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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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ADMINISTRATIVE PROCEEDING
File No. 3 - 18250

In the Matter of

Mark Megalli

Respondent.

DIVISION'S RESPONSE TO RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

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A. INTRODUCTION

Respondent Mark Megalli ("Megalli") contends that statements from counsel for the Securities and Exchange Commission ("the Commission") in the prior district court action preclude the Commission from pursuing a remedy that Congress has authorized. This argument flaunts the long established principle that public officers cannot waive a government agency's right to enforce federal law that protects the public. More importantly, however, Megalli's argument overlooks his repeated acknowledgment, in both the Commission's district court proceeding and his criminal case, that the Commission would be seeking associational bars and that he was willing to consent to such relief. Megalli offers no explanation for his complete and sudden reversal.

Because a waiver or estoppel is not justified either under the facts or the law, the Court should deny Megalli's motion.

B. FACTS

The Division of Enforcement ("the Division") relies on the facts set forth in its Motion for Summary Disposition, and provides the following additional facts that are relevant to the Court's consideration of Megalli's Motion for Summary Disposition.

1. <u>Megalli Has Understood From the Outset that the Commission Would Seek an Associational Bar</u>

Since the Commission filed its civil injunctive action in the United States District Court for the Northern District of Georgia against Megalli ("the District Court Action"), Megalli's counsel repeatedly acknowledged that the Commission would be seeking an associational bar, and that Megalli was amenable to such a remedy. For example, in a January 14, 2014 email to Commission counsel, Megalli's counsel 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." Division's Exhibit I (attached hereto)(emphasis added). Also, in the June 26, 2014 Sentencing Memorandum that Megalli's counsel prepared and filed for Megalli in his companion criminal case, Megalli's counsel argued for a lenient sentence in part because he "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]." Division's Exhibit J (attached hereto), p. 8 of 74.

At the sentencing hearing in his criminal case, counsel for Megalli twice stressed to the court that Megalli soon would be barred from the securities industry, stating, "We're going to work through a settlement with the SEC that is going to involve permanent debarment from the industry." (Div. Ex. E, p. 8), and, "[M]y client is out of this industry, Judge, you know that." (Div. Ex. E, p. 7).

2. **<u>The Commission Instituted this Administrative Proceeding Shortly After Megalli Lost His Collateral Attack on His Criminal Conviction</u>**

In Megalli's Sentencing Memorandum filed in the criminal case, Megalli assessed and expressly waived any *Newman*[1] defense, and argued that his willingness to waive the defense ought to incline the court toward leniency. Div. Ex. J, p. 60 of 74. Contrary to his repeated representation in both the District Court Action and the court presiding over his criminal case that he would settle the Commission's case, however, Megalli contested liability in the District Court Action and attacked his criminal plea on *Newman* grounds shortly after he had a lenient sentence in hand. Specifically, after having represented to the sentencing court that he would consent to a settlement on liability with the Commission in the District Court Action, Megalli filed a Motion for Judgment on the Pleadings in the District Court Action, arguing that he could not be found liable, and citing *Newman* as authority.

The Commission cross-filed for summary judgment, arguing in part that Megalli's plea in the criminal case collaterally estopped him from contesting liability in the civil case. Div. Ex G. On September 24, 2015, the court in the District Court Action entered an order granting in part and denying in part the

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[1] *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), *cert. denied*, __ U.S. __, 136 S. Ct. 899 (2015).

Commission's motion for summary judgment. *SEC v. Megalli*, 157 F. Supp. 3d 1240 (N.D. Ga. 2015). In that order, the court found Megalli's criminal plea collaterally estopped him from contesting liability in the Commission's case. Based on this finding of liability, the court then convened a hearing on October 27, 2015 to decide the appropriate remedies to be imposed ("the Remedies Hearing"). *SEC v. Megalli*, Case No. 1:13-cv-3783-AT, 2015 WL 13021472 at *2 (Dec. 15, 2015). On December 15, 2015, the district court issued an order that included an injunction, disgorgement plus prejudgment interest (approximately $20,000), and civil penalty of approximately $40,000. *Id.*

On April 29, 2015, Megalli filed his habeas petition in his criminal case arguing that, in light of the Second Circuit's holding in *Newman*, he is "actually innocent of insider trading ...." *See* Div. Ex. B, p. 3. On September 25, 2017, the district court denied Megalli's habeas petition. *See* Div. Ex. B. Seventeen days later, the Commission instituted this administrative proceeding.

C. DISCUSSION

1. The Division Did Not Waive, and Is Not Estopped From Pursuing, Remedies that Are in the Public Interest

Leaning heavily on the transcript of oral argument at the Remedies Hearing in the District Court Action, Megalli contends that the Commission either waived or should be judicially estopped from seeking an associational bar. In essence, he claims that the Commission told the Court that associational bars were not being sought in an effort to obtain severe sanctions in the district court proceeding. But the transcript of that hearing does not support Respondent's interpretation of the colloquy, especially in light of his repeated and insistent declaration that he expected to be barred from the securities industry. Much of the colloquy on which Megalli relies to support his argument consists of the Commission counsel simply clarifying for the district court the remedies that she was being asked to address.

Specifically, at the outset of the hearing, U.S. District Judge Totenberg asked Commission counsel what remedies she was being asked to decide. 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.

<u>The Court:</u> Okay. So you're not looking for debarment.

<u>Mr. Huddleston:</u> That is correct, Your Honor.

<u>The Court:</u> All right. I misunderstood that, then. All right. Very good. Well, let me hear from the Government first.

Respondent's Exhibit A, Remedies Tr. at pp. 3-4.

These clarifying statements were correct, 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. Commission counsel referred to the "Prayer for Relief" portion of the Commission's Complaint in listing, in order, the remedies to be addressed that day. *See*, Div. Ex. F, pp. 15-16. Megalli's effort to construe these comments as supporting a claim for judicial estoppel or a waiver of the Commission's right to seek an associational bar is unsupported by the record.

Nor do the statements later in the remedies hearing about not seeking an industry bar in the District Court Action suggest that Commission was abandoning its claim for associational bars. Respondent's Exhibit A, Remedies Tr. at 118-19. Those statements were part of Commission's counsel's overall discussion of the misstatements that Megalli's counsel made at the sentencing hearing in the criminal case. Specifically, at the sentencing hearing, Megalli's counsel had argued that a light sentence should be imposed because Megalli had settled with the Commission. In fact, however, Megalli had not settled with the Commission and, after obtaining a lenient sentence, moved for summary judgement seeking dismissal of the Commission's case.

More importantly, **after** Commission counsel finished his presentation to the court at the Remedies Hearing, Megalli's counsel urged the court to impose lenient sanctions **because** of the looming associational bar:

> 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.**

Respondent's Exhibit A, Remedies Tr. at 130 (emphasis added). Thus, even counsel for Megalli understood that the Commission had not waived its right to protect the public through administrative remedies.[2]

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[2] Had counsel for Megalli believed otherwise at the time, one would have expected him to respond somehow to the magnitude of what he now claims to be an intentional and unequivocal waiver by the Commission. But his words belie the claim.

a. Megalli Cannot Show that the Statements from Commission Counsel Were Accepted by the Court

Assuming that this Court were to recognize the doctrine of judicial estoppel, Megalli cannot make the required showing to invoke this doctrine.[3] Courts that recognize this doctrine note that judicial estoppel "forbids a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding." *Teledyne Industries, Inc. v. NLRB,* 911 F.2d 1214, 1217 (6th Cir.1990). The word "successfully" means that "in order to invoke judicial estoppel, a party must show that the opponent took a contrary position under oath in a prior proceeding **and that the prior position was accepted by the court.**" *Id.* at 1218 (emphasis added). *See also, Minnieland Private Day School, Inc. v. Applied Underwriters Captive Risk Assurance Company, Inc.*, 867 F.3d 449, 458 (4^{th} Cir. 2017) (same); *Montrose Medical Group Participating Savings Plan v. Bulger*, 243 F.3d 773, 782 (3d Cir. 2001) (same). To show that the prior position was "accepted by a court," the party "must show that the court adopted and relied on the represented position either in a preliminary matter or as part of a final disposition." *RFF Family Partnership v. Ross*, 814 F.3d 520, 528 (1^{st} Cir. 2016).

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[3] The D.C. Circuit, which is one circuit to which this proceeding could be appealed, has rejected the doctrine of judicial estoppel. *Konstandinidis v. Chen*, 626 F.2d 933, 938 (D.C. Cir. 1980) ("We conclude that the judicial estoppel doctrine has no vitality in this jurisdiction.")

Here, Megalli cannot show that the Commission's statements during the Remedies Hearing were accepted by the court in the District Court Action. Specifically, he cannot show that the court either adopted or relied upon Commission counsel's statements in determining the remedies that she deemed appropriate. Megalli points to nothing in either the district court's remedies order or the Remedies Hearing transcript suggesting that the court considered the statements from Commission counsel in fashioning the remedies that she imposed.

Indeed, **after** Commission counsel made statements about not seeking an associational bar in the District Court Action, Megalli's counsel urged the court to impose lenient sanctions because Megalli would be subject to an associational bar. Respondent's Exhibit A, Remedies Tr. at 130. Because these statements directly conflict with the statements from Commission counsel, and the court made no reference to any of these statement in her remedies order, it impossible for Megalli to show that the court accepted Commission counsel's statements, rather than the statements from Megalli's own counsel, in fashioning her remedies order.

b. Megalli Has Not Identified Any Detrimental Reliance on the Statements from Commission Counsel

Megalli also contends that the statements from Commission counsel at the Remedies Hearing waived the Commission's right to seek an associational bar. Contrary to Megalli's statement that courts merely "disfavor" the notion that a government official can waive the agency's ability to enforce a federal statute, Respondent's Memorandum of Authorities in Support of Motion for Summary Disposition ("Megalli Brief") at p. 9, numerous courts have unequivocally rejected this doctrine. In fact, one appellant court stated bluntly:

> [W]e know of no case where an officer or agent of the government . . . has estopped the government from enforcing a law passed by Congress. Unless a law has been repealed, or declared unconstitutional by the courts, it is a part of the supreme law of the land and no officer or agent can by his actions or conduct waive its provisions or nullify its enforcement.

Montilla v. U.S., 457 F.2d 978, 987 (Ct. Cl. 1972). *See also, Heckler v. Community Health Services of Crawford County, Inc.,* 467 U.S. 51, 60 (1984) ("When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined."); *Dantran, Inc. v. U.S. Dep't of Labor,* 171 F.3d 58, 66 (1st Cir. 1999) (declining to apply estoppel to "prevent[ ] the sovereign from enforcing valid laws for no better reason than that a government official has performed his enforcement duties negligently"); *United States v. Marine Shale Processors,* 81 F.3d 1329, 1348 (5th Cir.1996) (refusing to apply estoppel against the government where "a private party seeks to avoid the coverage of a law because of a government agent's misrepresentation that the law does not apply" and noting "the importance of separation of powers principles to claims of estoppel against the government"); *FDIC v. Hulsey,* 22 F.3d 1472, 1489 (10th Cir.1994) ("Courts generally disfavor the application of the estoppel doctrine against the government and invoke it only when it does not frustrate the purpose of the statutes expressing the will of Congress or unduly undermine the enforcement of the public laws.").

Even if this doctrine were applicable to this case, Megalli must at least show that he detrimentally relied on the Commission's statements. *Heckler*, 467 U.S. at 60. Some courts have further held that the harm purportedly suffered must rise to the level of a violation of a constitutional right. *SEC v. Electronics Warehouse, Inc.*, 689 F. Supp. 53, 73 (D. Conn. 1988), *aff'd sub nom SEC v. Calvo*, 891 F.2d 457 (2d Cir. 1989); *SEC v. Rosenfeld*, 1997 WL 400131 at *2 (S.D.N.Y. Jul. 16, 1997). Megalli has made no showing of any detrimental reliance, much less a deprivation of a constitutional right. Nor can he make such a showing given that his own counsel acknowledged at the remedies hearing that Megalli was "going to be out of the industry."

Perhaps seeking to avoid this heavy burden, Megalli describes his argument as a waiver, rather than estoppel. However, he seeks the same result-- preventing a government agency from enforcing federal law. Accordingly, this Court should apply the same standard as that required to invoke estoppel, regardless of the nomenclature Megalli uses. *See, e.g., U.S. v. Southern Indiana Gas and Elec. Co.*, Case No. IP 99-1692-C-M/F, 2003 WL 446280 at * 4 (S.D. Ind. Feb. 18, 2003) (because, "generally, rights may only be waived by those for whose benefit they were intended . . . it is doubtful that public officials . . . have any authority to waive a claim under [federal law]."); *FDIC v. Manatt,* 688 F. Supp. 1327, 1333 (E.D. Ark. 1988) ("public officers have no authority to waive enforcement of the law."), *aff'd.* 922 F.2d 486 (8th Cir. 1991); *U.S. v. Amoco Oil Co.*, 580 F. Supp. 1042, 1050 (W.D. Mo. 1984)("Generally speaking, public officers have no power or authority to waive the enforcement of the law on behalf of the public.").[4]

2. **<u>The Supreme Court's Decision in *Kokesh* Does Not Preclude an Associational Bar against Megalli</u>**

Megalli argues that after the Supreme Court's decision *Kokesh*[5], associational bars should be viewed as punitive and suggests that such relief is thus not appropriate in this case given the punishment that he has already received from the District Court Action and the criminal proceeding. Megalli Brief at pp. 19-23. This argument fails for at least two reasons.

