

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

DONALD S. TOTH and JAMES A. NASH,

Defendants.

Civil Action File No.

1:14-cv-026216

FIRST AMENDED COMPLAINT

Plaintiff, Securities and Exchange Commission (the “Commission”), files its first amended complaint and alleges that:

OVERVIEW

1. This matter involves insider trading by Donald S. Toth (“Toth”) and James A. Nash (“Nash”) in the common stock of O’Charley’s, Inc. (“O’Charley’s”) based on material nonpublic information about the tender offer to O’Charley’s from Fidelity National Financial, Inc. (“FNF”).
2. On February 6, 2012, O’Charley’s and FNF announced the execution of a merger agreement, pursuant to which FNF agreed to acquire all of the

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

3. On December 2, 2011, more than two months prior to the Announcement, Toth, an accountant, met with a client who a member of the Board of Directors of O'Charley's ("Board Member"). At that meeting, Board Member shared in confidence with Toth material nonpublic information concerning the impending O'Charley's transaction for purposes of obtaining tax planning advice from Toth.

4. Within days of the tax-planning meeting with Board Member, Toth breached his duty as an accountant to Board Member and purchased 5,000 shares of O'Charley's which he sold shortly after the Announcement for profits of \$19,036.

5. Toth also breached his duty as an accountant to Board Member and shared material nonpublic information concerning the O'Charley's transaction with two of his clients, Nash and Blair G. Schlossberg ("Schlossberg").

6. Shortly thereafter, Nash purchased 10,000 shares of O'Charley's, which he sold shortly after the Announcement for profits of \$38,541.

7. Nash thereafter shared material nonpublic information concerning the O'Charley's transaction that he knew had been provided to him in breach of a fiduciary duty with two other individuals who collectively purchased 3,500 shares of O'Charley's common stock. These individuals each sold their shares shortly after the Announcement for total profits of \$13,959.

8. Schlossberg shared material nonpublic information concerning the O'Charley's transaction with his longtime business partner, Moshe Manoah ("Manoah"), and the two jointly invested in O'Charley's stock, ultimately purchasing 24,337 shares of O'Charley's which they sold shortly after the Announcement for profits of \$92,717, which they split equally, each taking \$46,358.50.

9. As a result of this conduct, Defendants have engaged and, unless restrained and enjoined by this Court, will continue to engage in acts and practices that constitute and will constitute violations of Section 10(b) and 14(e) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. §§ 78j(b) & 78n(e)] and Rules 10b-5 and 14e-3 thereunder [17 C.F.R. §§ 240.10b-5 & 240.14e-3].

JURISDICTION AND VENUE

10. The Commission brings this action pursuant to Sections 21(d) and 21(e) of the Exchange Act [15 U.S.C. §§ 78u(d) and 78u(e)] to enjoin Defendants from engaging in the transactions, acts, practices, and courses of business alleged in this complaint, and transactions, acts, practices, and courses of business of similar purport and object, for civil penalties, and for other equitable relief.

11. This Court has jurisdiction over this action pursuant to Sections 21(d), 21(e), and 27 of the Exchange Act [15 U.S.C. §§ 78u(d), 78u(e), and 78aa].

12. Defendants, directly and indirectly, made use of the mails, or the means and instrumentalities of interstate commerce in connection with the transactions, acts, practices, and courses of business alleged in this complaint.

13. Certain of the transactions, acts, practices, and courses of business constituting violations of the Exchange Act occurred in the Northern District of Georgia. Defendants reside in the Northern District of Georgia.

14. Defendants, unless restrained and enjoined by this Court, will continue to engage in the transactions, acts, practices, and courses of business alleged in this complaint, and in the transactions, acts, practices, and courses of business of similar purport and object.

DEFENDANTS

15. Donald S. Toth, age 59, resides in Atlanta, Georgia and is a certified public accountant who has been licensed with the state of Georgia since 1980.

16. James A. Nash, age 54, resides in Buford, Georgia and owns a residential homebuilding company. He has been a friend and client of Toth for approximately fifteen years.

RELEVANT ENTITY

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

FNF'S TENDER OFFER TO O'CHARLEY'S

18. On October 24, 2011, FNF made an indication of interest to the O'Charley's Board of Directors relating to a possible acquisition of all of the outstanding common stock or assets of O'Charley's.

