13-1837-cr(L)

13-1917-cr(con)

To Be Argued By:
MARK F. POMERANTZ

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

JON HORVATH, DANNY KUO, HYUNG G. LIM, MICHAEL STEINBERG,

Defendants,

TODD NEWMAN, ANTHONY CHIASSON,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT ANTHONY CHIASSON

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INTRODUCTION

The government's zeal to combat insider trading went too far in this case, and swept in conduct that is not a crime under the law. Anthony Chiasson, a hedge fund manager, was convicted of insider trading based on the use of confidential business information "leaked" by corporate insiders. Chiasson played no role in inducing the insiders to disclose information. He was a remote tippee, removed from the insiders by four degrees of separation. Chiasson did not know who the insiders were or why they divulged information. Critically, he did not know that the tippers had fraudulently breached their fiduciary duties to their employers by exchanging confidential information for personal gain. According to the government's evidence, Chiasson knew only that his research analyst had sources of material nonpublic information coming from "insiders," and he traded on that information.

That is not a crime. There is no general duty to abstain from trading just because a tippee receives material nonpublic information coming from an insider. An insider violates the law only if he commits a fraudulent breach of fiduciary duty, which the Supreme Court has defined as providing confidential information for personal gain. A tippee's liability derives from the insider's liability: To be found guilty of securities fraud, a tippee must be "'a participant after the fact in the insider's breach of fiduciary duty.'" *Dirks* v. *SEC*, 463 U.S. 646, 659 (1983)

(quoting *Chiarella* v. *United States*, 445 U.S. 222, 230 n.12 (1980)). This means that, in order to commit a crime by trading on inside information, the tippee must *know* that the insider provided information for personal benefit.

Here, the government did not prove and the jury was not required to find that Chiasson knew anything about the tippers' exchange of confidential information for personal gain. Although the government argued that Chiasson knew that insiders had "improperly" breached duties of confidentiality to their employers, a breach of a confidentiality duty is not a fraudulent fiduciary breach that supports liability under *Dirks*. Absent knowledge that a tipper exchanged inside information for personal gain, Chiasson did not participate in conduct that violates Section 10(b) or Rule 10b-5.

If accepted, the government's "improper disclosure" theory would ride roughshod over *Dirks* and later cases, and lead to an unwarranted expansion of the federal securities laws. Pursuant to corporate confidentiality policies and the SEC's Regulation FD, many selective disclosures of material nonpublic information are "improper" in the broad sense that they violate some duty of confidentiality. Nonetheless, insiders commonly provide such information to analysts and investors; the financial community is awash in nonpublic information that insiders disclose selectively for a variety of reasons. Most trading on "leaks" and selective disclosures is beyond the scope of insider trading prohibitions, and is

legal. Indeed, thirty years ago, the Supreme Court recognized what the prosecution has since forgotten: "Imposing a duty to disclose or abstain solely because a person knowingly receives material nonpublic information from an insider and trades on it could have an inhibiting influence on the role of market analysts, which the SEC itself recognizes is necessary to the preservation of a healthy market." *Dirks*, 463 U.S. at 658.

Trading on inside information becomes securities fraud only where the tippee *knows* that an insider provided the information for personal gain. That is what converts trading on a "leak" or a "tip" into a criminal violation of the federal securities laws. Here, the government offered no such proof and the jury was required to make no such finding. Chiasson's conviction should be reversed.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 18 U.S.C. § 3231. The judgment of conviction was entered on May 15, 2013. (A-2940-46).[1] Chiasson filed a notice of appeal on May 15, 2013. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether a remote tippee can be guilty of insider trading if he does not know that the corporate insider disclosed information in exchange for personal benefit—even though the Supreme Court held in *Dirks* v. *SEC* that an insider

[1] "A" refers to the Appendix filed jointly by all parties.

commits a fraudulent fiduciary breach only if he tips for personal benefit, and a tippee commits insider trading only if he knows that the tipper engaged in a fraudulent fiduciary breach.

2. Whether Chiasson is entitled to (a) acquittal on all charges because there was insufficient evidence that he knew that he was trading on material nonpublic information that had been disclosed by a corporate insider in exchange for personal benefit, or (b) a new trial because the jury was not instructed to find such knowledge.