First, the Commission has held that associational bars are remedial, rather than punitive. *In the Matter of Timbervest*, 2015 WL 5472520 at *15 (Sept. 17, 2015) ("Barring the Timbervest partners from associating with an investment

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[4] Megalli cites two cases to support his argument that a government agency may, though the actions of its employees, waive its right to enforce a federal law. *See* Megalli Brief at 9-10, *citing Borden Chemical & Plastics Co.*, 1993 WL 70228 at * 8 (EPA Feb 18, 1993); *U.S. v. Mottolo*, 651 F. Supp. 615, 628 (D.N.H. 1988). Neither of those cases found such a waiver. Megalli's inability to identify any instance where such a waiver was found confirms that such waivers are rarely, if ever, available.

[5] *Kokesh v. SEC*, ___ U.S. ___, 137 S.Ct. 1635 (2017).

adviser is not 'punishment' nor is it 'punitive' because such bars protect investors in the future from unfit professionals."). In arguing for a different conclusion, Megalli relies on the concurring opinion in *Saad v. SEC*, 873 F.3d 297 (D.C. Cir. 2017). But the *Saad* matter is currently before the Commission, *In the Matter of Saad*, 2017 WL 6462614 (Dec. 18, 2017), and this Court must follow Commission opinions like *Timbervest* unless and until the Commission revises its precedent.

Second, even if this Court were to find the associational bars to be punitive, which it should not, that would not automatically preclude such a remedy in this case. Congress has specifically authorized the Commission to institute administrative proceedings, for the purpose of determining whether to bar or suspend a person from association with an investment adviser, if that person has either been enjoined from certain violations of the federal securities laws, or criminally convicted of certain crimes. Investment Advisers Act of 1940, Section 203(f). In other words, Congress has determined that the Commission should assess whether it is appropriate to remove convicted felons or those enjoined from certain conduct from the securities industry. Thus, the fact that Megalli has previously been sanctioned in prior federal court proceedings in no way deprives the Commission from deciding whether associational bars are also appropriate. Nor would a finding that associational bars are punitive require this Court to deviate from the traditional *Steadman* analysis in deciding whether a bar is appropriate. *See In the Matter of Harris et al.*, Initial Decision No. 1213, 2017 WL 4942807 at * 9 (Oct. 30, 2017) ("I have weighed the relevant factors, and even assuming that a permanent bar is punitive under *Kokesh*, my analysis of those factors remains the same.")

In a footnote, Megalli argues that the Division's delay in instituting this administrative proceeding further proves that an associational bar is only intended to punish him. Megalli Brief at p. 22, note 3. But the delay stems from Megalli's own actions.

Megalli's liability in the Commission's District Court Action was based on the collateral estoppel effect of Megalli's criminal conviction. Megalli admits as much, stating that the court found in favor of the Commission on liability in the civil injunctive action, "[b]ased largely on Mr. Megalli's guilty plea . . . ." Megalli Brief at p. 4. But, once he obtained credit from the sentencing judge for waiving any *Newman* defense, Megalli promptly launched a collateral attack on his criminal conviction on *Newman* grounds. Because the criminal conviction was the basis for civil liability and the ensuing injunction that authorized this proceeding, it made sense for the Commission to await a decision on Megalli's habeas petition before instituting this administrative proceeding. The district court rejected the habeas petition and denied Megalli a certificate of appealability on September 25, 2017 (*See* Div. Ex. B). The Commission commenced this administrative proceeding less than three weeks later, on October 12, 2017. Thus, there was no undue delay in instituting this proceeding.

3. The Commission May Bar Megalli From Association with an Investment Adviser

Megalli contends that the Commission cannot impose collateral bars because his misconduct predates Dodd Frank and the collateral bar authority in that Act is not retroactive. Megalli Brief at p. 18-19. For purposes of the motions for summary disposition, the Division recognizes that the Respondent contests a previous association with a broker-dealer and that the precedential impact of *Bartko v. Securities and Exchange Commission*, 845 F.3d 1217 (D.C. Cir. 2017), means that the 2010 statutory authorization of a collateral bar as a remedy is not available here. Respondent's second admitted occasion of insider trading occurred in July 2010, just days before the President signed Dodd-Frank into law. Accordingly, the Division hereby withdraws its request for a collateral bar.

However, Megalli admits that the misconduct to which he pled guilty occurred while he was associated with an investment adviser. Megalli Brief at p. 2 ("[H]is admitted misconduct, which occurred solely when he was associated with an investment adviser ..."); p. 18 ("At the time of his offense conduct, which occurred in relation to securities transactions in October 2009 and July 2010, Mr. Megalli was associated with Level Global, a registered investment adviser.") This association empowers the Commission to bar Megalli from association with an investment adviser if the Commission finds such relief within the public interest.

D. CONCLUSION

For all the foregoing reasons, the Division respectfully requests that this Court deny Megalli's Motion for Summary Disposition.

Respectfully submitted this 29th day of December, 2017,

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EXHIBIT I

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From:	Monnin, Paul <Paul.Monnin@dlapiper.com>
Sent:	Tuesday, January 14, 2014 12:32 PM
To:	Loomis, Madison G.
Cc:	LeVasseur, Zachary; Huddleston, Pat; Burr, Jennifer
Subject:	SEC v. Megalli

Graham,

I left you a VM at the office re Mark Megalli. 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.

Re disgorgement and a civil penalty, I'd like to send you a letter in the next day or two with a proposal on the economic component of resolving your enforcement action. Our answer date is Tuesday, January 21, so I was hoping we could move that date back by a few weeks to facilitate negotiation of a consent judgment.

By the way, if you want to send me a form of consent judgment on liability and entry of an injunction, I can take a look and we can get that out of the way.

Hopefully that works for you. Let me know.

Thanks,

Paul

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EXHIBIT J

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

UNITED STATES OF AMERICA, v. MARK MEGALLI, Defendant.	CRIMINAL ACTION NO. 1:13-CR-442-RWS

DEFENDANT MARK MEGALLI'S SENTENCING MEMORANDUM

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Defendant Mark Megalli, by and through his undersigned counsel, respectfully submits this sentencing memorandum in connection with the Court's advisory guideline range computation and its determination of a substantively reasonable sentence in this case under 18 U.S.C. § 3553(a).

I. INTRODUCTION

Mr. Megalli has entered a negotiated guilty plea to a criminal information charging him with a single count of conspiracy to engage in insider trading in violation of 18 U.S.C. § 371. As with most negotiated pleas that, as here, have culminated in a waiver of indictment, the parties have stipulated to application of the sentencing guidelines, such that there is little, if anything, to litigate with eregard to the Court's computation of an advisory guideline range. This is particularly true of the insider trading conspiracy count to which Mr. Megalli has pled, which is governed by USSG § 2B1.4, an offense guideline that, aside from an 8-point base offense level, effectively includes only a single specific offensee characteristic – namely, the overall "gain" (which includes both profit and avoided loss) attributable to the subject trading activity, which is not in dispute here.

As a result, Mr. Megalli does not anticipate devoting significant time at sentencing to the Court's advisory guideline range calculation. The parties have agreed for guideline purposes to a gain of between $2.5-$7 million; that no Chapter

3 enhancements for role, abuse of trust, or special skill apply under USSG §§ 3B1.1-3B1.3; and that Mr. Megalli is entitled to a 4-level acceptance of responsibility[1] and downward variance adjustment to account for his waiver of indictment and early plea. This corresponds to a total offense level of 22 and to an advisory custodial guideline range of 41-51 months (OL 22; CHC I), as to which the government has bound itself to a low-end recommendation. (With the exception of the government's 1-level variance recommendation, the foregoing guideline stipulations are also incorporated in the Probation Office's advisory guideline range computation set forth in Mr. Megalli's pre-sentence investigation report ("PSR")).

While computation of an advisory guideline range is effectively academic at this point, as shown below, imposition of a 41-month custodial guideline sentence is, without question, substantively unreasonable in this case. The Court, following *United States v. Booker* and subsequent controlling authority, must give due consideration to the factors set forth in 18 U.S.C. § 3553(a) in affixing a substantively reasonable sentence based on Mr. Megalli's guilty plea to conspiracy

[1] To the extent the government has reserved an objection to Mr. Megalli receiving the full, 3-level reduction for acceptance of responsibility under USSG § 3E1.1, Mr. Megalli has addressed the government's concerns below in Parts II.B and III.B of this memorandum.

to commit securities fraud in violation of 18 U.S.C. § 371, and the host of mitigating considerations discussed herein, (*see* Part III.C, *infra*), that counsel strongly in favor of a significant guideline variance here. To that end, Section 3553(a) mandates imposition of a sentence that is "sufficient, but not greater than necessary" to accomplish the basic goals of sentencing; namely, just punishment (*i.e.*, retribution), deterrence, public protection and rehabilitation. 18 U.S.C. § 3553(a).

As with most white collar offenses, application of the sentencing guidelines in insider trading cases is driven almost entirely by the purported economic value of the defendant's offense conduct; *i.e.*, the "gain" attributable to the subject trading activity. And as with the other Chapter 2B offense guidelines applicable to fraud violations, this excludes consideration of the broader statutory sentencing objectives set out in section 3553(a) – specifically, whether a significant offense level premised on gain actually corresponds to a particular offender's degree of criminal intent, the remuneration he personally realized from the charged offense conduct, or, indeed, is in fact relevant to the traditional sentencing objectives of proportionality, retribution and deterrence.

As shown below, it is a statistical reality that a decided majority of courts that have considered the guidelines' applicability in the insider trading context have concluded that a guideline sentence often materially overstates the degree of an offender's culpability, thereby necessitating a significant variance. This has repeatedly been the case even for defendants who, in stark contrast to Mr. Megalli, e have proceeded to trial when, among other things, the facts under indictment included their corruption of multiple corporate insiders, the payment of kickbacks and other remuneration, a range of issuers, and their personal realization of millions of dollars in illicit trading profits.

In this regard, fully 18 of the 22 total offense levels applicable to Mr. Megalli (associated with the 18-level increase for a trading gain of more than $2,500,000 but less than $7,000,000 under USSG § 2B1.4(b)(1)) has little if any correspondence to his actual culpability. As shown below, Mr. Megalli's *personal* gain attributable to the subject trades was negligible, amounting to a few thousand dollars. This is hardly a surprise, given that Carter's positions never comprised more than one-half of one percent of the $8 billion hedge fund (including leverage) that employed him. In addition, Mr. Megalli's offense conduct involved either conscious avoidance as to the source and legitimacy of certain information imparted by Eric Martin (which Mr. Megalli certainly admits is nonetheless criminally actionable) or, when Martin disclosed more concrete information, such disclosure was often part of a mix of legitimately sourced information collected by

Mr. Megalli on which he also relied in deciding whether to trade Carter's Inc.e ("Carter's") securities.

Finally, Mr. Megalli has already been substantially punished. He is not only deeply and irretrievably humiliated by his well-publicized conviction, but he also faces permanent debarment from the securities industry and the assessment of e potentially significant disgorgement and a civil penalty in connection with a parallel enforcement proceeding brought by the U.S. Securities and Exchange Commission. (Notably, with regard to the financial component of his criminal liability, Mr. Megalli has already deposited $50,000 in criminal restitution with the clerk for eventual disbursement to Carter's in partial reimbursement of its legal fees associated with the government's and the SEC's investigation of the subject trading activity.) In addition, 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.e

Accordingly, an extraordinary measure of retribution and deterrence is already in place here, which diminishes the utility of reliance on the advisory guideline range, effectively to the point of irrelevance. Indeed, Mr. Megalli faces the same guideline exposure as a defendant who, unlike Mr. Megalli, actively procured inside information through bribes and/or kickbacks, traded based solely on this information, and personally realized up to $7 million in illegal trading profits. As such, in deriving a "sufficient, but not greater than necessary" sentence, rote application of the guidelines, most notably the 18-level gain enhancement under USSG § 2B1.4(b)(1), dramatically overstates the degree of criminal culpability associated with Mr. Megalli's conviction. In addition, the mitigating factors the Court must consider under section 3553(a) in imposing a just sentence are not simply controlling in this case, they predominate over any of the aggravating factors referenced in the statute.