19. On October 25, 2011, the O'Charley's Board of Directors convened a special meeting with outside legal counsel to consider the indication of interest from FNF. At that meeting, the O'Charley's Board authorized the engagement of a financial advisor and formation of a Strategic Review Committee.

20. On November 23, 2011, O'Charley's and FNF executed a confidentiality and standstill agreement, pursuant to which O'Charley's would provide limited due diligence to FNF to allow FNF to consider improving its proposal for acquiring O'Charley's.

21. Negotiations between O'Charley's and FNF continued through December 2011, January 2012, and early February 2012.

22. On February 6, 2012, before the opening of the markets, O'Charley's and FNF each issued a press release announcing the execution of a merger agreement, pursuant to which FNF agreed to acquire all of the outstanding shares of O'Charley's common stock for \$9.85 per share through a tender offer. The acquisition price represented a premium of approximately 42% over the closing price of \$6.92 on the prior trading day.

23. The market reacted favorably to the Announcement. In the three months prior to the Announcement, O'Charley's average closing share price was

\$6.07 with an average daily trading volume of approximately 87,000 shares. On February 6, 2012, O'Charley's share price closed at \$9.84, and trading volume increased to over 17.4 million shares.

**TOTH'S MISAPPROPRIATION OF MATERIAL NONPUBLIC
INFORMATION AND SUBSEQUENT TIPPING**

24. On December 2, 2011, Toth met with Board Member, his longtime client who was a member of the O'Charley's Board of Directors, for a regular tax planning meeting.

25. During the tax planning meeting, Board Member discussed with Toth the impending O'Charley's transaction for the purpose of obtaining Toth's advice on mitigating his personal tax liability.

26. Based on the longstanding accountant-client relationship between Toth and Board Member, Toth knew that the information shared by Board Member during the tax planning meeting, including the information concerning the impending O'Charley's transaction, was confidential.

27. As a licensed certified professional accountant, Toth was prohibited from disclosing confidential information pertaining to a client obtained in the course of performing professional services without that client's consent.

28. Board Member did not consent to the disclosure of the information concerning the acquisition of O'Charley's.

29. Given his years of experience and licensure as a certified public accountant, as well as his history with Board Member, Toth knew or was reckless in not knowing that dissemination of information shared by Board Member, including the information concerning the impending O'Charley's transaction, would violate his fiduciary duty to Board Member.

30. On Friday, December 2, 2011, within an hour of his tax planning meeting with Board Member, Toth contacted his financial advisor and began making plans to purchase shares of O'Charley's for his own benefit.

31. The following trading day, on Monday, December 5, 2011, Toth purchased 5,000 shares of O'Charley's common stock at \$6.0235 per share, for a total purchase price of \$30,117.50, based on the material nonpublic information he misappropriated from Board Member.

32. Between December 2, 2011 and December 6, 2011, Toth met with his longtime friend and client, Nash. Disregarding the duty of trust and confidence he owed Board Member, Toth tipped Nash that he had spoken with an insider who knew that O'Charley's was going to be acquired.

33. Toth and Nash had been friends for approximately fifteen years. Toth performed personal and business accounting services for Nash, his family members, and the LLCs that Nash controlled.

34. On or about December 6, 2011, Toth met with his longtime client, Schlossberg. Disregarding the duty of trust and confidence he owed Board Member, Toth communicated information to Schlossberg concerning the impending O'Charley's transaction that Schlossberg knew or had reason to know was nonpublic and had been acquired directly or indirectly from an insider.

35. Toth had been Schlossberg's personal accountant for several years and also performed accounting services for various LLCs controlled by Schlossberg. During December 2011, Schlossberg and his business partner, Manoah, were in the process of conducting a real estate transaction for which Toth would be performing accounting services.

36. While in possession of material nonpublic information communicated by Toth regarding the impending acquisition of O'Charley's, which Schlossberg subsequently communicated to Manoah, Schlossberg and Manoah jointly invested in O'Charley's stock using a brokerage account held in the name of Manoah's

wife, with each partner paying for approximately half of the purchase price and sharing equally in any profit or loss.

