04-22-14 2nd Cir - Oral Argument

JUDGE WINTER: Okay.

JUDGE PARKER: The next case is United States versus Newman and Chiasson.

MARK POMERANTZ: May it please the Court, I'm Mark Pomerantz. I represent the appellant, Anthony Chiasson. I'd like to get right to the main legal issue that we've raised for the Court.

Anthony Chiasson is a remote tippee. He had no involvement with the insiders at Dell and NVIDIA. He received information fourth-hand. And, when it reached him, he knew simply that it came from inside those companies. He did not know that the insiders had disclosed the information in exchange for career advice, friendship, or indeed any other form of personal benefit.

The trial judge held, over objection, that proof of his knowledge was not required. When Judge Sullivan instructed the jury, he did tell the jury that the insiders had to receive or anticipate receiving some personal benefit. But he held that the defendants did not have to know about the receipt of the personal benefit. And so, the jury was not required to find that knowledge.

We believe this was error. Five district judges in this circuit--Judge Sweet in State Teachers against Fluor, then-District Judge McLaughlin in the Santoro case, Judge Holwell in Rajaratnam, Judge Rakoff in the Whitman case, and most recently Judge Gardephe in the Martoma case--have held that a tippee does have to know that insiders exchanged information for personal benefit, and that jurors have to be so instructed.

JUDGE PARKER: Can I correct it? In Martoma, the government went along with that charge.

MARK POMERANTZ: I believe, Your Honor, that, in Martoma, the government submitted a different charge, and Judge Gardephe went with the version of the charge that we believe was the correct version. But I--

JUDGE PARKER: Which is that the defendant had to know of the [UNINTEL].

MARK POMERANTZ: That the defendant had to know. To our knowledge, Your Honor, Judge Sullivan is the only judge to have held to the contrary. And that's because--

JUDGE HALL: Sorry, back to that point,

the reason that the defendant has to know that is because that's how--Dirks tells us that that's the only way to prove breach of duty?

MARK POMERANTZ: No, Dirks tells us that tippee liability is derivative. I'll retreat for a moment; I know that Your Honor is familiar with this, but, of course, there's no generalized duty to the marketplace. Chiasson is a stranger to those who are on the other side of his trades. He's a stranger to Dell and NVIDIA. He owes no duties of his own to refrain from trading.

And, indeed, the law is clear that the mere receipt of material nonpublic information, even material nonpublic information that comes to a person from an insider, doesn't give rise to any duty to abstain from trading.

Because liability for the tippee is derivative, it means there has to be a guilty tipper. If the tipper engages in a fraudulent fiduciary breach, of which the tippee has knowledge, the tippee, in effect, becomes an accessory after the fact in the tipper's fraudulent fiduciary breach.

And the relevance of personal benefit and the knowledge of personal benefit is that not

every breach of duty opens the door to insider trading liability. Dirks is quite clear on this. Dirks says--

JUDGE HALL: So your answer to my question is basically yes.

MARK POMERANTZ: Yes. Dirks says there has to be a fraudulent fiduciary breach. And Dirks goes on to define a fraudulent fiduciary breach in terms of the tipper's exchange of information for personal [UNINTEL].

And that, after all, was precisely the fraudulent fiduciary breach that the government was attempting to prove in this case. And it's precisely that fraudulent fiduciary breach that Judge Sullivan submitted to the jurors and said, "You have to find first that the tipper engaged in a fraudulent fiduciary breach." And he defined it correctly.

When he told the jury, "You have to find the tipper has engaged in a fraudulent fiduciary breach," he incorporated all of the ingredients of a fraudulent fiduciary breach identified by the Dirks court: the existence of a confidential relationship, a relationship of trust and confidence, the breach of a duty of

confidentiality, and the anticipation or the receipt of personal benefit.

So, that's what constitutes the fraudulent fiduciary breach that was alleged. But when it came to the tippee's knowledge of a fraudulent fiduciary breach, Judge Sullivan left a piece out of the equation. He left out of the equation the knowledge that the tipper was receiving some form of personal benefit. And that is what the Dirks court says takes a breach of confidentiality and transforms it into a fraudulent fiduciary breach.

JUDGE HALL: So, is that the only--excuse me; go ahead.

JUDGE PARKER: You had proved--help me recall this--that there were other disclosures of nonpublic information from Dell that was routine. What--flesh that out for me.

MARK POMERANTZ: Yeah. The record was replete, Your Honor, with the fact that Dell and NVIDIA were leaky companies, and that all kinds of material information reached the defendants, information that related to earnings, that related to margin.

JUDGE PARKER: So, how does this

information differ from the information that they got [UNINTEL]?

MARK POMERANTZ: Well, I think that was the point of the defense, Your Honor, is that there was no significant difference. And what it illustrates is that information--confidential information, material information--is the coin of the real in the securities business. And much information reaches portfolio managers like Mr. Chiasson, like Mr. Newman, without any indication that it has been exchanged for personal benefit.

So, the relevance of it was: you can't infer from simply the fact that information, indeed sensitive information, indeed confidential information--you cannot infer from the fact that it has reached a third party, a portfolio manager--you can't infer from that fact alone that some form of personal benefit to the insider was exchanged for that information.

And that's the touchstone here. It's the touchstone not only under Dirks and follow-on cases, Bateman Eichler, which we cite in the brief. It's not only the securities law. It's general principles of criminal law that support our argument.

Where you have a defendant like Chiasson, who is alleged to be a secondary actor, to be guilty of a crime because he was a participant in the insider's crime, then it's--I won't say [UNINTEL] book law, but I think well settled law that what the secondary actor has to know are all of the circumstances that make his participation participation in a crime.

And one of those circumstances was the exchange for personal benefit. If the insiders had not exchanged information for personal benefit, the government concedes there is no crime here. But the disjuncture, the oddity, is, although the government acknowledges that receipt of personal benefit, or the anticipation of personal benefit, has to be an ingredient of the tipper liability. That's what makes the tipper's conduct criminal.

And even though the government concedes that the tippee has to know of the fraudulent fiduciary breach, they say it's okay to leave that piece out of the equation. And we say it's not okay. It's not okay under Dirks; it's not okay under general principles of criminal law; and it's not okay under principles of willfulness

in cases like Excitement [VIDEA?] and Morissette that we cite in the brief. I see my bell is--

JUDGE PARKER: [ANSWER ME THIS?]--[UNINTEL] and Dirks, as I recall, were civil cases.

MARK POMERANTZ: Yes.

JUDGE PARKER: So, is the principle different with respect to civil cases as opposed to criminal prosecutions?

MARK POMERANTZ: We think that the arguments we're making apply equally in the civil context, with one caveat: there is the formulation in Dirks where the Dirks court speaks of the tippee's knowing or should-have-known of the tipper's fraudulent fiduciary breach. It may be that, in a civil case, a should-have-known is sufficient.

But for purposes of criminal liability--and this is, I think, undisputed here--Judge Sullivan charged the jury with the government's consent that the standard of knowledge was knowledge, not should-have-known. And what he listed was what the defendant has to know.