It follows that this Court should join the tide of sentencing courts from around the country that have varied substantially downward from the guidelines in insider trading prosecutions of remote tippee traders like Mr. Megalli in affixing a substantively reasonable sentence here.

II. BACKGROUND FACTS

A. Mr. Megalli's Personal History

Mr. Megalli's personal narrative is told by the people who know him best: his wife, parents, brother and numerous friends, many of whom have submitted mitigation letters to the Court attesting to Mark's character. The individual reflected in these letters is a man of keen intelligence, with a strong work ethic and tremendous devotion to his family and friends, who is in turn loved and supportede by a great many people.

Mark Megalli recently turned 42. He was born in New York City, to Maguid and Viviane Megalli, naturalized U.S. citizens who emigrated from Egypt after marrying in 1968 to avoid the severe discrimination visited on Christian e families in their native country. Mark's older brother, Michael, was born shortly after his parents arrived in this country. Now retired, Mark's father spent his e career as a board-certified urologist and hospital administrator. He served fore twelve years in the United States Army Reserve, attaining the rank of Lieutenant Colonel, and was the volunteer police surgeon for the city of Rye, New York. Mark's mother, also retired, was a career-long real estate agent. e

The Megallis are a close-knit family, and, as his mother writes, Mark's parents took great pride in their son's achievements:

> I wish I could tell you in this very short letter what a wonderful and honest person my son Mark Megalli is. He has always been our pride and joy. Growing up, he always excelled in whatever he was doing – his studies, his sports, and his hobbies, whether it was varsity crew or playing the piano or guitar. He was always aiming to be the best in his class.
>
> I suspect you will hear from others who are writing letters on his behalf that Mark is kind and compassionate, works hard, and always tries to do his best for his family. All true. Here is what I havee noticed as his mother: Mark always assumes the best motives ine everyone around him. He is very hesitant to prejudge others. Hee

> takes things at face value and is not prone to suspicion. I have seen this trait repeatedly in his relationships with us, his brother, his wife, his friends, and his colleagues. I think this may in some way speak to the situation in which he has now found himself.

(V. Megalli Letter).

These sentiments are echoed by Mark's father and older brother, who speak of his early promise and life-long positive character traits:

> Mark was first discovered by his kindergarten teacher, who predicted that Mark is and will continue to be one of a kind. She was right. He was and still is, in a nutshell, smart, hard-working, determined, sensitive, mild-mannered, peaceful, trustworthy, honest, honorable and extremely fair. His drawbacks are that he is very trusting of others and totally non-confrontational. As for all these characteristics of Mark, I would say that I used to and still get calls from people he has worked for and worked with that express their love and respect for him time and time again.

(Maguid Megalli Letter).

> We grew up in Rye, N.Y., where my parents had bought their first small house based on the excellent reputation of the town's schools. Aware of the sacrifices that had been made on our behalf, we worked hard to live up to the expectations placed on us by our parents and by ourselves.
>
> As early as kindergarten, Mark stood apart. By the first grade, his teacher had me bringing home double copies of my second grade homework so that Mark could do more challenging work. It wasn't long before Mark had established himself as the champion of the school's chess club; he would spend hours playing practice games against himself, with short breaks to master Rubik's cube.

(Michael Megalli Letter).

Following public elementary and middle school in Rye, Mark attended high school at Phillips Academy in Andover, Massachusetts. He attended Yale College, graduating *magna cum laude*, Phi Beta Kappa, and with Distinction in Political Science in 1994. Mark worked for Ralph Nader over the course of two summers in college, co-authoring a book that was published by Mr. Nader in 1991. After several months in Los Angeles, Mark matriculated at the Yale Law School and the Yale School of Management, earning a JD/MBA degree in 1999.

Following graduate school, Mark joined McKinsey & Company, focusing on strategic advice to financial services firms. While there, Mark undertook a pro bono consulting engagement for New York City Police Commissioner Ray Kelly, the purpose of which was to assess the NYPD response to 9/11. He presented the McKinsey study to the NYPD's top management in 2002.

Mark left consulting in 2003 to join the investment firm John Levin & Company (later called BKF Capital). It was there that he initiated his decade-long vocation analyzing the consumer discretionary space. He also passed the three-year Chartered Financial Analyst (CFA) examination toward the end of his time at BKF. Following BKF's dissolution, Mark was employed for two years by Searock Capital, another investment fund. In 2008, Buckingham Research Group, which specialized in the consumer discretionary sector, recruited Mark to serve as an analyst/junior portfolio manager.

Mark was contacted by Level Global, a Manhattan-based hedge fund, in 2009 to launch a consumer group, hire analysts, and manage capital. Believing this to be an opportunity for advancement, Mark joined Level Global in August 2009. Level Global, however, fairly quickly became embroiled in legal issues in 2010, which caused it to fold, at which time Buckingham asked Mark to return. He began working again at Buckingham in early 2011 and continued to work there until September 2013.

Mark's hard work and character earned the respect of his colleagues, including Buckingham's Chairman, Laurence C. Leeds, Jr.:

> [D]uring the approximately four years that Mark Megalli worked at Buckingham (in two separate tranches), I believe I got to know Mark Megalli quite well. Our offices were in close proximity, and during those years we must have spent well over one thousand hours working together. I always believed him to be a most decent and ethical person, and in a way, I considered him to be my protégé and perhaps future successor. . . .
>
> . . . Despite the fact that he has, as I understand it, pleaded guilty, I must say that this terrible and illegal action on his part seems so totally unlike the Mark I have known and worked with for over six years. It appears to be totally out of character.

> . . . Whatever the facts, to the extent that Mark did something terribly wrong, I believe it to be an aberration that is not indicative of the quality of his character as I knew it to be.

(L. Leeds Letter).

Mark developed a strong professional reputation for thorough preparation and thoughtful analysis, as noted by a former professional associate:

> Mark and I were in frequent dialogue over the years that he was my client. I have now known Mark for almost ten years. As a client, it had often impressed me that Mark had always done a thorough amount of research before any meeting that we had. If we were meeting with a company, his questions were thoughtful, insightful and interesting. Mark is an incredibly intelligent person with an extremely analytical mind. My analysts were always enthusiastic about meeting with Mark because they were likely to work through a different perspective that they hadn't had before then. . . . Mark had always done his homework and it was clear he was a very hard-worker. Mark had clarity and good ideas and could synthesize the information . . . .
>
> * * *
>
> I am aware of the difficulty that Mark is now facing. I was completely stunned when he told me that he was being charged with insider trading. I am still stunned as I have only known him as someone who did thorough research on stocks, worked incredibly hard and had the intellect and intuition to trade stocks profitably. I know Mark as a terrific husband and father, and as a kind, soft-spoken individual. He cares about people and those who know him as a friend know that he will always be their friend.

(C. Wispelwey Letter).

While in graduate school, Mark began dating and fell in love with his wife, Jenifer, a former college classmate from Columbus, Georgia, where her parents, Nelle and Billy Wells, continue to live in retirement. Married in 2000, Mark and Jenifer have two young daughters, [redacted]. As noted by their many friends who have corresponded with the Court, Mark and Jenifer are exemplary parents to their girls, who clearly love their father. In Jenifer Megalli's own words:

> When I was working in New York and Mark was a summer associate at Debevoise and Plimpton in the summer of 1997, we reconnected. I was turning 25. Mark was sweet, incredibly intelligent, and beautiful. One of our first serious conversations was about how important honesty is in a relationship. I admired how close he was with his brother and his parents. His conservative upbringing and character was very apparent in the way he was – and still is – focused on making them proud.
>
> We are both competitive but Mark is also easygoing and even tempered. In fact, I can count on one hand the number of times I have seen Mark get angry. He has poise, self-control and is very hesitant to judge others. These are all qualities that attracted me to Mark and make him who he is to me: a generous, caring, and faithful partner.
>
> * * *
>
> Now we have been married for almost 14 years and have two young daughters. No one has played a larger role in the decisions and events that have shaped my adult life. I have never known anyone as loyal as Mark. If there is any silver lining to the tragic events affecting our family as a result of the charges against my husband, it is a deeper appreciation of our marriage and how strong our bond is.

(J. Megalli Letter).

As a parent, Mark exhibits the same passion and devotion that he has brought to every aspect of his life:

> When Mark's first child, [redacted], was born, I saw my brother change; his drive took on new purpose in devotion to his family. Before children, Mark had been the dutiful son working hard to realize the dreams of his parents, but as a parent he committed himself to helping his children realize their own dreams.
>
> [redacted] She has much of her father's intensity and brilliance, and they share that unique bond that I know from personal experience exists between fathers and daughters. His younger daughter, [redacted]. She's happy and sociable and loves her role as the baby of the family. She's a funny kid and has the uncanny ability to combine goofball antics with comments so cutting and incisive, they sound like they came from my [redacted] year old.

(Michael Megalli Letter).

Jenifer Megalli's parents, Nelle and Billy Wells, likewise describe their son-in-law as a loving and devoted husband and father:

> Mark and our daughter Jenifer were married at Saint Patrick's Cathedral in New York in August 2000. We knew him through Jenifer for the years they were in college together but really came to know him as their courtship evolved around 1998-2000. Mark called us to ask us if he could propose to Jenifer which we were pleased to say yes to. He is so dignified and always does the proper thing in all situations. We were impressed that some men still go that extra step to ask for their daughter's hand in marriage.
>
> We later got to meet Mark's parents at their engagement party in New York. They were everything we expected them to be. We realized why Mark had turned out to be such a fine young man. We could tell how proud his parents were of him and how they expected only the

> best of him. We could also understand why Mark always conducted himself in a way that would please them.
>
> * * *
>
> Mark is honest and has integrity. He always finds the good in everyone and doesn't judge people or talk about people. We have never heard Mark use profanity in any shape or form. He is a perfect gentleman at all times.
>
> Mark is a thoughtful and caring father to his two daughters, [redacted]. Their family is very close and he plays a major role in all decisions concerning his children. He is involved in parent/teacher conferences and all functions at both of his children'se schools.
>
> * * *
>
> We could have searched the world over and never found a man to bee our son-in-law with such honesty, faithfulness, sincerity, humility, integrity and generosity as the man in Mark Megalli.

(N. & B. Wells Letter). e

Many of Mark and Jenifer's friends have expressed great admiration for the intense bond that unites the Megalli family:

> Having spent a great deal of time with the Megallis both as a couple and as a family, I have seen their shared love of learning, creativity, adventure and care. I know the fascination Mark has for Jen, and she for him. I watched them fall in love, first with each other and then with the girls. And I have seen them grow indelibly closer in recent months, despite (and indeed because of) the stresses they are facing. Their partnership is fiercely dedicated. Their shared concerns for protecting and supporting [redacted] over the oncoming time period are equally strong. From the day I met him, I have always seen Mark as big-hearted. Nowadays that heart belongs fully to his family.

(N. Bly Letter). Another of the Megallis' friends writes:

> I have known Mark Megalli for 24 years. I am fortunate to be able toa say that he has been a very close friend of mine over each of thosea years. When I first met Mark during freshman year of college, he was known as perhaps the nicest and kindest of all students. I considered myself lucky to be his friend. I still do.
>
> * * *
>
> [Mark] has two beautiful daughters and is an adoring and doting father and husband. I have known Mark's wife for 24 years as well. They also met in college. They have accomplished a great many a things as a couple – most important of which is the rearing of two thoughtful and energetic daughters.
>
> Mr. Megalli has really only ever wanted what I want – happy, healthy and well educated children and a fulfilling marriage. While thesea desires are simple to list, they are very difficult to satisfy. Accordingly, he has always been and remains focused on them. He has an uncompromising commitment to his family. In this regard, he is a role model. If I were ever in a situation where my family needed prolonged attention and care, I would consider Mark as the person to provide it. He is a kind and generous person.

(D. Beaton Letter). Indeed, many of Mark's close friends look to him as a model parent:

> aIn the more than fifteen years during which I have enjoyed a close a relationship with Mark, I have relied on him for a range of advice. Even though I have many friends from all periods of my life, it is consistently to Mark that I have turned about the most important matters. As a father of a daughter – my and Mark's most cherisheda roles – and as an investor – our professions – I have sought Mark'sa counsel about model behavior.a

> Much of how I parent my children is the result of thoughtful consideration Mark and I have shared. Where to draw lines, how to encourage and discourage certain conduct, effective methods of discipline and generally how to mold productive members of our community are all subjects on which I have sought Mark's guidance. Mark is consistent in his moral certitude and remarkably creative about how to transmit it to his children and mine, so I return again and again to him for similar conversations.

(G. Heyman Letter).