3. Whether Chiasson's 78-month sentence should be vacated because the district court erred in holding Chiasson accountable for the trading gains of a supposed co-conspirator and because the court created unwarranted sentencing disparity by imposing a sentence on Chiasson far in excess of the sentences of other insider trading defendants found guilty of more culpable conduct.

4. Whether the forfeiture order should be vacated, both because the district court erroneously required Chiasson to forfeit fees collected by a supposed co-conspirator and because Chiasson was deprived of his constitutional rights under the Fifth and Sixth Amendments to have the forfeiture amount set by a jury based upon proof beyond a reasonable doubt.

STATEMENT OF THE CASE

Chiasson appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York (Sullivan, J.), following a jury trial. The rulings at issue are unreported.[2]

Chiasson and co-defendant-appellant Todd Newman were charged in a superseding indictment with conspiracy to commit securities fraud in violation of 18 U.S.C. § 371 (Count One). Chiasson also was charged with five substantive counts of securities fraud in violation of Section 10(b) of the Securities Exchange Act and SEC Rules 10b-5 and 10b5-2, based upon alleged insider trading in Dell stock (Counts Six through Nine) and NVIDIA stock (Count Ten). (A-148-68).

The indictment alleged that a group of financial analysts at various hedge funds and other institutional investors exchanged financial information they obtained, mostly indirectly, from company insiders, and that the analyst group passed this information to portfolio managers at their companies. Chiasson, one of those portfolio managers, was alleged to have traded on the information for the benefit of his hedge fund, Level Global. The charges against Chiasson were based entirely on information that his analyst, Sam Adondakis, provided to him. The government did not claim that Chiasson had any contact with any of the insiders or tippees other than Adondakis. (A-151-57).

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[2] (A-1725-26; A-2924-34; A-2940-47).

The allegations focused on Dell and NVIDIA information that Adondakis received from the group of analysts. The indictment alleged that prior to Dell's May 29, 2008 earnings announcement, Adondakis relayed to Chiasson that Dell's gross margins would be higher than the market expected, and Chiasson caused Level Global to purchase call options on May 12, 2008. (A-153-54; A-164). The government also alleged that, ahead of Dell's August 28, 2008 earnings release, Adondakis gave Chiasson information that gross margins would be lower than expected; and that Chiasson caused Level Global to execute short sales of Dell stock on August 11 and 18, 2008 and to purchase Dell put options on August 20, 2008. (A-154-55; A-164). Finally, the indictment alleged that, in advance of NVIDIA's May 7, 2009 earnings announcement, Adondakis relayed information indicating that gross margins would be lower than market expectations and that Chiasson then caused Level Global to sell NVIDIA stock short on May 4, 2009. (A-157; A-164).

Trial commenced on November 7, 2012 and lasted approximately six weeks. On December 17, 2012, the jury returned a verdict of guilty on all counts. (A-1972-73).

On May 13, 2013, Judge Sullivan sentenced Chiasson to an aggregate term of 78 months' imprisonment, to be followed by a term of supervised release. He imposed a $5 million fine and ordered forfeiture in an amount not exceeding $2

million.[3] (A-2931-32). The judge denied Chiasson's application for bail pending appeal (A-2938), but this Court reversed that ruling on June 18, 2013. Chiasson is at liberty pending this appeal.

STATEMENT OF FACTS

Viewed in the light most favorable to the government, the trial evidence showed that Chiasson was a remote tippee who knew that Adondakis had received detailed information, leaked by insiders at Dell and NVIDIA, about quarterly revenue, gross margin, and other financial metrics ahead of quarterly earnings announcements. There was no evidence that Chiasson knew who the insiders were or that they had disclosed the information for personal benefit. The evidence also demonstrated that Adondakis and Level Global routinely received similar information from high-level executives at public companies who were not acting for personal benefit, and that these executives selectively disclosed the information in advance of quarterly earnings releases. Thus, the proof showed that Chiasson knew that company insiders frequently reveal material nonpublic information for a multitude of reasons, and was unaware that the information at issue was provided

[3] Judge Sullivan subsequently set the forfeiture amount at $1,382,217. (A-3002-04). In his forfeiture order, Judge Sullivan also mistakenly held, *sua sponte*, that his imposition of a $5 million fine was "plain error" under *United States* v. *Pfaff*, 619 F.3d 172 (2d Cir. 2010), and requested submissions on the remedy. (A-3004). But the judge had imposed the fine under 15 U.S.C. § 78ff, which authorizes fines up to $5 million, rather than under the statute applied in *Pfaff*. (*See* A-3005-06). After the parties pointed this out, the judge left the $5 million fine undisturbed. (A-3007).

corruptly. In other words, Chiasson lacked knowledge of the key fact—the alleged self-dealing of the insiders—that, if known, would have made his trading illegal.