He did charge the jury that a defendant has to know of a simple breach of

confidentiality. But, when he made that charge, he's saying that a defendant has to know facts that don't constitute a fraud and don't constitute a crime.

JUDGE HALL: Is the only way to have a fraudulent breach of the duty that the tipper receives something of value?

MARK POMERANTZ: Well, that is certainly the breach and the definition of the breach that's identified in Dirks. And in--

JUDGE HALL: Yeah. Does Dirks give an example? Or is Dirks the [UNINTEL] the profits on that [UNINTEL]?

MARK POMERANTZ: Yeah. For purposes of this case, Your Honor, the answer doesn't matter, because that--it's the Dirks definition of a fraudulent fiduciary breach that was the fraudulent fiduciary breach that got tried in this case.

That's the fraudulent fiduciary breach that the government attempted to prove; that's why you've had all the evidence about career advice and friendship. That's the fraudulent fiduciary breach of the tipper that was given to the jury as an essential ingredient.

So, if--I can't conceive readily of a fraudulent fiduciary breach in the insider trading context by an insider that would qualify without the exchange of personal benefit that Dirks contemplates. But even if, theoretically, there's another flavor of fraudulent fiduciary breach that qualifies, that's not the one that was at issue in this case. At issue in this case was--

JUDGE HALL: So, what if the--

MARK POMERANTZ: Classic Dirks.

JUDGE HALL: What if the defendant, the tippee or the derivative tippee, thinks, "Boy, you know, I've found a well here. This--great information keeps flowing, and we get it periodically. This is too good to be true."

Does that approach knowledge of the source being--doing something that is a fraudulent breach of confidential duty? Or is he just talking in his sleep and his wife's passing it on to somebody?

MARK POMERANTZ: Well, we can certainly imagine cases where the circumstantial evidence is so compelling that the government can credibly argue that a defendant did know that the insider

must have exchanged this information for personal gain. But, two points.

One: this is not such a case, and that is where the relevance of the other information comes in. And second, even if it were such a case, that theory was just never given to the jury. We could never litigate the issue of whether Mr. Chiasson knew about personal benefit, because Judge Sullivan said, "It's not a defense; I'm not submitting it to the jury," so we couldn't try it; we couldn’t sum up on it; we couldn't litigate the issue.

So, even if one could imagine a set of circumstances that kind of take this to the edge, that's not this case and it's not the basis on which the [UNINTEL].

JUDGE PARKER: Did the government try to prove that he knew about some sort of personal benefit?

MARK POMERANTZ: The government did not try and prove that Mr. Chiasson knew about personal benefit, because--well, A, there was no--whether they wanted to try or they didn't, there was no such proof. I mean, you know, the evidence just wasn't there.

I'm not suggesting that the government had proof of knowledge of personal benefit that it kept in its pockets. It didn't prove it. And Judge Sullivan didn't require the government to prove it. So, the issue, you know, dropped out of the case when the charge was given to the jury.

And it is an unfortunate circumstance, because we believe that the evidence was undisputed that Chiasson didn't know and couldn't have known. The government's main cooperator as Chiasson, Sam Adondakis, testified that he didn't know that the tippers, the insiders, were exchanging information for any form of personal benefit.

It was undisputed that all of the information that came to Chiasson came through Adondakis. So, if Adondakis didn't know, it's hard to understand how Chiasson would know. And it's impossible to understand the government's harmless error argument. But I'll leave that.

JUDGE HALL: Thank you, Mr. Pomerantz.

JUDGE PARKER: Thank you. Thank you, Mr. Pomerantz.

JUDGE HALL: You've reserved two minutes for rebuttal. Mr. Fishbein?

STEPHEN FISHBEIN: Thank you. May it please the Court, Stephen Fishbein. I represented Todd Newman at trial and on this appeal. The evidence at trial was insufficient, under the correct legal standard, to convict my client. And I'm going to address both knowledge of the benefit and also whether there was a breach or a benefit in the first place.

Starting with knowledge of benefit, there was no proof--Judge Parker, I think you asked the question--that Todd Newman knew of any benefit to any of the corporate insiders. And I should point out that we made clear at the beginning of this case what the correct legal standard was. We put it in our jury charge; we argued it to the judge.

The government knew full well, throughout this trial, that we would be pressing that issue. They knew full well that every District Court had required knowledge of benefit. The judge did not decide what the jury charge would be until the close of the government's case.

So, the government had every incentive to put on every piece of evidence it had to show

that Todd Newman knew about a benefit, and it came up with nothing. There was no direct evidence of that.

On appeal, they shift gears and they argue for what's in effect a double inference. They say that the circumstances suggest that the information was confidential and that it was not authorized to be disclosed. They then want to take a leap and say that, if you know that information came from the inside, and that it wasn't authorized, you must know about a benefit.

JUDGE PARKER: What was the government's theory about how you can tell the difference between nonpublic material information that you can trade on and nonpublic material information that you go to jail if you trade on? How did they offer that?

STEPHEN FISHBEIN: My interpretation was, "I know it when I see it." We did not think there was any bright line, and that was really our point. And I'd like to get into some detail on that.

You know, they say that the information that you can't trade on that came through Goyal and Tortora, you know, was quarterly information.

Well, the leaks, where there was no dispute that there wasn't any personal benefit, that was also quarterly information. It was accurate.

Let me give some specific examples. We proved leaks in this case. And, again, the premise here--it was agreed by everyone, the witnesses and everyone, that these leaks were not in exchange for personal benefit. And yet there were specific numbers: gross margin, 18 percent. Operating expense, 12 percent.

I'll give one ex--one of the leaks was an earnings-per-share number of $0.30 for the quarter. Now, Mr. Tortora, the government's star witness, said that, when he got this supposedly bad information from--on Dell, he never got earnings-per-share. He only got the ingredients for earnings-per-share. And yet we have an email that went to my client saying that a specific earnings-per-share number came out of Dell from an insider six days before the earnings release.

And what that shows is that, if you're a portfolio manager and you're receiving information that maybe you believe that not everybody has, and that it came from the inside, that is at least equally consistent with a leak

for which there is no personal benefit as there being a personal benefit.

And I think the law is very, very well established that, if facts are equally consistent with an innocent explanation and a guilty one, that does not support proof or an inference beyond a reasonable doubt.

And just to put a point on this, I would urge the Court to take a look at trial transcript page 688. It's Appendix 597. And there, again, the star witness, Justin Tortora, who was the conduit for this information, he said it was routine. It happened repeated times where he would be with management of a company, not only investor relations but management, executives, anybody, and he would--he said, "I got confidential information."

He even said, in his words, "It was information that I knew they shouldn't disclose." And he was asked a very direct question. "Did you give a personal benefit for that?" Answer: "No."

So, in light of the reality that was proved at this case, where inside confidential information comes out of a company not for personal benefit, but for other reasons, you

cannot infer beyond a reasonable doubt that it's only for personal benefit.