As Jenifer Megalli describes, however, Mark's prosecution has already exacted a significant toll on his family, particularly his two young daughters:

> At the start of this crisis and at so many points along the way, I have held onto the belief that the truth would prevail and everything would be okay. While I have never been so naïve to think that life is fair, the extremely punishing outcomes for Mark and for our family seem so severe: Mark's livelihood – a career which he loved and at which he excelled – has been taken away from him forever. . . .
>
> To our daughters the consequences of these upheavals are particularly devastating. We will likely be forced to sell our home as a result of the legal expenses and loss of income we are facing. We will be moving away from the city where they grew up to find a more affordable place in which to rebuild our lives. Our daughters will have to leave the safety of their current schools and friendships behind.
>
> When Mark and I got married, I left my career to take care of our family. Mark has been the sole breadwinner for our family. Now I am making plans to go back to work to support our family financially. The prospect of doing this [as] a single parent is overwhelming and terrifying.
>
> I don't know what the future holds, but I do know that our family will face intense pressures as we embark on a different life after this ordeal

> is over. We will be there to support Mark and we will move forward as a family. If Mark has a second chance to put his intelligence, strong character, and good heart to work, I am certain it will be for the good of his community and to better the world around him.
>
> In defending our family, we have tried to protect our young children from the worst of these horrible outcomes – losing their father in their daily lives. Mark is a sensitive, affectionate, and involved father whose parenting and wisdom are critical to the happiness and success of our daughters. I can't imagine life without Mark as my rock and my partner and I am overwhelmed by the prospect of being a single parent. I ask you to weigh the damaging impact on these precious family relationships against the need for Mark's punishment and humbly ask for leniency.

(J. Megalli Letter). Mark's father and brother echo these concerns:

> When we were back for Christmas in December, my wife and I were affected by the toll Mark's situation has already taken on [redacted]. As recently as this summer she was droll and animated, but the girl we saw this holiday seemed withdrawn and sad. She hasn't yet been told what's up, but you can tell she is braced for a shock that she knows is coming.

(Michael Megalli Letter).

> The luckiest part of his life story was marrying his classmate from Yale, Jenifer Wells, and being blessed by two wonderful daughters, [redacted], who are so close to their father. Sadly, I see the unspoken suffering in [redacted] eyes, and she does not yet know the half of it. I often wonder about the anguish and psychological devastation of the children in these situations without any wrongdoing on their part, or their mother for that matter.

(Maguid Megalli Letter).

B. Mr. Megalli's Trading of Carter's Securities

Although the PSR's recitation of Mr. Megalli's offense conduct (including his factual objections) is quite dense, in reality, of the $3.17 million of guideline gain that has been attributed to him, fully 87 percent is associated solely with Level Global's sale of Carter's shares in October 2009 (amounting to $2,110,460 of avoided loss), and its short sales of Carter's stock in July 2010 (amounting to $647,655 of profit). (PSR ¶ 158). Of the remaining gain, the evidence shows that Level Global's sale of Carter's shares on November 9, 2009 (amounting to $276,000 of avoided loss) was merely a portion of the fund's entire position at that time, Martin's contemporaneous e-mails suggest that he did not tip Megalli, and, as he conceded in one of his government debriefings, Martin himself has no recollection of having done so. As to the last increment of gain, arising from Level Global's February 2010 sale of Carter's stock (amounting to approximately $131,600 of profit), the information shared by Martin in advance of Carter's February 25, 2010 earnings announcement did not precipitate an immediate market impact.

It follows that it is unclear whether Mr. Megalli would have been criminally prosecuted based solely on Level Global's sale of Carter's shares on November 9, 2009 and February 2010, which amounts to just over $400,000 of guideline gain under USSG § 2B1.4. This is particularly true in that Mr. Megalli realized no appreciable personal gain from these trades, (*see* Part III.C.2, *infra*), as well as given the fact that it remains subject to debate (i) whether Martin's contemporaneous e-mails and investigative debriefings show that he did *not* tip Mr. Megalli on November 9, 2009 with regard to Carter's earnings restatement, (*see id.* Part III.B.3), and (ii) when the materiality of Martin's positive tips of February 2010 should be assessed, (*see id.* Part III.B.2).

Accordingly, it is entirely understandable that a considerable amount of the PSR's recitation of Mr. Megalli's offense conduct is devoted to Level Global's October 2009 sales and its July 2010 short sales of Carter's stock. While the government has taken Mr. Megalli to task for objecting to certain of the PSR's contentions in relation to these sales, Mr. Megalli has not sought to minimize his misconduct in this case, either in his dealings with the government prior to his waiver of indictment and entry of a guilty plea to the government's information or, even more importantly, in his Rule 11 colloquy with the Court.

Indeed – and as addressed more fully below in connection with Mr. Megalli's entitlement to acceptance of responsibility credit, (*see* Part III.B, *infra*) – any fair reading of his PSR objections demonstrates the following: First, that he does *not* deny that he acquired and then sold Carter's shares in February 2010 and that he sold short positions in Carter's stock in July 2010 based on *actual* knowledge of inside information that had been disclosed by Martin. In this regard, his PSR objections related to these sales merely go to the *degree* of the materiality of Martin's information given (i) that the market was, at least initially, fairly underwhelmed by Carter's February 25 earnings announcement, and (ii) there was a great deal of public information related to Carter's difficulties corroborating Martin's negative disclosures of July 2010. Second, Mr. Megalli's collateral PSR objections, which he is plainly entitled to preserve without jeopardizing his acceptance credit, go largely to demonstrably false or irrelevant facts that are nonetheless highly prejudicial to him. And finally, with respect to Level Global's October 2009 Carter's trade, his PSR objections are fully in accord with his discussions with the government prior to his waiver of indictment – and, moreover, his colloquy with the Court – that he sold $9,000,000 worth of Carter's shares (thereby avoiding approximately $2.1 million of loss), based on conscious avoidance as to the source and legitimacy of Martin's telephonic tip on the morning of October 23.

Indeed, the following, verbatim excerpt from Mr. Megalli's Rule 11 colloquy establishes his consent to the government's contention that he traded in material part based on actual knowledge of inside information from Martin in

February and July 2010, and that with respect to the October 2009 trades he is guilty based on conscious avoidance of such knowledge:

> MR. CHAIKEN: . . . . To give the court an example of information provided to Mr. Megalli, Mr. Posey tipped Mr. Martin and Mr. Martin tipped Mr. Megalli and others in advance of Carter's October 27th, 2009, announcement that it was conducting an internal investigation into accounting irregularities and would be delaying its earnings release for the third quarter of 2009, which was scheduled for October 27, 2009.
>
> After business hours on October 22nd, 2009, Mr. Posey and Mr. Martin had an in-person meeting over drinks in Atlanta during which Mr. Posey disclosed inside information about the investigation and earnings delay to Mr. Martin.
>
> * * *
>
> The next morning at 9:42 a.m. on Friday, October 23rd, 2009, Mr. Martin sold his entire position in Carter's stock, over 35,000 shares valued at approximately $1,000,000. Later that morning at 11:23 a.m. on October 23rd, 2009, Mr. Martin placed a seven-minute call to Mr. Megalli during which Mr. Martin disclosed inside information about the investigation to Mr. Megalli. Less than two minutes into the call, Mr. Megalli sent an instant message to Level Global's head of trading in which Mr. Megalli ordered the liquidation of Level Global's entire position in Carter's stock which at that time was 300,000 shares valued at nearly $9 million.
>
> * * *
>
> BY THE COURT: Mr. Megalli, that's a lot of information, and I'm going to ask you not necessarily to go through everything that's been stated here. As Mr. Chaiken has stated, he doesn't suggest that you had knowledge of everything that's said there. But what I want to focus on was your particular role in this, your relationships with Mr. Martin, your knowledge of what was going on, based on your

background the likelihood that you knew that insider information was being passed to you. As to those matters, the representations that havee been made by Mr. Chaiken in terms of his evidence, with what part of that do you disagree, if any?

THE DEFENDANT: *I mostly agree factually with pretty much everything he said.* I'd like to make a couple of distinctions, If I may.

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

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

[THE COURT]: Right.

[THE DEFENDANT]: Just as a very small factual correction. e

The only other real thing I guess –

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

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

So I'll let him address that.

THE COURT: Okay.

THE DEFENDANT: Right. So I have been advised not to get too much into the factual elements. So I want to be respectful of the Court, and I don't want to minimize my own culpability here and I take full responsibility for everything going on. So we'll put that as a preface.

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

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

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

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

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

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

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

(11/14/13 Guilty Plea Hr'g Tr. at 19-26 (emphasis added)).

Mr. Megalli has not minimized his misconduct because his PSR objections in no way depart from his Rule 11 colloquy with the Court, which the Court credited in adjudicating him criminally liable on the government's insider trading conspiracy charge. In connection with the government's Rule 11 proffer, Mr. Megalli admitted that he traded Carter's shares based on his actual knowledge of material, non-public information imparted by Martin and that, with respect to Level Global's October 2009 sales, he consciously avoided obtaining such e e knowledge.

III. ARGUMENT

A. Post-*Booker* Sentencing Standard

1. Procedural and Substantive Reasonableness

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that a mandatory federal sentencing guidelines regime violated the Sixth e Amendment. Pursuant to the *Booker* remedial opinion, the sentencing court is toe apply the factors set forth in 18 U.S.C. § 3553(a) to derive a "reasonable" sentence.e "Reasonableness" in the context of federal sentencing proceedings involves bothe procedural and substantive components.e

Substantively, "in reviewing the ultimate sentence imposed by the district court for reasonableness, we consider the final sentence, in its entirety, in light of the § 3553(a) factors, rather than reviewing each individual decision made during the sentencing process." *United States v. Greene,* 279 Fed. Appx. 902, 911 (11th Cir. 2008) (quotations omitted). "[W]e will only reverse a procedurally proper sentence if we are left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case." *United States v. McBride*, 511 F.3d 1293, 1297-98 (11th Cir. 2007) (internal citation omitted); *see also United States v. Irey*, 612 F.3d 1160, 1184-85 (11th Cir. 2010) (noting that district court application of the section e3553(a) factors is subject to abuse of discretion review on appeal "that accordse substantial deference to the district court's sentencing decisions") (quotation and citation omitted).

As a result, this Court is effectively the final arbiter of Mr. Megalli's sentence under what is now well-established, post-*Booker* sentencing authority.

2. Applicable Guideline Variance Authority

Section 3553(a), "as modified by *Booker*, contains an overarching provision instructing district courts to 'impose a sentence sufficient, but not greater than necessary' to accomplish the goals of sentencing." *Kimbrough v. United States*, 552 U.S. 85, 101 (2007) (quoting the sentencing goals set forth at 18 U.S.C. §

3553(a)(2)(A)-(D)). In arriving at an appropriate sentence, section 3553(a) provides for consideration of a number of factors. The first factor, reflecting the critical component that the district judge "make an individualized assessment based on the facts presented," is "a broad command to consider 'the nature and circumstances of the offense and the history and characteristics of the defendant.'" *Gall v. United States*, 552 U.S. 38, 50 & n.6 (2007) (quoting 18 U.S.C. § 3553(a)(1)). The second factor requires consideration of the "general purposes of sentencing," that is, imposition of a sentence reflecting the seriousness of the offense, promoting respect for the law, and providing "just punishment," as well as specific and general deterrence. 18 U.S.C. § 3553(a)(2); *Kimbrough*, 552 U.S. at 101.

Although a district judge "should begin all sentencing proceedings by correctly calculating the applicable Guidelines range," *Gall*, 552 U.S. at 49, the advisory guidelines are merely one of multiple factors to be considered in imposing a reasonable sentence. *Id.* at 59. Indeed, the district court may not presume a custodial guidelines range is reasonable, but rather must undertake an individualized evaluation of the facts and circumstances before it, particularly where, as here, a defendant's history and characteristics and corresponding considerations of retribution, deterrence and rehabilitation remove a case from those within the heartland of a particular guideline computation. *See generally Rita v. United States*, 551 U.S. 338, 351 (2007) (noting that it is merely "probable" that a particular sentence is reasonable when, solely in the "mine run" of cases, it is within the guidelines' application of the section 3553(a) factors); *accord Irey*, 612 F.3d at 1185.

In doing so, the sentencing court must consider the possibility that a custodial sentence derived from the guidelines is not only unnecessary to accomplish the goals set forth in section 3553(a), but that such sentence is "greater than necessary" to accomplish the statute's sentencing objectives. *See Gall*, 552 U.S. at 47 (rejecting any requirement than an outside-the-guidelines sentence be justified by "extraordinary" circumstances and further rejecting any "rigid mathematical formula" that uses the percentage of a departure from the guidelines as the standard for determining the strength of the justification required for a specific sentence). In other words, and as many sentencing courts in the insider trading context have found, a guidelines sentence may actually *thwart* application of section 3553(a)'s command to impose the *minimum* sentence necessary to achieve the goals of sentencing. *Rita*, 551 U.S. at 351.