A. The Proof At Trial

The prosecution's case focused principally on two different "tipping chains," one related to Dell and one to NVIDIA.[4]

1. The Dell Tipping Chain

The tips originated with Rob Ray, who worked in Dell's Investor Relations department. Ray did not testify at trial, and he was never charged with a crime or alleged to be a co-conspirator (*see* A-170; A-1631). Ray tipped cooperating witness Sandy Goyal, an analyst at Neuberger Berman (a large institutional investor). Goyal was a former Dell employee who met Ray in business school.

Goyal testified that beginning in late 2007, and for approximately two years, Ray gave him information about Dell's financial results after Dell "rolled up" the numbers but before it publicly released the results. (A-896). Ray provided "ranges" of numbers or comparisons to Wall Street expectations. (A-898). According to Goyal, Ray told him that Dell's margins could be in the "low 18's" (*i.e.*, 18 to 18.3%), or that margins and revenues could be higher or lower than market consensus estimates. (*Id.*). Goyal lied to Ray, claiming that he needed the

[4] The government charged that the conspiracy also involved information about several other companies, but did not discuss them in its summation; the core of the case was the Dell and NVIDIA tipping chains. (A-1774-93).

information to refine his financial model for Dell, and he never told Ray that anyone was trading on the information. (A-947). Goyal never offered Ray money, because he did not want Ray to "suspect[] something was wrong." (*Id.*). The government claimed that Ray shared information with Goyal because Goyal gave Ray "career advice." However, there was never an explicit *quid pro quo*. (A-922). Goyal testified that he gave Ray more career advice than he would have absent the passing of company information, but he would have given advice anyway. (A-923). Ray did not testify, and there was no evidence that Ray understood that he was exchanging inside information for career advice.

Goyal gave Ray's Dell information to Jesse Tortora, another cooperator and co-defendant Newman's analyst at Diamondback Capital. Tortora did not know the name of Goyal's source at Dell, the source's position or seniority, or that Goyal provided the source "career advice" in exchange for confidential information. (A-396-97; A-473; A-576). Tortora testified that Goyal told him only that the Dell insider "liked to talk stocks" and "trading ideas," and that Goyal sometimes gave information back to the insider. (A-498). Tortora testified that the confidential "earnings related metrics" he got from Goyal were specific and useful for trading, so he shared the information with both Newman and Tortora's "group of friends." (A-396-97).

Tortora's "group of friends" included Adondakis, Chiasson's analyst at Level Global. Tortora gave Adondakis the confidential Dell information even though Goyal specifically asked him not to share the information with Adondakis. (A-489-90). Adondakis testified that he passed the information to Chiasson, and Chiasson used it to make trading decisions. (A-1002). Thus, the Dell information passed from Ray to Goyal to Tortora to Adondakis to Chiasson. Chiasson was four levels removed from the original insider/tipper.

Adondakis, the sole conduit of inside information to Chiasson, knew precious little about the original tipper.[5] Adondakis did not know who the source was, where he worked within Dell,[6] or why he "leaked" information about Dell's financial results ahead of their public release. Adondakis was clueless about what, if anything, Ray received for providing Goyal with information. (A-1001; A-1190-91; A-1200). Adondakis simply knew that Goyal had a source of information at Dell, and that is what he told Chiasson. (A-1192).

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[5] The government argued that Ray provided the information only after-hours and on a personal telephone (A-899; A-1777), which showed that Ray was disclosing information improperly. There was no evidence that Chiasson or even Adondakis knew these facts. Also, there was testimony that after-hours conversations were not unusual for investor relations personnel. (A-1435-36).

[6] Adondakis testified that he was told at one point that Ray worked in Dell's finance department, though he did not say that he relayed this to Chiasson. (A-1190). In fact, Ray never worked in Dell's finance department. Ray worked in Investor Relations at Dell during 2007-2009, where he had access to confidential information before Dell released its quarterly financial results. (A-1401).