Now, I'm sure the government, as they did in their brief, they're going to say, "But Mr. Newman, you know, paid as a consultant one of the intermediaries, Mr. Goyal." That, of course, does not establish that the money was then transferred from Goyal to the insider. And, in fact, in this case, we proved that that was not the case.

JUDGE HALL: Does it only have to be money?

STEPHEN FISHBEIN: It does not only have to be money, no. The Supreme Court says, you know, a reputational benefit that will translate into future earnings. The government's theory with respect to Rob Ray was that it was career advice. But there was zero--zero--testimony that Mr. Tortora ever told Newman, or that Newman knew in any way, shape, or form, that Goyal was given career advice. And I'll come to the sufficiency of the benefit in a minute.

But I think the point that I want to make is that here we know for a fact that Goyal did not give any money to Rob Ray. In fact, he

didn't even tell Rob Ray that he was getting paid.

So, certainly the fact that Diamondback is employing consultants, which they did on a regular course--Goyal's consulting arrangement was set up before Rob Ray was in the picture, so there was nothing suspicious about it when it was originated. So, none of that supports this double inference the government is trying to make to the effect that you can infer a knowledge of a personal benefit.

Let me shift now to sufficiency of the breach to begin with. And let me start with the fact that neither insider here, neither Rob Ray nor Chris Choi, the insider at NVIDIA, has been charged criminally, civilly, or administratively. And, to my knowledge, in the recent spate of insider trading cases by the Southern District, this is the only one in which the insider was not charged with something.

And the reason for that is because, as Mr. Pomerantz said, it's derivative liability. Their whole theory is that the insiders are guilty of a terrible crime. And yet they haven't charged them. And I respectfully submit that the

reason they haven't done that is because, in fact, when you really drill down into the evidence, there is no sufficient evidence of breach or sufficient evidence of benefit.

Now, on breach, the government put in broad confidentiality policies with Dell and NVIDIA saying that all quarterly information is confidential. Now, we know that companies didn't abide by that, because we see all the evidence of leaks.

And in this Court's decision in the Mahaffy case, the Court made very clear that you don't only take into consideration the broad corporate policy, but also if the company took steps to actually keep the information confidential.

Now, here we have the benefit that Rob Ray's boss, the boss of the insider at Dell, testified. And he testified about what's allowed and what's not. And he specifically said that, in the case of modeling, discussions about analyst models, that company insiders are free to sort of give hints and help analysts with their models by saying, "Your model's too high; your model's too low." He said, "We talk about the quarter. We

talk about specific line items."

Now look at what Sandeep Goyal testified as to how he got this information from Dell. His testimony was very, very clear. He said, "I called up Rob Ray. I told him I was working on a model. And that's when I got the information. I didn't tell him I was trading. I just told him I needed help on a model to know whether I'm too high or too low."

So, if you compare what Sandeep Goyal said to Rob Ray, and they were compared against what Rob Ray's boss said was permissible--and this is transcript page 2926, which the government also cites. But I respectfully submit that those--that page and the next one fully support our position. Rob Ray said he was authorized to talk to an analyst about the models and whether the assumptions and their numbers were too high or too low.

I see I've run out of time, but I'll save the rest for rebuttal.

JUDGE HALL: Thank you, Mr. Fishbein. You've reserved two minutes. Ms. Apps?

ANTONIA APPS: May it please the Court, I represent the government on this appeal and I

represented the government below. The District Court properly instructed the jury that they had to find the defendants knew--

JUDGE PARKER: Well, before you get into that, I have something else to ask you. I looked at the--some of the docket sheets in the records and the indictments involving some of the players in this case. So, Adondakis was indicted before Judge Keenan. Tortora was indicted before Judge Pauley; Goyal, I believe, before Judge Forrest, and then Montoya before Judge Gardephe. And then, finally, we get to the men of the cases before-- the defendants, who were before Judge Sullivan.

Can you--and I notice a pattern of when you indict individuals and when you supersede. Can you allay my concern that what the government did was move these indictments around until they got up before--they could get their main case before their preferred venue, which is Judge Sullivan?

ANTONIA APPS: Your Honor, it is not uncommon for the U.S. Attorney's office, when an individual cooperated or is going to plead guilty ahead of time, to put it in the wheel and wheel out, which is what we did with every cooperator

before the four defendants were charged in January of 2012.

At that time, again, it went into the wheel. And the judge that was drawn from the wheel was Judge Sullivan. And that is the judge who presided over the case. It is quite common for the office to, when they have cooperating witnesses, simply to put them in the wheel as they did in this case.

JUDGE PARKER: Then, once you got Judge Sullivan, you superseded with Mr. [STEIN?].

ANTONIA APPS: We did, Your Honor. That, I think, was a different situation. The analyst who was the main cooperator against the subsequent defendant, Mr. Steinberg, was an analyst who was part of the conspiracy and who was charged initially and wheeled out to Judge Sullivan.

There were a whole host of reasons as to why it made sense to supersede Mr. Steinberg into the existing case before Judge Sullivan, not the least of which was judicial efficiencies, in that Mr. Sullivan had--Judge Sullivan, I beg your pardon, had presided over not only a course of the pretrial, enormous amount of pretrial

litigation, but of course a six-week trial in which the issues were the same.

Mr. Steinberg was alleged to be part of the same conspiracy that was tried in front of Judge Sullivan. And many of the witnesses were the same. Jesse Tortora, a cooperating witness, testified in both trials, as did the corporate witnesses. It was a very similar--the evidence that the government put forward in both cases involved a lot of overlapping witnesses, a lot of overlapping testimony, and common issues of law and fact.

JUDGE WINTER: [UNINTEL PHRASE] were you trying the two both together--you're talking about efficiencies that are [UNINTEL] trial. Was there [UNINTEL] Steinberg was [UNINTEL] also. There's no [UNINTEL PHRASE]?

ANTONIA APPS: There was not enough time to try Steinberg with the two defendants Newman and Chiasson who were tried--

JUDGE WINTER: Where are the efficiencies then?

ANTONIA APPS: Your Honor, the same judge who has presided over the trial, and which involved--was a lengthy, complex trial for six

weeks, presided over the same issues and had--

JUDGE WINTER: I know [UNINTEL PHRASE] Second Circuit for almost all of [UNINTEL PHRASE] a lot of [UNINTEL PHRASE] issues that were [UNINTEL PHRASE] Rosenberg, where the government [UNINTEL PHRASE] criminal cases were related.

And at some point, the Southern District changed the rule there, which you [HAD?] [UNINTEL] a criminal case [WERE?] related, and thereby [UNINTEL] the judge, because [UNINTEL PHRASE] Rosenberg case. Now you're trying--you're doing the same thing, but superseding the indictment.

So, under the Rosenberg case, the finding was there was a witness in common, which would [UNINTEL] the case Judge [UNINTEL PHRASE] trial [UNINTEL] Rosenberg's. But your [APPROACH?] [UNINTEL PHRASE].

ANTONIA APPS: I respectfully disagree, Judge Winter. We did--I'm not familiar with the case that you mentioned, but there was not just one overlapping witness. There were numerous overlapping witnesses. This was the same case.

