD TO GUESS. IT CERTAINLY WASN'T MILLIONS OF DOLLARS AT THE TIME, YOU KNOW, THAT I HAD STARTED --

THE COURT: WHEN YOU SAY MID-HUNDRED THOUSAND, DO YOU MEAN 150 OR YOU MEAN 500?

THE WITNESS: IN THE FIVE HUNDRED SORT OF THOUSAND-ISH RANGE. IF I RECALL CORRECTLY, I THINK THAT'S ABOUT WHERE WE WERE FINANCIALLY AT THAT TIME.

AND JUST TO BE CLEAR, SO THAT THOSE NUMBERS ADD UP, AFTER I LEFT LEVEL GLOBAL WHEN THE FIRM CLOSED DOWN AND I WENT BACK -- ACTUALLY I WENT BACK TO BUCKINGHAM, WHICH WAS MY

ORIGINAL EMPLOYER. AND IN 2011 AND 2012, I MADE ENOUGH MONEY AT BUCKINGHAM SO THAT I WAS ABLE TO OFFSET THE LEGAL BILLS THAT I CITED EARLIER. AND THAT'S WHY THAT NUMBER DIDN'T CHANGE THAT MUCH FROM THAT 800,000. IT SORT OF WENT UP AND THEN IT WENT STRAIGHT DOWN.

THE COURT: ALL RIGHT. SO WHAT WERE YOUR EARNINGS IN 2011 AND 2012?

THE WITNESS: IN 2011, I EARNED A TOTAL COMPENSATION OF 2.8 MILLION. AND IN 2012, I EARNED TOTAL COMPENSATION OF 2.0 MILLION. THAT'S BONUS PLUS SALARY. BUT ON AN AFTER-TAX BASIS, OF COURSE, AT THAT TAX BRACKET, YOU KEEP ABOUT HALF, ROUGHLY, OF THOSE PROCEEDS. SO THOSE PROCEEDS WERE USED TO PAY LEGAL EXPENSES AS WELL AS LIVING EXPENSES OVER THE LAST, YOU KNOW, TWO YEARS WHEN I HAVEN'T BEEN WORKING, ABLE TO WORK.

THE COURT: DO YOU HAVE ANY IDEA HOW MUCH YOUR ADDITIONAL FEES ARE?

MR. MONNIN: WELL, I DON'T, YOUR HONOR. I MEAN, CERTAINLY THIS PERIOD RELATED TO THIS HEARING HAS INVOLVED SOME LEGAL EXPENSES.

THE COURT: OKAY.

MR. MONNIN: AND I BELIEVE WE'LL CONTINUE TO BE BRIEFING THINGS.

THE COURT: ALL RIGHT. WELL, OBVIOUSLY, YOU AND YOUR WIFE ARE FUNDING HER EDUCATION. DO YOU HAVE ANY OTHER FAMILY OBLIGATIONS?

THE WITNESS: TUITION FOR OUR DAUGHTERS. WE HAVE TWO DAUGHTERS WHO WE PAY TUITION FOR.

THE COURT: FOR? ARE THEY IN PRIVATE SCHOOL?

THE WITNESS: THEY ARE IN PRIVATE SCHOOL IN NEW ORLEANS, CORRECT. YOU KNOW, OUR MAIN EXPENSES AT THIS POINT ARE THE COST OF KEEPING AN EMPTY APARTMENT IN NEW YORK THAT WE'RE HOPING TO GO BACK TO, THE COST OF RENTING OUR TEMPORARY SPACE IN NEW ORLEANS WHILE MY WIFE FINISHES OUT HER DEGREE.

THE COURT: THEN YOU'LL GO BACK TO NEW YORK.

THE WITNESS: THAT WILL BE IN ABOUT 18 MONTHS.

THE COURT: YOU HAVE NOT RENTED YOUR APARTMENT?

THE WITNESS: WE RENTED IT FOR A PERIOD OF TIME WHILE I WAS INCARCERATED. THE APARTMENT IS GETTING VERY WORN DOWN, AND WE WERE HAVING PROBLEMS WITH THE RENTERS, BECAUSE THEY SAID THE AIR CONDITIONING IS NOT WORKING, THINGS ARE BREAKING DOWN, AND SO THEY STOPPED THE LEASE. AND, YOU KNOW, IT'S A DIFFICULT APARTMENT TO RENT BECAUSE IT NEEDS SOME UPKEEP AT THIS POINT.

THE COURT: I DON'T WANT TO PUT YOUR ADDRESS ON THE RECORD.

THE WITNESS: NO, IT'S IN NEW YORK CITY.

THE COURT: IT'S IN NEW YORK CITY, THOUGH. ON THE UPPER WEST SIDE, THE UPPER EAST SIDE, THE LOWER WEST SIDE, SOHO?

THE WITNESS: IT'S NEAR GRAMERCY PARK.

THE COURT: OKAY. AND WHAT ARE YOUR FUTURE PLANS?

THE WITNESS: WELL, THAT'S WHAT I'M TRYING TO FIGURE OUT NOW. SO, FOR NOW, WHAT I'M DOING IS, I'M WORKING WITH MY BROTHER. MY BROTHER WAS AN EXECUTIVE AT MICROSOFT FOR SIX YEARS. HE HAD A BUSINESS IDEA THAT LED HIM TO LEAVE MICROSOFT EARLIER THIS YEAR.

AND WITHOUT GOING INTO THE SPECIFICS, IT HAS TO DO WITH AN ONLINE ENTREPRENEURIAL COMMUNITY KIND OF AN IDEA WHERE YOU'RE HELPING SMALL BUSINESS OWNERS WITH THEIR BUSINESSES. SO I'M WORKING WITH HIM. PRIMARILY I'M WORKING WITH HIM ON THIS STARTUP. WE DON'T HAVE REVENUES. WE HAVEN'T RAISED ANY CAPITAL. I THINK IT'S A GOOD IDEA, BUT IT'S SORT OF IN THE VERY EARLY STAGES AND WILL TAKE SOME TIME TO GET TO FRUITION, IF IT EVER DOES.

I'VE TRIED TO VOLUNTEER AT A NUMBER OF DIFFERENT COMMUNITY SERVICE ORGANIZATIONS TO FULFILL MY HUNDRED HOURS OF COMMUNITY SERVICE THAT JUDGE STORY REQUIRED. AND WHAT I FOUND IS THAT, EVEN ON A VOLUNTEER BASIS, IT'S VIRTUALLY IMPOSSIBLE TO GET WORK BECAUSE PEOPLE DON'T WANT TO BE ASSOCIATED WITH A CONVICTED FELON. AND THAT'S BEEN VERY PAINFUL. I'VE TRIED TO BE A GUARDIAN AD LITEM FOR A CHILDREN'S ORGANIZATION. I'VE TRIED TO WORK FOR THE INNOCENCE PROJECT AND A NUMBER OF OTHER THINGS. AND IT'S BEEN INTERESTING AND FRUSTRATING TO ME TO BE WILLING TO WORK FOR FREE AND HAVE PEOPLE SAY, WE CAN'T WORK WITH YOU, WE DON'T NEED THE ASSOCIATION. SO --

THE COURT: HOW LONG WAS YOUR SUPERVISED RELEASE

TERM?

THE WITNESS: THREE YEARS.

THE COURT: AND THE INNOCENCE PROJECT WOULDN'T LET YOU VOLUNTEER WITH THEM?

THE WITNESS: NO, IRONIC. BUT I HAVE FULFILLED THE 100 HOURS.

THE COURT: YOU HAVE DONE THAT?

THE WITNESS: I HAVE DONE THE 100 HOURS.

THE COURT: WHAT DID YOU END UP DOING?

THE WITNESS: I WORKED WITH A GROUP THAT ADVOCATES AGAINST SOLITARY CONFINEMENT CALLED SOLITARY WATCH. I USED TO WORK FOR RALPH NADER, AND HE PUT ME IN TOUCH WITH THEM. AND I'VE DONE A LOT OF LEGAL RESEARCH AND PUBLISHING FOR THEM.

I ALSO WORKED FOR A MELANOMA EDUCATION FOUNDATION. SO I'VE DONE ABOUT 80 HOURS WITH THAT GROUP. AND I AM ALSO GIVING A GUEST LECTURE AT YALE LAW SCHOOL NEXT MONTH. THAT'S ONLY GOING TO BE A FEW HOURS.

THE COURT: IS YOUR BROTHER-IN-LAW IN NEW ORLEANS?

THE WITNESS: MY BROTHER.

THE COURT: YOUR BROTHER, ACTUALLY.

THE WITNESS: YEAH. NO, HE LIVES IN SEATTLE.

THE COURT: AND HOW OLD ARE YOUR DAUGHTERS?

THE WITNESS: [redacted] AND [redacted]

THE COURT: AND YOU WERE RELEASED WHEN?

THE WITNESS: I WAS RELEASED FROM PENSACOLA ON MAY

15TH OF THIS YEAR. AND I WAS RELEASED FROM THE HALFWAY HOUSE/ HOME CONFINEMENT JULY 22ND OF THIS YEAR.

THE COURT: WHEN DID YOUR FAMILY MOVE TO NEW ORLEANS?

THE WITNESS: NOT THIS PAST SUMMER BUT THE SUMMER OF 2014, JUST BEFORE I WENT TO PENSACOLA. MY SENTENCE STARTED THERE SEPTEMBER 8TH OF 2014.

THE COURT: ANY QUESTIONS?

MR. MONNIN: NO, YOUR HONOR.

MR. HUDDLESTON: NO, YOUR HONOR.

THE COURT: THANK YOU.

THE WITNESS: THANK YOU.

MR. HUDDLESTON: YOU CAN COME DOWN.

THE COURT: YOU CAN STEP DOWN.

ALL RIGHT. SO I UNDERSTAND YOUR POSITION ABOUT MATERIALITY. AND YOU PROBABLY JUST GIVE ME A FEW CASES ON THAT AS MUCH AS ANYTHING ELSE, JUST YOUR VIEWPOINT. I DON'T KNOW THAT WE NEED TO HAVE EVERYONE DO A LOT MORE BRIEFING IF THAT'S THE FOCUS.

I GUESS MY QUESTION REALLY IS, AS TO THE OTHER ITEMS, IS YOUR GENERAL THEORY THAT BASED ON THE TERMINATION PROVISION, OR IS IT SIMPLY BASED ON THE TOTALITY OF GLOBAL'S PROFITS? I JUST WOULD LIKE YOU TO RE-ARTICULATE TO ME YOUR THEORY --

MR. HUDDLESTON: SURE.

THE COURT: -- FOR HOW I SHOULD -- THE BASIS HERE OF DISGORGEMENT AND THE CIVIL PENALTY, JUST SO I CAN HEAR IT AGAIN

BASED ON THE EVIDENCE.

MR. HUDDLESTON: SURE, YOUR HONOR.

THE COURT: GIVE THE OPPORTUNITY TO MR. MONNIN TO RESPOND IF YOU NEED FURTHER REPLY. I JUST THINK IT WOULD PROBABLY BE MORE USEFUL SINCE I'VE GOT YOU HERE AND I CAN DO SOME LIVE EDUCATION RATHER THAN READING EDUCATION.

MR. HUDDLESTON: THERE YOU GO. WELL, I'LL DO MY BEST.

WE'LL START WITH THE, THE POINT THAT WE BELIEVE THAT THE CONTORINIS DECISION FROM THE SECOND CIRCUIT IS GOOD LAW AND THAT THE CASE OUT OF THE FIFTH CIRCUIT, THE OLD FIFTH CIRCUIT, BLATT, THAT YOUR HONOR CITED, NEED NOT BE READ TO CONTRADICT CONTORINIS. BLATT WAS NOT AN INSIDER TRADING CASE. THERE WERE SPECIAL CONSIDERATIONS REGARDING DISGORGEMENT IN INSIDER TRADING CASES. AND BLATT STANDS FOR THE PROPOSITION THAT YOU CAN'T MAKE SOMEBODY DISGORGE ASSETS THAT HAVE NOTHING TO DO WITH THE FRAUD.

THAT'S NOT THE SITUATION WE FIND OURSELVES IN HERE. AND SO WE WOULD URGE THE COURT TO LOOK AT CONTORINIS, WHICH PROVIDES FOR HEDGE FUND MANAGERS, SPECIFICALLY A HEDGE FUND MANAGER BEING ORDERED TO DISGORGE THE TRADES THAT HE ORDERED.

I WOULD ALSO MAKE THE POINT, IT'S WELL SETTLED LAW, ALTHOUGH I DON'T BELIEVE THE 11TH CIRCUIT HAS RULED SPECIFICALLY, THAT A TIPPER CAN BE RESPONSIBLE FOR THE TIPPEE'S PROFITS. OTHERWISE, IT'S JUST WAY TOO EASY TO AVOID LIABILITY

AND THE FINANCIAL CONSEQUENCES THAT GO WITH VIOLATING THE INSIDER TRADING LAW.

IN THIS CASE, WHEN WE GET DOWN TO IT, MR. MEGALLI WAS THE TIPPER. LEVEL GLOBAL WAS THE TIPPEE. AND IT'S PERFECTLY IN CONFORMITY WITH ALL THE AUTHORITIES THAT HE SHOULD BE RESPONSIBLE FOR HIS TIPPEE'S PROFITS, THAT THERE BE JOINT AND SEVERAL RESPONSIBILITY FOR THOSE.

NOW, THERE WAS A LOT OF TALK ABOUT THE LEVEL GLOBAL SETTLEMENT WITH THE SEC. YOUR HONOR, I CAN REPRESENT TO YOU THAT THAT CASE DID NOT INVOLVE TRADES IN CARTER'S SECURITIES. IT DID NOT INVOLVE MR. MEGALLI'S MISCONDUCT. THEY ARE TWO SEPARATE THINGS.

THE COURT: WHAT WAS THE SCOPE OF THE MONIES CLAIMED BY THE SEC THERE, I GUESS, JUST IN TERMS OF SHEER EQUITY AND PARITY AND THINKING ABOUT PROPORTIONALITY ISSUES. IT -- SHOULDN'T I BE CONCERNED AT ALL ABOUT WHAT THE SUM OF THE PROFITS WERE THAT GLOBAL MIGHT HAVE OBTAINED IN THIS OTHER CASE WITHOUT, I MEAN, I CAN OBVIOUSLY GO BACK TO THE RECORD.

MR. HUDDLESTON: AS A PRECEDENT FOR HOW MUCH TO --

THE COURT: WELL, POTENTIALLY, YES.

MR. HUDDLESTON: WELL, I'M NOT SURE THAT THE DOCUMENT WE HAVE IN FRONT OF YOU LAYS OUT THE FACTORS AND ANALYZES THE FACTORS THAT ARE RELEVANT. SO I'M NOT SURE I CAN COMMENT, JUDGE. I DIDN'T WORK ON THE LEVEL GLOBAL CASE, SO I DON'T KNOW.

THE OTHER POINT I WOULD MAKE IS THAT I THINK YOU WILL REMEMBER THAT MR. MEGALLI ADMITTED THAT IT WAS FAIR TO SAY HE CONTROLLED THE TRADING OF THE CONSUMER DISCRETIONARY SPACE, THAT IT WAS HIS TO RUN, THAT BEFORE HE GOT THERE, THE FIRM WAS LARGELY A TECHNICAL ORGANIZATION AND THAT HE'S THE PERSON THAT THEY GAVE THAT KIND OF TRADING TO. THERE ARE PROVISIONS IN THE SECURITIES LAW FOR CONTROL OF PERSONAL LIABILITY. THAT'S WHY I BROUGHT OUT THE FACT THAT HE WAS PAID, AT LEAST IN 2010, AS IF HE OWNED THREE PERCENT OF THE COMPANY. I UNDERSTAND THAT HE WASN'T ON THE ARTICLES OF INCORPORATION, NOT LISTED AS AN OWNER. BUT THE TRUTH IS, HE WAS PAID AS AN OWNER AND NOT JUST ON HIS OWN PROFITS. YOU WILL REMEMBER HE WAS PAID ON THE LEVEL RADAR PROFITS, AS WELL, WHICH HE HAD NOTHING TO DO WITH. AND SO WE WOULD SAY HE WAS PAID LIKE AN OWNER. HE HAD CONTROL OF THAT TRADING. THEREFORE, HE SHOULD BE HELD RESPONSIBLE FOR THE DISGORGEMENT THAT LEVEL GLOBAL MADE.

BY THE WAY, IT WAS HIM.

THE COURT: I DON'T REALLY KNOW WHAT THE OWNERS MADE.

MR. HUDDLESTON: WHAT THE FIRM MADE.

THE COURT: RIGHT.

MR. HUDDLESTON: YEAH.

THE COURT: EQUITY SHAREHOLDERS. I MEAN, I DON'T KNOW WHAT PERCENTAGE THEY MADE OR WHETHER THEY GOT EXTRA BENEFITS.

MR. HUDDLESTON: WELL, WE KNOW THAT THEY GOT THE TWO

MILLION LOSS AVOIDED IN 2009 AND THE $600,000.00 OF PROFIT IN 2010, SO WE BELIEVE THAT IS THE PROPER MEASURE OF DISGORGEMENT HERE. THOSE, THOSE ARE AS TO THE DISGORGEMENT ISSUES.

LET ME SEE IF THERE'S SOMETHING THAT I'M FORGETTING.

I MENTIONED THE CONTROL. I MENTIONED TIPPER RESPONSIBLE FOR THE TIPPEE'S LIABILITY.

OH, THE OTHER THAT YOU ASKED ME ABOUT BRINGING IN THE EMPLOYMENT AGREEMENT. OBVIOUSLY DISGORGEMENT IS AN EQUITABLE REMEDY AND THAT RESTS WITHIN THE SOUND DISCRETION OF THE COURT.

AND SO THE REASON I BROUGHT THAT OUT, JUDGE, IS THAT THE MAN KNEW IN OCTOBER 2009 THAT HE HAD ACTED WRONGFULLY. HE KNEW, IF HE HAD READ HIS EMPLOYMENT AGREEMENT, THAT HIS CONDUCT WOULD HAVE BEEN GROUNDS FOR TERMINATION FOR CAUSE, WHICH WOULD HAVE CUT OFF EVERY FINANCIAL BENEFIT HE RECEIVED THEREAFTER.

WE OFFERED THAT, MUCH AS MR. MONNIN OFFERED HIS SLIDE DECK AS AN ALTERNATIVE THING FOR THE COURT TO CONSIDER, WE OFFERED THAT AS A WAY FOR THE COURT TO CONSIDER THE INEQUITY HE OUGHT TO BE -- HE OUGHT TO PAY BACK EVERYTHING HE RECEIVED AFTER THAT FIRST VIOLATION.

SO THAT'S WHAT I HAVE TO SAY ABOUT DISGORGEMENT. IF YOU WANT ME TO GO ON ABOUT CIVIL PENALTIES --

THE COURT: SURE.

MR. HUDDLESTON: OKAY. THE CIVIL PENALTIES, THE FACTORS TO BE CONSIDERED ARE VERY SIMILAR TO THOSE TO BE CONSIDERED FOR WHETHER TO IMPOSE INJUNCTIVE RELIEF. THERE'S

ONLY ONE THING THAT'S DIFFERENT THERE.

SO YOU'VE GOT, YOU KNOW, THE SERIOUSNESS OF THE VIOLATION THAT YOU GOT. WAS IT ISOLATED. WAS IT REPEATED. YOU'VE GOT THE LEVEL OF SCIENTER. YOU'VE GOT THE ASSURANCES AGAINST MISCONDUCT AND HOW MUCH WEIGHT YOU CAN PUT ON THAT. AND YOU'VE GOT WHETHER THE DEFENDANT'S AGE AND OCCUPATION MIGHT GIVE HIM ADDITIONAL OPPORTUNITY FOR SIMILAR MISCONDUCT. AND SO I WENT THROUGH THOSE, THE EVIDENCE THERE.

WHAT I WOULD SAY, YOUR HONOR, IS THAT ALL OF THEM CUT IN FAVOR OF ENTERING AN INJUNCTION HERE. AND THE REASON I GO BACK TO THE -- WHICH IS ALSO CIVIL PENALTIES. THE ONE THING THAT'S DIFFERENT IN THE CIVIL PENALTIES ANALYSIS IS THAT YOU ADD ONE ELEMENT, WHICH THE JUDGE HAS BROUGHT OUT, AND THAT IS THAT THE DEFENDANT CAN COME FORWARD WITH EVIDENCE THAT HE CANNOT PAY. RIGHT? IT'S NOT OUR BURDEN TO PROVE THAT, BUT THE DEFENDANT CAN COME IN AND MAKE THAT RELEVANT. THERE IS NO FACTOR STATED LIKE MATERIALITY OR WAS HIS MISCONDUCT JUST A LITTLE DROP IN A BIGGER POOL. THAT'S NOT WHAT THE LAW IS.