2. The NVIDIA Tipping Chain

The NVIDIA tipping chain was similarly attenuated. Chris Choi, who worked in NVIDIA's finance unit and was privy to financial data before they were announced in the company's quarterly filings, was the original source. (A-1506). The government never prosecuted Choi or alleged that he was a co-conspirator. (A-170; A-1631). Choi did not testify. Hyung Lim, a cooperator, testified that he was Choi's church and family friend. (A-1511-12). Lim asked Choi "how the quarter [was] doing," and Choi responded by providing NVIDIA's quarterly financial information ahead of public filings. (A-1520-21). Lim never told Choi that he wanted the information to trade in NVIDIA stock, although Choi knew that Lim was a trader. (A-1514). Lim relayed the information to Danny Kuo, a personal friend and poker buddy. (A-1506-07). Kuo, an analyst at Whittier Trust, gave Lim small amounts of money, but neither gave money to Choi.[7] (A-1506; A-1520). Choi did not know that Lim relayed the information to Kuo or anyone else. (A-1521).

Kuo passed the NVIDIA information to the analyst "group of friends," including Adondakis. (A-1042). Adondakis provided it to Chiasson. (*E.g.*, A-

[7] There was no evidence that Adondakis ever knew of these payments, and therefore no conceivable basis on which Chiasson could have known about them. There also was considerable trial testimony relating to $175,000 in payments from Diamondback to Goyal through a consulting agreement with Goyal's wife. (A-490-96; A-900-03). Chiasson and Adondakis knew nothing of this arrangement. (A-785; A-1190-91).

1045). Thus, the NVIDIA tipping chain was Choi to Lim, Lim to Kuo, Kuo to his analyst friends (including Adondakis), and Adondakis to Chiasson.

Adondakis knew little about the NVIDIA insider. He knew that Kuo had a church friend with an NVIDIA contact who was an "accounting manager." (A-1138; A-1221). But Adondakis did not know who the ultimate or intermediate sources were, and never met or spoke with either. There was no evidence that Adondakis knew anything about the relationship between Kuo's "church friend" and the NVIDIA insider, or about any benefit that the insider may have received. Adondakis did not know Lim or Choi, and he knew nothing about their friendship. Chiasson knew only what Adondakis chose to share, and nothing about who leaked NVIDIA's information, or why or how it was leaked. Indeed, Adondakis testified that he did not specifically tell Chiasson that the source of the NVIDIA information even worked at NVIDIA. (A-1044).

3. The Information That Chiasson Received

Lacking evidence that Chiasson knew the insiders or their reasons for disclosing Dell and NVIDIA information, the prosecutors argued that Chiasson knew from the nature and timing of the information that it had been improperly disclosed. The prosecution argued that Chiasson was a "savvy" portfolio manager, who knew that companies did not disclose specific numbers about earnings before public filings. (A-1889). They also argued that the timing, frequency, and

accuracy of the updates showed that the critical information was "coming from someone at the company that should not be giving it out." (*Id.*).

The government attempted to depict a world in which corporate financial information is tightly controlled, and shared with investors and analysts only for proper corporate purposes pursuant to approved and established procedures. To prove that the two insiders breached their obligations to their employers by divulging information, the government called witnesses from Dell and NVIDIA. Robert Williams, Ray's supervisor at Dell, described Dell's internal processes for preparing quarterly financial reports, and detailed Ray's access to confidential information. He testified that Dell's policies and procedures, together with the SEC's Regulation FD,[8] required Ray to protect such information, and prohibited sharing the company's financial results with anyone prior to public announcement. (A-1403-08; A-1416-18). Michael Byron, a witness from NVIDIA, gave similar testimony regarding Choi. (A-1528).

The prosecution portrayed Ray's and Choi's breaches of their companies' confidentiality rules as sinister and manifestly improper. However, there was no evidence that Chiasson knew about these internal Dell and NVIDIA policies or

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[8] Regulation FD provides that if an issuer or a defined set of persons acting on its behalf discloses material nonpublic information to certain individuals or entities, the issuer must simultaneously or promptly disclose the same information to the public at large. *See* 17 C.F.R. § 243.100(a). Regulation FD is not an insider trading rule, as discussed *infra* at 27-30, 46-48.

communications. On the contrary, the evidence showed that Chiasson knew that high-level executives at these two companies routinely disclosed similarly precise, accurate information to selected investors, including Chiasson's fund. Adondakis acknowledged that he was in regular contact with investor relations departments at various companies, including Dell and NVIDIA; that investor relations departments "from time to time" put out messages suggesting how the company is going to perform via off-line, private conversations in advance of quarterly filings; that NVIDIA was one of the more "talkative" companies in terms of informal communications from company insiders about likely financial performance; and that it was part of his job as an analyst to solicit this information and share it with Chiasson, who was managing fund portfolios. (A-1032; A-1118; A-1185; A-1222; A-1303-05).