There were certain efficiencies that, to put it into--to supersede Mr. Steinberg into

the existing case, which, of course, the defendants had not at that time been sentenced, it is--the United States Attorney's Office occasionally does exactly this.

Of course, Judge Sullivan, who was presiding, indicated on the record that he had consulted with Chief Judge Preska about whether the supersede--it was appropriate to proceed on the superseder with Michael--the defendant Michael Steinberg, and ultimately ruled that it was appropriate under the local rules to do so.

JUDGE PARKER: And it was just coincidence that the judge--these cases [UNINTEL] sheer coincidence was the one judge on this list who had bought into the government's theory on knowledge of personal gain.

ANTONIA APPS: Your Honor, first of all, if I may--

JUDGE PARKER: [UNINTEL] all the other judges on the list had rejected it, and the government had given it up in the case before Judge Gardephe.

ANTONIA APPS: I'm not sure I understand, Judge Parker, what you mean by "list." But in fact there were other judges in

cases that the defendants routinely ignore: Judge Keenan in Thrasher.

There was a case ruling in [UNINTEL] where it's clear that the judges in those cases held that the government did not need to prove, for purposes of establishing tippee liability, that the defendant knows the circumstances of the initial--of the breach by the original tipper. And so, it is, respectfully, not true that Judge Sullivan is out there alone.

Also, just to address a question that Your Honor, Judge Parker, raised with respect to Martoma, of course, Martoma was a case where the defendant was the first-level tippee who gave their benefit to the tipper. And the fact that the government acquiesced in an instruction and thereby avoided an appellate issue should not be seen as in any way a signal that the government concedes its position.

And clearly, it makes sense for District Judges mindful of not having to retry cases that, when an issue is pending before the Circuit, to adopt a conservative jury instruction--

JUDGE PARKER: But the conservative

instruction was the opposite of what you were insisting in this case was required by the law.

ANTONIA APPS: But--

JUDGE PARKER: And so, I don't understand why anyone is doing a service, I mean to a jurist, where it looks like the government is taking completely inconsistent views on critical information, a critical point of law--and you can see how important it is because we're all concerned about it--for some--

ANTONIA APPS: Wait--

JUDGE PARKER: Very difficult to understand tactical benefit.

ANTONIA APPS: Your Honor, we--

JUDGE PARKER: Ms. Apps.

ANTONIA APPS: Sorry, Judge Parker. But we often take--accept a burden that is higher in a particular case when there's a pending issue for appeal.

For example, in this very case, the jury was instructed that they had to find that the information was a substantial factor as a basis for trading, notwithstanding that, on appeal in the Rajatnaram case, not decided at the time of the Newman trial, the government had

taken the position that it need only be a factor. And so, we often do that.

JUDGE PARKER: You can understand how we're--or at least I'm concerned that the government's position on these key points of law seems to be varying according to which judge you're talking to.

ANTONIA APPS: I respectfully disagree that that is the way it works, Your Honor. We selectively--we may select which issues to litigate in any particular case. Why would--it would make no sense to insist on a jury instruction in Martoma when the defendant is the one who paid the tipper. And that is--it is clearly established that there would be no reason to take that issue on appeal.

JUDGE PARKER: [UNINTEL PHRASE] on the point of law, you'll no doubt win on appeal.

ANTONIA APPS: Well, and--

JUDGE PARKER: Right?

ANTONIA APPS: But we often don't. We often are risk-averse in these situations. There's an enormous amount of resources that go into litigating a particular case.

There are sometimes--for some cases, we

select an issue to take up on appeal that we may not do so in another case, just as I indicated we accepted the higher burden on the known possession of information in this very case, notwithstanding in Rajatnaram, that preceded it, we had opted to challenge the lower burden.

If I may, Your Honor, though, at the end of the day, it does turn on what the answer to the fundamental underlying legal question is. And we think that the District Court properly instructed the jury that they had to find the defendants knew the information was disclosed in breach of a duty of trust and confidence.

And the evidence overwhelmingly supported that finding. The defendants were told they were receiving secret earnings numbers from company insiders before those numbers were released to the public, numbers which were at times accurate to the decimal point.

They received those numbers quarter after quarter after quarter. And they pressed their analysts to get the updates from the company insiders. They were told that the information originated from individuals, employees inside the company with access to the

internal rolled-up numbers. And, while Newman seeks to--

JUDGE PARKER: [UNINTEL] is this argument pointed in the direction that, if the charge were inaccurate, the error would be harmless?

ANTONIA APPS: Your Honor, we certainly make the harmless error analysis. And, in particular, on that point, Newman paid Goyal $175,000 for the information. There is absolutely an inference that he knew Goyal, who was getting the information from someone inside the company, understood that that employee was receiving some kind of benefit. Newman knew that the--Goyal's contact, [UNINTEL]--

JUDGE PARKER: How are we to--help me understand: if this information--if information concerning Dell's earnings is routinely leaked and can be traded on, how do we know--what's the principle--

ANTONIA APPS: I--

JUDGE PARKER: That criminalizes some information, some of this information, and makes virtually indistinguishable information innocuous?

ANTONIA APPS: I'm glad you brought that up, Judge Parker, because the arguments on the leaks are just plain wrong on the facts. And Tortora--to answer some of the questions, the--what the company--Tortora testified that Dell didn't leak the top-level earnings numbers.

You asked Mr. Pomerantz, I believe, "How did the information that the insiders like Rob Ray provided differ from the information that the companies disseminated to the public in an authorized fashion?" And they differed markedly.

Companies routinely talk about general business trends, long-term outlook. Sometimes they use numbers. But sophisticated market professionals like Chiasson and Newman know full well that that is not the same as receiving the revenue or gross margin number before it is released in that quarterly announcement.

And we went through in our briefs and we outlined why those claims that the defendants made were wrong. And, in fact, they, in some sense, an acknowledgement of their own weaknesses when they feel they need to cite information outside the record in order to support that claim.

JUDGE HALL: So, was the [UNINTEL]--

ANTONIA APPS: And it wasn't our--beg your pardon, Judge Hall.

JUDGE HALL: Is the argument that the nature of the information, as you've described it, the specificity and the granularity of it, somehow is proof that it was fraudulently leaked?

ANTONIA APPS: That is one of the factors and one of the elements in this particular case, because, in addition to those factors--and, by the way, it was quarter after quarter after quarter, inconsistent with any notion of accident or mistake by the original tipper. The defendants pressed for that information. They paid for the information.

JUDGE PARKER: Help me understand how that theory is at all [UNINTEL], because it seems to me that it turns most fundamentally on the sophistication and the experience of the tippee. So, if I've been in the business 15 minutes, there's a different criminal standard than if I've been in the business for 15 years, because I'm a relatively young analyst; I don't fully perceive the significance of this.

It may sound--you know, it may be a

little bit unusual, but it doesn't seem criminal to me because it's just like the information that's been flowing over the Autex or flowing over the Bloomberg or what have you all the time.