SO, REGARDING THE INJUNCTIVE RELIEF, THE REASON I BRING OUT WHAT HAPPENED AT THE SENTENCING HEARING, JUDGE, AND YOU MADE THE POINT THAT IT'S PART OF THE RECORD, IN THE SENTENCING MEMORANDUM, WHICH I DIDN'T ASK HIM TO READ, IT'S IN THE BRIEFING, MR. MONNIN MADE THE POINT TO JUDGE STORY THAT THIS GUY IS GOING TO BE BARRED FROM THE SECURITIES INDUSTRY. WE STARTED THIS HEARING TODAY WITH US MAKING IT CLEAR THAT WE

DIDN'T EVEN PLEAD THAT. AND SO WE BELIEVE THAT THIS MAN WAS SENTENCED, GOT AN UNDULY LIGHT SENTENCE BECAUSE OF MISREPRESENTATIONS HE HAD MADE ABOUT THE RELIEF THE SEC WAS SEEKING AND ABOUT THE DEFENDANT'S INTENT TO ENTER INTO A SETTLEMENT WITH THE SEC.

AND SO WE THINK THAT GOES TO BOTH THE ASSURANCE OF, YOU KNOW, GOOD BEHAVIOR IN THE FUTURE, GIVEN THE ASSURANCES HE MADE TO THE SENTENCING COURT, AND TO CIVIL PENALTIES. AND, GIVEN THE FACT THAT WE ARE NOT SEEKING TO BAR THE MAN FROM THE SECURITIES INDUSTRY, NOR ARE WE SEEKING AN ORDER TO BAR HIM FROM BEING AN OFFICER OR DIRECTOR OF A PUBLIC COMPANY, WHICH IS ON THE TABLE IN SOME OF OUR CASES, WE BELIEVE THAT INJUNCTIVE RELIEF IS EVEN MORE PROPER IN THIS CASE AS IT WILL BE THE ONLY COURT ORDER THAT HAS A CHANCE OF RESTRAINING HIM. THERE'S NOTHING ABOUT INSIDER TRADING THAT REQUIRES A SPECIAL OCCUPATION OR SPECIAL LICENSE. IT REQUIRES ACCESS TO THE INFORMATION, AND THAT'S IT.

THE COURT: SO REMIND ME WHAT, IF YOU SUBMITTED THE PROPOSED TERM OF INJUNCTIVE RELIEF HERE, THE LANGUAGE THAT YOU ARE SEEKING.

MR. HUDDLESTON: WELL, WE'RE SEEKING A PERMANENT INJUNCTION, SO IT WOULD BE --

THE COURT: A PERMANENT INJUNCTION THAT STATES WHAT?

MR. HUDDLESTON: THAT STATES THAT HE IS ENJOINED FROM FUTURE VIOLATIONS OF SECTION 10B OF THE EXCHANGE ACT AND RULE

10B-5 THEREUNDER, SECTION 17(A) OF THE SECURITIES ACT AND ALL PROVISIONS OF THAT. AND THEN BECAUSE OF THE GOBLE CASE FROM THE 11TH CIRCUIT, TYPICALLY WE PUT IN SOME SPECIFICS AS TO INSIDER TRADING AND THAT SPECIFICALLY HE IS NOT ALLOWED TO TRADE WHILE IN POSSESSION OF MATERIAL NONPUBLIC INFORMATION.

THE COURT: WELL, LET'S DEAL WITH THE EASY ISSUE. MR. MONNIN, ARE YOU OBJECTING TO THAT?

MR. MONNIN: OF COURSE I AM. MY CLIENT HAS ALREADY TESTIFIED THAT HE --

THE COURT: ALL RIGHT. WELL, FIRST OF ALL, AGAIN, GET THROUGH, WHY DON'T YOU SUBMIT THE PROPOSED INJUNCTIVE PROVISIONS THAT YOU ARE SEEKING, BECAUSE THAT DOESN'T SEEM TO BE IN DISPUTE.

MR. MONNIN: WILL DO.

MR. HUDDLESTON: WILL DO.

THE COURT: AND SO, IN TOTAL, JUST REMIND ME, WHAT IS THE SUM THAT YOU'RE LOOKING AT IN DISGORGEMENT, AND WHAT ARE YOU SEEKING IN CIVIL PENALTIES?

MR. HUDDLESTON: WELL, THE DISGORGEMENT IS THE $2,034,000.00 FROM THE OCTOBER 2009 TRADES. AND THEN I DON'T HAVE THE FIGURE RIGHT IN FRONT OF ME, THE 685,000.

THE COURT: THIS IS THE --

MR. HUDDLESTON: YEAH, IT'S IN THE BRIEFING.

THE COURT: ALL RIGHT. IT'S ROUGHLY 685,000.

MR. HUDDLESTON: EXACTLY. AND AS TO CIVIL PENALTIES,

JUDGE, AS YOU CORRECTLY STATED, YOU ALLOWED AN AWARD UP TO THREE TIMES IN THAT AMOUNT IN CIVIL PENALTIES. YOU KNOW, I'M NOT IN A POSITION TO GIVE YOU A NUMBER OTHER THAN THE MAXIMUM BECAUSE THAT HAS TO BE CLEARED FIRST WITH MY CLIENT IN WASHINGTON.

THE COURT: DISGORGEMENT, YOU WANTED BOTH ESSENTIALLY THAT BOTH THE TWO MILLION PLUS AND 685 ORIGINALLY --

MR. HUDDLESTON: CORRECT.

THE COURT: -- THAT ARE AT ISSUE. AND YOU WANTED THE CIVIL PENALTIES. AT THIS POINT, YOU'RE SAYING UP TO THE MAXIMUM, WHICH WAS THREE TIMES THAT AMOUNT. IS THAT WHAT YOU'RE SAYING?

MR. HUDDLESTON: THAT'S CORRECT, YOUR HONOR. WE MAKE THE POINT THAT THIS IS A YOUNG, HIGHLY-EDUCATED MAN WITH LOTS OF CONTACTS, A VERY BRIGHT FELLOW WHO IS GOING TO DO VERY WELL.

THE COURT: THANK YOU VERY MUCH.

DID YOU WANT TO RESPOND TO ANY OF THAT, MR. MONNIN?

MR. MONNIN: YES, I WOULD, YOUR HONOR. A NUMBER OF THINGS.

WITH RESPECT, JUDGE, THE SEC ALREADY MADE THE SAME ARGUMENT AND MADE THE SAME CONTENTIONS WITH REGARD TO DISGORGEMENT IN A CIVIL PENALTY IN CONNECTION WITH THE SUMMARY JUDGMENT BRIEF. AND I BELIEVE THAT WHAT THE COURT HAS STATED IN ITS ORDER IS THAT THE CONTORINIS CASE FROM THE SECOND CIRCUIT -- AND I'LL BYPASS THE IRONY OF THE SEC VOCIFEROUSLY

OBJECTING TO APPLICATION OF NEWMAN IN CONNECTION WITH THE LIABILITY, BUT THEN ONCE DISGORGEMENT COMES AROUND, THEY ARE RELYING ON A SECOND CIRCUIT CASE. SO YOU CAN'T RELY ON THE SECOND CIRCUIT FOR PURPOSES OF LIABILITY BUT YOU CAN WHEN IT HELPS YOU OUT WITH DISGORGEMENT.

AND ON THE ISSUE OF DISGORGEMENT, JUDGE, AT PAGE 23, 24, AND OVER THROUGH TO 25 OF THE COURT'S OPINION, THE COURT HAS ALREADY FOUND -- I MEAN, IF YOU RECALL, I MADE A MOTION WITH THE COURT THAT WE SHOULD BIFURCATE BRIEFING OF LIABILITY AND FINANCIAL REMEDIES. WE DID NOT DO THAT. SO WE ADDRESSED FINANCIAL REMEDIES. THE COURT'S RULING WITH REGARD TO DISGORGEMENT IS THAT THE BLATT CASE IS CONTROLLING WITH REGARD TO THE MEASURE, THE APPROPRIATE MEASURE OF DISGORGEMENT BEING WHAT MR. MEGALLI PERSONALLY REALIZED IN TERMS OF HIS TRADING PROFIT.

AND WHAT WE'VE SHOWN THE COURT OVER THE HOUR AND A HALF OR THE HOUR AND 20 MINUTES OR SO THAT I WAS BEFORE THE COURT IS A COUPLE OF THINGS. FIRST OF ALL, MR., MR. MEGALLI DIDN'T HAVE A THREE PERCENT INTEREST IN THE PROFITS OF LEVEL GLOBAL. HE HAD A THREE-THOUSANDTHS PERCENT INTEREST. IT'S .003 INTEREST, MEANING .3 PERCENT INTEREST IN THE PROFITABILITY OF LEVEL GLOBAL.

AND HE DIDN'T MAKE ANYTHING, AS A MATTER OF LAW, AS A MATTER OF CONTRACT, AND AS A MATTER OF FACT, BASED ON THE LIQUIDATION OF THE OCTOBER -- THE INITIAL LONG POSITION FROM

SEPTEMBER THROUGH OCTOBER 2009. THAT POSITION WAS LIQUIDATED IN OCTOBER 2009. IT GENERATED A LOSS AVOIDED OF 2.053 MILLION. AND HE GOT NONE OF THAT.

AND I THINK THAT WE HAVE COMPLETELY ESTABLISHED THAT, JUDGE. AND YOUR RULING IS THAT HE SHOULD ONLY BE LIABLE IN DISGORGEMENT. AND EVERY CASE IN THIS COURT, IN OTHER DISTRICT COURTS OF THE NORTHERN DISTRICT OF GEORGIA AND THE 11TH CIRCUIT, ALL OF THE CASES THAT ARE BINDING AND CONTROLLING ON THIS COURT SAY THAT MR. MEGALLI SHOULD ONLY BE LIABLE IN DISGORGEMENT FOR WHAT HE PERSONALLY REALIZED.

AND THAT'S WHY WE CAME IN HERE TO PUT THE EVIDENCE BEFORE THE COURT THAT THIS IS WHAT HE PERSONALLY REALIZED BASED ON THIS ADMITTEDLY ILLEGAL TRADING ACTIVITY THAT THE COURT HAS FOUND HIM LIABLE FOR.

SO WITH REGARD TO DISGORGEMENT, I REALLY DON'T UNDERSTAND WHY THE SEC SHOULD HAVE A SECOND BITE AT THE APPLE WHEN THE COURT HAS ALREADY RULED IN ITS ORDER, AND I QUOTE, IN BLATT, THE COURT IMPOSED DISGORGEMENT, BUT ONLY TO THE EXTENT OF THE AMOUNT OF THE FEE REALIZED BY EACH DEFENDANT FOR HIS ASSISTANCE IN EXECUTING THE FRAUD. SINCE BLATT, DISTRICT COURTS IN THE 11TH CIRCUIT SEEM TO HAVE BEEN CAREFUL IN NOT IMPOSING DISGORGEMENT ABOVE AND BEYOND A, QUOTE, REASONABLE APPROXIMATION OF THE DIRECT GAIN ACCRUING TO THE WRONGDOER.

AND THERE'S NO -- HOLDING MR. MEGALLI LIABLE IN DISGORGEMENT FOR THE FULL LOSS AVOIDED AND GAIN ASSOCIATED WITH

THE TWO TRANSACTIONS THAT WE'RE TALKING ABOUT HERE, IS IN NO WAY A REASONABLE APPROXIMATION OF WHAT HE MADE. AND THE COURT HAS ALREADY, HAS ALREADY FOUND THAT.

THE COURT: BUT THEN YOU SHIFT THE THING TO THE QUESTION OF CIVIL PENALTIES.

MR. MONNIN: SURE.

THE COURT: AND THAT'S THE MORE DIFFICULT ISSUE.

MR. MONNIN: SURE.

THE COURT: I MEAN, I UNDERSTAND THE DISTINCTION THAT THE MR. HUDDLESTON IS DRAWING MY ATTENTION TO, HIS PERSPECTIVE AS TO THE DISGORGEMENT. BUT LET'S GET TO THE MORE DIFFICULT QUESTION ABOUT THE CIVIL PENALTY.

MR. MONNIN: SURE.

THE COURT: DRAWS US BACK IN THE SAME WEB OF PROBLEMS.

MR. MONNIN: WHAT I'D LIKE TO DO IS SHOW THE COURT THE STATUTE THAT WE'RE TALKING ABOUT HERE, WHICH IS SECTION 78, LITTLE U, DASH ONE OF TITLE 15 OF THE FEDERAL CODE, WHICH IS SECTION 21(A) OF THE EXCHANGE ACT OF 1934. SO THIS IS THE CIVIL PENALTIES PROVISION THAT IS IN ISSUE WITH RESPECT TO THIS INSIDER TRADING ACTIVITY. IT RELATES TO CIVIL PENALTIES FOR INSIDER TRADING.

AND I THINK THAT THE ISSUE THAT MR. HUDDLESTON AND THE SEC HAS RECOMMENDED BE BRIEFED -- AND WE REALLY DON'T THINK THAT IT SHOULD BE AN ISSUE, JUDGE -- IS SPECIFICALLY PARAGRAPH

(A)(2). AND THIS IS REALLY THE QUESTION, JUDGE.

SO WHAT THE STATUTE IS REFERRING TO IS, WHAT WAS THE OVERALL PROFIT GAINED OR LOSS AVOIDED AS A RESULT OF THE UNLAWFUL PURCHASE, SALE, OR COMMUNICATION IN FURTHERANCE OF THE INSIDER TRADING. SO THE QUESTION BECOMES, WHAT IS THE APPROPRIATE MEASURE OF THE CIVIL PENALTY. IS IT MR. MEGALLI'S PERSONAL GAIN, OR IS IT LEVEL GLOBAL'S INSTITUTIONAL GAIN.

AND I THINK THAT WHAT WE HAVE, JUDGE, IS THAT YOU DERIVED A FOOTNOTE IN YOUR ORDER, SPECIFICALLY FOOTNOTE NINE AT PAGE 26 OF YOUR ORDER, I MEAN, YOU CAN READ IT FOR YOURSELF, THAT THE APPROPRIATE MEASURE OF THE CIVIL PENALTIES HERE --

THE COURT: WELL, I UNDERSTAND THAT. BUT I ALSO UNDERSTAND THE OBJECTION OF THE GOVERNMENT. AND I WILL TAKE NOTE THAT I ASSUME WITHOUT DECIDING. SO I THINK WHAT THAT NORMALLY SAYS IS, YOU KNOW, THAT'S AN ASSUMPTION. I HAVEN'T DECIDED.

MR. MONNIN: SO YOU HAVEN'T DECIDED. SO REALLY THE ISSUE I THINK THAT WE'RE TALKING ABOUT, JUDGE, WHAT'S CURRENTLY BEING LITIGATED IN COURTS, CERTAINLY UP IN NEW YORK, IS THE ISSUE OF, UNDER PARAGRAPH (A)(2) OF TITLE -- OR OF SECTION 21(A), WHAT IS THE APPROPRIATE LOADSTAR THAT YOU'RE SUPPOSED TO LOOK AT. IS THE APPROPRIATE LOADSTAR INSTITUTION OR PERSONAL GAIN. OUR POSITION IS CERTAINLY THAT IT IS ONLY PERSONAL GAIN.

AND, JUDGE, THE REASON THAT I SAY THAT AND WHAT WE WOULD BRIEF FOR THE COURT IS THAT MORRISON AND FOERSTER, THE

LAW FIRM, HAS -- CREATES A MONOGRAPH EACH YEAR. IT'S AN INSIDER TRADING MONOGRAPH. AND I'M NOT SUBMITTING THAT THIS IS EVIDENCE, BUT I BELIEVE, GIVEN THAT THE COURT IS GOING TO GO THROUGH -- HAS TO GO THROUGH FACTORS IN AGGRAVATION AND MITIGATION, AND I AGREE WITH MR. HUDDLESTON ON THIS, THAT THIS IS VERY MUCH LIKE A SENTENCING PROCEEDING WHERE YOU LOOK AT SCIENTER AND YOU LOOK AT AGGRAVATING AND MITIGATING FACTORS. WHAT THE COURT SAID AND ADDRESSED, THE ISSUE OF DISGORGEMENT IN THE CIVIL PENALTY HAVE DONE IS THAT IN THE VAST MAJORITY OF CASES, OUT OF 326 TOTAL CASES FROM 2010 TO 2014, THE COURT HAS EITHER HELD --

THE COURT: IS THIS JUST FOR THE SECOND CIRCUIT OR IS THIS THE SOUTHERN DISTRICT OF NEW YORK OR NATIONAL?

MR. MONNIN: THIS IS NATIONAL, JUDGE. SO IN THE 326 CASES, IN 43 PERCENT OF THE TIME, THE COURT HAS CONCLUDED THAT THE CIVIL PENALTY AND THE DISGORGEMENT FIGURE SHOULD BE THE SAME. NOW, IF DISGORGEMENT IS LIMITED TO A PERSONAL BENEFIT OR PERSONAL GAIN, IT NECESSARILY FOLLOWS THAT THE COURTS HAVE CONCLUDED THAT THE CIVIL PENALTY, THE LOADSTAR FOR A CIVIL PENALTY SHOULD BE PURELY PERSONAL GAIN AS WELL.

THE COURT: LET'S LOOK AT THE OTHER ONE.

MR. MONNIN: SO THE OTHER ONE, WHAT YOU HAVE IS THAT CIVIL PENALTY IS ZERO IN 27 PERCENT OF THE CASES. AND WHAT THE COURTS ARE GETTING AT THERE IS, DOES THE DEFENDANT HAVE THE ABILITY TO PAY A CIVIL PENALTY.

BUT I SUBMIT TO THE COURT THAT IF WE'RE TALKING ABOUT 43 PERCENT OF THE TIME, YOU KNOW, VIRTUALLY HALF OF THE TIME WHERE DISGORGEMENT AND THE CIVIL PENALTY ARE THE SAME, THAT THE IDEA THERE IS THAT THE COURTS WANT TO PROMOTE DISGORGEMENT. SO THEY ARE ENSURING THAT THE DEFENDANT IS GOING TO BE ABLE TO PAY DISGORGEMENT. SO EFFECTIVELY 70 PERCENT OF THE TIME, JUDGE, 27, 27 PLUS 43, WHAT THE COURTS HAVE CONCLUDED IS THAT EITHER A CIVIL PENALTY IS NOT IN ORDER OR THE CIVIL PENALTY SHOULD EQUATE TO DISGORGEMENT. I THINK WHAT THE --

THE COURT: AND WHAT DO THE OTHER HEADINGS SAY?

MR. MONNIN: THE OTHER HEADINGS ARE WHERE 17 PERCENT OF THE TIME CIVIL PENALTY IS LESS THAN DISGORGEMENT.

THE COURT: ALL RIGHT.

MR. MONNIN: AND 13 PERCENT OF THE TIME CIVIL PENALTY IS GREATER THAN DISGORGEMENT.

I AGREE WITH MR. HUDDLESTON. I THINK THAT WE SHOULD BE BRIEFING THE ISSUE OF THE APPROPRIATENESS OF A CIVIL PENALTY. BUT I THINK WHAT THE SEC IS SAYING HERE IS THAT, FIRST OF ALL, IT'S REVISITING THE LAW OF THE CASE AND SAYING THAT MR. MEGALLI SHOULD BE LIABLE FOR THE FULL TWO MILLION PLUS $648,000.00 ON DISGORGEMENT, WHEN MR. MEGALLI TOUCHED NONE OF THAT. I MEAN, HE TOUCHED NONE OF IT ON THE TWO MILLION, AND HE ONLY TOUCHED 2,000 OF IT ON THE $648,000.00.

SO WE BELIEVE, LEGALLY, THE COURT HAS ALREADY RULED. AND THE COURT ORDERED US TO BRIEF THIS ISSUE AND HAS ALREADY

RULED IN SUMMARY JUDGMENT AND WOULD HAVE TO REOPEN THAT RULING. I MEAN, THAT'S NOT A FOOTNOTE ON DISGORGEMENT, JUDGE. I BELIEVE THAT YOU ALREADY CONCLUDED THAT MY CLIENT'S DISGORGEMENT LIABILITY IS TIED INTO HIS PERSONAL GAIN.

NOW, WHETHER THAT IS 2,000, BECAUSE IF YOU'LL RECALL, THE NEXT THING YOU SAID IS, I DON'T KNOW THAT 2,000 IS REASONABLE; GIVE ME SOMETHING ELSE TO GO ON HERE. AND THAT'S WHY WE CAME INTO COURT TO PRESENT TO YOU AS WE DID.