As a result, the district court is generally "free to make its own reasonable application of the § 3553(a) factors, and to reject (after due consideration) the advice of the Guidelines." *Kimbrough*, 552 U.S. at 113 (Scalia, J., concurring); *see also Gall*, 552 U.S. at 50 (noting that district judges are generally free to impose sentences outside the recommended guideline range, provided they have considered "the extent of the deviation and [have] ensure[d] that the justification is sufficiently compelling to support the degree of the variance"). Based on its independent evaluation of each section 3553(a) factor, a district court is legally authorized to impose a non-guidelines sentence, including a sentence substantially below the advisory guideline range. *Kimbrough*, 552 U.S. at 101; *see also Irey*, 612 F.3d at 1187 ("the appellate court may not presume that a sentence outside the guidelines is unreasonable and must give 'due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance'") (quoting *Gall*, 552 U.S. at 51).

B. The Court's Advisory Guideline Computation Should Include Full Acceptance of Responsibility Credit

1. Mr. Megalli Has Not Sought to Minimize His Misconduct

The government has questioned Mr. Megalli's entitlement to acceptance credit following submission of his PSR objections. This is perplexing, particularly in that criminal defendants in this and other federal judicial districts routinely persist in factual objections at sentencing without jeopardizing their acceptance credit. Moreover, Mr. Megalli's PSR objections do nothing – other than supplying relevant context that goes solely to *mitigation*, not lack of acceptance – to dispute his longstanding concession, including as articulated in open court during his Rule 11 colloquy, that he traded in February and July 2010 based on *actual knowledge* of inside information shared by Martin and in October 2009 based on *conscious avoidance* as to the illicit basis for Martin's sale recommendation.

The government's concerns regarding Mr. Megalli's entitlement to acceptance credit thus appear to spring from the misconception that he has somehow denied having traded based on actual knowledge of material, non-public information disclosed by Martin in February and July 2010 and conscious avoidance of such knowledge in October 2009. He has not.

In fact, the introduction to Mr. Megalli's PSR objection letter to the Probation Office states expressly: "Mr. Megalli readily acknowledges that he traded Carter's shares based on illicit advice from Mr. Martin, albeit typically accompanied by other, independently corroborative analysis compiled by Mr. Megalli." (Def.'s PSR Objection Ltr. at 3). Mr. Megalli amplified this admission by pointing to his sole responsibility for trading on insider information in his acceptance of responsibility statement incorporated in the PSR:

> I respectfully submit this letter to the Court *to fully accept responsibility for the actions that culminated in my guilty plea on November 14, 2013.* I have thought a great deal over the past few months about the series of events that led me to this point. My first

> reaction was one of disbelief and, frankly, anger. What I missed initially was that the target of my anger should have been me, not others . . . .
>
> *I have come to the realization that there is no one I can possibly blame for this mess other than myself.*
>
> I am extremely disappointed that I did not follow Warren Buffett's advice to investment managers to "play in the middle of the court." *In the case of my relationship with Eric Martin, it is plain that I stepped out of bounds and this was wrong. What I should have said to Mr. Martin at the beginning of our relationship was to not provide me with advice relating to his former employer. That would have been the right thing to do.*

(PSR ¶ 159 (emphasis added)).

Moreover, during his Rule 11 plea colloquy – and with Mr. Megalli's full assent – the government stated as follows with regard to Mr. Megalli's offense conduct:

> Beginning in September 2009 and continuing through July 2010, Mr. Martin provided Mr. Megalli with material nonpublic information regarding Carter's quarterly and annual financial results and other events in advance of the public disclosure of that information. The information related to Carter's earnings per share, also referred to as EPS, forward guidance, and other confidential internal financial performance information. Mr. Megalli, in turn, caused Level Global to buy, sell and short Carter's common stock based, in whole or in part, on this material nonpublic information. Mr. Megalli did so *knowing or consciously avoiding the knowledge* that Mr. Martin was obtaining the information from a Carter's insider in breach of that insider's duties of trust and confidence to Carter's.

(11/14/13 Guilty Plea Tr. at 16-17 (emphasis added)).

Accordingly, far from minimizing his misconduct, Mr. Megalli's PSR objections simply – and permissibly – place his trades in context to show that, while Martin's information was undoubtedly material – indeed, Mr. Megalli termed his October 23, 2009 call with Martin the "catalyst" for liquidating $9,000,000 worth of Carter's stock – he did not rely on Martin in isolation. This in turn goes to mitigation, insofar as a remote tippee trader like Mr. Megalli who nonetheless conducts independent due diligence is plainly less culpable than a trader who personally corrupts an insider and proceeds to trade on nothing else.

2. Mr. Megalli Has Merely Objected To the Relative Significance of Martin's Disclosures in February and July 2010, Not His Actual Knowledge

Reference to Mr. Megalli's PSR objections reveals that he has merely questioned the significance, not the illegality, of the information Martin disclosed prior to Carter's February 25, 2010 earnings release. In doing so, Mr. Megalli's objections merely state that the PSR's reference to a purportedly "precipitous" drop in the Dow Jones Industrial Average (the "Dow"), while Carter's dropped only "slightly" is factually incorrect. (*See* Def.'s Objections to PSR ¶¶ 125-26). The inference being that Martin's information was material to the market given that Carter's shares held steady while the Dow purportedly plummeted. In point of fact, Carter's shares held steady with the rest of the market, which essentially did not move on February 25, 2010. The Dow closed at 10,374.16 on February 24, 2010 and at 10,321.03 the following day, a decline of only 0.5%, while Carter's stock closed down $0.07 (or .25%). It follows that the materiality of Martin's information was of comparatively questionable significance to the market.[2]

With regard to Level Global's July 2010 short sales, Mr. Megalli's PSR objections also go solely to the significance, as opposed to the actionability, of Martin's disclosures. In particular, Mr. Megalli's PSR objections, *see id.* at 16-17, illustrate the wealth of independent due diligence he conducted to corroborate the advisability of shorting Carter's stock, as evidenced by a July 27, 2010 Morgan Stanley note "that Carter's stock had seen the second largest absolute increase in volume of short sales in the entire consumer sector – up by 34.6%." *Id.* at 16. As such, while Mr. Megalli admits to having shorted Carter's stock in July 2010 based on actual knowledge of inside information imparted by Martin, such information was complemented by Mr. Megalli's independent due diligence.

[2] While the government has also addressed the applicable October 2009 and February 2010 trading windows in its PSR objections, Mr. Megalli notes that he has questioned the PSR's use of disparate trading windows only to point out that the applicable trading window is an issue, along with many others, he waived by pleading guilty. He certainly understands he remains subject to the 18-level enhancement for illicit gain under USSG § 2B1.4(b)(1).

3. The Evidence Suggests That Mr. Megalli's November 9, 2009 Carter's Trade Was Not Based on Inside Information Disclosed by Martin

Mr. Megalli's lone objection to relevant conduct, which remains entirely consistent with acceptance of responsibility, relates to Level Global's sale of 150,000 Carter's shares on November 9, 2009, purportedly in anticipation of Carter's restatement announcement of later that day. *See id.* at 13-14. In fact, Martin admitted in an e-mail to his clients *following* Carter's restatement announcement, "We are frankly amazed that management would again come out and delay earnings after the beating they took last week from investors and the share price." *Id.* at 13. Approximately 20 minutes later, Martin e-mailed Megalli directly, stating, "I am praying you lowered today, I should have." *Id.* Indeed, Martin apologized to Megalli by e-mail the following day: "Can stop by the office around 3pm if you want to whip me for cri[.]" *Id.* Finally, Martin advised the government during a December 5, 2012 debriefing, *after* he had elected to cooperate, [redacted] *Id.*

In light of this evidence, it is inconceivable that Mr. Megalli's objection toe einclusion of the November 9, 2009 sale as relevant conduct – which, because it hase no guideline impact, he did not even ask be excluded from the PSR's gain computation, (PSR¶ 158) – should jeopardize his acceptance credit.

4. Conscious Avoidance is Just as Criminally Actionable as Actual Knowledge

Applicable tipper-tippee insider trading authority has long countenanced criminal liability based either on a tippee's actual knowledge of the tipper's direct or derivative fiduciary breach or deliberate avoidance of learning the truth. *See*e e *generally Dirks v. SEC*, 463 U.S. 646, 660 (1983) (tippee has duty to abstain or disclose "only when the insider has breached his fiduciary duty . . . and the tippee knows or should know that there has been a breach"); *United States v. Whitman*, 904 F. Supp. 2d 363, 372 (S.D.N.Y. 2012) ("[W]here appropriate . . . thee Government is entitled to a 'willful blindness' or 'conscious avoidance' instruction to the jury on the issue of [tippee scienter]"). Conscious avoidance liability flowse from trading activity that is "so overwhelmingly suspicious" that a "failure to question the suspicious circumstances establishes the defendant's purposeful contrivance to avoid guilty knowledge." *United States v. Svoboda*, 347 F.3d 471, 480 (2d Cir. 2003) (quoting *United States v. Lara-Velasquez*, 919 F.2d 946, 952 (5th Cir. 1990)); *see also United States v. Rodriguez*, 983 F.2d 455, 458 (2d Cir.

1993) (noting that it is "essential to the concept of *conscious* avoidance that the defendant must be shown to have *decided* not to learn the key fact, not merely to have failed to learn it") (emphasis in original).

Mr. Megalli has never made a secret of his position that, while Martin tipped him to sell on October 23, 2009, such tip – which was conveyed to Mr. Megalli's trader in two minutes (or less) – did *not* involve disclosure of Carter's impending earnings delay, Kohl's identification as the customer in question, or the prospect of a restatement. This led the parties to negotiate inclusion of a conscious-avoidance intent element in the government's information, which, as noted above, the parties also addressed during Mr. Megalli's change of plea hearing. In particular, Mr. Megalli acknowledged that certain of the information imparted by Martin on October 23, 2009 was sufficiently suspicious to render his conscious choice not to divine its source and nature criminally actionable. (*See* 11/14/13 Guilty Plea Hr'g Tr. at 24-25); *see also Svoboda*, 347 F.3d at 480 (deliberate actions to avoid knowledge are sufficient to confer criminal liability). Most importantly, given that conscious avoidance is just as actionable as actual knowledge, the Court correctly accepted Mr. Megalli's allocution testimony in adjudicating him guilty, thereby mooting any objection to Mr. Megalli's receipt of acceptance credit based on acknowledging his conscious avoidance, as opposed to actual knowledge, in connection with the October 2009 Carter's trades.

5. Mr. Megalli is Entitled to Acceptance of Responsibility Credit as a Matter of Applicable Law and Equity

As noted above, Mr. Megalli's position regarding his knowledge and intent has been consistent throughout these proceedings, including at sentencing. He has not minimized his liability, but rather has merely sought to place it in context to distinguish him from those remote tippee traders who corrupt corporate insiders with kickbacks, trade based solely on this information, and reap millions of dollars of personal profit as a result. Frankly, given that he allocuted at length regarding his conscious avoidance in relation to the October 2009 trades, the time for the government to have objected, if at all, was prior to the Court adjudicating him guilty of the subject insider trading conspiracy (which was followed by national publication of his criminal conviction). Finally, he has further demonstrated acceptance of responsibility within the meaning of USSG § 3E1.1 by depositing $50,000 in early – and complete – restitution with the clerk of court.

Mr. Megalli, a defendant who, alone among his currently convicted co-conspirators, waived indictment and entered a negotiated plea, would be irretrievably prejudiced by the Court's failure to accord him acceptance of responsibility credit. Based on any fair reading of the foregoing discussion and Mr. Megalli's PSR objections, this clearly should not happen.

C. Entry of a Substantively Reasonable Sentence in This Case Under 18 U.S.C. § 3553(a) Necessitates a Substantial Variance

As discussed above, section 3553(a) expressly provides that, in deriving a substantively reasonable sentence, the Court must consider the nature and circumstances of the offense and the history and characteristics of the defendant, as well as the need for the sentence imposed to: (1) reflect the seriousness of the offense, (2) promote respect for the law, (3) provide just punishment, (4) afford adequate deterrence, and (5) protect the public from further crimes of the defendant. 18 U.S.C. § 3553(a)(1) & (2).

As one sentencing court has aptly noted, evaluation of the foregoing section 3553(a) factors frequently supports a substantial downward variance in fraud cases:

> [S]entencing judges know that a full consideration of "the nature and circumstances of the offense and the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1), implicates offense and offender characteristics that are too numerous and varied, and occur in too many different combinations to be captured, much less quantified in the Commission's Guidelines Manual. *A consideration of those and other factors set forth in § 3553(a) produces sentences that are moored to fairness, and to the goals of sentencing set forth in § 3553(a)(2), but sometimes not so much to the advisory Guidelines range. Indeed, in some cases, the fair sentence can drift quite far*

> *away from the advisory range, which is, after all, but one of eight factors the sentencing judge must consider.*

United States v. Ovid, No. 09-CR-216 (JG), 2010 WL 3940724, *1 (E.D.N.Y. Oct. 1, 2010) (emphasis added).