But then, if I've been in the business for 15-20 years, I'm a supervisor, I'm a--you know, I'm a managing director or an officer, there seems to be a different standard, a different criminal exposure.

I don't know how we can operate--I don't know how we can really go with a regime like that, because, at the end of the day, what--if you follow your position to its logical conclusion, at the end of the day, the person who's likely to be guilty is the person who the government decides to indict.

ANTONIA APPS: Your Honor, first of all, sophistication is clearly not a one-size-fits-all--it's not the only thing that matters. But courts have repeatedly recognized--

JDUGE 1: I was taking--I was teeing off on the answer you gave us.

ANTONIA APPS: It is but one factor. And courts have repeatedly recognized that the sophistication of the defendant is a factor to

take into account. It was taken into account in Obus. It was taken into account in Judge Winter's decision in [LIBERRA?]. It is a factor that's continually taken into account.

In this case, though, that was just one small factor. We didn't even--we barely even touched on sophistication in closing arguments. What we focused on were the facts, the facts of the payments, the fact that Newman was told it came from a company insider who was disclosing it at nights and on weekends, the fact that Chiasson directed his analysts to conceal the source of the information from official company reports.

And, by the way, you know, Mr. Fishbein talked about nights and weekends not being unusual. But if you look at the exhibits the government put into evidence of the calls, Government's Exhibits 26 and 27, for a two-year period, there are 68 calls between Ray and Goyal, and all save one was at night or on a weekend.

And just also there were a couple of matters that the--Judge Parker, that you brought up in--

JUDGE PARKER: Let me ask you this. Why is it, on the issue of whether the tippee's got

to know the personal benefit--explain why Judge Sullivan is right and all of his half-dozen colleagues are wrong.

ANTONIA APPS: Your Honor, as this Court--

JUDGE PARKER: Help me understand that.

ANTONIA APPS: Yes. Your Honor, at this--as this Court held in Obus, and it is consistent with Dirks; this Court held it in [LIBERRA?]; it has held it for decades: the elements of tippee liability are different from the elements of tipper liability.

And what the Court of Appeals in Obus held was, in order to establish tippee liability--and this stems back to [LIBERRA?]--that the tipper breached a fiduciary duty and that the tippee knew of the breach of the fiduciary duty. And that is exactly what the government proved in this case. And, were it otherwise, were there a contrary rule--

JUDGE PARKER: The SEC itself takes the position that Dirks requires knowledge of personal gain.

ANTONIA APPS: I don't believe the SEC has ever taken the position that downstream

tippee requires knowledge of a personal gain. And--but--Your Honor, by the way, since I think what you're alluding to is the defendant's argument about Reg FD, and the [UNINTEL], that's another point, to come back to the leaks.

It's clear that they had no faith--the defendants had no [FACE?] in the record, which was rejected by the jury, as to whether these companies leaked information, because they continually resort to references outside of the record, such as the Regulation FD and its enacting statutes.

But--and one more point on harmless error, Your Honor. With respect to NVIDIA, all you need to do is look at Government Exhibit 806, which is in the record 2109. Mr. Newman received an email the day before an earnings announcement for NVIDIA which said this information, information correct to the decimal point, was coming from an accounting manager at NVIDIA through a friend of mine. That right there is benefit under [JOW?].

JUDGE PARKER: What's the benefit?

ANTONIA APPS: Friendship is a benefit under [JOW?].

JUDGE PARKER: Friendship [UNINTEL]?

ANTONIA APPS: And so, that is count five for Newman and count 10 for Chiasson. And Chiasson--Sam Adondakis testified, at transcript 1878-79, that there was benefit--that the--excuse me, that the information came through a friend. Right there is benefit.

JUDGE PARKER: How does career advice--what's--explain--help me understand the government's career advice.

ANTONIA APPS: Career--the benefit that the government actually proved at trial, the career advice, was far higher than the benefit that was found sufficient in [JOW?].

In [JOW?], a tipper joined a--was recruited to join an investment opportunity, an investment club, and didn't in fact receive a single tip in that investment club. And the Court of Appeals held that the mere opportunity to receive a tip in the future--here we had far more, helping with the resume--

JUDGE PARKER: [UNINTEL] Ms. Apps, what you should do is stand closer to the microphone and keep your voice up. And that way, arguments--this is just hypothetical because you're doing a

fine job--because that way, your arguments go better. Is that career advice?

ANTONIA APPS: I'm not sure that that's good career advice, Your Honor. But, in this case--

JUDGE HALL: [UNINTEL PHRASE] now that he's [UNINTEL].

ANTONIA APPS: Apparently I was talking [UNINTEL]. But in this case, there was so much more. And it was assisting with resumes, putting good words in, sending across stock pitches, which would be used in investment [IN VIEW?], sending a resume to a recruiter. It is clear that it well passes the [JOW?]--

JUDGE PARKER: I'm sorry. I apologize for being facetious. But the underlying problem is that--and this may be, you know, our Court's problem and not yours. But the benefit standard is so soft. You get cases maybe like this one, where it just doesn't seem to amount to anything.

ANTONIA APPS: In which case, it makes no sense to impose--to have liability turn--of the downstream tippee turn on whether they received a benefit. And this point--this is a really important point, because--

JUDGE WINTER: [UNINTEL PHRASE] on this point, isn't it the case that the tipper who delivered the [UNINTEL PHRASE] always [UNINTEL] in the tipper's self-interest to do so? And that seems to be the government's [UNINTEL], the active self. In the [UNINTEL] case, the active self shows the tipper thought the tipper was getting some benefit.

ANTONIA APPS: That is not the government's position, and certainly not the facts of this case, where the defendants pressed for the information themselves and the tipper disclosed it three to five times a quarter for eight quarters in a row.

JUDGE WINTER: [UNINTEL PHRASE] the defendants [UNINTEL PHRASE] if they were actually [BRIBING?] to get it.

ANTONIA APPS: But they were bribing the first-level tippee to get it.

JUDGE WINTER: [UNINTEL PHRASE]

ANTONIA APPS: The--

JUDGE WINTER: Then, I mean, we're [UNINTEL] with Dirks. If you read the Dirks [AMENDMENT?] [UNINTEL PHRASE] it uses the word "guiding principle," has to establish a guiding

principle for people who have--who train all the time.

ANTONIA APPS: And with that--

JUDGE WINTER: [UNINTEL] nonpublic information. It wants to protect [UNINTEL]. And, unless there's some kind of [UNINTEL PHRASE] benefit coming to a tipper, there's nothing [UNINTEL] at all. The tipper will always find it in his or her self-interest to be doing what they're doing. It may be misguided, but they'll find it in there.

ANTONIA APPS: Your Honor, the guiding principle be that when--that the government should prove knowledge of a breach of trust. When you have a case like this one, when that's precisely what the government proved, because Newman paid for the information--you talk about bribing? Newman bribed the first-level tippee. The clear inference from that is that the original tipper was receiving some kind of benefit as well. And--

JUDGE HALL: Could you--

ANTONIA APPS: It's a really important point, too, members of the Court and Judge Winter, Mark Pomerantz opened his argument by

saying that there was no evidence that the tipper knew what information--what the benefit was, so the downstream tippees didn't know what the benefit was that the tipper received.