BUT WITH RESPECT TO A CIVIL PENALTY, WHAT THE SEC IS SAYING IS IS THAT THE CIVIL PENALTY STATUTORILY SHOULD BE UNTETHERED FROM THE DISGORGEMENT ANALYSIS, BECAUSE WHILE DISGORGEMENT IS BASED ON INDIVIDUAL OR PERSONAL GAIN, THE CIVIL PENALTY MAY BE BASED ON THE OVERALL EMPLOYER GAIN, WHICH WE SUBMIT IS NOT AT ALL WHAT WE'RE TALKING ABOUT WITH RESPECT TO WHAT'S APPROPRIATE IN TERMS OF THE MAXIMUM CIVIL PENALTY AMOUNT.

SO I HAVE TWO ARGUMENTS, JUDGE. ONE IS, WHAT SHOULD BE BRIEFED TO YOU IS THE ISSUE OF WHETHER IT'S APPROPRIATE STATUTORILY FOR THIS ITEM TO BE INSTITUTIONAL VERSUS PERSONAL. AND I THINK I KNOW THE COURT UNDERSTANDS THAT.

AND, SECONDARILY, THESE ARE THE FACTORS THAT MR. HUDDLESTON WAS REFERRING TO IN TERMS OF THE, THE FACTORS IN AGGRAVATION AND MITIGATION THAT INFORM THE COURT'S DISCRETION. SO MY SECOND ARGUMENT IS, LOOK, EVEN IF THE COURT CONCLUDES THAT MR. MEGALLI MAY BE LIABLE OR COULD CONCEIVABLY BE LIABLE

IN A CIVIL PENALTY BASED ON INSTITUTIONAL GAIN, THE COURT SHOULD STILL EXERCISE ITS DISCRETION TO LOOK AT THE FACTORS IN AGGRAVATION AND MITIGATION.

AND THE MAJOR FACTORS IN MITIGATION ARE CERTAINLY THAT MY CLIENT HAS ALREADY BEEN SIGNIFICANTLY PUNISHED. THERE WAS A PARALLEL CRIMINAL CASE. THIS IS NOT -- THIS IS ISOLATED CONDUCT. I MEAN, MR. HUDDLESTON SAID REPEATEDLY, THE MATERIALITY HAS NOTHING WHATSOEVER TO DO WITH THE FACTORS IN AGGRAVATION AND MITIGATION.

WELL, HOW DO YOU GET INTO THE EGREGIOUSNESS OF THE DEFENDANT'S CONDUCT WITHOUT TALKING ABOUT THE MATERIALITY OF THE TRADING ACTIVITY TO HIS OVERALL PORTFOLIO. I DON'T GET THAT. OF COURSE, MATERIALITY IS RELEVANT TO EGREGIOUSNESS. THE DEGREE OF HIS SCIENTER, WHAT WAS HE DOING WITH THE REST OF HIS TIME, WHETHER THE DEFENDANT'S CONDUCT CREATED SUBSTANTIAL LOSSES. YOU KNOW, OF COURSE YOU GET INTO MATERIALITY AND WHAT HIS OVERALL TRADING ACTIVITY WAS.

SO I SUBMIT TO THE COURT, NUMBER ONE, MR. MEGALLI'S ONLY LIABLE IN THE CIVIL PENALTY. THE MAXIMUM SHOULD BE THREE TIMES WHATEVER HIS PERSONAL GAIN WAS, WHATEVER THE COURT CONCLUDES. AND THEN IT CAN EXERCISE ITS DISCRETION THERE. AND THE STATISTICS SHOW THAT HE SHOULD BE LIABLE NOT AT ALL BASED ON WHAT OTHER COURTS HAVE CONCLUDED 27 PERCENT OF THE TIME, OR JUST FOR A ONE-TIME CIVIL PENALTY BASED ON WHAT COURTS HAVE CONCLUDED 43 PERCENT OF THE TIME BASED ON THE STATISTICS, WHICH

WE CAN CERTAINLY BRING FORWARD.

BUT, JUDGE, EVEN IF YOU WERE TO CONCLUDE THAT MR. MEGALLI COULD BE LIABLE FOR, SAY, THREE TIMES THE LOSS AVOIDED AND THE PROFITS FROM THE LIQUIDATION OF THE LONG POSITION AND THE SHORT SALES, IT'S VERY SIMILAR TO WHAT YOU HAVE IN A ROUTINE CRIMINAL PROCEEDING WHERE DEFENDANTS COME BEFORE YOU POTENTIALLY BEING LIABLE CONSECUTIVELY. SAY THEY ARE CONVICTED OF TWO 20-YEAR STATUTES. THEY ARE POTENTIALLY EXPOSED TO 40 YEARS. NOW, THE COURT IS NOT ROUTINELY IMPOSING 40-YEAR SENTENCES. WHAT YOU DO IS YOU EXERCISE THE 3553(A) FACTORS, WHICH ARE THE EXACT SAME FACTORS I HAVE UP HERE ON THE SCREEN, TO REDUCE THE CIVIL PENALTY TO REALLY CORRESPOND TO WHAT MR. MEGALLI ACTUALLY DID AND WHAT IS HE DESERVING OF PUNISHMENT FOR.

AND I'LL WRAP UP BY SAYING, WHAT HE ACTUALLY DID, HE RECOGNIZES THE SERIOUSNESS OF IT. HE RECOGNIZES THAT IT'S MISCONDUCT. BUT HE'S PAID VERY DEARLY FOR IT. I MEAN, HE'S GONE TO PRISON. HE'S PLED GUILTY. HE'S GOING TO BE OUT OF THE INDUSTRY.

THE OTHER COMPONENT OF IT IS THAT, IF YOU LOOK AT THE ACTUAL TRADING DATA AND IF YOU LOOK AT THE TRADES, THEY ARE VERY ISOLATED, BOTH WITHIN THE OVERALL WORLD OF CARTER'S AS WELL AS WITH REGARD TO THE CONSUMER PORTFOLIO AND CERTAINLY WITH REGARD TO THE PROFITABILITY OVERALL OF LEVEL GLOBAL AND LEVEL RADAR.

RECALL, WE'RE GIVING THE SEC THE BENEFIT OF THE DOUBT IN THAT, BECAUSE MR. MEGALLI WAS BONUSED FOR LEVEL RADAR, THAT WE'RE NOT SEEKING TO EXCLUDE THAT. I MEAN, HIS TRADING ACTIVITY IN CARTER'S HAD NOTHING WHATSOEVER TO DO WITH WHETHER HE WAS GOING TO GET BONUSED FOR LEVEL RADAR. BUT WE ARE NOT SEEKING TO EXCLUDE, I THINK IT'S $500,000.00 OR 300,000. IT'S $326,000.00 WORTH OF LEVEL RADAR PROFITABILITY THAT WE'RE NOT TRYING TO EXCLUDE FROM THE COURT'S COMPUTATION OF DISGORGEMENT OR POTENTIALLY A CIVIL PENALTY HERE.

SO I THINK, JUDGE, IF YOU RETIRE TO CHAMBERS AND YOU LOOK AT -- WELL, SORRY.

THE COURT: THAT'S ALL RIGHT. I JUST LIKE THE IDEA OF RETIRING.

MR. MONNIN: WELL, I KNOW.

IF YOU GO BACK TO CHAMBERS, I GUESS I SHOULD SAY, AND YOU REALLY LOOK AT HOW, HOW MUCH WHAT MY CLIENT DID THAT WAS WRONG AND THAT THE COURT HAS CONCLUDED WAS WRONG WAS REALLY PART OF HIS DAY-IN-AND-DAY-OUT ACTIVITY, YOU'RE GOING TO CONCLUDE THAT IT WASN'T VERY SERIOUS IN TERMS OF -- IT'S SERIOUS IN ISOLATION. HE WENT TO JAIL FOR IT. HE'S PAID DEARLY FOR IT. BUT IN TERMS OF EVERYTHING ELSE THAT HE WAS DOING, IT'S NOT VERY SIGNIFICANT TO THAT. HE'S NOT LIABLE IN DISGORGEMENT FOR FIGURES BEYOND HIS PERSONAL GAIN. HE SHOULDN'T BE LIABLE IN A CIVIL PENALTY AT ALL. I MEAN, OUR POSITION IS THAT HE SHOULDN'T BE LIABLE IN A CIVIL PENALTY AT

ALL. BUT IF YOU ARE GOING TO FIND A CIVIL PENALTY, THE LOADSTAR FOR THAT SHOULD BE HIS PERSONAL PROFIT, HIS PERSONAL COMPENSATION, AS OPPOSED TO ANYTHING RELATED TO LEVEL GLOBAL.

AND I GUESS WHAT I WOULD SAY IS, I WOULD VERY MUCH APPRECIATE THE COURT'S, I GUESS, INDULGENCE IN TERMS OF LETTING US KNOW WHERE YOU ARE ON THAT, BECAUSE WE'RE PERFECTLY WILLING TO BRIEF IT. I CAME INTO THIS HEARING BELIEVING THAT DISGORGEMENT WAS REALLY DONE IN TERMS OF THE LAW, AND WE'VE PROVEN UP THE FACTS RELATED TO IT. AND THE CIVIL PENALTY I GET. BUT THERE'S NO CIVIL PENALTY THAT SHOULD BE AN ISSUE HERE.

THE COURT: ALL RIGHT. WELL, LET ME SAY, FIRST OF ALL, I -- MY UNDERSTANDING IS THAT MR. HUDDLESTON'S TRIAL IN FRONT OF JUDGE MAY IS IN THE RANGE OF TWO WEEKS OR EVEN MORE. SO OBVIOUSLY HE IS NOT WRITING A BRIEF. HE'S HAD ENOUGH TIME WITH ME FOR THE IMMEDIATE FUTURE. SO WE'LL TAKE -- WE'LL TALK ABOUT IT AND SEE WHETHER THERE'S ANYTHING FURTHER THAT WE NEED, OTHER THAN THE -- IF, IF YOU HAD YOUR DRUTHERS, OBVIOUSLY, SOMEBODY HERE WANTS TO WRITE A BRIEF, APPARENTLY. IS THAT YOUR PREFERENCE, TO BE ABLE TO WRITE A BRIEF, RATHER THAN JUST GIVE ME SOME CITATIONS AS TO MATERIALITY?

MR. HUDDLESTON: YES, YOUR HONOR.

THE COURT: ALL RIGHT. IS THAT YOUR PREFERENCE AS WELL, OR NOT?

MR. MONNIN: I GUESS MY QUESTION, JUDGE, IS, IS IT AN

OPEN ISSUE FOR THE COURT WHETHER THE APPROPRIATE MEASURE OF A CIVIL PENALTY SHOULD BE LEVEL GLOBAL, AS OPPOSED TO MY CLIENT?

THE COURT: FOR DISGORGEMENT OR FOR ANYTHING?

MR. MONNIN: I THINK YOU'VE ALREADY DECIDED ON DISGORGEMENT.

THE COURT: WELL, FOR ANYTHING, I THINK I HAVE TO GO BACK AND LOOK IN LIGHT OF THIS EVIDENCE, SO I CERTAINLY CAN LET YOU KNOW. BUT, OBVIOUSLY, THAT'S THE SINE QUA NON QUESTION HERE.

MR. MONNIN: SURE.

THE COURT: BUT, BUT, YOU KNOW, IF THERE'S SOMETHING ELSE THAT YOU THINK WILL BE HELPFUL, YOU KNOW, AS TO THAT ISSUE OR ANYTHING ELSE, I'M WILLING TO POTENTIALLY THINK ABOUT IT. BUT I NEED TO GO BACK AND LOOK AT MY ORDER, THINK ABOUT THE EVIDENCE, REVIEW SOME OF THE CASES.

I THINK THE ONE THING THAT I WONDERED ABOUT, WHICH WAS SOMETHING COMPLETELY DIFFERENT, IT'S LIKE THE JURY GOING OFF ON YOU, IF ONE THING MR. HUDDLESTON ARGUES, HE IS NOT REALLY A TIPPEE, THAT THE DEFENDANT IS NOT A TIPPEE, IS REALLY A TIPPER, BECAUSE GLOBAL WAS THE TIPPEE, YOU WOULD TAKE THAT PROPOSITION. IF YOU DON'T, IS THIS A MATTER OF FACT OR IS IT A MATTER OF LAW?

MR. MONNIN: YOUR HONOR, FIRST OF ALL, OF COURSE, WE DON'T ACCEPT THAT STANDARD. I BELIEVE THAT IT IS AN ISSUE OF LAW. THE CONTORINIS CASE THAT WE BRIEFED AND THAT MR.

HUDDLESTON ARGUED, THE ESSENTIAL, I WOULD PUT IT, FICTION OF THAT HOLDING WAS THAT THE WAY, THE ONLY WAY THAT YOU CAN, THE ONLY WAY THAT YOU CAN HOLD AN INSIDER TRADER AS A TIPPEE LIABLE FOR FUNDS THAT HE NEVER PERSONALLY POSSESSED, HIS EMPLOYER'S FUNDS, IS TO GO THROUGH THE FICTION OF SAYING THAT THAT TRADER IS JOINTLY AND SEVERALLY LIABLE WITH HIS EMPLOYER. AND THE ONLY WAY THAT YOU CAN GET THERE IS TO SAY THAT THE TIPPEE, MR. MEGALLI, BECAME THE TIPPER TO LEVEL GLOBAL. AND THAT'S, THAT'S THE SECOND CIRCUIT'S RULING. AND, MIND YOU, I ATTACHED THE WHOLE CERT PETITION RELATED TO CONTORINIS TO MY LAST SUMMARY JUDGMENT FILING.

THE COURT: CONTORINIS IS NOT NECESSARILY LOOKING TO FOLLOW A LOT MORE LAWS. I WANT TO GO BACK AND SEE WHAT'S REALLY ON THE RECORD BEFORE WE TELL YOU ANYTHING.

MR. MONNIN: OKAY.

THE COURT: WE WILL MAKE A DECISION. BUT WE ARE NOT GOING TO MAKE IT DUE THE FIRST WEEK HE'S OUT OF TRIAL.

MR. MONNIN: NO. THAT IS FINE.

THE COURT: I JUST WANTED TO NOT HAVE TO FIND A DAY WHERE YOU ALL WERE AVAILABLE AND WE THINK THAT WE COULD PUT ALL THESE PIECES TOGETHER. AND, PRESUMABLY, WE'LL HAVE A TRANSCRIPT. SO THANK YOU VERY MUCH.

IS THERE ANYTHING ELSE WE NEED TO ADDRESS WHILE WE'RE ALL TOGETHER?

MR. HUDDLESTON: NO, YOUR HONOR.

THE COURT: ALL RIGHT.

MR. MONNIN: NO, YOUR HONOR.

THE COURT: I GATHER THIS IS YOUR WIFE WHO'S HERE WITH YOU?

APPRECIATE YOUR BEING HERE. I ALWAYS LIKE TO SEE FAMILY MEMBERS AT ANY TYPE OF PROCEEDING.

YOU CAN HAVE A SEAT.

I DON'T KNOW ENOUGH ABOUT EVERYTHING THAT HAS HAPPENED AT GLOBAL. OBVIOUSLY I HAVE READ THESE DECISIONS AND KEPT UP WITH THIS WITHOUT HAVING WASTING YOUR TIME WITHOUT WATCHING ALL OF THIS. JUST ON A LARGER SCALE. AND I DON'T KNOW, GIVEN EVERYTHING ELSE THAT WAS HAPPENING IN OUR SOCIETY, HOW, WHATEVER HAPPENED HERE FITS INTO THIS PICTURE, WHAT WAS GOING ON WALL STREET, WHAT THE CULTURE, HOW THE CULTURE EVOLVES AND HOW EVERYONE STARTS ADOPTING THE SAME ATTITUDE ABOUT WHAT IS ACCEPTABLE AND NOT.

AND I ASSUME THAT THOSE WHO ARE SITTING IN NEW YORK ON THE BENCH ARE SEEING A LOT MORE OF IT AND HAVE MUCH MORE DEVELOPED OPINIONS THAN I DO. I'VE PERHAPS MORE DEVELOPED OPINIONS ABOUT FRAUDS THAT ARE COMING IN FRONT OF ME EVERY DAY. SO IT'S, YOU KNOW, I'M TRYING TO LOOK -- SOME OF MY QUESTIONS ABOUT GLOBAL WAS JUST TRYING TO UNDERSTAND WHAT THAT WILL LOOK LIKE. TO UNDERSTAND MORE ABOUT THIS DEFENDANT'S CONDUCT AS WELL. BUT IT'S CERTAINLY A SAD DAY WHEN SOMEBODY, THIS DEFENDANT HAS -- MR. MEGALLI, YOU OBVIOUSLY HAD AN ENORMOUS

AMOUNT OF EDUCATION AND SKILLS. AND IT'S A WASTE TO OUR SOCIETY.

SO WHATEVER HAPPENS HEREAFTER AND WHATEVER PENALTY I IMPOSE, I JUST WANT TO SAY -- BECAUSE I MIGHT NOT SEE YOU AGAIN PERSONALLY -- I HOPE THAT YOU'RE ABLE TO CONTINUE THE WORK THAT YOU WERE DOING, HOWEVER DIFFICULT IT WAS, ON THE VOLUNTEER WORK. YOU HAVE A LOT TO CONTRIBUTE, A GREAT DEAL OF EDUCATION. AND IT'S -- LIFE IS STRANGE IN A WAY THAT TERRIBLE MISFORTUNE AND ERRORS OF JUDGMENT CAN END UP BEING USED TO BRING LIGHT AND MEANING TO YOUR LIFE, TOO.

AND MAYBE I'M SPEAKING MORE AS A SENTENCING JUDGE IN THAT REGARD, BUT WHEN I SEE SOMEBODY WITH ALL THE TALENT AND EDUCATION YOU HAVE AND YOUR WIFE STANDING BY YOUR SIDE, YOUR HAVING [redacted], I GUESS I HAVE A DESIRE TO SAY THAT YOU, YOU CAN MAKE A DIFFERENCE. I HOPE YOU WILL MAKE A DIFFERENCE. I HOPE THAT THE HUNDRED HOURS IS NOT JUST 100 HOURS. OR 120 HOURS, BECAUSE TO THE EXTENT YOU RECONSTRUCT YOUR LIFE AND ARE NOT PROFIT-DRIVEN AND BLIND TO THE CONSEQUENCES OF YOUR CONDUCT, THERE'S AN EXTENT TO WHICH YOU ARE GOING TO HELP OTHERS AS WELL.

AND THERE ARE MANY PEOPLE, WHETHER IN NEW ORLEANS OR NEW YORK CITY, WHO NEED THE ASSISTANCE OF SOMEBODY SO TALENTED AS YOU ARE. AND WHATEVER THE DIFFICULTIES YOU'VE HAD IN FINDING WORK WITH A NONPROFIT, I DON'T THINK THAT THAT'S A -- I DON'T THINK THAT'S GOING TO BE IN LOTS OF PLACES. YOU WILL

FIND YOUR NICHE. AND PEOPLE NEED YOU, AND PEOPLE NEED TO -- WHO HAVE REALLY BEEN IN THEIR OWN FORM OF DAMNATION, NEED A HELPING HAND FROM SOMEBODY LIKE YOU. AND THE WAY THAT YOU RESURRECT YOURSELF AND YOUR OWN CHILDREN AND YOUR WIFE IS THAT WAY AS WELL.

SO I WISH YOU THE BEST OF LUCK, AS WELL AS YOUR WIFE IN HER ARCHITECTURAL DEGREE.

AND, COUNSEL, YOU'VE BEEN MOST HELPFUL, BOTH OF YOU, AND I APPRECIATE IT. AND IT'S REALLY A PLEASURE TO HEAR AN ARGUMENT AND A DISPUTE SO WELL PRESENTED. VERY HELPFUL TO THE COURT. THANK YOU.

MR. MONNIN: MAY I MAKE ONE SUGGESTIONS THAT MAY BE HELPFUL? IF THE COURT IS INCLINED -- AND I THINK IT IS IMPORTANT, PERHAPS, TO HAVE SUPPLEMENTAL BRIEFINGS, MAYBE JUST HAVE US FILE AT THE SAME TIME AND JUST DO ONE BRIEF, AND YOU CAN TELL US WHAT YOU'RE INTERESTED IN.

THE COURT: THAT WOULD BE FINE. THAT'S GREAT. AND IF I'M INCLINED TO DO THAT, I'LL PROBABLY JUST TELL YOU, AS I SAID, WHEN THE TIME, FROM ONE WEEK, WHATEVER THE CONCLUSION OF HIS TRIAL IS, I'LL START THINKING ABOUT IT, REASONABLY ABOUT A WEEK AFTERWARDS AFTER HE'S CHECKED ALL HIS E-MAILS AND ALL THE CRAZINESS.