This case fits well within the foregoing admonition. First, a substantial downward variance here will further the statutory objectives of ensuring proportionality in relation to the sentencing of similarly-situated remote tippee traders, while increasing the likelihood that Mr. Megalli is appropriately punished in a manner that is not more severe than necessary to promote general and specific deterrence.

Second, rote application of the guidelines in this case results in an offense level that significantly overstates Mr. Megalli's culpability. Specifically, the guideline offense level, which is driven primarily by Level Global's gains and losses avoided, fails to take into account, among other things, (i) the fact that Mr. Megalli did not, at least in the main, personally profit or attempt to personally profit from the offense conduct and (ii) his status as a remote tippee who neither corrupted an insider, breached any fiduciary duty nor divulged confidential information to others.

And third, consideration of Mr. Megalli's personal history, devotion to his friendsiand family, and the debilitating consequences he has already suffered plainly counsel in favor of leniency here.

1. Mr. Megalli is Entitled to a Substantial Variance Based on Considerations of Proportionality and Deterrence

As codified in 18 U.S.C. § 3553(a)(2), sentencing in federal court serves multiple purposes, including retribution, specific and general deterrence, incapacitation and rehabilitation. Incapacitation and rehabilitation are inapposite to the vast majority of federal fraud prosecutions, given that, as here, the fact of conviction disqualifies the offender from occupying any status that would afford him the opportunity to re-offend. Accordingly, the focus under section 3553(a)(2) in federal fraud prosecutions is on retribution and deterrence, both sentencing objectives that, particularly for first-time offenders like Mr. Megalli, afford substantial downward departure grounds, particularly in light of the kinds of sentences available, including probation/community confinement, coupled with community service and restitution.

a. Sentencing Courts Routinely, and Substantially, Vary Downward in Insider Trading Prosecutions

Courts routinely have downwardly varied from the advisory guideline range in insider trading prosecutions. Indeed, from October 1, 2009 through December

31, 2013, U.S. Sentencing Commission data reflects that courts imposed guidelinee sentences *in only 16 of 104 insider trading cases*, and none above the guidelines.[3]e Although, admittedly, a significant number (40 cases) of the foregoing non-guideline sentences resulted from 5K departures, Sentencing Commission data establishes that a larger number (46 of the remaining 64 cases, or fully 71 percente of the total number of non-5K insider trading sentences entered over the past four years) resulted from variances exclusive of any government-sponsored departure.

e Moreover, the actual sentencing reductions accorded in these cases – based on a comparison of the advisory guideline range with the custodial sentence ultimately imposed – have often been quite significant. Indeed, according to a

[3] *See* U. S. Sentencing Comm'n, Preliminary Quarterly Data Report at tbl. 5 (1st Quarter 2014), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2014-Quarter-Report-1st.pdf; U. S. Sentencing Comm'n, 2013 Sourcebook of Federal Sentencing Statistics at tbl. 28 (2013), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual- e reports-and-sourcebooks/2013/Table28.pdf; U. S. Sentencing Comm'n, 2012 Sourcebook of Federal Sentencing Statistics at tbl. 28 (2012), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2012/Table28.pdf; U. S. Sentencing Comm'n, 2011 Sourcebook of Federal Sentencing at tbl 28 (2011), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2011/Table28.pdf; U. S. Sentencing Comm'n, 2010 Sourcebook of Federal Sentencing Statistics at tbl. 28 (2010), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2010/Table28.pdf.

well-regarded compendium of sentencing data, *more than half of the sentences handed down on non-cooperator pleas were below 50% of the minimum guideline range from 2010-13, while fully 63% of the non-cooperator plea sentences handed down in 2012-13 were below the 50% mark.* *See* Morrison & Foerster LLP, 2013 Insider Trading Annual Review (2013), at 11 (chart) *available at* http://media.mofo.com/files/Uploads/Images/140108-Insider-Trading-Annual-Review.pdf. Accordingly, it is approaching a statistical reality, particularly as the government has continued to prosecute insider trading cases across a range of offense conduct, that the heartland of insider trading sentencing involves upwards of a 50% guideline reduction.

Notably, these variance statistics do not distinguish between schemes that implicate the corruption of insiders, the payment of bribes and other remuneration, and the direct realization of millions of dollars of personal gain, versus Mr. Megalli's offense conduct, which involved none of these aggravating factors.

Further, such variances account for the uniquely debilitating impact of a criminal insider trading conviction on most defendants (regardless of custodial time), which includes, without limitation, considerations of public humiliation and loss of reputation, loss of career and permanent debarment from the securities industry, and loss of income and the ability to support one's family. For example:

- *United States v. Anderson*, 267 Fed. Appx. 847, 849-51 (11th Cir. 2008) (affirming variance from 18-24 month guideline range to 3 years probation and six months home detention based on, among other things, the negative consequences to the defendant, including job loss and diminished future income prospects);
- *United States v. Whitman*, No. 12-cr-125 (S.D.N.Y. Jan. 29, 2013) (variance from 51-63 month guideline range to 24 month sentence for hedge fund founder and portfolio manager who actively participated in two separate criminal conspiracies involving multiple public companies, and who lied on the witness stand at trial);
- *United States v. Brownstein*, No. 11-cr-904 (S.D.N.Y. Jan. 11, 2012) (guilty plea by former hedge fund CEO to insider trading and $2.4 million profit; stipulated guideline range of 37-46 months reduced to custodial sentence of one year and one day);
- *United States v. Longueuil*, No. 11-cr-161 (S.D.N.Y. July 29, 2011) (guilty plea by former portfolio manager to trading on inside information obtained from expert consulting network, resulting in $1.25 million gain; stipulated guideline range of 46-57 months reduced to custodial sentence of 30 months);

- *United States v. Contorinis*, No. 09-cr-1083 (S.D.N.Y. Dec. 17, 2010) (conviction following insider trading trial of former hedge fund manager, one $13.6 million gain; guideline range of 97-121 months reduced to custodial sentence of 72 months);
- *United States v. James Turner II*, No. 2:11-cr-868 (D.N.J. Apr. 16, 2012) (former hedge fund chief investment officer sentenced to one year despite guideline range of 57-71 months (based on gain in excess of $2.5 million) and personal profits of approximately $1.1 million; tippers received probation despite guideline ranges of 46-57 months and 30-37 months, respectively);
- *United States v. Tom*, No. 1:05-cr-10361 (D. Mass. July 23, 2009) (37-46 month guideline range, based on attributable range of approximately $783,000 and USSG § 3C1.1 obstruction enhancement, downwardly varried to one year and one day).

Aside from a defendant's offense conduct, his personal background and family obligations are also routinely cited as a factor that calls for a significant variance. *See, e.g., Gupta*, 904 F. Supp. 2d at 353-55 (advisory guideline range of 78-97 months reduced to custodial sentence of 24 months); *Adelson*, 441 F. Supp.

2d at 515 (urging courts to step outside the guidelines and consider "the human being who will bear the consequences"); *United States v. Milne*, 384 F. Supp. 2d 1309, 1312-13 (E.D. Wis. 2005) (reducing guideline range and imposing split sentence to allow defendant to work and support his family).

Finally, considerations of proportionality – codified as "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct[,]" 18 U.S.C. § 3553(a)(6) – dictate that the Court need not be tethered to the guidelines when, as a matter of national statistical fact, district courts from around the country have so routinely varied from advisory guideline ranges derived principally from application of USSG § 2B1.4. In varying from the guidelines, these courts have recognized that application of USSG §2B1.4, with its focus on institutional gain as a proxy for individual moral culpability, not only frequently overstates the seriousness of an offender's misconduct, but also fails to account for the particularly disabling effect of a felony insider trading conviction on individuals (like Mr. Megalli) who have participated in the securities industry throughout their career. Indeed, it is precisely because a felony insider trading conviction is so uniquely debilitating that courts have not appeared troubled by the impact of a substantial downward variance on considerations of general deterrence. They know the devastating personal and professional effects of a felony insider trading conviction – separate and apart from jail time – accord specific and general deterrence, both simultaneously and in equal measure.

b. Deterrence is Effectively Served by the Fact of Mr. Megalli's Felony Conviction

Given the debilitating personal, financial and professional consequences that Mr. Megalli has suffered and will continue to suffer, the guideline stipulations and significant, multi-level variance advocated herein meet the objectives of 18 U.S.C. § 3553(a)(1) to secure a just punishment that is not more severe than is necessary to promote general and specific deterrence. Mr. Megalli and his wife Jenifer have been married for fourteen years and have two young daughters. Removing Mr. Megalli from his family for an extended period of time is unquestionably devastating, particularly given Mr. Megalli's devotion to his wife and daughters, as has been shared with the Court by his family and many friends. Mr. Megalli has already lost his job as a result of the government's investigation, cutting off his family's only source of income. Moreover, Mr. Megalli will be barred from working in the investment industry – the only industry in which he has worked over the past eleven years – thus effectively eliminating the risk of a repeat offense and significantly limiting his future employment options.

In short, the personal, financial and professional consequences that Mr. Megalli has suffered and will continue to suffer serve as a tremendous source of both individual and general deterrence, justifying the substantial variance advocated herein.

2. The Nature and Circumstances of Mr. Megalli's Offense Conduct Are Fundamentally Mitigating

Just as the Court is to "consider every convicted person as an individual" so too is it required to evaluate "every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Gall*, 552 U.S. at 52 (quoting *Koon v. United States*, 518 U.S. 81, 113 (1996)). The PSR's tendency to focus on Mr. Megalli's trading activity and communications with Martin in isolation – without examining clearly applicable mitigating factors such as Mr. Megalli's lack of personal gain, his parallel due diligence in support of his trading decisions, and his status as a remote tippee who never engaged in forward tipping – suggests that Mr. Megalli has been deemed inevitably subject to sentencing within the applicable guideline range. This is not the case.

a. Mr. Megalli's Personal Gain Was Negligible

Using institutional, as opposed to personal, gain for purposes of an offense level computation in insider trading cases has come under increasing attack as being substantively unreasonable. *See*, *e.g.*, *United States v. Gupta*, 904 F. Supp. 2d 349, 351 (S.D.N.Y. 2012) ("[T]here is no better illustration of the irrationality of this approach than the instant case: for of the total of 30 Guideline points calculated by the Probation Department and endorsed by the Government as reflecting the proper measure of [defendant's] crime and punishment, no fewer than 20 – or two thirds of the total – are exclusively the product of [co-conspirator's] and his companies' monetary gain, in which [defendant] did not share in any direct sense"); *see also United States v. Contorinis*, 692 F.3d 136, 145-48 (2d Cir. 2012) (vacating criminal forfeiture order imposed on hedge fund portfolio manager convicted of insider trading 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"); *see also United States v. Emmenegger*, 329 F. Supp. 2d 416, 427-28 (S.D.N.Y. 2004) (finding that the amount of victim loss or defendant gain under the guidelines is a "relatively weak indicator of the moral seriousness of the offense").

The fact that Mr. Megalli did not directly profit from the unlawful trades at issue is a highly relevant variance consideration. Each trade was executed through Level Global's accounts for the exclusive benefit of the Level Global fund and its investors. Any profit or loss avoided from the trades inured in the first instance to the benefit of Level Global and its investors, not Mr. Megalli.e

e That said, Mr. Megalli does not – and, indeed, cannot – deny that positive trading performance was an important employment consideration at Level Global. As a corollary, however, it bears noting that Mr. Megalli managed a several-hundred million dollar consumer sector portfolio at Level Global, which required him to monitor 300-400 separate issuers. For its part, Carter's securities never comprised more than one-half of one percent of Level Global's total available investment capital.

Moreover, 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. In particular, Mr. Megalli was eligible to receive 1%-3% of Level Global's incentive fees if hise consumer fund returned $50 million or less, and 3%-5% of Level Global'se incentive fees if his consumer fund returned $50 million or more.e

Ultimately, Mr. Megalli's consumer fund returned approximately $40 million in 2010, and he received 3% of Level Global's overall incentive fees. (His employment contract precluded an incentive bonus award for 2009.) As noted in the PSR, the subject Carter's trades generated a guideline gain of approximately $3.17 million. (PSR ¶ 158). Level Global was entitled to 10 percent of these profits as an incentive fee (its investors kept the remainder), such that the $3.17 million at issue generated approximately $317,000 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, he is in fact accountable solely for the illicit gain realized from the 2010 Carter's trades, or $779,266. *Id.* Three percent of $77,926 (the amount of Level Global's incentive fee associated with the 2010 Carter's trades) corresponds to $2,338 realized by Mr. Megalli directly.