The trial record was replete with examples of insiders "leaking" material nonpublic information to certain analysts and investors. These selective disclosures may have violated Dell's and NVIDIA's confidentiality policies or Regulation FD, but the government did not (and could not) argue that trading on this information was prohibited.

The following are some examples of the significant information that Dell and NVIDIA routinely "leaked" to selected investors, and that Adondakis routinely shared with Chiasson:

- Dell's head of Investor Relations ("IR"), Lynn Tyson, in a one-on-one call, informed Tortora that Dell would soon undertake a "multi-billion dollar" restructuring. Tyson explained that this information was not yet in the marketplace and would be formally announced at an upcoming "analyst day." (A-599-600; A-2379). Dell publicly announced the restructuring five days later. *See* http://www.infoworld.com/t/hardware/dell-eyes-3-billion-in-cost-savings-in-3-years-836.

- During the "quiet period" leading up to Dell's first quarter 2008 release, Dell's CFO told an analyst that Dell would achieve headcount reduction of about three times market expectations. (A-2380-81). This information proved accurate and critical to Dell's quarterly earnings. (A-2257-67; A-2440).

- Halfway through Dell's third quarter 2008, IR told an analyst "offline" that the company would miss quarterly estimates "by a country mile." (A-601-02; A-2387). Dell missed estimates by nearly $1 billion that quarter. (A-2253-56; A-2455).

- During the "quiet period" leading up to Dell's third quarter 2008 release, Tyson told an analyst that gross margin would be stable even if revenue missed expectations. (A-600-01; A-2388). Six days before the earnings release, Dell IR told an analyst that the company would report earnings of at least 30 cents per share. (A-2390; A-1175). Tortora forwarded both insights to his friends including Adondakis, who relayed the information to Chiasson. (A-2388-89; A-2391). Revenues missed widely but gross margin was stable, and the company reported earnings per share of 37 cents. (A-2253-56; A-2455).

- Halfway through Dell's fourth quarter 2008, Tyson told Tortora that soon-to-be-released industry data would show poor results for Dell and that it had strong, not yet reported, sales for Black Friday. (A-567-74; A-2392-94). Tortora forwarded this information to his friends, including Adondakis. (A-2394). When the industry data was released, it showed that Dell's PC shipments declined more than any other manufacturer listed. (A-2472-75).

- Two weeks before Dell's quarter end in April 2009, Tyson told a group of analysts at a lunch that Dell's normalized gross margin would be 18%. (A-482-83; A-920-21; A-2397). Goyal emailed this information to Tortora, and

it was also circulated to Adondakis and others. (A-2397; GX315). Dell later announced gross margin of 18.1%. (A-2403).

- Three weeks before Dell's quarter end in April 2010, Tortora learned from Dell IR that gross margin would be "in-line at best" with market expectations of 17.7%. (A-604-06; A-2399). This proved accurate when Dell reported on May 20, 2010. *See* http://www.dell.com/learn/us/en/uscorp1/investor-financial-reporting?c=us&l=en&s=corp&cs=uscorp1.

- Halfway through NVIDIA's quarter ending in April 2009, NVIDIA IR told a Diamondback consultant that "margins have been hit by collapse of workstation demand . . . higher mix to chipsets, [and] drop in [desktop] margins." (A-2417). This proved to be accurate. (A-2295-311).

- In late March 2009, two thirds of the way through NVIDIA's quarter ending April 2009, Mike Hara, head of IR, "did not flinch" when Adondakis asked about another analyst's precise revenue estimates for the current quarter. (A-2419; *see also* A-708-09; A-1120). Adondakis circulated this information internally at Level Global and to friends. (A-2419). In another report of the same meeting, Adondakis indicated that gross margin would be flat and revenue would track higher than the company's guidance (A-2421), both of which proved accurate. (A-2295-311; A-2423-33).