THANK YOU.

MR. HUDDLESTON: THANK YOU, JUDGE.

THE COURTROOM DEPUTY: ALL RISE. COURT'S IN RECESS.

(PROCEEDINGS CONCLUDED AT 5:22 P.M.)

- - -

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

CERTIFICATE OF REPORTER

I DO HEREBY CERTIFY THAT THE FOREGOING PAGES ARE A TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS TAKEN DOWN BY ME IN THE CASE AFORESAID.

THIS, THE 30TH DAY OF DECEMBER, 2015.

/S/ *ELIZABETH G. COHN*

ELIZABETH G. COHN, RMR, CRR
OFFICIAL COURT REPORTER

Exhibit B

ALSTON & BIRD

One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424
404-881-7000 | Fax: 404-881-7777

Paul N. Monnin | Direct Dial: 404-881-7394 | Email: paul.monnin@alston.com

November 20, 2017

BY EMAIL AND REGULAR MAIL

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U.S. Securities and Exchange Commission
100 F. Street, NE
Washington, DC 20549

Re: *In the Matter of Mark Megalli*, Administrative Proceeding File No. 3-18250

Dear Ms. Avakian, Mr. Peikin and Ms. Fitzpatrick:

The undersigned represents respondent Mark Megalli in the above-referenced, follow-on administrative proceeding. I write to request its voluntary dismissal by the Securities and Exchange Commission on grounds of, among other things, waiver and judicial and equitable estoppel.

On November 14, 2013, Mr. Megalli entered a negotiated guilty plea to a criminal information, docketed in the United States District Court for the Northern District of Georgia as *United States v. Megalli*, No. 1:13-CR-442-RWS, charging him with a single count of conspiracy to engage in insider trading. He was sentenced in July 2014 to a year and a day in custody and three years of supervised release. He was also ordered to pay $50,000 in criminal restitution, which he satisfied prior to sentencing. He has completed the custodial portion of his sentence.

The SEC initiated a parallel enforcement action against Mr. Megalli, docketed in the United States District Court for the Northern District of Georgia as *SEC v. Megalli*, No. 1:13-CV-3783-AT, on the same day as his criminal plea. Based largely on Mr. Megalli's guilty plea, U.S. District Judge Amy Totenberg entered partial summary judgment in the SEC's favor solely as to Mr. Megalli's insider trading liability on September 24, 2015. She set a separate hearing with regard to remedies for October 27, 2015. Mr. Megalli testified at this hearing, and the parties also argued before Judge Totenberg about the amount of disgorgement, along with the factors in aggravation and mitigation going to the assessment of a civil penalty, if any, and entry of a permanent injunction.

For its part, the SEC sought disgorgement of nearly $2.7 million, which was comprised of gains and avoided losses realized exclusively by Mr. Megalli's former hedge fund employer, not by Mr. Megalli personally, plus a civil penalty of more than $6 million. Mr. Megalli countered that his disgorgement and civil penalty exposure was confined solely to his personal gain, and that the assessment of a civil penalty, if any, should be based on his minimal compensatory gain, not the trading profits and avoided losses realized solely by the hedge fund that formerly employed him.

On December 17, 2015, Judge Totenberg agreed with Mr. Megalli by entering a final civil judgment in which she ordered him to pay $19,000 in disgorgement and a civil penalty of $38,000. She further entered a permanent injunction against future securities law violations.

In seeking entry of both a multi-million dollar civil penalty and a permanent injunction against Mr. Megalli, the SEC's trial counsel first advised Judge Totenberg at the outset of the remedies hearing (a transcript of which accompanies this correspondence) that an industry bar was not part of the SEC's enforcement plans:

> THE COURT: WE'RE GOING TO BE LOOKING AT THE CIVIL PENALTY ISSUE AND THE DISBARMENT ISSUE. IS THERE ANYTHING ELSE THAT WE'RE GOING TO HAVE TO – DISGORGEMENT AS WELL. GREAT. ANYTHING ELSE?
>
> MR. HUDDLESTON: WE HAVEN'T PLED FOR DEBARMENT, AND SO THAT'S NOT PART OF THE CASE.
>
> THE COURT: THAT'S NOT PART OF THE CASE.
>
> MR. HUDDLESTON: NO, YOUR HONOR.

> MR. MONNIN: YOUR HONOR, WHAT I UNDERSTAND IS THAT THE SEC HAS PLED AN INJUNCTION AGAINST FUTURE VIOLATIONS, AS OPPOSED TO AN INDUSTRY BAR. E
>
> MR. HUDDLESTON: RIGHT, CORRECT.
>
> THE COURT: ALL RIGHT. JUST EXPLAIN THAT AGAIN WHAT YOU JUST SAID. . . .
>
> MR. HUDDLESTON: . . . WHAT WE PLED FOR FIRST IS A PERMANENT INJUNCTION AGAINST FUTURE VIOLATIONS. SECONDLY, FOR DISGORGEMENT AND PREJUDGMENT INTEREST. AND FINALLY FOR CIVIL PENALTIES.
>
> THE COURT: OKAY. SO YOU'RE NOT LOOKING FOR DEBARMENT.
>
> MR. HUDDLESTON: THAT IS CORRECT, YOUR HONOR.
>
> THE COURT: ALL RIGHT. I MISUNDERSTOOD THAT, THEN.

(Oct. 27, 2015 Hr'g Tr. at 3-4).

Moreover, at the conclusion of the remedies hearing, the SEC's trial counsel expressly argued as follows in encouraging Judge Totenberg to remediate Mr. Megalli's conduct through entry of a civil penalty in excess of $6 million and a permanent injunction:

> MR. HUDDLESTON: . . . GIVEN THE FACT THAT WE ARE NOT SEEKING TO BAR THE MAN FROM THE SECURITIES INDUSTRY, NOR ARE WE SEEKING AN ORDER TO BAR HIM FROM BEING AN OFFICER OR DIRECTOR OF A PUBLIC COMPANY, WHICH IS ON THE TABLE IN SOME OF OUR CASES, WE BELIEVE THAT INJUNCTIVE RELIEF IS EVEN MORE PROPER IN THIS CASE AS IT WILL BE THE ONLY COURT ORDER THAT HAS A CHANCE OF RESTRAINING HIM. THERE'S NOTHING ABOUT INSIDER TRADING THAT REQUIRES A SPECIAL OCCUPATION OR SPECIAL LICENSE. IT REQUIRES ACCESS TO THE INFORMATION, AND THAT'S IT.

Id. at 119.

Accordingly, in pursuing substantial remedial relief from the district court – including disgorgement of approximately $2.7 million in trading gains and avoided losses realized exclusively by a third party and a civil penalty of more than $6 million – the SEC voluntarily and unequivocally told Judge Totenberg several times that not only had it not pled an industry bar, but that it would not be seeking one, either. Indeed, in asking for significant financial relief, the

SEC advised Judge Totenberg expressly that hers would be the only court order that could prevent Mr. Megalli's future securities law violations.

Now, despite the foregoing, unequivocal representations – on which the SEC clearly intended for Judge Totenberg to rely – the SEC has initiated a follow-on proceeding to bar Mr. Megalli from the securities industry. This is both legally and equitably improper.

As an initial matter, any fair and objective reading of the foregoing record makes clear that the SEC has waived initiation of the instant follow-on proceeding. When Judge Totenberg asked the SEC to enumerate its remedies, its counsel did not stop at telling her than an industry bar had not been pled (thereby fostering the misimpression that such remedy could have been claimed in a civil action), but rather went further by stating in open court that "we are not seeking to bar the man from the securities industry." *Id.* at 119.

Moreover, the SEC is bound by this express waiver because the foregoing representations were stated, without any compulsion either by the district court or Mr. Megalli, in the context of justifying nearly $2.7 million in disgorgement, more than $6 million in civil penalties, and a permanent injunction against future securities law violations. In other words, in seeking millions of dollars in financial remedies and entry of a permanent injunction, the SEC affirmatively represented to Judge Totenberg that her entry of final judgment would be the last, best hope to punish Mr. Megalli and to restrain him from future insider trading violations. Principles of judicial estoppel dictate that representations like this are actionable in enjoining pursuit of the instant administrative proceeding, and that if the SEC intended to proceed with its administrative remedies, it had no business telling Judge Totenberg that it was not seeking Mr. Megalli's debarment as a quid pro quo for her entry of its requested civil relief.

Initiation of the current follow-on proceeding is also inequitable. Mr. Megalli was criminally sentenced in 2014 and final judgment was entered against him in the SEC's civil enforcement action in December 2015. But the SEC did not institute its order initiating administrative proceedings until October 2017. If the SEC were truly concerned about Mr. Megalli's capacity to reoffend (when he has never been a registered securities professional and his offense conduct involved minimal personal gain), it had full and fair opportunity to initiate an administrative action long ago.

The SEC may argue that it waited these additional years to pursue this action pending resolution of Mr. Megalli's habeas petition. Yet the fact that Mr. Megalli pursued habeas relief with respect to his criminal conviction based on *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), *cert. denied* ___ U.S. ___, 136 S. Ct. 242 (2015), during this time is of no moment. Both Mr. Megalli's and the government's publicly available habeas briefing make clear that his guilty

plea and the putative procedural default that accompanied it presented a significant obstacle to collateral relief. In addition, despite Mr. Megalli's invocation of *Newman* principles with respect to his civil insider trading liability, Judge Totenberg readily entered partial summary judgment against him as to liability in September 2015.

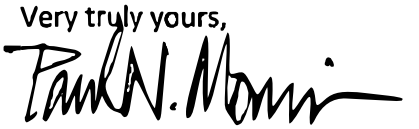
Simply stated, Mr. Megalli's pursuit of habeas relief involved neither a legal nor a procedural bar to the instant administrative proceeding, which, if the SEC truly viewed Mr. Megalli to be a potential recidivist, should have been initiated well before last month. Further, in the time since he was released from custody, Mr. Megalli has sought to rebuild his life by moving his family back to New York from New Orleans (where they had lived for approximately 30 months) and by establishing a business of providing investment research services to clients. His wife also took a job at an architecture firm in New York, and he re-enrolled his children in their New York City schools. He did all this in reliance on the SEC's assurances to Judge Totenberg that a follow-on debarment proceeding was not part of its enforcement plans.

Finally, to the extent the SEC would contend that its trial counsel was merely clarifying that the district court lacked statutory authority to debar Mr. Megalli and that the SEC was reserving its pursuit of such debarment for a follow-on proceeding, it had more than ample opportunity to make this clear to the district court in its pre-hearing briefing, during the civil remedies hearing, or at any time before entry of final judgment. Instead, after Judge Totenberg had expressed confusion about whether the SEC had asked her to debar Mr. Megalli, the SEC's counsel expressly and unequivocally waived off a securities industry bar in advocating to Judge Totenberg that she should enter millions of dollars in financial remedies accompanied by a permanent injunction. Because this fairly epitomizes judicial estoppel, the SEC should dismiss the instant follow-on proceeding.

Mr. Megalli does not take the notion of contacting the co-directors of the SEC's Enforcement Division and its chief litigation counsel lightly. He has done so because the regional trial counsel who represented the SEC during the underlying civil action would presumably defer to you given the matters presented by this correspondence that call for institutional resolutioneIn addition, the parties have conducted a pre-hearing conference with the assigned ALJ in the administrative proceeding at issue, and Mr. Megalli believes that, rather than present the foregoing facts and argument in a motion for summary disposition, the SEC would conceivably want to address them in advance of or outside the context of a briefing schedule that is about to commence.

Thank you for your consideration of this correspondence and its requested relief.

Very truly yours,



Paul N. Monnin

Attachment

cc: Joseph K. Brenner, Esq. (by email, brennerj@sec.gov, and U.S. Mail)
Aaron Lipson, Esq. (by email, lipsona@sec.gov, and U.S. Mail)
M. Graham Loomis, Esq. (by email, loomism@sec.gov, and U.S. Mail)
Pat Huddleston, Esq. (by email, huddlestonp@sec.gov, and U.S. Mail)
Andrew Sumner, Esq. (by email, andy.sumner@alston.com)

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

SECURITIES AND EXCHANGE COMMISSION,

PLAINTIFF,

DOCKET NO. 1:13-CV-03783-AT

-VS-

MARK MEGALLI,

DEFENDANT.

TRANSCRIPT OF HEARING PROCEEDINGS
BEFORE THE HONORABLE AMY TOTENBERG
UNITED STATES DISTRICT JUDGE
TUESDAY, OCTOBER 27, 2015

APPEARANCES:

ON BEHALF OF THE PLAINTIFF:

PAT HUDDLESTON, II, ESQ.

ON BEHALF OF THE DEFENDANT:

PAUL MONNIN, ESQ.
ERIC DAVID STOLZE, ESQ.

ELIZABETH G. COHN, RMR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
ATLANTA, GEORGIA

(ATLANTA, GEORGIA; OCTOBER 27, 2015, AT 1:50 P.M. IN OPEN COURT.)

THE COURT: GOOD AFTERNOON. PLEASE HAVE A SEAT.

WE'RE HERE IN SEC VERSUS MARK MEGALLI, CIVIL ACTION NUMBER 1:13-CV-3783.

GOOD AFTERNOON, COUNSEL. THANK YOU FOR PERSISTING.

AND, MR. MEGALLI? GOOD TO SEE YOU.

WE'RE GOING TO BE LOOKING AT THE CIVIL PENALTY ISSUE AND THE DISBARMENT ISSUE. IS THERE ANYTHING ELSE THAT WE'RE GOING TO HAVE TO -- DISGORGEMENT AS WELL. GREAT.

ANYTHING ELSE?

MR. HUDDLESTON: WE HAVEN'T PLED FOR DEBARMENT, AND SO THAT'S NOT PART OF THE CASE.

THE COURT: THAT'S NOT PART OF THE CASE.

MR. HUDDLESTON: NO, YOUR HONOR.

MR. MONNIN: YOUR HONOR, WHAT I UNDERSTAND IS THAT THE SEC HAS PLED AN INJUNCTION AGAINST FUTURE VIOLATIONS, AS OPPOSED TO AN INDUSTRY BAR.

MR. HUDDLESTON: RIGHT, CORRECT.

THE COURT: ALL RIGHT. JUST EXPLAIN THAT AGAIN WHAT YOU JUST SAID. AND IF YOU COULD JUST GET A LITTLE CLOSER TO THE MICROPHONE SO THAT --

MR. HUDDLESTON: CERTAINLY, YOUR HONOR.

WHAT WE PLED FOR FIRST IS A PERMANENT INJUNCTION AGAINST FUTURE VIOLATIONS.

SECONDLY, FOR DISGORGEMENT AND PREJUDGMENT INTEREST.

AND FINALLY FOR CIVIL PENALTIES.

THE COURT: OKAY. SO YOU'RE NOT LOOKING FOR DEBARMENT.

MR. HUDDLESTON: THAT IS CORRECT, YOUR HONOR.

THE COURT: ALL RIGHT. I MISUNDERSTOOD THAT, THEN.

ALL RIGHT. VERY GOOD. WELL, LET ME HEAR FROM THE GOVERNMENT FIRST.

MR. HUDDLESTON: IF I MIGHT, YOUR HONOR, I WOULD CERTAINLY YIELD THE FLOOR TO THE DEFENDANTS. THEY PREPARED A PRESENTATION WHICH WILL DRAW OUT ALL THE FACTS.

THE COURT: THAT'S FINE. THAT'S FINE.

MR. HUDDLESTON: OKAY.

MR. MONNIN: YES, YOUR HONOR. WE'VE DONE THAT.

AND, JUST FOR THE RECORD, I'VE GIVEN YOUR LAW CLERK, MR. BARTHOLOMEW?

THE COURT: RIGHT.

MR. MONNIN: CORRECT. AND THAT MR. BARTHOLOMEW HAS THE ORIGINAL EXHIBITS 1 THROUGH 7 THAT THE SEC HAS STIPULATED TO.

THE COURT: ALL RIGHT.

MR. MONNIN: IN LIGHT OF THAT STIPULATION, I GUESS I'LL JUST GO AHEAD AND MOVE THOSE. AND I'LL CERTAINLY HAVE MY CLIENT TESTIFY ABOUT THE FOUNDATION AND WHAT THEY RELATE TO.

THE COURT: ALL RIGHT.

MILLION LOSS AVOIDED IN 2009 AND THE $600,000.00 OF PROFIT IN 2010, SO WE BELIEVE THAT IS THE PROPER MEASURE OF DISGORGEMENT HERE. THOSE, THOSE ARE AS TO THE DISGORGEMENT ISSUES.

LET ME SEE IF THERE'S SOMETHING THAT I'M FORGETTING.

I MENTIONED THE CONTROL. I MENTIONED TIPPER RESPONSIBLE FOR THE TIPPEE'S LIABILITY.

OH, THE OTHER THAT YOU ASKED ME ABOUT BRINGING IN THE EMPLOYMENT AGREEMENT. OBVIOUSLY DISGORGEMENT IS AN EQUITABLE REMEDY AND THAT RESTS WITHIN THE SOUND DISCRETION OF THE COURT.

AND SO THE REASON I BROUGHT THAT OUT, JUDGE, IS THAT THE MAN KNEW IN OCTOBER 2009 THAT HE HAD ACTED WRONGFULLY. HE KNEW, IF HE HAD READ HIS EMPLOYMENT AGREEMENT, THAT HIS CONDUCT WOULD HAVE BEEN GROUNDS FOR TERMINATION FOR CAUSE, WHICH WOULD HAVE CUT OFF EVERY FINANCIAL BENEFIT HE RECEIVED THEREAFTER.

WE OFFERED THAT, MUCH AS MR. MONNIN OFFERED HIS SLIDE DECK AS AN ALTERNATIVE THING FOR THE COURT TO CONSIDER, WE OFFERED THAT AS A WAY FOR THE COURT TO CONSIDER THE INEQUITY HE OUGHT TO BE -- HE OUGHT TO PAY BACK EVERYTHING HE RECEIVED AFTER THAT FIRST VIOLATION.

SO THAT'S WHAT I HAVE TO SAY ABOUT DISGORGEMENT. IF YOU WANT ME TO GO ON ABOUT CIVIL PENALTIES --

THE COURT: SURE.

MR. HUDDLESTON: OKAY. THE CIVIL PENALTIES, THE FACTORS TO BE CONSIDERED ARE VERY SIMILAR TO THOSE TO BE CONSIDERED FOR WHETHER TO IMPOSE INJUNCTIVE RELIEF. THERE'S

ONLY ONE THING THAT'S DIFFERENT THERE.

SO YOU'VE GOT, YOU KNOW, THE SERIOUSNESS OF THE VIOLATION THAT YOU GOT. WAS IT ISOLATED. WAS IT REPEATED. YOU'VE GOT THE LEVEL OF SCIENTER. YOU'VE GOT THE ASSURANCES AGAINST MISCONDUCT AND HOW MUCH WEIGHT YOU CAN PUT ON THAT. AND YOU'VE GOT WHETHER THE DEFENDANT'S AGE AND OCCUPATION MIGHT GIVE HIM ADDITIONAL OPPORTUNITY FOR SIMILAR MISCONDUCT. AND SO I WENT THROUGH THOSE, THE EVIDENCE THERE.

WHAT I WOULD SAY, YOUR HONOR, IS THAT ALL OF THEM CUT IN FAVOR OF ENTERING AN INJUNCTION HERE. AND THE REASON I GO BACK TO THE -- WHICH IS ALSO CIVIL PENALTIES. THE ONE THING THAT'S DIFFERENT IN THE CIVIL PENALTIES ANALYSIS IS THAT YOU ADD ONE ELEMENT, WHICH THE JUDGE HAS BROUGHT OUT, AND THAT IS THAT THE DEFENDANT CAN COME FORWARD WITH EVIDENCE THAT HE CANNOT PAY. RIGHT? IT'S NOT OUR BURDEN TO PROVE THAT, BUT THE DEFENDANT CAN COME IN AND MAKE THAT RELEVANT. THERE IS NO FACTOR STATED LIKE MATERIALITY OR WAS HIS MISCONDUCT JUST A LITTLE DROP IN A BIGGER POOL. THAT'S NOT WHAT THE LAW IS.