Further, attributing Level Global's gain to Mr. Megalli also overstates his culpability given the leverage inherent in institutionalized securities trading, as opposed to personal trading in a retail brokerage account. Here, because he served as a Level Global portfolio manager at the time of the alleged offense conduct, Mr. Megalli's trading involved millions of dollars across hundreds of thousands of shares. Again, however, Mr. Megalli neither directly nor, in the main, personally profited from his offense conduct. As opposed to the highly-publicized prosecution of former hedge fund manager Raj Rajaratnam, who actively procured inside information that inured to his personal benefit as the principal officer of

Galleon Group, Mr. Megalli's benefit, as noted above, was dramatically more diffuse, thereby warranting a multi-level variance.

In this regard, sentencing courts have, post-*Booker*, commonly exercised their variance authority to adjust guideline ranges that have been inflated due principally to the institutionalized or market-related aspects of a fraud scheme, which the courts have recognized does not, standing alone, reflect more aggravated intent or bad faith. *See generally Adelson*, 441 F. Supp. 2d at 509-15 (reasoning that the "multiplier effect" on loss associated with revelations of securities fraud at public companies that have typically issued millions of shares is a clear ground for variance); *Parris*, 573 F. Supp. 2d at 754 (stating that, in the absence of a variance, "we now have an advisory guidelines regime where, as reflected by this case, any officer or director of virtually any public corporation who has committed securities fraud will be confronted with a guidelines calculation either calling for or approaching lifetime imprisonment").

In short, driving up the potential term of incarceration Mr. Megalli faces based on the benefit that Level Global obtained from the trades at issue, virtually none of which inured directly to Mr. Megalli's personal benefit, translates to significant additional punishment and generates an advisory guideline range that is substantively unreasonable.

b. Mr. Megalli Did Not Seek to Augment His Gain Through Parallel Personal Trading or Forward Tipping

It is also an important variance consideration that Mr. Megalli never traded Carter's securities for his own account (*i.e.*, in a personal brokerage or retail account he controlled) throughout his dealings with Martin, a fact the government acknowledged during his change of plea hearing. (11/14/13 Guilty Plea Hr'g Tr. at 21). Nor did Mr. Megalli recommend to David Ganek, Level Global's principal, that Ganek trade Carter's shares in parallel with him, notwithstanding Ganek's access to exponentially greater trading capital and leverage. Simply put, there were clearly more direct – and certainly more remunerative – means for Mr. Megalli to have profited from his misconduct, yet he availed himself of none of them.

c. Mr. Megalli Did Not Corrupt a Corporate Insider or Breach Any Fiduciary Duty

Mr. Megalli did not induce any insider to breach a duty, nor did he have direct contact with any corporate insider who did so. Mr. Megalli was at all times a secondary tippee of Martin, who was himself a tippee of Richard Posey, the lone Carter's insider in the charged conspiracy. Mr. Megalli never met Posey, nor was he even aware of Posey's identity in relation to the trades in issue. (*See* 11/14/13

Guilty Plea Hr'g Tr. at 17 (reflecting the government's acknowledgment that "Mr. Martin did not identify his [Carter's] source by name")). Courts have long recognized that those who breach a fiduciary duty are more culpable than those whose liabilities are derivative of a breach. *See Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 313 (1985) ("[I]n the context of insider trading, we do not believe that a person whose liability is solely derivative can be said to be as culpable as one whose breach of duty gave rise to that liability in the first place"); *see also SEC v. Tome*, 638 F. Supp. 638, 639 n.1 (S.D.N.Y. 1986) ("it is illogical to argue . . . that a tippee's liability can be greater than that of the tipper"), *aff'd*, 833 F.2d 1086 (2d Cir. 1987).

For its part, the government has argued in other insider trading cases thate one who induces a fiduciary breach is "simply more culpable" than one who receives and trades on that information, even if the tippee is a securities professional with substantial trading authority. For example, in connection with Danielle Chiesi's sentencing in the Southern District of New York for having facilitated a spoke of Raj Rajaratnam's well-known insider trading scheme, the government wrote as follows with respect to her culpability as compared to that of her boss, Mark Kurland, to whom she had disclosed inside information on which he traded:

> Chiesi is simply more culpable than Kurland, since she was the one on the front lines obtaining inside information and swapping it with others. It was Chiesi, and not Kurland, who had the relationship with Moffat. It was Chiesi, and not Kurland, who induced Moffat to breach his duties to IBM. And it was Chiesi, and not Kurland, who magnified the crime by simultaneously conspiring with Rajaratnam and others, who controlled billions of [sic] more dollars.

Gov't Sentencing Mem. at 12, (Doc. 284), *United States v. Chiesi*, No. 09 CR 1184 (RJH), (S.D.N.Y. June 13, 2011).

Similarly, the SEC has advocated to no less of an authority than the U.S. Supreme Court that the relative culpability of those who directly breach or induce a breach of fiduciary duty is higher than those who indirectly profit from it, noting that tippers are the "*persons most directly culpable in a violation*," because, "[a]bsent the tipper's misconduct, the tippee's trading would not occur." Brief for the U.S. Securities and Exchange Commission as Amicus Curiae Supporting Respondents, *Bateman Eichler, Hill Richards, Inc. v. Berner*, No. 84-679, 1985 WL 669566, at *21 (quoting H.R. Rep. No. 98-355, at 9 (1983)) (emphasis in original). Congress codified the SEC's position in the Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, 98 Stat. 1264 (1984), which authorized the imposition of civil penalties on non-trading tippers based "on the premise that tippers are the parties most responsible for any fraud on the investing public." *Id.*

Mr. Megalli did nothing to corrupt any Carter's insider. Indeed, the criminal scheme perpetrated in the first instance by Posey and Martin extended to other remote tippee traders, including one who has been immunized and others who may never be charged.[4] Without question, insider trading by a remote tippee is patentlye criminal, yet others were plainly indispensable to the conspiracy's success in that they personally breached a fiduciary duty to Carter's and disseminated their illegally obtained information well beyond Mr. Megalli.

d. Mr. Megalli's Carter's Trades Were Typically Accompanied by Independent (and Often Personal) Due Diligence

As noted above in connection with his entitlement to acceptance of responsibility credit, (*see* Part III.B, *supra*), and as further delineated in his PSR objections, (*see*, *e.g.*, Def.'s PSR Objection Ltr. at 7 (PSR ¶ 31), 10 (PSR ¶¶ 65-70), 15-16 (PSR ¶¶ 127-42) and 16-17 (PSR ¶¶ 143-57)), Mr. Megalli was ae diligent investor who typically availed himself of a wealth of analyst research, as

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[4] As an additional indicium of comparative culpability, it is undisputed that Martin lied to the FBI repeatedly over the course of at least two interviews, yet neither his plea agreement nor the transcript of his Rule 11 plea colloquy reflects that he faces any incremental sentencing exposure (*i.e.*, in addition to his insider trading liability) under, for example, 18 U.S.C. § 1001 or USSG § 3C1.1 (obstruction) for having done so. This is true despite the fact that Martin also denied having illegally traded Carter's securities in sworn deposition testimony in the SEC's civil enforcement proceeding, pending before Judge Totenberg, against certain former Carter's officers.

complemented by his own analysis, in making his trading decisions. This is not to say, however, that he failed to rely on Martin's inside information regarding Carter's as a part of the overall mix of information that was material to him in connection with effectuating the charged trades. He did. Indeed, and as noted above, Martin's October 23, 2009 telephonic tip was, by Mr. Megalli's own admission during his plea allocution, the catalyst for him to order the sale of Carter's stock during the same phone conversation.

Rather, the important point here with regard to mitigation is that, as opposed to other remote tippee defendants who rely in isolation on material, non-public information that has been passed to them, Mr. Megalli's reliance on inside information disclosed by Martin was, in the main, corroborated by independent analysis and otherwise innocent due diligence, particularly with respect to Level Global's July 2010 short sales. (*See id.* at 16-17 (PSR ¶¶ 143-57)). While a trader who relies on inside information in combination with other data remains criminally liable for his violation, the corresponding punishment should account for the relative significance of the disclosure in the overall mix of information justifying an illegal trade.

e. Mr. Megalli Waived a Potentially Meritorious Legal Defense Related to Knowledge of Insider Benefit

According to his debriefings, Martin never identified his source at Carter's by name. Further, there is no suggestion that Martin indicated to Mr. Megalli that his source was reaping some benefit from disclosing information to Martin. This has potentially dispositive legal implications. As is currently being litigated in the Second Circuit on the appeal of the criminal insider trading convictions of Todd Newman and Anthony Chiasson (a former Level Global principal), *see United States v. Chiasson and Newman*, No. 13-1917 (CON)(2d Cir. 2013), an essential element of a breach of fiduciary duty giving rise to tippee liability is that the tipper engaged in self-dealing:

> Whether disclosure is a breach of duty therefore depends in large part on the purpose of the disclosure. . . . [T]he test is whether the insider personally will benefit, directly or indirectly, from his disclosure. Absent some personal gain, there has been no breach of duty to stockholders. And absent a breach by the insider, there is no derivative breach [by tippees].

Dirks, 463 U.S. at 662. Tippees do not "assume an insider's duty to the shareholders . . . because they receive inside information[.]" *Id.* at 660; *see also id.* at 659 ("recipients of inside information do not invariably acquire a duty to disclose or abstain"). Rather, tippees assume the insider's fiduciary duty only when "[inside information] has been made available to them *improperly*," *i.e.*, in exchange for a personal benefit. *Id.* at 660 (emphasis in original).

If an insider is not liable for disclosing inside information unless such disclosure is the product of self-dealing, *see id.* at 654 (noting that sharing of inside information unaccompanied by a personal benefit is not fraudulent and therefore not actionable under Rule 10b-5), it necessarily follows that a tippee must know of the personal benefit to be found criminally liable. *See id.* at 660-62 (holding that ae tippee must "know[] . . . that there has been a breach" of fiduciary duty and, because there can be no breach of a fiduciary duty giving rise to tippee liability absent some personal benefit, a tippee can only "know" of a breach if he is alsoe aware of a benefit); *accord Bateman Eichler, Hill Richards, Inc.*, 472 U.S. at 311 n.21 ("A tippee generally has a duty to disclose or to abstain from trading on material nonpublic information only when he knows or should know that his insider source has breached his fiduciary duty to the shareholders by disclosing the information – in other words, where the insider has sought to benefit, directly or indirectly, from his disclosure.") (quotations omitted).

Given Martin's admission that he never identified Posey, either by name or, for that matter, even by position within Carter's, and, further, that he never disclosed any rationale for Posey to have violated his fiduciary duty to Carter's, it appears unlikely that the government would have been able to establish Mr. Megalli's knowledge of Posey's personal benefit beyond a reasonable doubte had this case gone to trial. *See, e.g., Whitman*, 904 F. Supp. 2d at 371 ("[I]f the only way to know whether the tipper is violating the law is to know whether thee tipper is anticipating something in return for the unauthorized disclosure, then the tippee must have knowledge that such self-dealing occurred, for, without such a knowledge requirement, the tippee does not know if there has been an 'improper' disclosure of inside information."); *accord United States v. Rajaratnam*, 802 F. Supp. 2d 491, 498–99 (tippee liability "necessitates tippee knowledge of *each* e *element*, including the personal benefit, of the tipper's breach") (emphasis ine original); *Hernandez v. United States*, 450 F. Supp. 2d 1112, 1118 (C.D. Cal. 2006) (tippee only liable "if [he] had knowledge of the insider-tipper's personal gain"). Because Martin was the only conduit between Mr. Megalli and Posey, and Martin has disclaimed having identified Posey even by job category, much less by name, it is difficult to see how a jury could reasonably infer Mr. Megalli's knowledge of Posey's personal benefit from the circumstances of Martin's disclosures.

This is not to say that Mr. Megalli improperly waived an absolute, legal defense to liability. He expressly acknowledges that a trial on the merits (involving the government's continued refinement of its proof and potentially including Mr. Megalli's testimony in open court) would have been required to perfect a defense based on lack of knowledge of Posey's criminally actionable benefit. That said, the government's ability to prove knowledge of benefit when Martin concedes he never identified Posey either by name or even by job title – and he certainly never identified a reason for his unnamed source to have violated a fiduciary duty to Carter's – is hardly a foregone conclusion, which means it should factor as a mitigating circumstance in the Court's assessment of a reasonable sentence in this case.

3. Mr. Megalli's Personal History and Characteristics, Along With the Debilitating Consequences of His Conviction, Militate Strongly in Favor of a Lenient Sentence

> But surely, if ever a man is to receive credit for the good he has done, and his immediate misconduct assessed in the context of his overall life hitherto, it should be at the moment of his sentencing, when his very life hangs in the balance. This elementary principle of weighing the good with the bad, which is basic to all the great religions, moral philosophies, and systems of justice, was plainly part of what Congress had in mind when it directed courts to consider, as a necessary sentencing factor, the history and characteristics of the defendant.