The government's own witnesses acknowledged that they obtained and passed along such information without believing that they were committing crimes. (A-566-68; A-595-606; A-641-42; A-709; A-749-50; A-753-55; A-920-21; A-1118-24; A-1185; A-1222-24; A-1276-78; A-1288-89; A-1300-01). Chiasson had no reason—without knowing more about Ray and Choi, the nature of their relationships with their immediate tippees, and why they tipped—to believe that their information, unlike other "leaks," was improperly provided for personal benefit.

B. The Jury Charge

Based on the Supreme Court's opinion in *Dirks*, the defendants moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29. They argued that the evidence was insufficient to show that the Dell and NVIDIA insiders provided information in exchange for a personal benefit, and that there was no evidence that the defendants *knew* that the information had been exchanged for personal gain. Absent such knowledge, the defendants argued, they were not aware of or participants in the tippers' fraudulent breaches of fiduciary duties to Dell or NVIDIA, and they could not be convicted of insider trading. (A-1623-29). The defendants also asked the district court to instruct the jury that it must find that a defendant knew that an insider had disclosed information for personal gain in order to find that defendant guilty. (A-198; A-200-01; A-203; A-1626-27).

The district court reserved decision on the Rule 29 motions, remarking that the legal issues "are interesting ones and don't come up in every insider trading case." (A-1633).[9] In discussing the defendants' requested jury charge, the district court acknowledged that their position was "supportable certainly by the language of *Dirks*." (A-1723). But the judge ultimately decided that he was constrained to rule the other way by this Court's decision in *SEC* v. *Obus*, 693 F.3d 276 (2d Cir.

[9] The court never formally ruled on the Rule 29 motions until after sentencing, when it entered a conclusory order denying them. (A-2947).

2012). (A-1725-26). Accordingly, the district court did not instruct the jury that it had to find that Chiasson knew that the Dell and NVIDIA insiders had disclosed confidential information for personal benefit.

SUMMARY OF ARGUMENT

Under *Dirks* v. *SEC*, an insider/tipper who discloses material nonpublic information used to trade securities does not violate Section 10(b) and Rule 10b-5 unless he has engaged in self-dealing—disclosing the information to derive personal gain. It is the exchange of information for gain, and not simply the breach of a duty of confidentiality, that triggers the tipper's liability for securities fraud. A tippee who receives information from a corporate insider has no general duty to refrain from trading on that information, but can be liable derivatively as a "participant after the fact" in the tipper's fraud if he knows that the information was provided to him "improperly." In this context, as *Dirks* made clear, and as numerous courts have held, an "improper" disclosure means a disclosure for personal benefit. Accordingly, in a criminal case the tippee must know that the tipper was engaged in a disclosure of inside information for personal benefit. Unless the tippee knows that the tipper has exchanged information for personal gain, the tippee does not commit securities fraud, and does not act "willfully" under the Securities Exchange Act or generally under the criminal law. The court below therefore erred in ruling that a tippee's knowledge of personal benefit was

not required for fraud liability. Because the government failed to prove that Chiasson knew that the inside information upon which he traded came from insiders who had disclosed the information for personal gain, the evidence was insufficient to prove him guilty of the crimes charged, and he is entitled to an acquittal as a matter of law. At a minimum, a new trial should be ordered, because the trial court's jury instructions failed to tell the jury that it could convict only if Chiasson knew that the tippers had exchanged confidential information for personal gain.

The 78-month term of incarceration that the district court imposed was procedurally and substantively improper. Procedurally, the court below erred by holding Chiasson responsible for securities trades by Chiasson's business partner David Ganek. There was no evidentiary or legal basis for holding Chiasson responsible for Ganek's trades, and as a consequence the court sentenced Chiasson based on an improperly inflated calculation of the amount of his financial "gain." Substantively, Chiasson's sentence was unfair, and the product of a myopic focus on the amount of his purported "gain." The sentencing judge acknowledged that Chiasson was less culpable than his co-defendant, and less culpable than other insider trading defendants, but he imposed a prison term that was significantly longer, resulting in a grossly disparate and unreasonable sentence.

The forfeiture order entered against Chiasson also should be vacated. The amount of the forfeiture was improperly increased because Chiasson was ordered to forfeit gain that was realized by his business partner, without an evidentiary basis for finding that his business partner was a co-conspirator. Further, under recent Supreme Court decisions, the amount of the forfeiture should have been determined by a jury beyond a reasonable doubt, rather than a judge using a "preponderance of the evidence" standard.