SO, REGARDING THE INJUNCTIVE RELIEF, THE REASON I BRING OUT WHAT HAPPENED AT THE SENTENCING HEARING, JUDGE, AND YOU MADE THE POINT THAT IT'S PART OF THE RECORD, IN THE SENTENCING MEMORANDUM, WHICH I DIDN'T ASK HIM TO READ, IT'S IN THE BRIEFING, MR. MONNIN MADE THE POINT TO JUDGE STORY THAT THIS GUY IS GOING TO BE BARRED FROM THE SECURITIES INDUSTRY. WE STARTED THIS HEARING TODAY WITH US MAKING IT CLEAR THAT WE

DIDN'T EVEN PLEAD THAT. AND SO WE BELIEVE THAT THIS MAN WAS SENTENCED, GOT AN UNDULY LIGHT SENTENCE BECAUSE OF MISREPRESENTATIONS HE HAD MADE ABOUT THE RELIEF THE SEC WAS SEEKING AND ABOUT THE DEFENDANT'S INTENT TO ENTER INTO A SETTLEMENT WITH THE SEC.

AND SO WE THINK THAT GOES TO BOTH THE ASSURANCE OF, YOU KNOW, GOOD BEHAVIOR IN THE FUTURE, GIVEN THE ASSURANCES HE MADE TO THE SENTENCING COURT, AND TO CIVIL PENALTIES. AND, GIVEN THE FACT THAT WE ARE NOT SEEKING TO BAR THE MAN FROM THE SECURITIES INDUSTRY, NOR ARE WE SEEKING AN ORDER TO BAR HIM FROM BEING AN OFFICER OR DIRECTOR OF A PUBLIC COMPANY, WHICH IS ON THE TABLE IN SOME OF OUR CASES, WE BELIEVE THAT INJUNCTIVE RELIEF IS EVEN MORE PROPER IN THIS CASE AS IT WILL BE THE ONLY COURT ORDER THAT HAS A CHANCE OF RESTRAINING HIM. THERE'S NOTHING ABOUT INSIDER TRADING THAT REQUIRES A SPECIAL OCCUPATION OR SPECIAL LICENSE. IT REQUIRES ACCESS TO THE INFORMATION, AND THAT'S IT.

THE COURT: SO REMIND ME WHAT, IF YOU SUBMITTED THE PROPOSED TERM OF INJUNCTIVE RELIEF HERE, THE LANGUAGE THAT YOU ARE SEEKING.

MR. HUDDLESTON: WELL, WE'RE SEEKING A PERMANENT INJUNCTION, SO IT WOULD BE --

THE COURT: A PERMANENT INJUNCTION THAT STATES WHAT?

MR. HUDDLESTON: THAT STATES THAT HE IS ENJOINED FROM FUTURE VIOLATIONS OF SECTION 10B OF THE EXCHANGE ACT AND RULE

10B-5 THEREUNDER, SECTION 17(A) OF THE SECURITIES ACT AND ALL PROVISIONS OF THAT. AND THEN BECAUSE OF THE GOBLE CASE FROM THE 11TH CIRCUIT, TYPICALLY WE PUT IN SOME SPECIFICS AS TO INSIDER TRADING AND THAT SPECIFICALLY HE IS NOT ALLOWED TO TRADE WHILE IN POSSESSION OF MATERIAL NONPUBLIC INFORMATION.

THE COURT: WELL, LET'S DEAL WITH THE EASY ISSUE. MR. MONNIN, ARE YOU OBJECTING TO THAT?

MR. MONNIN: OF COURSE I AM. MY CLIENT HAS ALREADY TESTIFIED THAT HE --

THE COURT: ALL RIGHT. WELL, FIRST OF ALL, AGAIN, GET THROUGH, WHY DON'T YOU SUBMIT THE PROPOSED INJUNCTIVE PROVISIONS THAT YOU ARE SEEKING, BECAUSE THAT DOESN'T SEEM TO BE IN DISPUTE.

MR. MONNIN: WILL DO.

MR. HUDDLESTON: WILL DO.

THE COURT: AND SO, IN TOTAL, JUST REMIND ME, WHAT IS THE SUM THAT YOU'RE LOOKING AT IN DISGORGEMENT, AND WHAT ARE YOU SEEKING IN CIVIL PENALTIES?

MR. HUDDLESTON: WELL, THE DISGORGEMENT IS THE $2,034,000.00 FROM THE OCTOBER 2009 TRADES. AND THEN I DON'T HAVE THE FIGURE RIGHT IN FRONT OF ME, THE 685,000.

THE COURT: THIS IS THE --

MR. HUDDLESTON: YEAH, IT'S IN THE BRIEFING.

THE COURT: ALL RIGHT. IT'S ROUGHLY 685,000.

MR. HUDDLESTON: EXACTLY. AND AS TO CIVIL PENALTIES,

Exhibit C

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
ATLANTA REGIONAL OFFICE
950 East Paces Ferry Road, N.E., Suite 900
Atlanta, Georgia 30326-1382

M. Graham Loomise
Regional Trial Counsele

Telephone: (404) 842-7622
Facsimile: (404) 842-7679

November 22, 2017

VIA ELECTRONIC DELIVERY

Paul N. Monnin, Esq.
Alston & Bird
One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309

Re: In the Matter of Mark Megalli, Administrative Proceeding File No. 3-18250

Dear Paul:

Your November 20, 2017 correspondence to Stephanie Avakian and Steven Peikin has been forwarded to me for response. We have discussed the arguments in your letter, and disagree with your contention that the Securities and Exchange Commission ("SEC") has waived its claims for associational bars against Mr. Megalli. You contend that we somehow led Mr. Megalli to believe that that the Commission would not seek such relief, but the evidence shows that you and your client knew from the outset that the Commission would be seeking associational bars. Indeed, in your January 14, 2014 email to me, you stated "As we've previously discussed, liability and consent to an injunction **and industry bar** aren't going to be an issue for you in this case." (Emphasis added). Also, in the June 26, 2014 Sentencing Memorandum that you prepared and filed for Mr. Megalli in his companion criminal case, you argued for a lenient sentence in part because Mr. Megalli "also faces permanent debarment from the securities industry and the assessment of potentially significant disgorgement and a civil penalty in connection with a parallel enforcement proceeding brought by the [SEC]."

We also disagree with your contention that Pat Huddleston's statements during the October 27, 2015 remedies hearing before Judge Totenberg preclude the SEC from seeking associational bars. The initial comments that Pat made at the outset of the hearing, i.e. that the Commission hadn't pled for debarment, were simply a clarification to Judge Totenberg when she asked what remedies she was being asked to decide in the SEC's district court action against Mr. Megalli. The specific colloquy was as follows:

The Court: Good afternoon, counsel. Thank you for persisting. And, Mr. Megalli? Good to see you. We're going to be looking at the civil penalty issue and the disbarment issue. Is there anything else that we're going to have to -- disgorgement as well. Great. Anything else?

Mr. Huddleston: We haven't pled for debarment, and so that's not part of the case.

The Court: That's not part of the case.

Mr. Huddleston: No, Your Honor.

Mr. Monnin: Your Honor, what I understand is that the SEC has pled an injunction against future violations, as opposed to an industry bar.

Mr. Huddleston: Right, Correct.

The Court: All right. Just explain that again what you just said. And if you could just get a little closer to the microphone so that –

Mr. Huddleston: Certainly, Your Honor. What we pled for first is a permanent injunction against future violations. Secondly, for disgorgement and prejudgment interest. And finally for civil penalties.

The Court: Okay. So you're not looking for debarment.

Mr. Huddleston: That is correct, Your Honor.

The Court: All right. I misunderstood that, then. All right. Very good. Well, let me hear from the Government first.

Remedies Tr. at 3-4. Pat's clarifying statements were accurate, as the Commission was not seeking associational restrictions in the district court action, and thus that issue was not something that would be addressed at the remedies hearing. We view your attempt to construe these comments as a waiver of our right to seek associational bars as wholly unsupported by the record.

We likewise disagree with your argument that Pat's statements later in the remedies hearing about not seeking an industry bar in the district court action amount to a waiver, or estop us from seeking associational bars in an administrative proceeding. See Remedies Tr. at 118-19.e Those statements were part of Pat's overall discussion of the misstatements we think youe made at Mr. Megalli's sentencing hearing in the criminal case. Specifically, at the sentencinge hearing, you argued that a light sentence should be imposed because Mr. Megalli had settlede

with the SEC. In fact, however, Mr. Megalli had not settled with the SEC and, after the sentencing hearing, you moved for summary judgement seeking dismissal of the SEC's case. Rather than seeking to convince Judge Totenberg that we had abandoned our claims for associational relief, Pat was arguing that a stiff civil penalty was appropriate because Mr. Megalli received an unduly light sentence in his criminal case in part because of the misrepresentations at the sentencing hearing.

Your statements later in the remedies hearing, after Pat's comments, clearly reflect your understanding that the SEC would be seeking associational bars. Specifically, in arguing for minimal penalties to Judge Totenberg, you stated:

> "I'll wrap it up by saying what he actually did, he recognizes the seriousness of it. He recognizes that it's misconduct. But he's paid very dearly for it. I mean, he's gone to prison. He's plead guilty. **He's going to be out of the industry.**"

Remedies Tr. at 130 (Emphasis added). This statement also flatly contradicts the claim in your November 20, 2017 letter that Mr. Megalli was somehow led to believe that associational bars were "not part of [the SEC's] enforcement plans."

It is also obvious that Pat's comments about not seeking industry bars played no role in Judge Totenberg's ultimate decision on the amount of penalty. Neither of her two orders following that hearing (the November 11, 2017 Order requesting additional briefing on penalties and her December 15, 2017 Order imposing remedies) references the associational bar issue in any way. Rather, those orders show that her focus in determining the appropriate penalty for Mr. Megalli was whether the applicable statute, Section 21A(2) of the Securities Exchange Act of 1934, allowed her to consider the substantial ill-gotten gains by Level Global, the fund in which Mr. Megalli executed the illegal trades.

Finally, we disagree with your claim that that the delay in instituting the administrative proceeding warrants dismissal of that proceeding. The summary judgment against Mr. Megalli in the SEC's district court case, and the resulting injunction that provides the basis for the administrative proceeding, were premised on the collateral estoppel effect from Mr. Megalli's criminal conviction. We believe it was thus prudent for us to await the resolution of Mr. Megalli's challenge to that conviction before instituting the administrative proceeding. That is precisely what we did. Moreover, it is universally recognized that laches is not a viable defense against the SEC. See, e.g., David Disner, et al., Release No. 34-38234, 1997 WL 47268 at * 5 (Feb. 4, 1997) ("the defense of laches is not available against a United States government agency acting in the public interest.").

For these and other reasons, we do not agree that there is a basis to dismiss the administrative proceeding pending against your client.

Sincerely,

M. Graham Loomis
Regional Trial Counsel

cc: Stephanie Avakian (via email)
Steven Peikin (via email)

Exhibit D

ALSTON & BIRD

One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424
404-881-7000 | Fax: 404-881-7777

Paul N. Monnin | Direct Dial: 404-881-7394 | Email: paul.monnin@alston.com

November 29, 2017

BY EMAIL AND REGULAR MAIL

M. Graham Loomis, Esq.
Regional Trial Counsel
Atlanta Regional Office
U.S. Securities and Exchange Commission
950 East Paces Ferry Road, N.E., Suite 900
Atlanta, Georgia 30326-1382

Re: *In the Matter of Mark Megalli*, Administrative Proceeding
File No. 3-18250

Dear Graham:

Thank you for your November 22 correspondence regarding the above-referenced administrative proceeding. While your letter makes clear that the SEC does not intend to dismiss its follow-on action, I write to encourage the SEC's reconsideration of this position. I also write to complete the record on the assumption that certain or all of your contentions may find their way into the SEC's Rule 250 motion practice.

First, Mr. Megalli certainly does not deny that his felony plea in October 2013 exposed him to an associational bar. Nor does he deny that the likelihood of securities industry debarment was part of the parties' settlement discussions that began in January 2014 and his written and oral advocacy in connection with his criminal sentencing in July 2014.

It was not Mr. Megalli, however, who refused to settle his civil liability. Rather, and as detailed in the attached affidavit and supporting exhibits submitted to Judge Totenberg, it was the SEC that repeatedly required Mr. Megalli to admit to aggravating and unsubstantiated facts that were outside his guilty plea and sentencing as part of any proposed consent judgment. (*See, e.g.*, attached declaration at ¶¶ 6-21). This was despite the fact that Mr. Megalli remained willing, both before and after his sentencing, to resolve his civil liability consistently with the facts he admitted at his guilty plea and sentencing, including that he had traded in reliance on

material, non-public information in October 2009 and July 2010, the proceeds and avoided losses of which had generated the approximately $2.7 million in trading gain to Mr. Megalli's former hedge fund employer that the SEC proffered to Judge Totenberg in its pursuit of civil financial remedies. *Id.* Indeed, consenting to liability as evidenced by a guilty plea transcript is precisely how the SEC agreed to resolve its parallel civil enforcement action against Richard Posey, Mr. Megalli's co-conspirator. *See id.* at ¶¶ 15-16. Yet for reasons never made fully clear to Mr. Megalli, the SEC steadfastly refused to agree to the same procedure in his case, despite the fact that his plea and the sentencing on which it was based supplied the SEC with all relevant facts with which to establish his liability for the insider trading gain the SEC ultimately proffered to Judge Totenberg in support of its financial remedies contentions. *Id.* ¶¶ 6-21.

In particular, Mr. Megalli expressly informed the SEC after his sentencing, just as he had conceded to Judge Story in connection with his sentencing, that he "does not – and cannot – deny that he traded Carter's [securities] based on actual knowledge of inside information in July 2010 and conscious avoidance as to the basis for [former Carter's insider and intermediate tippee Eric] Martin's sale recommendation in October 2009." *Id.* ¶ 19, Ex. 9. Further, while the SEC has repeatedly criticized (including in your November 22 letter) the undersigned's sentencing advocacy with regard to the likelihood of a civil liability settlement, aside from the fact that Mr. Megalli attempted in good faith and for months before and after his sentencing to resolve his civil liability by agreement, *see id.* at ¶¶ 6-8 and 11-19, the reality here is that the undersigned's references to the SEC's parallel enforcement proceeding had very little to do with Judge Story's ultimate sentence. This is because, at the outset of the July 8, 2014 sentencing hearing involving Mr. Megalli and his co-conspirators and in plain view of the SEC's trial counsel herein (who attended the hearing), Judge Story elected, and so stated on the record, to reorder the sequencing of the defendants' individual sentencings from most to least culpable. This meant that Eric Martin and Richard Posey were first sentenced to respective custodial terms of 24 and 15 months, thereby effectively capping Mr. Megalli's custodial exposure at less than 15 months (he was sentenced to a year and a day in custody) before he was called forward for his own sentencing.

Nor may Mr. Megalli be faulted for invoking *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), *cert. denied* ___ U.S. ___, 136 S. Ct. 242 (2015), in support of his motion for summary judgment or for litigating the degree of his post-liability exposure to disgorgement and entry of a civil penalty. Aside from the fact that *Newman*'s issuance in December 2014 post-dated Mr. Megalli's July 2014 sentencing and his ensuing efforts to resolve his civil liability by agreement, (*see* attached declaration at ¶¶ 19-21), both the Justice Department and the SEC had declared that *Newman* presented an unprecedented and disabling sea change in insider trading jurisprudence as a predicate to the filing of Mr. Megalli's summary judgment motion and corresponding habeas petition. With regard to remedies, the record is also abundantly clear that Mr. Megalli had always reserved his ability to litigate the appropriate measure of civil

financial remedies. *See id.* at ¶¶ 6-10 and 17-18. This was certainly prudent insofar as the SEC's request for approximately $9.2 million in disgorgement, prejudgment interest, and a three-times civil penalty was nearly 150 times the $62,000 in financial remedies ultimately ordered by Judge Totenberg.

In sum, after attempting in good faith and for months both before and after his sentencing to resolve his civil liability, Mr. Megalli invoked *Newman* and the events surrounding its issuance – including the Justice Department's dismissal of Newman's and his co-defendant's indictment and the judicially sanctioned withdrawal of guilty pleas that had been entered by multiple, already convicted tippee traders – to question the validity of his criminal conviction and the SEC's ability to prove its case. This occurred after Mr. Megalli had been sentenced and had tried before and after his sentencing to arrive at an agreed consent judgment with the SEC as to his liability, but before he – or, for that matter, either DOJ or the SEC – could have predicted the substance of the *Newman* opinion. He also sensibly preserved the argument that his financial liability should be based on personal, rather than institutional, gain, which now has issue preclusive effect in light of Mr. Megalli's briefing and testimony regarding this issue, followed by Judge Totenberg's entry of judgment in Mr. Megalli's favor with regard to the limited scope of the SEC's financial remedies.

But much of this is secondary to the fact that the SEC, in seeking to maximize the imposition of financial and injunctive relief, expressly advocated to Judge Totenberg that, because "we are not seeking to bar the man from the securities industry, nor are we seeking an order to bar him from being an officer or director of a public company, which is on the table in some of our cases," (Oct. 27, 2015 Hr'g Tr. at 119), she should punish Mr. Megalli because the criminal judgment entered against him was, at least according to the SEC, too lenient. Indeed, your November 22 letter expressly acknowledges this quid pro quo by declaring that the SEC's representations to Judge Totenberg were "part of Pat's overall discussion of the misstatements we think you made at Mr. Megalli's sentencing hearing in the criminal case." To wit, "Pat was arguing that a stiff civil penalty was appropriate because Mr. Megalli received an unduly light sentence in his criminal case in part because of the misrepresentations at the sentencing hearing."

Putting to the side that, as evidenced both above and in the attached, Mr. Megalli tried in vain before and after his criminal sentencing to settle his civil liability by consent (and consistently with how the SEC had agreed to resolve the liability of one of his co-conspirators), it is abundantly clear that realization of the SEC's objective of attaining maximum punishment was best accomplished by informing Judge Totenberg in no uncertain terms that the SEC would *not* be seeking his debarment. This was in lieu of disclosing, or even intimating, that Mr. Megalli's permanent debarment would be achieved through a subsequent proceeding in the SEC's own administrative forum.

In this regard, the SEC's self-serving contention that "Pat's comments about not seeking industry bars played no role in Judge Totenberg's ultimate decision on the amount of [a] penalty," is internally inconsistent with the SEC's admission that the intended effect of the subject representations was to achieve maximum civil punishment in light of purportedly minimal criminal punishment. It is also nonsensical in that it goes without saying – as evidenced by the fact that the SEC never informed Judge Totenberg before, during or after the remedies hearing that it intended to pursue Mr. Megalli's permanent administrative debarment – that if the SEC had disclosed the inevitability of a follow-on administrative proceeding to Judge Totenberg, she presumably would have been inclined to take this into account in affixing the SEC's financial remedies.

In other words, the fact that Judge Totenberg's post-hearing orders make no mention of Mr. Megalli's debarment relates directly to the fact that the SEC told her unequivocally that it was "not seeking to bar the man from the securities industry," (Hr'g Tr. at 119), not that such a bar would be pursued in a follow-on proceeding.

Moreover, the SEC did not stop at advising Judge Totenberg that it would not be seeking Mr. Megalli's debarment. Rather, it doubled-down on this misimpression by stating that a public company director or officer bar – which federal district courts plainly have jurisdiction to order on summary judgment – was not part of the SEC's civil enforcement action. *See id.* ("[N]or are we seeking an order to bar him from being an officer or director a public company, which is on the table in some of our cases."); *see also*, *e.g.*, *SEC v. Miller*, 744 F. Supp. 2d 1325, 1346-47 (N.D. Ga. 2010) ("Section 21(d)(2) of the Exchange Act and Section 20(e) of the Securities Act provide for officer and director bars and penalties. [A district court] may enter such an order if it finds that [a] defendant's conduct demonstrates unfitness to serve as an officer or director of any . . . issuer. [A district court] has substantial discretion in determining whether to order such a bar.") (internal citations and quotations omitted); *accord SEC v. Aqua Vie Beverage Corp.*, No. CV-04-414-S-EJL, 2008 WL 1914723, at *2 (D. Idaho Apr. 29, 2008) (noting that on summary judgment a district court "has broad equitable powers to fashion appropriate relief for violations of the federal securities laws, which include the power to order an officer and director bar").

The notion that the SEC's trial counsel was merely toeing a fine line with regard to Judge Totenberg's remedial jurisdiction is thus belied on two accounts. First, after Judge Totenberg indicated at the outset of the remedies hearing that she misunderstood the scope of the SEC's pleading, the SEC's trial counsel responded solely by stating that the SEC had not pled industry or associational debarment; *not* that such relief is legally unavailable in a civil enforcement action and that it was reserving Mr. Megalli's permanent debarment for a follow-on administrative proceeding. (*See* Hr'g Tr. at 4 ("THE COURT: OKAY, SO YOU'RE NOT LOOKING

FOR DEBARMENT. MR. HUDDLESTON: THAT IS CORRECT, YOUR HONOR. THE COURT: ALL RIGHT, I MISUNDERSTOOD THAT, THEN.")). Second, in asserting that it did not intend either to debar Mr. Megalli from the securities industry or to prevent him from serving as a director or officer of a public company, the SEC's trial counsel chose to conflate an administrative debarment remedy over which the district court lacked jurisdiction with a separate debarment remedy for which civil jurisdiction plainly lies.