But as I understand the defendants, they're not even abdicating that the downstream tippee needs to know the kind of the benefit, whether it's chocolates or flowers, only that a benefit is received. And they make the same error in their briefs.

In the reply brief, at pages 24-25 for Chiasson's reply brief, it claims that Adondakis did not know whether the initial tipper benefit, and therefore Chiasson didn't know whether the initial tipper benefit--and again, I think that goes potentially to--

JUDGE WINTER: [UNINTEL PHRASE] going through your charge, the legal issues and putting aside the facts. What does the government, in the case of the derivative tippee, [UNINTEL PHRASE] case, [UNINTEL] misappropriation cases where theft [UNINTEL PHRASE] whether or not they knew about theft, they knew about it.

What does the government have to prove, beyond the fact that a derivative tippee, a

downstream tippee, let's say four levels down, has to believe that the information is nonpublic, in the sense that it's more accurate to the [UNINTEL], that the pricing [UNINTEL PHRASE] does not accurately reflect the information [UNINTEL] tippee has?

Second, go through [UNINTEL PHRASE] irrelevant that [UNINTEL PHRASE]. Third, that the numbers probably came from the company, and that the company had [UNINTEL PHRASE] policy regarding the information. Under the legal theory [UNINTEL PHRASE] prove more than that?

ANTONIA APPS: Well, Your Honor, the government has to prove knowledge of the breach. And here, of course, the [PERFORMERS?] were told that it came from inside the company.

JUDGE WINTER: [UNINTEL PHRASE] came from the company, the company had some confidentiality policy.

ANTONIA APPS: It depends on--I mean, that may or may not be sufficient in the circumstances. Here, of course, there was much more. But knowledge of the breach, I think, fairly understood, means knowledge of [FORWARD?].

JUDGE WINTER: [UNINTEL PHRASE] I

understand your [UNINTEL] there was much more here. I was talking about the legal instructions. [UNINTEL PHRASE] the instructions [UNINTEL] Judge Sullivan, the government's proof would be sufficient for proof of what I just said?

ANTONIA APPS: I'm not sure if we would agree that the "probably came from the company" is sufficient. It depends on the case. But I think it is critical to show that the defendants knew the information was sourced to the company and came directly from company insiders, which was true of every tip in this case, unlike the example--

JUDGE PARKER: [UNINTEL]

ANTONIA APPS: That Mr. Fishbein--sorry.

JUDGE PARKER: [UNINTEL] information is going to come from Dell. So, that's pretty self-evident.

ANTONIA APPS: Not necessarily. There--it's not necessarily true that it comes from Dell, and that there could come from--as an argument the defendants made was that this came from some kind of modeling or sell-side analyst.

But there was direct evidence that this information came from Dell of every tip that came

from the Dell insider. And for NVIDIA, the same is true. Unlike the example that Mr. Fishbein gave, where he talks about the $0.30, that wasn't sourced.

JUDGE WINTER: [UNINTEL PHRASE] in regard to [UNINTEL], I take it my description of what you--what these instructions required as proof [UNINTEL]?

ANTONIA APPS: Again, I think that we view it as a higher burden that we actually had from down--the District Court below.

JUDGE WINTER: [UNINTEL PHRASE]

ANTONIA APPS: Again, I think that, when you have to show that it comes--the defendants know that the downstream tippee--excuse me, the defendants know that the tipper breached a fiduciary duty of trust or duty of trust and confidence, I think you have to show more than it probably came from the company.

JUDGE WINTER: What do you [UNINTEL] that it came from the company? [UNINTEL PHRASE] it came from the company, or most probably came from the company confidentiality policy?

ANTONIA APPS: More than a confidentiality policy. They have to show--we

have to show that, in fact, it was adhered to. And the defendants argued, transcript 3815, that it wasn't enough to show that there was policy but there had to be a breach in fact.

And when companies--what--the argument they made to the jury, when the companies selectively disclose, there's no breach, and they didn't make--they weren't successful.

JUDGE WINTER: But on legal--I'm talking about legal instructions and you're talking about the proof.

ANTONIA APPS: I'm simply saying I think the burden is--that we actually had in the jury charge was slightly higher than as articulated by Your Honor. I don't think we need--we ultimate-- at the end of the day, no Court in this Circuit-- and, respectfully, Obus set forth the legal elements that we need to prove for tippee liability.

And so, those separate elements--and they specifically addressed the level of knowledge in order to be a participant after the fact, and held that we only need to know of the breach of duty, because that is synonymous with fraud, as was shown in this case. Just to this

point of--

JUDGE PARKER: So, why does the Supreme Court, in Dirks, give us a touchstone which says, "This is how you prove breach, actionable breach"?

ANTONIA APPS: For purposes of tipper liability, one must prove benefit. But, as the Seventh Circuit recognized in Evans, at page 324, despite the derivative nature of the liability, tipper and tippee liability differ. They have different elements. That is fundamental, that they have different elements. Every Court that has interpreted Dirks has found separate elements for tipper and tippee liability.

And Dirks itself failed to take the opportunity the defendants so wish they had of saying that knowledge by the tippee of benefit is required, notwithstanding Dirks addressed that you have to have benefit for tipper. It did not go additionally and say you have to have knowledge of the benefit. It said only knowledge of the breach of trust.

One point--this is very--the--I want to come back to the chocolates and flowers point, because, in the brief, at pages 24-25, in saying

that--

JUDGE WINTER: Doesn't Dirks say that the breach of trust involves getting a benefit?

ANTONIA APPS: For purposes of tipper liability, Your Honor. But, you know, the element--and O'Hagan talked about what it is. Although a misappropriation case, O'Hagan talked about the fact that the deception was in the--

JUDGE PARKER: Judge Winter's--

ANTONIA APPS: Sorry, Judge Winter. I didn't see.

JUDGE WINTER: I'm sorry. ANTONIA APPS:

ANTONIA APPS: I apologize. I couldn't see you talking there.

JUDGE WINTER: Oh, no, don't apologize. Talk about what you're talking about.

ANTONIA APPS: Did you have a question, Your Honor? I--

JUDGE WINTER: No. [UNINTEL]

ANTONIA APPS: Okay. To this point, they say that Adondakis didn't know whether there was a benefit received. But, in fact, the question in--at the appendix cite that they put in there, at 1190, was whether Adondakis knew what the tipper received, a fundamentally different

proposition, and not even one advanced--

JUDGE PARKER: [UNINTEL PHRASE] the government is resisting so much on the proposition that the person you're trying to convict has to know of the breach?

Because, you know, there--we sit in the financial capital of the world. And the amorphous theory that you have, that you've tried this case on, gives precious little guidance to all of these institutions, all of these hedge funds out there who are trying to come up with some bright line rules about what can and what cannot be done.