37. Between December 7, 2011 and January 23, 2012, while in possession of material nonpublic information communicated to him by Schlossberg regarding the impending acquisition of O'Charley's, Manoah purchased 24,337 shares of O'Charley's common stock for a total purchase price of \$146,240.56.

**NASH TRADES BASED ON MATERIAL
NONPUBLIC INFORMATION AND TIPS OTHERS**

38. While in possession of material nonpublic information he learned from Toth regarding the impending acquisition of O'Charley's, Nash purchased 10,000 shares of O'Charley's common stock for a total purchase price of \$59,648, on December 7, 2011.

39. Based on the nature of the information and Nash's knowledge that the material nonpublic information came from an insider, Nash knew or should have known that Toth violated a fiduciary duty or duty of trust or confidence by disclosing that information to Nash.

40. Within days of purchasing shares of O'Charley's common stock, Nash had dinner with a longtime friend, Tippee A. Nash tipped Tippee A that he had

purchased shares of O'Charley's based on material nonpublic information concerning the acquisition that he obtained from Toth.

41. On December 10, 2011, while in possession of material nonpublic information communicated by Nash regarding the impending acquisition of O'Charley's, Tippee A purchased 3,000 shares of O'Charley's common stock for a total purchase price of \$17,259.

42. On or around December 2011, Nash also tipped another friend, Tippee B, that he had purchased shares of O'Charley's based on material nonpublic information concerning the acquisition that he obtained from Toth.

43. On December 21, 2011, while in possession of material nonpublic information communicated by Nash regarding the impending acquisition of O'Charley's, Tippee B purchased 500 shares of O'Charley's common stock for a total purchase price of \$2,920.

44. On February 6, 2012, the day of the Announcement, Toth, Nash, Manoah, Tippee A, and Tippee B each sold all of their shares of O'Charley's common stock, realizing the following profits, respectively:

- a. Toth realized profits of \$19,036.
- b. Nash realized profits of \$38,541.

- c. Manoah realized profits of \$92,717. Manoah and Schlossberg split the profits equally, each taking \$46,358.50.
- d. Tippee A realized profits of \$12,132.
- e. Tippee B realized profits of \$1,827.

COUNT I – INSIDER TRADING

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

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

46. During December 2011, Defendants, in connection with the purchase or sale of securities described herein, by the use of the means and instrumentalities of interstate commerce or by use of the mails, directly or indirectly:

- a. employed devices, schemes, and artifices to defraud; or
- b. made untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

- c. engaged in acts, practices, and courses of business which would and did operate as a fraud and deceit upon the purchasers of such securities, all as more particularly described above.

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

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

COUNT II – INSIDER TRADING

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

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

50. By December 2011, substantial steps had been taken to commence a tender offer of the securities of O'Charley's by FNF, including, among others: (1) meetings between senior management of O'Charley's and FNF; (2) retaining financial advisors and legal counsel; and (3) the execution of a confidentiality and standstill agreement.

51. At the time Defendants purchased O'Charley's securities, they were in possession of material information regarding the tender offer for O'Charley's by FNF, which they knew or had reason to know was nonpublic, and which they knew or had reason to know was acquired directly or indirectly from an officer, director, partner, or employee or other person acting on behalf of the issuer.

52. Toth communicated to Nash and Schlossberg the material nonpublic information relating to the O'Charley's tender offer, and thereby caused Nash and Schlossberg to trade, when he knew that such information came from an officer, director, partner, or employee or other person acting on behalf of the issuer and it was reasonably foreseeable that such communication was likely to result in Nash and Schlossberg purchasing O'Charley's securities in violation of Section 14(e) and Rule 14e-3.

53. Nash communicated to Tippee A and Tippee B the material nonpublic information relating to the O'Charley's tender offer, and thereby caused Tippee A and Tippee B to trade, when he knew or had reason to know that such information came from an officer, director, partner, or employee or other person acting on behalf of the issuer and it was reasonably foreseeable that such communication was likely to result in Tippee A and Tippee B purchasing O'Charley's securities in violation of Section 14(e) and Rule 14e-3.

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

PRAYER FOR RELIEF

WHEREFORE, Plaintiff the Commission respectfully prays for:

I.

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

II.

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

III.

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

IV.

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

V.

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

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

Dated: August 14, 2014

Respectfully submitted,

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