Accordingly, any unbiased reading of the subject colloquy between the SEC's trial counsel and Judge Totenberg demonstrates that, to achieve the SEC's stated goal of maximum civil punishment, its counsel first failed to disabuse Judge Totenberg of the impression that she had jurisdiction to entertain an associational bar. Instead, the SEC affirmatively fostered this misconception by claiming that it had simply declined to plead this remedy, rather than supplementing its representation with the disclosure that a permanent associational bar would in fact be separately and administratively pursued. This misconception was then compounded at the hearing's conclusion by the SEC's unambiguous assertion that it did not intend to seek Mr. Megalli's exclusion from the securities industry, which was stated in the same breath as the SEC's equally unequivocal assertion that it had waived pursuit of a D&O bar that is "on the table" in its other civil enforcement actions.

It defies belief that Judge Totenberg was able to parse the SEC's stated waiver of a D&O debarment remedy, over which the court clearly has civil jurisdiction, from counsel's bare disclaimer, unaccompanied by any notice that such disclaimer was merely "for now," of an associational bar that is solely for the SEC. More broadly, the SEC's tap-dancing on the indisputable judicial impression engendered by its counsel's statements, coupled with the admission that the SEC's fundamental objective was to exert maximum civil punishment, is why Mr. Megalli has asserted waiver and estoppel here. It is fundamentally inequitable for the SEC to imply uniform civil jurisdiction over an associational and D&O bar and then to assert waiver of both in no uncertain terms to further its self-acknowledged objective of maximizing Mr. Megalli's civil punishment.

As a result, Mr. Megalli once again requests voluntarily dismissal the instant follow-on proceeding.

Very truly yours,

/s/ Paul N. Monnin

Paul N. Monnin

Attachment

cc: Stephanie Avakian (by email, avakians@sec.gov, with attachment)
Steven Peikin (by email, peikins@sec.gov, with attachment)

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-3783-AT

DECLARATION OF PAUL N. MONNIN

I, Paul N. Monnin, declare as follows:

1. I am partner with Paul Hastings LLP ("Paul Hastings") with personal knowledge of the information stated herein.

2. Prior to becoming a partner at Paul Hastings, I was a partner with DLA Piper LLP (US) ("DLA Piper").

3. I began representing defendant Mark Megalli in connection with a criminal insider trading investigation by the U.S. Attorney's Office for the Northern District of Georgia in approximately August 2013, while I was still a DLA Piper partner.

4. The criminal investigation culminated in Mr. Megalli's entry of a negotiated guilty plea, on November 14, 2013, to a single-count criminal

information, styled *United States v. Mark Megalli*, No. 1:13-CR-442-RWS (N.D. Ga.), filed by the United States Attorney for the Northern District of Georgia.

5. On the same day as Mr. Megalli's guilty plea, the U.S. Securities and Exchange Commission sued Mr. Megalli for civil insider trading violations in the above-captioned enforcement proceeding.

6. In light of his guilty plea in the parallel criminal action, Mr. Megalli and the SEC commenced settlement discussions in relation to the above-referenced civil action in January 2014. Such discussions, however, always involved a "bifurcated" settlement, meaning that the parties would explore Mr. Megalli's potential entry of a liability consent order separately from settlement of the SEC's request for disgorgement and a civil penalty.

7. Attached hereto as Exhibit 1 is a true and correct copy of a January 14-15, 2014 email exchange between the undersigned and the SEC Staff evidencing the parties' contemplation of a bifurcated settlement and the SEC's disclosure of a proposed consent order related solely to Mr. Megalli's liability.

8. Attached hereto as Exhibit 2 is a true and correct copy of a February 17-19, 2014 email exchange between the undersigned and the SEC Staff. As reflected in this exchange, Mr. Megalli objected to the SEC's proposed liability consent order; not because he denied his substantive liability, but rather because it

required his admission of certain facts at the margin of the SEC's complaint and outside the scope of this guilty plea.

9. At the same time he forwarded his objections to the SEC's form of liability consent, and consistent with the notion that the parties' always contemplated a bifurcated settlement, the undersigned supplied the Staff with a February 17, 2014 letter analyzing the appropriateness of disgorgement and entry of a civil penalty in this case, a true and correct copy of which is attached hereto as Exhibit 3.

10. Attached hereto as Exhibit 4 is a true and correct copy of a February 26, 2014 letter the undersigned sent the SEC Staff regarding application of the Second Circuit's holding in *SEC v. Contorinis*, 743 F.3d 296 (2d Cir. 2104), to the entry of disgorgement in Mr. Megalli's case. This letter reflects that the parties continued to bifurcate Mr. Megalli's liability from the SEC's financial remedies in their settlement discussions.

11. Attached hereto as Exhibit 5 is a true and correct copy of a March 25-April 2, 2014 email exchange between the undersigned and the SEC Staff. This exchange reflects that, on March 25, 2014, Mr. Megalli forwarded a proposed mark-up of the SEC's liability consent to the Staff, that, in Mr. Megalli's view,

was consistent with his criminal plea and admitted to all material facts necessary to generate liability.

12. A true and correct copy of the marked-up liability consent Mr. Megalli sent the SEC on March 25, 2014 is attached hereto as Exhibit 6. It reflects Mr. Megalli's good faith effort to concede those facts he admitted before Judge Story – which led to his criminal conviction – while at the same time reserving other factual matters falling outside his guilty plea.

13. Per Exhibit 5, the SEC responded on March 25, 2014 that Mr. Megalli's proposed liability consent was likely unacceptable due to the SEC's policy that defendants who enter a criminal plea have to admit the allegations of a parallel civil complaint that are consistent with their criminal plea.

14. As evidenced by Exhibits 5 and 6, however, the undersigned addressed the SEC's concern later that day by noting that the liability consent Mr. Megalli had proposed was in fact consistent with his guilty plea and, moreover, admitted the material allegations of the SEC's complaint. Adopting a take-it-or-leave-it approach, however, the SEC rejected Mr. Megalli's proposed liability consent on April 2, 2014, directing that he was required either to sign the liability consent as proposed by the SEC or to answer the SEC's complaint.

15. Attached hereto as Exhibit 7 is a true and correct copy of an April 14, 2014 letter the undersigned sent the SEC Staff regarding potential resolution of Mr. Megalli's liability on the same basis to which the SEC had agreed with Richard Posey in *SEC v. Posey*, 1:14-CV-664-AT (N.D. Ga.), a parallel enforcement proceeding also pending before this Court.

16. In particular, because the factual basis of Posey's liability consent simply involved attaching the transcript of his change of plea hearing before Judge Story to what was effectively a single-paragraph consent, Mr. Megalli proposed, as he had advocated since January 2014, that his liability also be resolved by attaching his guilty plea hearing transcript to a short-form consent. The SEC, however, once again declined this request.

17. In connection with Mr. Megalli's July 8, 2014 criminal sentencing before Judge Story, the undersigned noted that, although it remained likely given the facts admitted at his criminal plea and sentencing that Mr. Megalli would settle his civil liability with the SEC, the parties intended to litigate disgorgement and entry of a civil penalty, if any, in this enforcement action.

18. Per the transcript of Mr. Megalli's sentencing, a true and correct copy of which is attached hereto as Exhibit 8, and with the SEC's counsel seated in the courtroom, the undersigned expressly advised Judge Story that

> 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.* . . . [T]he 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.*

(Emphasis added). Accordingly, the undersigned advised the SEC in open court at Mr. Megalli's sentencing of his continued intent to litigate the SEC's entitlement to financial penalties in this case.

19. Attached hereto as Exhibit 9 is a true and correct copy of a July 16-August 13, 2014 email exchange in which the undersigned, following Mr. Megalli's sentencing, expressly advised the Staff that, although Mr. Megalli fully intended to concede liability consistently with his guilty plea and sentencing, he remained unable to execute a liability consent in the form previously proposed by the SEC, given its inclusion of purported facts falling outside his criminal plea that are not only without foundation but also unnecessary to establish his civil liability.

20. Rather than assert that Mr. Megalli had somehow reneged on a promise to resolve his liability – which had always involved the SEC's insistence that Mr. Megalli admit to extraneous facts outside his plea and sentencing – Exhibit 9 reflects that the SEC responded simply by asking for potential deposition dates.

21. Exhibit 9 encompasses the parties' last substantive discussion regarding potential resolution of Mr. Megalli's liability prior to the parties' cross-motions for summary judgment, which in Mr. Megalli's case was based on *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), an appellate opinion post-dating the parties' exchange in Exhibit 9 and one that the SEC has characterized as being unprecedented.

22. Accordingly, the facts recited in this declaration and evidenced by the attached exhibits reflect that the parties never intended to resolve the SEC's entitlement to disgorgement and a civil penalty in advance of litigation. Further, although the parties exchanged various liability consent proposals, including proposals from Mr. Megalli in which the SEC simply could have accepted those admissions leading to his criminal conviction, no agreement on Mr. Megalli's civil liability was ever reached prior to summary judgment.

23. While the SEC has previously contended in this litigation that Mr. Megalli "misrepresented" his willingness to settle the SEC's complaint, purportedly to obtain favorable sentencing consideration from Judge Story, the attached exhibits evidence Mr. Megalli's continued efforts, both well before and after his sentencing, to settle the SEC's liability claims consistently with the

admissions he made at during his criminal plea and sentencing – admissions that resulted in a prison sentence and a criminal restitution order.

24. The fact that, as a condition of settlement, the SEC arbitrarily demanded, contrary to its own policy in parallel civil and criminal proceedings, that Mr. Megalli admit to extraneous, unfounded facts falling outside his guilty plea and sentencing hardly means that he was unwilling to settle. It is only the SEC's capriciousness in response to Mr. Megalli's good faith and well-documented efforts to settle his pre-*Newman* liability that caused the parties' liability-related settlement negotiations to fail.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that, to the best of my personal knowledge, the information set forth above is true and correct.

Executed on December 7, 2015

Paul N. Monnin

EXHIBIT 1

From: Loomis, Madison G. <LoomisM@sec.gov>
Sent: Wednesday, January 15, 2014 12:24 PM
To: Monnin, Paul
Cc: Huddleston, Pat; LeVasseur, Zachary
Subject: RE: Megalli
Attachments: Megalli consent.docx

Noticed a couple of mistakes in the consent. Revised version is attached.

M. Graham Loomis
Regional Trial Counsel
Atlanta Regional Office
404-842-7622

From: Loomis, Madison G.
Sent: Wednesday, January 15, 2014 11:55 AM
To: 'Monnin, Paul'
Cc: Huddleston, Pat; LeVasseur, Zachary
Subject: RE: Megalll

Paul-

Here are the proposed consent and consent order imposing injunctive relief.

M. Graham Loomis
Regional Trial Counsel
Atlanta Regional Office
404-842-7622

From: Monnin, Paul [mailto:Paul.Monnin@dlapiper.com]
Sent: Tuesday, January 14, 2014 5:04 PM
To: Loomis, Madison G.
Cc: Huddleston, Pat; LeVasseur, Zachary
Subject: Megalll

Thanks for your VM. Why don't you send me a form of liability consent judgment for a bifurcated settlement. I don't think you sent me one before. I know for the most part what it will look like. I'll send you disgorgement and civil penalty proposal soon.

Paul N. Monnin

T +1 404.736.7804
F +1 404.682.7804
M +1 [redacted]
E paul.monnin@dlapiper.com

DLA PIPER

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United States
www.dlapiper.com

Please consider the environment before printing this email.

EXHIBIT 2

From: Huddleston, Pat <HuddlestonP@SEC.GOV>
Sent: Wednesday, February 19, 2014 9:25 AM
To: Monnin, Paul
Cc: LeVasseur, Zachary; Loomis, Madison G.
Subject: RE: SEC v. Megalli, No. 1:13-CV-3783-AT: Consent, Consent Judgment and Disgorgement/Civil Penalty Letter Brief

Thanks for the email, Paul. If I'm reading the docket correctly, the transcript of Mr. Megalli's plea allocution will be available next week. I will need to review it before I consider the proposed edits.

Best regards,

Pat

Pat Huddleston
Senior Trial Counsel
U.S. Securities and Exchange Commission
950 East Paces Ferry, N.E., Suite 900
Atlanta, GA 30326-1382

404-842-7616

From: Monnin, Paul [mailto:Paul.Monnin@dlapiper.com]
Sent: Wednesday, February 19, 2014 9:15 AM
To: Huddleston, Pat
Cc: LeVasseur, Zachary; Loomis, Madison G.
Subject: FW: SEC v. Megalli, No. 1:13-CV-3783-AT: Consent, Consent Judgment and Disgorgement/Civil Penalty Letter Brief

Pat,

I spoke with Graham for a bit yesterday evening. As I related to him, in our plea discussions with the government, the U.S. Attorney's Office was adamant that Mark stipulate to the $2.5-$7M insider trading gain increment under Section 2B1.4 of the sentencing guidelines. (For the most part, the guidelines don't distinguish between personal/institution/conspiracy gain for sentencing purposes, particularly in light of relevant conduct principles under Section 1B1.3.) The total gain from the late October 2009 and July 2010 trades is in excess of $2.5M, so, in addition to the evidence supporting his liability, those were the trades to which Mark entered a plea. We advised the government of the factual/evidentiary issues with respect to the other trades (noted in the attached pdf I sent you on Monday) during our plea negotiations.

Hopefully, this gives you some relevant background on the proposed edits to the consent and consent judgment. I know those need to be taken care of first. I'm around if you have any questions.

Thanks,

Paul

From: Monnin, Paul
Sent: Monday, February 17, 2014 1:12 PM
To: 'Loomis, Madison G.'
Cc: huddlestonp@sec.gov; LeVasseur, Zachary; Burr, Jennifer
Subject: SEC v. Megalli, No. 1:13-CV-3783-AT: Consent, Consent Judgment and Disgorgement/Civil Penalty Letter Brief

Graham,

Please see the attached letter and forms of consent and consent judgment in relation to the above-referenced case. Per our voicemail exchange back in January, I've made a few proposed changes to the consent and consent judgment (reflected in the attached black-lines) so that they're consistent with Mr. Megalli's criminal plea. In particular, Mr. Megalli is consenting to liability with respect to the October 2009 and July 2010 Carter's trades, which mirrors his plea to the criminal information filed by the U.S. Attorney's Office. These trades constitute by far the majority of the insider trading gains at issue, and entry of the revised consent will alleviate Mr. Megalli's objections (set forth in the attached document) with respect to certain factual allegations in the pending complaint.

As noted in the attached letter brief, our position regarding disgorgement is largely conceptual – *i.e.*, that Mr. Megalli is solely liable for personal, as opposed to institutional, gain – such that litigation, if any, regarding disgorgement and a civil penalty will focus on the law, rather than the facts.

Please feel free to contact me after you've had a chance to review the attached.

Thanks,

Paul

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EXHIBIT 3

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CONFIDENTIAL SETTLEMENT COMMUNICATION SUBJECT TO FRE 408

February __, 2014

BY E-MAIL AND U.S. MAIL

M. Graham Loomis, Esq.
Regional Trial Counsel
U.S. Securities and Exchange Commission
950 East Paces Ferry Road, Suite 900
Atlanta, Georgia 30326-1234

Re: ***Securities and Exchange Commission v. Mark Megalli*, No. 1:13-CV-3783-AT – Settlement Proposal Regarding Disgorgement and Civil Penalty**

Dear Graham:

As we have discussed, this correspondence sets forth defendant Mark Megalli's confidential offer of settlement regarding the SEC's collection of disgorgement, prejudgment interest and a civil monetary penalty in connection with the above-referenced enforcement proceeding. In substance, Mr. Megalli believes that the disgorgement figure on which the parties settle should correspond to his *personal* financial gain – as opposed to the *institutional* gain realized by his former employer, Level Global Investors, L.P. ("Level Global") – associated with the insider trading activity to which he has resolved his liability by plea in the parallel criminal action and to which he intends to admit liability by consent in this enforcement proceeding.

To that end, enclosed are clean and black-lined versions of the draft consent and consent judgment you sent me in relation to Mr. Megalli's insider trading liability that reflect his proposed, minor changes. Set forth below is his argument regarding the appropriate level of disgorgement and an accompanying civil penalty in this case.

Substantial Deterrence Has Already Been Accorded by Mr. Megalli's Criminal Prosecution and Consent to a Permanent Securities Industry Bar

At the outset, it is important to note that the foregoing economic remedies are, consistent with the SEC's enforcement mandate, oriented fundamentally toward deterrence, rather than compensation. *See generally SEC v. First Jersey Securities, Inc.*, 101 F.3d 1450, 1474 (2d Cir. 1996) ("The effective enforcement of the federal securities laws requires that the SEC be able to

make violations unprofitable"); *SEC v. First Pac. Bancorp*, 142 F.3d 1186, 1191 (9th Cir. 1998) ("Disgorgement is designed to deprive a wrongdoer of unjust enrichment, and to deter others from violating securities laws by making violations unprofitable"); *SEC v. Universal Express, Inc.*, 646 F. Supp. 2d 552, 563 (S.D.N.Y. 2009) (citing appellate authority standing for the proposition that the SEC's array of enforcement remedies are designed primarily "to deter others from engaging in similar conduct"); *see also SEC v. Phoenix Telecom, LLC*, 231 F. Supp. 2d 1223, 1225 (N.D. Ga. 2001) ("The purpose of disgorgement is not to compensate the victims of the fraud, but to deprive the wrongdoer of his ill-gotten gain") (quotations omitted).

In this regard, the instant SEC enforcement action is not the sole enforcement proceeding Mr. Megalli faces in relation to the trading activity alleged in the SEC's complaint. In connection with his entry of a negotiated guilty plea in the parallel criminal case, Mr. Megalli faces custodial and fine guideline ranges of, respectively, 41-51 months and $7,500-$75,000. In addition, as required by his plea agreement, Mr. Megalli has already deposited $50,000 in criminal restitution with the clerk of the U.S. District Court for the Northern District of Georgia for eventual disbursement to Carter's, Inc. in partial reimbursement of its legal fees associated with the government's and the SEC's investigation of the subject trading activity. Finally, based on his felony conviction for conspiracy to engage in insider trading, it is virtually assured that Mr. Megalli, who holds an inactive New York law license, will be disbarred.

Accordingly, a strong measure of deterrence is already in place here, even before considering the financial components of the SEC's enforcement regime. Although Mr. Megalli has reserved the right to argue for a variance from the foregoing custodial and fine guideline ranges, it is likely he will be sentenced to prison and subjected to a criminal fine. And, aside from his eventual disbarment from legal practice, Mr. Megalli will soon be debarred by consent from the securities industry – an industry in which he has worked for most of his adult life. Given that the financial enforcement remedies available to the SEC are inherently equitable, Mr. Megalli believes that the criminal and professional penalties he already faces, both in connection with the parallel criminal proceeding and the permanent liability injunction he is about to enter, should factor substantially into settlement of the economic aspects of the instant enforcement action.

Disgorgement is Legally Confined to Mr. Megalli's Personal Gain

It is well-settled that disgorgement is an equitable remedy intended to prevent unjust enrichment, rather than constituting some form of punishment. *See generally SEC v. Lauer*, 478 Fed. Appx. 550, 557 (11th Cir. 2012) ("Disgorgement is an equitable remedy intended to prevent

unjust enrichment"); *SEC v Miller*, 744 F. Supp. 2d 1325, 1342 (N.D. Ga. 2010) (noting that "[t]he primary purpose of disgorgement as a remedy for violation of the securities laws is to deprive violators of their ill-gotten gains," and, as such, it is "remedial and not punitive"). It follows that the "power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing. Any further sum would constitute a penalty assessment." *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 735 (11th Cir. 2005) (citation ande quotations omitted). In practice, this means that, "[i]n determining the amount of disgorgement to be ordered, a court must focus on the extent to which a defendant has profited from his fraud." *Universal Express, Inc.*, 646 F. Supp. 2d at 563; *accord SEC v. Gowrish*, No. C 09-5883 SI, 2011 WL 2790482, at *7 (N.D. Cal. July 14, 2011) ("Exercising their discretion . . . courts have ordered defendants to disgorge only the profits they *personally* earned from [an] insider trading scheme") (emphasis added).

Here, there is no dispute that Mr. Megalli was at all relevant times solely a Level Global employee. He did not own or otherwise hold an equity share in the business and was only entitled to a small percentage of the firm's incentive fees, which were paid pursuant to his employment contract. Mr. Megalli joined Level Global in August 2009. His employment agreement, which covered only 2009 and 2010, reflects that his compensation consisted primarily of three components: a signing bonus, a salary, and an incentive participation bonus.