And your theory leaves all of these institutions at the mercy of the government, whoever the government chooses to indict, you know, how big the fund is. You know, it's a billion-dollar fund, so the gain was $50 million, it looks huge, and the jury will--eyes will [UNINTEL] over and so forth.

Isn't the whole community, the legal community and the financial community, served by having a rule that says the person you all want to send to jail has to know of the benefit?

ANTONIA APPS: Your Honor, the bright

line that the legal community currently has, and has had since the 1990s, is that the defendant, the downstream tippee, know of the breach of trust. That is the bright line that the country-- that New York has been operating under for decades, and it is the appropriate bright line in this case. To apply another--

JUDGE PARKER: So, [UNINTEL] the breach of trust?

ANTONIA APPS: For purposes of tipper liability--

JUDGE PARKER: [UNINTEL]

ANTONIA APPS: For purposes of tipper liability, the government must establish that--

JUDGE PARKER: What are the elements of breach of trust that the downstream tippee has to know?

ANTONIA APPS: That the--

JUDGE PARKER: And I agree it was charged you have to know there was a breach of trust.

ANTONIA APPS: That--

JUDGE PARKER: How does the government prove the breach of trust that the downstream tippee has to know?

ANTONIA APPS: That the disclosure of the information was unauthorized in contravention of the policies and the way they operate in principle, as written and in fact. And so, the argument that the defendants make on appeal, that they unsuccessfully made below, that a company like Dell leaks everywhere in selective disclosures, that goes to whether or not the company actually insists that the information is not disclosed.

It wasn't proved--the government proved that Dell didn't commit those kinds of disclosures, didn't disclose the topline earnings numbers. Yes, Dell talks to investors, all investors, about low-level information. But very different from the high-level information that was in fact disclosed in this case. And that is critical.

The defendants attempted to confuse the jury by saying that all this information was leaked, and it is--it was not. And we rebut each of those points in our briefs, Your Honor.

JUDGE PARKER: Now--

ANTONIA APPS: But fundamentally, the tips here were so--the defendants were told,

"This information came from company insiders." It was, again, information that was accurate to the decimal point.

And an example--just an example of the--to show that this information was not leaked, on the quarter in question that is part of the substantive, August of 2008, when Dell released its earnings numbers, the stock plummeted by 14 percent in a single day based on that information, showing that there wasn't a selective disclosure, as the defendants contend, of the information.

There was a couple of other points I wanted to address. I know I'm--I see that I'm out of time. But fundamentally, Your Honor, if I may just say that, you know, Obus set forth the elements of tippee liability, which differ from the elements of tipper liability.

JUDGE WINTER: [UNINTEL PHRASE]

ANTONIA APPS: It was, but it explicitly held that it applied to misappropriation and classical. And, by the way, Your Honor, the Courts have not--Obus was not alone in that, because Dirks, which was a classical case, has often been looked at as creating the elements for

tippee liability.

It only makes sense to harmonize that and have those elements of tippee liability be the same for classical and for misappropriation. Otherwise, we're left with a rule--to come back to Judge--

JUDGE WINTER: Well, that's fine. That's fine. It's just that, in misappropriation cases, the [UNINTEL PHRASE] of the information [UNINTEL] by the tipper.

ANTONIA APPS: I--

JUDGE WINTER: The tipper [UNINTEL PHRASE] the information. They're not [AN EMPLOYEE OR AGENT?] of the owner. And no one ever said in a misappropriation case that the tippee doesn't have to know of the misappropriation or the theft.

[UNINTEL PHRASE] there are cases that don't mention that because it's [UNINTEL PHRASE] the verdict. [UNINTEL PHRASE] was a case of the-- where the theft was mainly money, [UNINTEL] reported [UNINTEL] press. [UNINTEL PHRASE] There was no issue as to whether the defendant knew of the misappropriation.

ANTONIA APPS: Right. There certainly

was issues about the defendant's knowledge that were raised in Obus, of course, Your Honor. And fundamentally, to have a different rule for downstream tippee liability comes back to Judge Parker's question about a concern for having a bright-line rule, because you cannot achieve a bright-line rule if the downstream tippee liability rule is different for misappropriation versus classical cases.

Let's just take--if you posit slightly different facts here, if, instead of Ray intentionally breaching by disclosing the numbers to Goyal, if you'd posited that Goyal duped Ray, the--not even the defendants would claim they had a leg to stand on to argue that, as downstream tippees, they would be required to know of any benefit to the original tipper.

And so, that is--in order to have a uniform rule, as Obus recognized, explicitly saying it applies to classical and misappropriation--

JUDGE HALL: Thank you.

ANTONIA APPS: You should have a set of--oh, [UNINTEL]. Thank you.

JUDGE HALL: Thank you very much, Ms.

Apps.

ANTONIA APPS: Thank you, Your Honor.

JUDGE HALL: Mr. Pomerantz?

MARK POMERANTZ: First, I'd like to go back to what the District Court actually did require the government to prove here in terms of tippee knowledge. This is from the charge, at page 4033 of the transcript.

The defendant's knowledge was, as stated by the Court, "He must have known that it was originally disclosed by the insider in violation of the duty of confidentiality." That's what Judge Sullivan charged the jury. And the government's position is--

JUDGE PARKER: Is that all he charged them?

MARK POMERANTZ: Well, on the critical point of what a tippee has to know, the operative language is "a violation of the duty of confidentiality." So, the government's position is: it's okay; all you need is a knowledge by the defendant that there has been a breach of confidentiality.

And look at the slipperiness of this slope. The government concedes, because it has

to, because the Supreme Court has said it time and time again, it's okay, it's legal, to trade on material nonpublic information that comes from an issuer. Dirks, after all, traded on material nonpublic information that he knew had come from an issuer, Seacrest at Equity Funding.

The notion of nonpublic information is, I would submit--it's the same as confidential information. Indeed, the government proves information is nonpublic by showing the steps the company took to maintain confidentiality.

So, the government's posture is: it's okay to trade on material and confidential information known to come from an issuer, but you go to jail if you trade and you know there's been a breach of confidentiality. That is a distinction without a difference.

And, in any case, the bright line that Your Honor is quite right, people in this business, like Chiasson and Newman, are entitled to--the bright line is the line that was set by the Supreme Court in Dirks. In Dirks, the Court put it in language that is just unequivocal: "Whether disclosure is a breach of duty therefore depends in large part on the purpose of the

disclosure."

The test is whether the insider personally will benefit, directly or indirectly, from the disclosure. Absent some personal gain, there has been no breach of duty to stockholders.

So, that's the test. That's the test the Supreme Court has given us. And if that's the test for a fraudulent fiduciary breach by an insider, how can it be that a jury doesn't have to find knowledge of that aspect of a fraudulent fiduciary breach when you're considering tippee liability?

JUDGE PARKER: So, your position is that that quantum of knowledge is the only thing that meaningfully separates the ability to trade and the threat of jail if you do?