Adelson, 441 F. Supp. 2d at 513-14.

Mr. Megalli is a first-time offender who, as attested by the numerous family members and friends who have submitted letters to the Court on his behalf, has lived a life of kindness, optimism and compassion. Those who know Mark well know him to be a man of strong character and honesty:

> With respect to Mark, having watched him mature over the years and embark on his career, I have always found him to display the very highest moral character. In the 35 years I have known him, I have never once seen Mark say anything or do anything that would raise the slightest question about his complete integrity. The adjectives that come foremost to mind when I think of Mark are honest, sincere, trustworthy and dependable. Despite his enormous talents and his outstanding academic and professional achievements over the years, Mark has always been humble and reserved. He is also very respectful and considerate of everyone with whom he deals.
>
> His family and friends are very important to Mark. He is a loving husband, a devoted father to his two daughters and a caring and devoted son to both of his parents. He has established lifelong friendships with classmates from grade school, from Phillips Andover Academy and from Yale College and with many others, and the fact that all of his friends are standing by him during his ordeal and professing their total loyalty to him is a testament to the special kind of person that Mark is.
>
> In sum, Mark Megalli is a person of impeccable character.

(R. Friedman Letter). Another friend writes:

> . . . In twenty-four years of knowing Mark, I have observed him to be a devoted friend, father, and son; a modest, perceptive, and deeply kind person. In my opinion, he is a gentleman in every sense of the word.
>
> * * *
>
> From my first impressions of Mark and to this day, he has always been well-mannered – someone who strives for (and achieves) excellence always, but who maintains an unflashy, even self-effacing

> e attitude. I cannot remember him ever making a disparaging commente about anyone but himself. (That rare quality, by the way, ise something he and his wife Jenifer have in common.) He has a quietness in the way he carries himself, in spite of his formidable talents and intelligence. In the early days, he occupied the quiete center of our group of friends – not at all as a social butterfly, but as someone for whom everyone had the deepest respect and affection. There was a sense that he was actually kinder and more intelligent than all of us, but because of his modesty only his closest friends knew the secret.

(N. Bly Letter).

Mark's friends consistently cite his humility and thoughtfulness as amonge his strongest characteristics:

> Mark is a loyal friend and a devoted husband and father with kindness, generosity and sincerity as hallmarks of his persona. Mark is one of the most intelligent and perceptive people that I have ever had the pleasure of knowing, but these gifts are manifested through a humble and empathetic demeanor, making Mark's brand of intellectual inquiry accessible and contagious to the people around him. Mark's self-deprecating humor and self-effacing manner evidence his quiet confidence and gentle nature.
>
> Mark is an intellectual who is driven by challenges. Never afraid of ehard work, Mark is a terrific role model not only to his children, but also to his peers. He has always been a long-term thinker, and I have long admired his stoic dedication to his education and career. I have never known Mark to take the easy path in any endeavor, and, despite the circumstances surrounding the writing of this letter, I have only ever known Mark to be honest, forthright, and law abiding. He hase always held himself and those around him to the highest moral ande ethical standards. Moreover, I consider Mark's trustworthiness and sense of fairness to be unimpeachable.e

> Mark together with his wife are a very civic-minded couple who have supported a myriad of causes with their time, money, and spirit. Always eager to lend a helping hand, Mark has always been someone that others turn to for advice and support. He is, in the end, the rare sort of individual that this world needs more of. I look forward to seeing how Mark continues to positively impact the people and institutions around him as he embarks on the next chapter in his life.

(P. Potter Letter). Mark has also been a source of inspiration and support to those around him:

> I do not have strong enough words to describe the value my friendship with Mark has played in my life. [redacted]

[redacted]

From a young age, Mark displayed tremendous generosity and a dedication to charitable service to others:

> Our high school had the motto "non sibi", which means "not for self". Mark embodied this characteristic. In high school he worked at a camp for children with cerebral palsy for two summers. Most high school students I knew were still searching for their own identity and had neither the maturity nor the compassion to help others who were less fortunate, especially those who behaved differently. Mark continued this commitment to others in college, where he volunteered

> as a literacy tutor for adults pursuing their GED, and he is most recently helping abused women through a non-profit in New York.

(E. Older Letter). Indeed, Mark and Jenifer Megalli have made charity and volunteer work an important part of their marriage:

> For most of our marriage (the past nine years) I have been a volunteer for Sanctuary for Families, a non-profit that serves the victims of domestic violence and human trafficking. At every step along the way as my involvement with Sanctuary has intensified, Mark has been a staunch supporter of the work we do. When I was asked to join the board a few years ago, he strongly encouraged me to accept. Every time we have discussed a need that Sanctuary has: new cribs for the shelter, Mother's Day packages, adopting families for the holidays, chairing the annual benefit, Mark has always responded with an enthusiastic yes. His financial support of Sanctuary has made it possible for us to help thousands of victims every year. He also volunteers his own time tutoring at-risk young people in our shelter system. Mark never asks for anything for himself and he is always ready to say yes when asked to help others.

(J. Megalli Letter). Mark and Jenifer's generosity and charitable service has been remarkable to others:

> . . . Mark has demonstrated exceptional generosity in my experience. As befitting his devotion to family, he and his wife have been regularly generous to the Sanctuary for Families, an organization which works to prevent and address domestic abuse and related issues – enough so that Jenifer was asked to join their Board of Directors. In addition, the Megallis have also been unerringly supportive of The Center for Discovery, which serves children and adults with autism and other disabilities and medical frailties. Because I serve on its board, and more importantly because my brother lives there, this organization is very close to my heart. By far more than any of my other friends, the Megallis have been liberally generous and ever-present at the unending fundraisers to which I have invited them. For

> me, this fact alone speaks to the real goodness and loyalty that I have seen in Mark since the beginning.

(N. Bly Letter).

Mark's friends and family have struggled to reconcile the serious mistakes for which he now faces sentencing with what has otherwise been a lifetime of hard work and integrity:

> . . . e [Mark] has led both a privileged and exemplary life to this point, one that is wholly inconsistent with the actions to which I understand he has pled guilty. I therefore cannot reconcile what I know to be true about his character and sense of propriety, which were unsurprising given his upbringing, with this matter. His entire life to this point has been marked by rewards fairly earned through hard work and dedication, and he distinguished himself in ways that would make any parents proud, especially ones, like his, that immigrated to this country.
>
> Indeed, the situation Mark now faces is so inconsistent with his values and personal history that I can assure you that he has already paid a e terrible price. He has been disgraced personally and professionally.e If Mark were a different kind of person, one who had a history ofe seeking to inappropriately exploit his opportunities rather than earn,e by dedication and hard work, the good name he has enjoyed to date, Ie would consider this a sad, predictable outcome. As it is, I ame confident that he is horrified by this devastating set back, and I hope he is able to draw on a lifetime of success and achievement in getting his life back on track.e

(A. Jain Letter). Another of Mark's friends, a practicing attorney, writes:

> . . . [I]t was with great surprise and disappointment that I learned from Mark of his current legal troubles. I have always known Mark to be exceptionally responsible so it should come as no surprise that my initial reaction upon hearing of the situation was that the nature of the

> offense is wholly inconsistent with Mark's character and an exceptionally uncharacteristic aberration. Mark explained the charges and described to me what happened at length. I have never heard Mark so utterly despondent. From our discussion and based on our long-standing friendship, I know these charges are a source of genuinely intense remorse and significant embarrassment for him, and he deeply regrets the impact the situation has had on all of those affected by it. At the same time, I know Mark is ready to take responsibility for this situation and I am confident that Mark will not again allow himself to be in a similar predicament.

(T. Seeley Letter). Yet another long-time friend has commented similarly:

> I have been, and will continue to be, proud to call Mark my friend because in all of these years I have never seen him involved in any sort of misconduct or unethical behavior. Through many contexts and stages of life, he has always distinguished himself by his honesty and through the trust he inspires in those around him. As we have grown, I have watched him become a conscientious husband to Jenifer and doting father to [redacted] in addition to the friend he has been to so many people he has met over the years.
>
> . . . I was saddened and truly shocked when Mark admitted guilt in the matters now before you. These are serious matters and he now owes a debt to society. Yet I am convinced that Mark's misconduct was a grave but anomalous error in judgment rather than an indication of his character or normal patterns of behavior. He will be able to repay his debt most effectively by returning quickly to a normal life – a life where [he] can deploy his prodigious intellectual talents in the service of those around him.

(S. Schiesel Letter). Another writes:

> . . . I have known and observed Mark since he was a boy. I have followed with pride his academic successes at Yale and further as a Yale JD-MBA graduate. He is a hard working, highly intelligent scholar, a responsible citizen, a wonderful husband, a nourishing

> parent, an ideal son, a hard working employee and a highly ethical ands outstanding citizen.
>
> I was shocked to learn of the charges against Mark, as he has always been an upright, law-abiding person. As President of an investment advisory firm, I know ours is a precarious profession. The incident with which he is charged, is very unlike Mark's character as I have known it for years. But, mistakes happen and no one is perfect. Whether from a lapse of judgment, a misguided action or a misplaced trust, thesincident obviously was a "Mistake". A "one-off" mistake in an otherwise unblemished career and life. Mark has already paid dearly for his mistake. He has been deprived from a career he passionately pursued, has suffered severe emotional and physical stresses, has seen his personal life unravel, his family life come under tremendous pressure and has been engulfed with tremendous shame and humiliation.

(H. Bibi Letter).

Mark's great sense of shame and remorse for his actions has been palpable to those around him:

> Mark has already been significantly punished. He feels extreme shame and embarrassment. He can never return to the life he built for himself. All the studying in school that led to his career, and allsthe hard work he put into that career are now all gone. Thankfully he put the most value in his life on his family. His love for Jen and his two children are paramount and will get him through this, but there is no doubt he has been punished by this whole ordeal.

(A. Kayne Letter). Likewise, Ralph Nader, a long-time friend of Mr. Megalli's and his parents, writes:

> This is only the second time I have written a letter asking a judge to be lenient in sentencing a defendant. I do so because I have known Mark Megalli (and his family) since Mark was four years old, have

> observed his remarkable record as a student, the great respect with which his teachers, classmates and colleagues have regarded him, and the strong, enduring family bonds that have supported him throughout his life.
>
> * * *
>
> Mark's remorse is real and deep. His immediate and parental family knows he is sorry for his misdeeds. His career in the securities industry is gone. He knows the high hurdles, both formal and informal, that his punishment and rehabilitation will require him to surmount.
>
> He reprimands himself and strives to come out a much better and socially productive human being with steady support by family and friends for the contributions he can and will make to society. He makes no excuses for himself.

(R. Nader Letter).

It is abundantly clear, however, that Mark is admired and loved by a great many people who will continue to support him as he rebuilds his life. As Mark's brother Michael writes:

> One blessing of this entire experience has been watching the great outpouring of support that Mark has received from his friends. People love my brother. They know him as I know him: an engaged listener, a devoted friend, and a great raconteur who always has a captivating, hilarious story to tell. They also know him to be brilliant, even-keeled, wise and honorable.
>
> * * *
>
> . . . Mark is guilty of an error of judgment, based in misplaced trust. It's a mistake he will regret for the rest of his life. It's a mistake that

> has already cost him the career he loved, his ability to provide for his family, his reputation, and many months of sleep.
>
> I have to admit I have high hopes for Mark's next chapter. The process of remaking his life will take years, but I know he'll meet the challenge with the intelligence, determination, courage and integrity he has always embodied.

(Michael Megalli Letter).

Mr. Megalli has suffered personal humiliation, economic devastation, professional dislocation and permanent incapacitation as a result of his misconduct. The life he has worked for over the past 42 years is irrevocably altered, regardless of whether he is incarcerated. Justice, fairness and proportionality each dictate that the Court take this into account in ruling that the fact of his felony conviction, with its array of highly punitive consequences beyond custodial exposure, is effectively punishment enough.

IV. CONCLUSION

A substantively reasonable sentence here involves a substantial guideline variance, coupled with no fine. Considerations of proportionality, the facts and circumstances of Mr. Megalli's offense conduct (specifically including his negligible personal gain), and the terrible collateral consequences he has either already or is about to suffer, readily establish this to be an insider trading prosecution replete with mitigation.

Dated: June 26, 2014

Respectfully submitted,

By: /s/ Paul N. Monnin

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LOCAL RULE 7.1D CERTIFICATE

The undersigned hereby certifies that the foregoing has been formatted in Times New Roman font, 14-point type, which complies with the font size and point requirements of Local Rule 5.1B.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a copy of the foregoing document was electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to all attorneys of record. A non-redacted copy of this document has also been electronically served on counsel for the government.

Dated: June 26, 2014

By: /s/ Paul N. Monnin
Paul N. Monnin

CERTIFICATE OF SERVICE

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

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This 29th of December, 2017

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Regional Trial Counsel