With respect to his signing bonus, Mr. Megalli was to receive a total of $500,000 after three years, with one-third of such bonus vesting at the end of 2010, 2011, and 2012, respectively, assuming he was still with the firm. Ultimately, he received only one-third of this signing bonus, in the amount of $178,312 (which included some investment return). The 2011 and 2012 bonus amounts never vested, as Level Global shuttered its operations in early 2011. Further, Mr. Megalli did not actually receive the first third of his signing bonus until 2013, as per his contractual arrangement with the firm.

Mr. Megalli's annual salary was set in the amount of $250,000 for 2009 and 2010. He received $98,558 in salary for 2009, corresponding to the fact that his employment commenced in August of that year.

Mr. Megalli's incentive bonus was based on the performance of Level Global overall, as well as his consumer portfolio within Level Global. It applied only to 2010, not 2009, and was calculated as follows: Mr. Megalli was eligible to receive 1%-3% of Level Global's incentive fees if his consumer fund returned $50 million or less, and 3%-5% of Level Global's incentive fees if his consumer fund returned $50 million or more. As opposed to a straight formula, these

ranges reflected management's discretion to award incentive bonus compensation to the firm's portfolio managers. Mr. Megalli was guaranteed, however, that his 2010 compensation (salary plus bonus) would be a minimum of $750,000.

Ultimately, Mr. Megalli's consumer fund returned approximately $40 million in 2010, and he received 3% of Level Global's overall incentive fees. As such, his 2009 incentive bonus was $0, and his 2010 incentive bonus was $1,195,936 (which, again, is 3% ofeLevel Global's *overall* incentive fees, not the fees attributable solely to profits on Mr Megalli's consumer portfolio). Including some minor benefits, his all-in compensation for 2009 was about $111,000, and his all-in compensation for 2010 was about $1,478,000.

According to the SEC, the Carter's trades in question netted approximately $3.2 million (in both loss avoided and profit), a number Mr. Megalli does not contest for present purposes. To the best of Mr. Megalli's knowledge, Level Global was entitled to keep 10% of these profits as an incentive fee (Level Global's investors kept the remainder), such that the $3.2 million at issue generated approximately $320,000 in firm gain. As most of this profit occurred in 2009, a year in which Mr. Megalli was contractually ineligible to receive an incentive bonus, it would be technically accurate to hold him accountable in disgorgement solely for the illicit gain realized from the 2010 Carter's trades, or approximately $650,000. Three percent of $65,000 (the amount of Level Global's incentive fee associated with the 2010 Carter's trades) corresponds to $1,950 realized by Mr. Megalli directly.

Rather than parse the Carter's gains by year, however, Mr. Megalli is willing to disgorge $9,600, corresponding to 3% of Level Global's $320,000 incentive fees emanating from each of the Carter's trades alleged by complaint. He understands that this amount is subject to the assessment of prejudgment interest.

Although there is certainly precedent supporting the notion that disgorgement liability may be imposed jointly, as opposed to severally, this authority is limited to jointly undertaken securities law violations. *See, e.g.*, *SEC v. Calvo*, 378 F.3d 1211, 1215 (11th Cir. 2004) ("It is a well settled principle that joint and several liability is appropriate in securities law cases where two or more individuals or entities have close relationships in engaging in illegal conduct"); *SEC v. JT Wallenbrock & Associates*, 440 F.3d 1109, 1117 (9th Cir. 2006) ("Where two or moree individuals or entities collaborate or have a close relationship in engaging in the violations of thee securities laws, they may be held jointly and severally liable for the disgorgement of illegallye obtained proceeds"); *SEC v. Cavanagh*, No. 98 CV 1818DLC, 2004 WL 1594818, at *29e (S.D.N.Y. July 10, 2004) ("When apportioning liability for disgorgement among multiplee

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defendants, courts have discretion to find joint and several liability when two or more individuals collaborate in the illegal conduct").

We have yet to find a case where an employee of a hedge fund, whose compensation (including bonus) was exclusively a creature of contract, has been held liable in disgorgement for the entire amount of insider trading profits realized by his employer, particularly where, as here, he merely received a small percentage of these profits as a benefit of employment. Indeed, "[t]o the extent that joint liability requires payment of a sum greater than the profits unlawfully gained by the fraudulent transactions, it is a penalty and is therefore improper." *SEC v. World Gambling Corp.*, 555 F. Supp. 930, 931 (S.D.N.Y. 1983); *see also Gowrish*, 2011WL 2790482, at *7 ("[W]here one party to a fraudulent scheme has an agreement with the principal to participate in the scheme but retain only a small portion of the proceeds, it is an abuse of discretion to require that party to disgorge all proceeds.").

It follows that, because disgorgement is synonymous with unjust enrichment – *i.e.*, "the amount with interest by which the defendant profited from his wrongdoing," *Miller*, 744 F. Supp. 2d at 1342 – disgorgement here is limited to the compensation Mr. Megalli received from Level Global based on its gain from the subject Carter's trading. *See generally Calvo*, 378 F.3d at 1217 (limiting disgorgement to a reasonable approximation of profits "causally connected to the violation"). Confining disgorgement in this case to Mr. Megalli's Carter's-related compensation is eminently fair for multiple other reasons, including, without limitation, the following:

First, it is beyond dispute that a majority of the approximately $3.2 million in "gain" at issue is actually comprised of loss avoided when Mr. Megalli sold Carter's shares in late October 2009. According to the United States Supreme Court, the *absence* of actual proceeds over which to impose a constructive trust or an implied lien renders any remedy directed to the amelioration of such avoided loss effectively legal, rather than equitable:

> But where the property [sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor, and the plaintiff cannot enforce a constructive trust of or an equitable lien upon other property of the [defendant]. *Thus, for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession.*

Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213-14 (2002) (alterations in original) (emphasis added).

Accordingly, the SEC is effectively disabled from seeking equitable recovery of avoided loss, which generates no tangible corpus of funds, in insider trading enforcement. Indeed, the only cases we have uncovered in which disgorgement was imposed in relation to illicitly avoided losses involved the liquidation of long positions and the initiation of short selling, which is not at issue in Mr. Megalli's late October 2009 Carter's trades. In offering to settle disgorgement on the terms related herein, Mr. Megalli is not making an issue of the fact that the SEC's collection of ill-gotten gains based on avoided loss implicates legal, as opposed to equitable, relief.

Second, in January 2012, the SEC sued Level Global, along with its individual principals, for alleged insider trading violations in the Southern District of New York in an enforcement action styled, *SEC v. Adondakis, et al.*, No. 12 Civ. 409 (HB). Level Global settled the SEC's claims by consent in late May 2013, with the final judgment ordering disgorgement in the amount of $10,082,725.78 and a civil penalty in the same amount. (*See* Doc. 88, Final Judgment as to Defendant Level Global Investors, L.P., *SEC v. Adondakis, et al.*, Case No. 2:12-cv-409-HB (S.D.N.Y.)) Although the insider trading claims Level Global settled in the Southern District of New York enforcement proceeding related to trading in shares of Dell, Inc. and Nvidia Corporation, the point is that, presumably in recognition of the foregoing authority confining disgorgement to a defendant's particularized gain, Level Global was a necessary and indispensable party to complete equitable relief, notwithstanding joinder of its former principals. Simply put, Mr. Megalli is not liable for gains realized by Level Global and any enforcement proceeding to recover such gains must be brought against Level Global (or its successors) directly.

Third, because courts have routinely accepted the SEC's position that a disgorgement order is enforceable through contempt sanctions, *see, e.g.*, *SEC v. Huffman*, 996 F.2d 800, 803 (5th Cir. 1993) (finding that a disgorgement order is enforceable by contempt because it is "more like a continuing injunction in the public interest than a debt"); *SEC v. Goldfarb*, 2012 U.S. Dist. LEXIS 85628, at *10-17 (N.D. Cal. 2012) (contempt available), it would be grossly inequitable to require that Mr. Megalli fund, at the risk of contempt, a disgorgement amount corresponding to millions of dollars in gains he never personally realized.

Finally, it is important to note that, with respect to criminal forfeiture (the criminal analogue of civil disgorgement), applicable law has coalesced around the concept that forfeiture is confined to proceeds personally realized by a defendant, rather than those obtained by the

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investment fund for which he worked. *See, e.g., United States v. Contorinis*, 692 F.3d 136, 145-48 (2d Cir. 2012) (vacating criminal forfeiture order imposed on hedge fund portfolio manager because the subject proceeds had been acquired by the fund, rather than the defendant, and thus "the district court erred in ordering [the defendant] to forfeit funds that were never possessed or controlled by himself or others acting in concert with him"). Indeed, in connection with the criminal insider trading conviction of Level Global founder Anthony Chiasson in the Southern District of New York, the district court ordered that Chiasson personally forfeit only $1,382,217 when the government's evidence established to the jury's satisfaction that he had generated approximately $68 million in illicit profits for his fund based on illegal access to material, nonpublic information of Dell and Nvidia. (*See* Doc. 179, Brief for the United States, *United States v. Newman and Chiasson*, Case No. 13-1387 (2d Cir.), at 2 and 4).

Mr. Megalli Consents to a Reasonable Civil Monetary Penalty

Mr. Megalli understands that, per the injunction to which he will consent, he is exposed to the assessment of a civil monetary penalty under Exchange Act Section 21A. 15 U.S.C. § 77u-1. Mr. Megalli understands that the statutory maximum penalty for insider trading is potentially greater than the corresponding maximum penalty under Exchange Act Section 21(d)(3). *Compare id.* at § 77u-1(a)(2) *and* § 78u(d)(3)(B)(ii). Nonetheless, in light of the significant criminal penalties he already faces, coupled with his consent to a permanent injunction barring him from the securities industry, Mr. Megalli believes that a one-time civil penalty somewhere within the Tier II statutory maximum of $50,000 per violation (*i.e.*, subject to the parties' negotiation) would be appropriate.

Summary of Mr. Megalli's Settlement Offer

Based on the foregoing, Mr. Megalli proposes to settle the above-referenced enforcement action through his consent (per the attached terms) to entry of a permanent injunction that, among other things, bars him from the securities industry in which he has spent the majority of his career. This is in addition to the penalties he faces in relation to the parallel criminal prosecution, including exposure to prison time, imposition of a criminal fine, and his existing satisfaction of $50,000 in criminal restitution to Carter's. Mr. Megalli further agrees to disgorge $9,600 in compensation, plus prejudgment interest, associated with the subject trading activity. Finally, Mr. Megalli understands that his misconduct exposes him to a civil penalty, subject to the parties' negotiation.

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Pursuant to Rule 83 of the Commission's Rules on Information and Requests, 17 C.F.R. § 200.83, Mr. Megalli hereby requests that the information contained in this letter and its enclosures not be disclosed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, *et seq.*, without advance notice to the undersigned pursuant to 17 C.F.R. § 200.83(d).

Thank you for your attention to this correspondence. Please feel free to contact me after you have reviewed it.

Very truly yours,

DLA Piper LLP (US)

/s/ Paul N. Monnin

Paul N. Monnin

PNM/jmb
Enclosures

cc: SEC Senior Trial Counsel Pat Huddleston, II (by e-mail w/ enclosures)
Mr. Mark Megalli (by e-mail w/ enclosures)
Zachary M. LeVasseur, Esq. (by e-mail w/ enclosures)

EXHIBIT 4

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CONFIDENTIAL SETTLEMENT COMMUNICATION SUBJECT TO FRE 408

February 26, 2014

BY E-MAIL AND U.S. MAIL

Pat Huddleston, II, Esq.
Senior Trial Counsel
U.S. Securities and Exchange Commission
950 East Paces Ferry Road, Suite 900
Atlanta, Georgia 30326-1234

Re: ***Securities and Exchange Commission v. Mark Megalli*, No. 1:13-CV-3783-AT – Disgorgement Ruling in *SEC v. Contorinis***

Dear Pat:

This responds to your request that we address the impact, if any, of the recent majority opinion by a Second Circuit panel in *SEC v. Contorinis*, --- F.3d ----, 2014 WL 593484 (2d Cir. Feb. 18, 2014), on our client Mark Megalli's settlement position with regard to disgorgement, prejudgment interest and the assessment of a civil penalty that we conveyed to you by letter on February 17. While we recognize that *Contorinis* is a favorable ruling for the Commission – albeit a split decision with a strong dissent from a Second Circuit judge who separately served on the panel that adjudicated Mr. Contorinis' forefeiture appeal in his favor – we believe a number of important considerations limit its applicability to Mr. Megalli.

First, it goes without saying that the Second Circuit's decision is merely persuasive authority in the Eleventh Circuit. As the *Contorinis* majority recognized, "Circuits which have considered related issues are mixed regarding the extent to which a party can be ordered to disgorge total gain from an unlawful act, when the party has not personally received the full benefit of the wrongdoing." *Id.* at *6 n.5. As evidence of this circuit split, the *Contorinis* panel specifically acknowledged *SEC v. Blatt*, 583 F.2d 1325 (5th Cir. 1978). The Fifth Circuit in *Blatt* "vacated a district court's order that individual, knowing participants in an illegal securities scheme [are required to] disgorge amounts beyond their personal gain, [and further] limit[ed] each violator's disgorgement to 'the amount of the fee realized by each defendant for his assistance in executing the fraud.'" *Contorinis*, 2014 WL 593484, at *6 n.5 (quoting *Blatt*, 583 F.2d at 1336). Because *Blatt* was decided prior to October 1, 1981, it is binding precedent in thee

Eleventh Circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

Indeed, both the Eleventh Circuit and courts of the Northern District of Georgia continue to cite *Blatt* as controlling authority for the proposition that "[a district] court's power to order disgorgement *extends only to the amount with interest by which the defendant profited from his wrongdoing. Any further sum would constitute a penalty assessment.*" *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 735 (11th Cir. 2005) (quoting *Blatt*, 583 F.2d at 1335) (emphasis added); *see also SEC v. Miller*, 744 F. Supp. 2d 1325, 1342 (N.D. Ga. 2010) (same); *SEC v. Phoenix Telecom, LLC*, 231 F. Supp. 2d 1223, 1225 (N.D. Ga. 2001) (same).

Second, *Contorinis* appears ripe for *en banc* review by the full Second Circuit. As Judge Denny Chin explained in his dissent, the majority opinion in *Contorinis* is inconsistent with the separate Second Circuit panel ruling in Mr. Contorinis' parallel criminal case, *United States v. Contorinis*, 692 F.3d 136, 145-48 (2nd Cir. 2012), holding that a defendant may not be ordered to forfeit funds that he never received or possessed. Notably, Judge Chin was also on the panel in the criminal appeal. Aside from this intra-circuit split, it is also worth noting that the inter-circuit split identified in *Contorinis* also makes the panel's holding potentially subject to cert review by the U.S. Supreme Court.

Third, while the trial court order affirmed in *Contorinis* mandated the defendant's personal disgorgement of $7.2 million in actual profit the hedge fund had accrued as a result of his illegal trades (less any amount paid pursuant to criminal forfeiture), this figure did *not* include the additional $5.3 million in losses avoided by the fund. *See Contorinis*, 2014 WL 593484, at *1-*2. Hence, *Contorinis* further bolsters our position, as set out in our February 17 letter, that Level Global's avoided losses, which comprise by far the majority of the approximately $3.2 million in gain at issue, should be excluded from disgorgement in Mr. Megalli's case.

Finally, it is important to note that the *Contorinis* majority "[did] not conclude that district courts *must* impose disgorgement liability for insider trading upon wrongdoers when the gains accrue to innocent third parties, but rather that the district courts *may* elect to do so in appropriate circumstances." *Id.* at *5 (emphasis in original). Disgorgement remains fundamentally an equitable remedy entrusted to the district court's broad discretion. *See id.* ("It is well established that district courts have broad discretion to impose disgorgement"); *see generally SEC v. Lauer*, 478 Fed. Appx. 550, 557 (11th Cir. 2012) ("Disgorgement is an equitable remedy intended to prevent unjust enrichment"); *Miller*, 744 F. Supp. 2d at 1342

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(noting that "[t]he primary purpose of disgorgement as a remedy for violation of the securities laws is to deprive violators of their ill-gotten gains," and, as such, it is "remedial and not punitive").

In Mr. Megalli's case, equitable considerations dictate imposition of a substantially smaller disgorgement figure than that approved at the panel level in *Contorinis*. In contrast to Mr. Contorinis, Mr. Megalli did not have any equity stake in Level Global. Moreover, the subject Carter's trades had almost no impact on Mr. Megalli's personal compensation (approximately $9,600, as opposed to Mr. Contorinis' compensatory gain of $427,875 as a result of his trades).

In conclusion, we see no need to alter the settlement offer proposed in our February 17 letter in light of the panel holding in *Contorinis*. To the extent you disagree, we welcome further discussion on this issue.

Pursuant to Rule 83 of the Commission's Rules on Information and Requests, 17 C.F.R. § 200.83, Mr. Megalli hereby requests that the information contained in this letter and its enclosures not be disclosed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, *et seq.*, without advance notice to the undersigned pursuant to 17 C.F.R. § 200.83(d).

Thank you for your attention to this correspondence.

Very truly yours,

DLA Piper LLP (US)

/s/ Paul N. Monnin

Paul N. Monnin

PNM/jmb

cc: SEC Regional Trial Counsel M. Graham Loomis, Esq. (by e-mail)
Mr. Mark Megalli (by e-mail)
Zachary M. LeVasseur, Esq. (by e-mail)

EXHIBIT 5

From: Huddleston, Pat <HuddlestonP@SEC.GOV>
Sent: Wednesday, April 02, 2014 9:02 AM
To: Monnin, Paul; Loomis, Madison G.
Cc: LeVasseur, Zachary
Subject: RE: SEC v. Megalli, No. 1:13-CV-3783-AT: Consent

Hi, Paul:

We have considered what you proposed. Our position is that what we sent you last is the best we can do. Your client can sign it, as is, or file an answer to the complaint.

Thanks,

Pat

Pat Huddleston
Senior Trial Counsel
U.S. Securities and Exchange Commission
950 East Paces Ferry, N.E., Suite 900
Atlanta, GA 30326-1382

404-842-7616

From: Monnin, Paul [mailto:Paul.Monnin@dlapiper.com]
Sent: Tuesday, April 01, 2014 9:44 AM
To: Loomis, Madison G.; Huddleston, Pat
Cc: LeVasseur, Zachary
Subject: FW: SEC v. Megalll, No. 1:13-CV-3783-AT: Consent

Just following up on the consent. Could you let me know where we are?

From: Monnin, Paul
Sent: Tuesday, March 25, 2014 11:04 AM
To: 'Loomis, Madison G.'; Huddleston, Pat
Cc: LeVasseur, Zachary; Burr, Jennifer
Subject: RE: SEC v. Megalll, No. 1:13-CV-3783-AT: Consent

Thanks, Graham. I don't think the policy regarding criminal convictions is an issue here because the draft consent Pat sent me a few weeks ago directs that Megalli admit several facts (set forth in paragraphs 19, 21 and 43 of your complaint) that weren't part of his guilty plea.

Paragraph 19 alleges that Level Global acquired a $9 million position in Carter's stock (350,000 shares) based on positive earnings information shared by Martin. We don't dispute that Martin shared Carter's information with Megalli in September 2009, but Megalli also used other analysis and data independent of Martin to recommend that Level Global amass this

position. Our proposed edit to the consent merely clarifies that Martin's information formed part of the rationale to acquire Carter's shares.

Paragraph 43 alleges that Megalli "bragged" to his colleagues about being "max short" after covering the Carter's short positions in July 2010. Mr. Megalli has always denied, including to the government, that the "max short" reference had anything to do with trading on inside information from Martin. Rather, Megalli and one or more of his colleagues had a common former boss named Seth Turkeltaub. Mr. Turkeltaub frequently used expressions like "max short" and "max long" to characterize securities positions, which his former subordinates, including Mr. Megalli, thought was ridiculous, labeling them "Turkisms." The "max short" reference was thus intended solely as a joke and shouldn't be taken out of context to connote boastfulness.

Finally, Mr. Megalli has consented to each of the other complaint allegations related to the October 2009 sales and July 2010 short sales of Carter's stock, with the exception of the last two sentences of paragraph 21, which are also inconsistent with his guilty plea. As I've explained to Pat, during his guilty plea hearing, Megalli denied that Martin called him about an accounting issue at Carter's on October 23, 2009. Rather, and as Mr. Megalli conveyed under oath to Judge Story at the time of his guilty plea, when Megalli and Martin spoke on October 23, Megalli advised Martin that he was selling Carter's shares and Martin confirmed this to be a good idea. Megalli further noted for Judge Story that the advice to sell was a change of course for Martin, and that Megalli consciously avoided delving into Martin's basis for this advice. In accepting Mr. Megalli's guilty plea, Judge Story concluded that such conscious avoidance rendered Megalli criminally liable.