MARK POMERANTZ: Well, and it is a very--you know, the question whether personal benefit exists is a squishy one, and it's particularly squishy in this case when you get into concepts of career advice, friendship, and so on. But--but--you have to remember, however squishy the notion of personal benefit may be, it wasn't even given to the jury to consider here. The jury never even was told it had to find it.

So, you know, as a first point, the charge is insufficient. Then you get into the question of the sufficiency of the evidence. And I need to point out, of course, that, with respect to Mr. Chiasson, there's no evidence in the record, none, that he knew anybody was being paid, that he paid anyone.

And, when the government cites an exhibit to say, "Well, the knowledge of friendship was apparent," they're talking about the wrong link in the chain. There is no proof that the friendship between the NVIDIA insider and the first NVIDIA tippee was known to the defendants.

The document to which Ms. Apps refers is a friendship between the first-line tippee and the next tippee. And, of course, Mr. Chiasson is even further down the chain. So, it's even--

JUDGE HALL: Let me just take you back to my personal--I'm sorry, my first question, Mr. Pomerantz. And that is: is it Mr. Chiasson's view, the defendant's view in this case, that only demonstrating personal benefit is sufficient, the knowledge of personal benefit is sufficient to prove knowledge of fraudulent

breach?

MARK POMERANTZ: I think I would answer it this way: there are three components that the defendant has to know. One is the existence of a relationship of trust and confidence between the insider and the issuer. The second is a breach of the duty of confidence. And the third is personal benefit. You need all three. Those are the components of a fraudulent fiduciary breach, identified in Dirks but not only Dirks. And the notion that it--

JUDGE HALL: Doesn't Dirks tie the personal benefit to the breach?

MARK POMERANTZ: Yes. Yes.

JUDGE HALL: Not as a separate component. But you don't have a breach unless you have a personal benefit. Isn't--

MARK POMERANTZ: That's exactly the point. And that's where--

JUDGE HALL: [UNINTEL] is that exclusive? That's the question I'm trying to--is that the only way you can prove, the government can prove, fraudulent breach?

MARK POMERANTZ: In a classic insider trading case such as this one, I believe--and if

you take Dirks to mean what it said, and of course it was reiterated by the Supreme Court in later cases; it's never been retreated from-- personal benefit is a defining aspect, a necessary aspect, of a fraudulent fiduciary breach.

Bearing in mind, of course, as the Court has emphasized, not every breach opens the door. This, although there is no statute, we're dealing here with a judge-made offense, this has to be fraudulent conduct.

So, the first question always has to be: where is the fraud? And the Supreme Court in Dirks said we can find the fraud if you have a relationship of trust and confidence and if you have an insider who betrays that relationship of trust and confidence for personal benefit.

And, again, I come back to the notion that, even if I'm wrong, and there are other forms of fiduciary breach that open the door to insider trading liability for tippees, the particular fraudulent fiduciary breach that the government attempted to prove here, and the one that was submitted to the jury when it--when the issue was, "Had the tippers done something

wrong?" and then we'll deal separately with the tippees.

But for tipper wrongdoing, for tipper criminality, the breach that the government alleged, the breach they say they proved, the breach that was submitted to the jury, is a fraudulent fiduciary breach contemplating personal benefit. It's just that a necessary component of that fiduciary breach, i.e. the contemplation of the receipt of benefit, drops out when you get to tippee knowledge.

And we're saying that's wrong. We're saying you can't--you know, it's like trying to have an egg sandwich but there's no eggs. You know, if the crime's tippee--you've consumed an egg sandwich, you can't say, "But we'll forget about whether the government has proved the existence of eggs." It just doesn't work.

It's an essential part of the fiduciary breach that there be personal benefit. That's the teaching of Dirks. And that wasn't here. And the--

JUDGE HALL: Thank you. Thank you, Mr. Pomerantz.

MARK POMERANTZ: Thank you, Your Honor.

JUDGE HALL: Mr. Fishbein?

STEPHEN FISHBEIN: Judge Hall, it's certainly our position that a fraudulent self-dealing by the insider is essential for the tipper's breach, and then the tippee has to know about it. And my point on sufficiency is that the government just didn't prove that.

And I take issue with the prosecutor saying that the leaks were somehow different than the charged information that my client was charged with. The leaks were very specific. Earnings per share of $0.30, contrary to what she said, that was attributed to an insider at Dell.

So, when Todd Newman gets the email, it's Dell Investor Relations saying 30-percent EPS. That's indistinguishable. Or, similarly, 18-percent gross margin, that was a specific leak from inside Dell. Everybody knew it was coming from inside Dell. It's a specific number, 18 percent. Same with 12-percent opex or missing revenues by a country mile.

And, in every one of those cases, the government concedes there was no personal benefit. There was no allegation of personal benefit.

So, from my client's perspective, you cannot go from, "It comes from the inside; it's specific," and then take the leap and say you must know about a personal benefit, especially when you look at the actual charge, the charge supposed tips. Jesse Tortora is constantly saying, "I guess," you know, "Maybe," "I think." It's always couched with uncertainty. And so, you put that all together, and, Judge Parker, to your point, it's just--it's not distinguishable.

Second, Ms. Apps said that my client paid a bribe. Nowhere in the trial record will you see that characterized as a bribe. That's a first time on appeal. The payment to Sandeep Goyal was a consulting payment.

It is undisputed that, when they hired Sandeep Goyal as a consultant, they hired numerous other consultants. He was hired to do legitimate work. That's what he said and that's what Jesse Tortora said. When he was hired and they--the amount of money--

JUDGE PARKER: Was there some visa problem there?

STEPHEN FISHBEIN: Yes, yes. Exactly. In other words, Goyal had a visa problem, and that's

why he said, "Pay my wife instead." But the undisputed evidence was, when they set that up, it was for Sandeep Goyal to do legitimate consulting for Tortora and for Diamondback.

So, to say now that it's a bribe, when they never argued that at trial, they never argued even in their appellate briefs that this consulting payment supports an inference of a benefit, a benefit to Rob Ray, when they know for a fact that none of the money that Sandeep Goyal got went to Rob Ray. Goyal said, "I did not transfer any of the money to Rob Ray. I didn't even tell him he was getting paid."

And if I could just illustrate it like this, it's a very common instruction in this courthouse. You see somebody walk into the courtroom, dripping wet; you can infer that it's raining. But if I prove for a fact at trial that there's somebody downstairs spraying people with hoses when they come into the courthouse, you wouldn't give that inference, because you know that it's not true.

And that's exactly what's going on here. We proved unequivocally that none of the money went to Rob Ray. He didn't get that kind of

benefit. And so, to infer it is just a specious inference. Thank you.

JUDGE PARKER: Thank you.

JUDGE HALL: Thank you.

JUDGE PARKER: Thank you all.

JUDGE HALL: Thanks, everyone. We will reserve decision.

Gotham Transcription states that the preceding transcript was created by one of its employees using standard electronic transcription equipment and is a true and accurate record of the audio on the provided media to the best of that employee's ability. The media from which we worked was provided to us. We can make no statement as to its authenticity.

Attested to by:

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