I've attached the entire guilty plea hearing transcript for your reference. The relevant colloquy between Mr. Megalli and Judge Story regarding the October 23 phone call is at pages 22-27.

Hopefully, this once again clarifies our proposed edits to the consent Pat previously forwarded – each of which is consistent with the record of Mr. Megalli's guilty plea and, moreover, is consistent with Mr. Megalli's civil liability in connection with the SEC's enforcement action.

Feel free to let me know if you have any questions.

Paul

Paul N. Monnin

T +1 404.736.7804
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M +1 [redacted]
E paul.monnin@dlapiper.com

DLA Piper LLP (US)
One Atlantic Center
1201 West Peachtree Street, Suite 2800
Atlanta, Georgia 30309-3450
United States
www.dlapiper.com

From: Loomis, Madison G. [mailto:LoomisM@sec.gov]
Sent: Tuesday, March 25, 2014 10:01 AM
To: Monnin, Paul; Huddleston, Pat
Cc: LeVasseur, Zachary; Burr, Jennifer
Subject: RE: SEC v. Megalli, No. 1:13-CV-3783-AT: Consent

Paul:

I haven't looked closely at your draft consent, but based on your email I don't think we can accept it. Our general policy is that defendants neither admit nor deny the allegations in the complaint. When the defendant has pled guilty in a parallel criminal case, he must admit those allegations in our complaint to which he pled guilty. If there are additional allegations in our complaint that were not in the criminal case, we revert back to the standard "no admit or deny" policy for those allegations. From your email, it looks like you are trying to have Megalli deny the additional allegations in our complaint.

If your client cannot agree with our policy, then I think you should file an answer and we can proceed from there.

Let me know if you have any questions.

M. Graham Loomis
Regional Trial Counsel
Atlanta Regional Office
404-842-7622

From: Monnin, Paul [mailto:Paul.Monnin@dlapiper.com]
Sent: Tuesday, March 25, 2014 9:38 AM
To: Huddleston, Pat
Cc: Loomis, Madison G.; LeVasseur, Zachary; Burr, Jennifer
Subject: SEC v. Megalli, No. 1:13-CV-3783-AT: Consent

Pat,

Attached is a clean and black-lined liability consent in the above-referenced enforcement matter that reflects Mr. Megalli's proposed changes to the last draft you sent me. As we discussed, there are two principal edits.

The first is with respect to paragraph 19 of the complaint, which alleges in essence that Level Global amassed a 350,000 share position in Carter's stock in September 2009 based on positive earnings information Martin shared with Megalli. While Mr. Megalli concedes that he

directed that Level Global purchase Carter's shares based *in part* on his communications with Martin, he maintains that other facts and analysis independent of Martin also played a significant role. The revised consent reflects that, with respect to paragraph 19, Mr. Megalli admits that Martin's positive earnings information was merely part of the rationale for acquiring Carter's stock, rather than the entire basis for the position.

Second, as noted in our earlier submission disclosing Mr. Megalli's factual objections to the SEC's complaint (see attached), Mr. Megalli's reference to being "max short" in instant messages following the July 2010 short sales and cover of Carter's shares was *not* intended as bragging, but rather was a sarcastic joke directed to overly dramatic phrasing a common boss of Mr. Megalli's and his former colleagues tended to use. In other words, the reference to "max short" does not reflect reliance on material non-public information to execute the subject trades.

Please feel free to let me know if you have any questions or comments regarding the attached.

Thanks,

Paul

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EXHIBIT 6

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.	:	

DEFENDANT MARK MEGALLI'S
CONSENT TO ENTRY OF JUDGMENT

1. Defendant Mark Megalli ("Defendant") acknowledges having been served with the complaint in this action, enters a general appearance, and admits the Court's jurisdiction over Defendant and over the subject matter of this action.

2. Defendant has pleaded guilty to criminal conduct relating to certain matters alleged in the complaint in this action. Specifically, in *United States v. Mark Megalli*, Criminal Information~~Indictment~~ No. 1:13-CR-442-RWS (N.D. Ga), Defendant pleaded guilty to violations of Section 10(b) of the Securities Exchange Act of 1934 [15 U.S.C. § 78j(b)] ("Exchange Act") and Rule 10b-5 thereunder [17

Defendant's initials _____

C.F.R. § 240.10b-5]. In connection with that plea, Defendant admitted certainthe allegations in paragraphs 19 through 24 and paragraphs 38 through 4243 of the Commission's complaint in this matter ("complaint"), as follows:

- With respect to the allegations of paragraph 19 of the complaint, Defendant admitted that he directed the purchase of Carter's stock based in part on certain positive earning information he received from Eric Martin ("Martin");
- Defendant admitted the allegations in paragraphs 20, 22, and 23 and paragraphs 38 through 42 of the complaint;
- With respect to the allegations in paragraph 21 of the complaint, Defendant admitted that he spoke to Martin in a telephone conversation on October 23, 2009, and that Martin indicated during that conversation that he thought it would be a good idea to sell Carter's stock, but Defendant denied that Martin specifically discussed an accounting delay at Carter's;
- Defendant admitted the allegations in paragraph 24 of the complaint, insofar as Level Global's avoided losses were $2,034,000, not $2,110,910 as alleged in the complaint.

Formatte
+ Aligned

Defendant's initials _____

Defendant's admissions ~~which~~ are set out in the transcript of his plea allocution, attached as Exhibit A to this Consent. This Consent shall remain in full force and effect regardless of the existence or outcome of any further proceedings in *United States v. Mark Megalli*.

3. Admitting the allegations in paragraphs ~~19~~20, 22, 23, and 38 through 42 ~~through 24 and paragraphs 38 through 43~~ of the complaint and partially admitting the allegations in paragraphs 19, 21 and 24 as set forth above, and without admitting or denying the remaining allegations of the complaint, Defendant hereby consents to the entry of the *Order of Permanent Injunction As To Defendant Mark Megalli* (the "Order") in the form attached hereto as Exhibit B (the "Order") and incorporated by reference herein, which, among other things, permanently restrains and enjoins Defendant from violation of Section 17(a) of the Securities Act of 1933 [15 U.S.C. § 77q(a)] ("Securities Act") and 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].

4. Defendant agrees that the Court shall order disgorgement of ill-gotten gains and prejudgment interest thereon; that the amounts of the disgorgement and civil penalty shall be determined by the Court upon motion of the Commission;

Defendant's initials _____

and that prejudgment interest shall be calculated from the dates of insider trades alleged in the complaint, based on the rate of interest used by the Internal Revenue Service for the underpayment of federal income tax as set forth in 26 U.S.C. § 6621(a)(2). Defendant further agrees that, upon motion of the Commission, the Court shall determine whether a civil penalty pursuant to Section 21A of the Exchange Act [15 U.S.C. § 78u-1] is appropriate and, if so, the amount of the penalty. Defendant further agrees that in connection with the Commission's motion for disgorgement and/or civil penalties, and at any hearing held on such a motion: (a) Defendant will be precluded from arguing that he did not violate the federal securities laws as alleged in the complaint; (b) Defendant may not challenge the validity of this Consent or the Final Judgment; (c) solely for the purposes of such motion, the allegations of the complaint shall be accepted as and deemed true by the Court; and (d) the Court may determine the issues raised in the motion on the basis of affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence, without regard to the standards for summary judgment contained in Rule 56(c) of the Federal Rules of Civil Procedure. In connection with the Commission's motion for disgorgement and/or civil penalties, the parties may take discovery, including discovery from appropriate nonparties.

Defendant's initials _____

5. Defendant waives the entry of findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

6. Defendant waives the right, if any, to a jury trial and to appeal from the entry of the Order.

7. Defendant enters into this Consent voluntarily and represents that no threats, offers, promises, or inducements of any kind have been made by the Commission or any member, officer, employee, agent, or representative of the Commission to induce Defendant to enter into this Consent.

8. Defendant agrees that this Consent shall be incorporated into the Order with the same force and effect as if fully set forth therein.

9. Defendant will not oppose the enforcement of the Order on the ground, if any exists, that it fails to comply with Rule 65(d) of the Federal Rules of Civil Procedure, and hereby waives any objection based thereon.

10. Defendant waives service of the Order and agrees that entry of the Order by the Court and filing with the Clerk of the Court will constitute notice to Defendant of its terms and conditions. Defendant further agrees to provide counsel for the Commission, within thirty days after the Order is filed with the Clerk of the

Defendant's initials _____

Court, with an affidavit or declaration stating that Defendant has received and read a copy of the Order.

11. Consistent with 17 C.F.R. § 202.5(f), this Consent resolves only the claims asserted against Defendant in this civil proceeding. Defendant acknowledges that no promise or representation has been made by the Commission or any member, officer, employee, agent, or representative of the Commission with regard to any criminal liability that may have arisen or may arise from the facts underlying this action or immunity from any such criminal liability. Defendant waives any claim of Double Jeopardy based upon the settlement of this proceeding, including the imposition of any remedy or civil penalty herein. Defendant further acknowledges that the Court's entry of a permanent injunction may have collateral consequences under federal or state law and the rules and regulations of self-regulatory organizations, licensing boards, and other regulatory organizations. Such collateral consequences include, but are not limited to, a statutory disqualification with respect to membership or participation in, or association with a member of, a self-regulatory organization. This statutory disqualification has consequences that are separate from any sanction imposed in an administrative proceeding. In addition, in any disciplinary proceeding before the Commission based on the entry of the injunction in this action, Defendant understands that he

Defendant's initials _____

shall not be permitted to contest the factual allegations of the complaint in this action.

12. Defendant understands and agrees to comply with the terms of 17 C.F.R. § 202.5(e), which provides in part that it is the Commission's policy "not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings," and "a refusal to admit the allegations is equivalent to a denial, unless the defendant or respondent states that he neither admits nor denies the allegations." As part of Defendant's agreement to comply with the terms of Section 202.5(e), Defendant: (i) will not take any action or make or permit to be made any public statement denying, directly or indirectly, any admitted allegation in paragraphs 19 and 24 and 38 through 42 of the complaint or creating the impression that the complaint is without factual basis; (ii) will not make or permit to be made any public statement to the effect that Defendant does not admit the allegations set forth above in paragraphs 19 through 24 and 38 through 42 of the complaint, or that this Consent contains no admission of the allegations, without also stating that Defendant does not deny the allegations; (iii) upon the filing of this Consent, Defendant hereby withdraws any papers filed in this action to the extent that they deny the admitted ~~any~~ allegations of~~in~~ paragraphs 19 through 24 and 38 through 42

Defendant's initials _____

of the complaint; and (iv) stipulates solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, that the allegations in the complaint are true, and further, that any debt for disgorgement, prejudgment interest, civil penalty, or other amounts due by Defendant under the Final Judgment or any other judgment, order, consent order, decree, or settlement agreement entered in connection with this proceeding, is a debt for the violation by Defendant of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19). If Defendant breaches this agreement, the Commission may petition the Court to vacate the Order and restore this action to its active docket. Nothing in this paragraph affects Defendant's: (i) testimonial obligations; or (ii) right to take legal or factual positions in litigation or other legal proceedings in which the Commission is not a party.

13. Defendant hereby waives any rights under the Equal Access to Justice Act, the Small Business Regulatory Enforcement Fairness Act of 1996, or any other provision of law to seek from the United States, or any agency, or any official of the United States acting in his or her official capacity, directly or indirectly, reimbursement of attorney's fees or other fees, expenses, or costs expended by Defendant to defend against this action. For these purposes,

Defendant's initials _____

Defendant agrees that Defendant is not the prevailing party in this action since the parties have reached a good faith settlement.

14. Defendant agrees that the Commission may present the Final Judgment to the Court for signature and entry without further notice.

15. Defendant agrees that this Court shall retain jurisdiction over this matter for the purpose of enforcing the terms of the Order.

Dated: February __, 2014.

_____
Mark Megalli

On _____, 2014, _____, a person known to me, personally appeared before me and acknowledged executing the foregoing Consent.

_____
Notary Public
Commission expires:

Approved as to form:

Defendant's initials _____

_____

Attorney for Defendant

_____

Formatte
paragraph

EXHIBIT 7

DLA Piper LLP (US)
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Paul N. Monnin
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T 404.736.7804
F 404.682.7800

CONFIDENTIAL SETTLEMENT COMMUNICATION SUBJECT TO FRE 408

April 14, 2014

BY E-MAIL AND U.S. MAIL

Pat Huddleston, II, Esq.
Senior Trial Counsel
U.S. Securities and Exchange Commission
950 East Paces Ferry Road, Suite 900
Atlanta, Georgia 30326-1234

Re: ***Securities and Exchange Commission v. Mark Megalli*, No. 1:13-CV-3783-AT – Liability Consent**

Dear Pat:

Enclosed are the defendant's consent to permanent injunction (including attachments), (Doc. 7), the Commission's motion for entry of a permanent injunction, (Doc. 10), and Judge Totenberg's permanent injunction order, (Doc. 11), in *Securities and Exchange Commission v. Richard T. Posey*, No. 1:14-CV-664-AT (N.D. Ga.). As the sole basis for his civil liability, Mr. Posey's consent references that he,

> pleaded guilty to criminal conduct relating to certain matters alleged in the complaint in this action. Specifically, in *United States of America v. Richard T. Posey*, Criminal Indictment No. 1:13-cr-00239-RWS (N.D. Ga.), Defendant pleaded guilty to violations of 18 U.S.C. § 371. In connection with that plea, Defendant admitted the facts set out in the transcript of his plea allocution, attached as Exhibit A to this Consent.

(Doc. 7 at ¶ 2).

As with Mr. Posey, my client, Mark Megalli, pled guilty in *United States v. Mark Megalli*, No. 1:13-CR-442-RWS (N.D. Ga.), to a single count of criminal conspiracy to engage in insider trading in violation of 18 U.S.C. § 371. Since his criminal plea last fall, Mr. Megalli has consistently been willing to consent to entry of a permanent injunction in the Commission's civil enforcement action against him per the factual admissions set out in the transcript of his

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plea allocution, which led Judge Story to accept his guilty plea and to convict him of the government's insider trading conspiracy charge.

Indeed, it would appear given Judge Totenberg's entry of a permanent injunction in the *Posey* enforcement proceeding that, with little or no additional effort on the Commission's part, Mr. Megalli's liability consent could be similarly structured. Namely, Mr. Megalli's consent would reference his guilty plea and conviction on the government's criminal information charging him with participation in a criminal insider trading conspiracy, and the factual basis for Judge Totenberg's permanent injunction would be set forth in the transcript of Mr. Megalli's guilty plea hearing, incorporated by reference in his consent. In short, given Judge Story's acceptance of both Mr. Posey's and Mr. Megalli's criminal pleas and Judge Totenberg's entry of a permanent injunction against Mr. Posey based effectively on the transcript of his guilty plea, there appears to be no reason to believe Judge Totenberg would fail to enter a permanent injunction against Mr. Megalli on the same basis.

I note that the Commission's rejection of Mr. Megalli's last consent mark-up – which, as opposed to Mr. Posey's consent, was based on a structure obligating Mr. Megalli to admit certain of the Commission's civil allegations verbatim – occurred on April 2, after the Commission had already obtained and filed the enclosed consent from Mr. Posey. If there is a rational basis for requiring that Mr. Megalli answer and proceed to defend a civil complaint when he has already been adjudicated criminally liable by Judge Story, please advise. If not, Mr. Megalli remains willing to consent to a permanent injunction per the form of consent entered by Mr. Posey and approved by Judge Totenberg.

Thank you for your attention to this correspondence. Please feel free to contact me after you have reviewed it.

Very truly yours,

DLA Piper LLP (US)

/s/ Paul N. Monnin

Paul N. Monnin

PNM/jmb
Enclosures

DLA PIPER

cc: SEC Regional Trial Counsel M. Graham Loomis (by e-mail w/ enclosures)
Mr. Mark Megalli (by e-mail w/ enclosures)
Zachary M. LeVasseur, Esq. (by e-mail w/ enclosures)

EXHIBIT 8

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

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

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

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

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 9

From: Huddleston, Pat <HuddlestonP@SEC.GOV>
Sent: Wednesday, August 13, 2014 11:13 AM
To: Monnin, Paul
Cc: LeVasseur, Zachary
Subject: RE: Megalli

Hi, Paul:

Let's get your client deposed before he reports to prison. Please shoot me some dates as soon as possible.

Thanks,

Pat

Pat Huddleston
Senior Trial Counsel
U.S. Securities and Exchange Commission
950 East Paces Ferry, N.E., Suite 900
Atlanta, GA 30326-1382

404-842-7616

From: Monnin, Paul [mailto:Paul.Monnin@dlapiper.com]
Sent: Wednesday, July 23, 2014 4:31 PM
To: Huddleston, Pat
Cc: Loomis, Madison G.; LeVasseur, Zachary; Mattox, Christina R.
Subject: RE: Megalli

Pat,

As promised, attached is Mr. Megalli's sentencing memorandum, which, at pages 18-25 and 29-38, lays out his culpability for the Carter's trades at issue. Per the sentencing memo and the transcript of his guilty plea hearing (which is liberally quoted in the sentencing memo), Mark has maintained from the time of his guilty plea through his criminal sentencing that Martin's tipping was an important factor, although not the sole factor, leading to the subject trades. In addition, Mark has consistently maintained throughout his criminal prosecution that Martin did not tip him as to an accounting delay at Carter's on October 23, 2009, but rather that he traded based on conscious avoidance of the basis for Martin's recommendation that Level Global sell its Carter's position. As a result, Mr. Megalli does not – and cannot – deny that he traded Carter's shares based on actual knowledge of inside information in July 2010 and conscious avoidance as to the basis for Martin's sale recommendation in October 2009.

That said, he is unable to execute the Consent as last presented by the SEC because it requires his admission, contrary to the foregoing, that Level Global amassed a 350,000 share position in

Carter's stock in September 2009 based *solely* on Martin's tips and, further, that Mr. Megalli sold Carter's stock in October 2009 based on *actual knowledge* that Carter's intended to delay its earnings announcement.

Because Mr. Megalli's admissions, as stated at his guilty plea hearing and also set forth in his sentencing memorandum, were sufficient not only to justify his criminal conviction but also to precipitate a custodial sentence from Judge Story, we again request that the Staff consider entry of a Consent (like the consent entered by Richard Posey) stating that it is consistent with the guilty plea – and sentencing – admissions Mark has made. Alternatively, we believe the proposed edits to the Consent previously disclosed to the Staff are consistent with these same guilty plea and sentencing admissions.

To be clear, Mr. Megalli has and will continue to admit his culpability for trading on inside information. Such admission, however, should be consistent with the facts he admitted in pleading guilty and at sentencing.

Happy to discuss if you'd like.

Paul

Paul N. Monnin

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F +1 404.682.7804
M +1 [redacted]
E paul.monnin@dlapiper.com

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DLA Piper LLP (US)
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1201 West Peachtree Street, Suite 2800
Atlanta, Georgia 30309-3450
United States
www.dlapiper.com

From: Huddleston, Pat [mailto:HuddlestonP@SEC.GOV]
Sent: Friday, July 18, 2014 4:31 PM
To: Monnin, Paul
Cc: Loomis, Madison G.
Subject: Re: Megalli

Thanks, Paul.

Pat

From: Monnin, Paul [mailto:Paul.Monnin@dlapiper.com]
Sent: Friday, July 18, 2014 04:15 PM
To: Huddleston, Pat

Cc: LeVasseur, Zachary <Zachary.LeVasseur@dlapiper.com>
Subject: RE: Megalli

Pat,

Thanks for reaching out. I was up in New York on a case during the middle part of this week. As you heard, Judge Story released Mr. Megalli's passports for a final trip to Egypt to see his grandmother. He's there this week. I believe he gets back over the weekend. I've sent him a note to talk about the consent as soon as he gets back. I'll circle back with you ASAP.

Thanks,

Paul

From: Huddleston, Pat [mailto:HuddlestonP@SEC.GOV]
Sent: Wednesday, July 16, 2014 11:09 AM
To: Monnin, Paul
Subject: Megalli

Hi, Paul:

I am writing to follow up after the sentencing hearing last week. Given your representations to the Court, do I understand that your client is willing to sign the Consent in the form last presented to him? Please let me know. If not, we will get busy with discovery.

Best regards,

Pat

Pat Huddleston
Senior Trial Counsel
U.S. Securities and Exchange Commission
950 East Paces Ferry, N.E., Suite 900
Atlanta, GA 30326-1382

404-842-7616