Pursuant to Federal Rule of Appellate Procedure 28(i), Chiasson joins in the appellate arguments made by co-defendant Todd Newman, including specifically sections I, II, and III of his Argument.

ARGUMENT

I. CHIASSON'S CONVICTION SHOULD BE REVERSED

As a remote "tippee," Chiasson had no obligation to refrain from trading on inside information unless he knew that an insider disclosed the information for personal gain. The government did not prove that Chiasson had this knowledge, and the jury was not required to find that he did. Accordingly, this Court should direct an acquittal due to insufficient evidence, or at a minimum, grant Chiasson a new trial with a properly instructed jury.

A. To Be Guilty of Insider Trading, a Tippee Must Know That an Insider Provided Confidential Information for Personal Gain

1. *Dirks* and Subsequent Cases Require Tippee Knowledge

The starting point for analysis is settled law: A person who knowingly receives and trades on material nonpublic information from an insider *does not*, without more, commit securities fraud. The Supreme Court has clearly and repeatedly held that there is "no 'general duty between all participants in market transactions to forgo actions based on material, nonpublic information.'" *United States* v. *O'Hagan*, 521 U.S. 642, 660 (1997) (quoting *Chiarella*, 445 U.S. at 233). *See also Dirks*, 463 U.S. at 654-59. A duty to refrain from trading, therefore, does not arise merely from the receipt of nonpublic information from an insider.

More is required, and the Supreme Court has specified what that "more" is. In *Dirks* v. *SEC*, the Court addressed tippee liability at length. The defendant, Raymond Dirks, was a securities analyst at a broker-dealer. Dirks received material nonpublic information from an insider at Equity Funding of America that its assets were vastly overstated. The insider tipped Dirks so that he could expose the fraud. Dirks relayed this information to clients and investors who sold their stock, thereby avoiding losses when the company's fraud became known and its stock price plummeted. The SEC sued Dirks, alleging that he had aided and abetted securities fraud by relaying confidential and material inside information to people who traded the stock.

The Supreme Court held that Dirks did not violate Section 10(b) and Rule 10b-5, and explicitly rejected the theory that a tippee must refrain from trading "whenever he receives inside information from an insider." 463 U.S. at 655. The Court emphasized that tippee liability derives from the tipper's liability, and turns on the purpose of the tipper's disclosure of inside information and the tippee's knowledge of the tipper's improper purpose.

The opinion first considered the duties of corporate insiders, or "tippers." Pointing to the SEC's decision in *In re Cady, Roberts & Co.,* 40 S.E.C. 907 (1961), the Court noted that a tipper's duty to disclose material information or to refrain from trading stemmed from the insider's fiduciary relationship to the issuer. Because Rule 10b-5 is an antifraud measure, the majority explained, "[n]ot 'all breaches of fiduciary duty in connection with a securities transaction' . . . come within the ambit of Rule 10b-5." 463 U.S. at 654 (quoting *Santa Fe Indus.* v. *Green*, 430 U.S. 462, 472 (1977)); *see also Chiarella*, 445 U.S. at 234-35 (emphasizing that Section 10(b) and Rule 10b-5 are "catchall" provisions, but "what [they] catch[ ] must be fraud"). The Court emphasized that the securities laws were intended, among other things, to eliminate the use of inside information for personal advantage. Therefore, the particular fiduciary breach that triggers *fraud* liability is the insider's use of corporate information for his own personal benefit:

> 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.

463 U.S. at 662.

The dissent in *Dirks* criticized the use of "personal benefit" as the litmus test for Rule 10b-5 liability, noting that there are other ways to breach duties owed to corporate shareholders. *Id.* at 673-74. But the majority understood the critical role in the securities market that analysts play through their ability to "ferret out and analyze information . . . by meeting with and questioning corporate officers and others who are insiders." *Id.* at 658 (internal quotation marks omitted). The Court observed that "[i]mposing a duty to disclose or abstain solely because a person knowingly receives material nonpublic information from an insider and trades on it could have an inhibiting influence on the role of market analysts, which the SEC itself recognizes is necessary to the preservation of a healthy market." *Id.* Accordingly, the Court thought it "essential" that there be a "guiding principle for those whose daily activities must be limited and instructed by the SEC's inside-trading rules." *Id.* at 664. The guiding principle the Court identified was the disclosure of inside information for personal gain: That is how the Court defined the *particular* fiduciary breach that amounts to securities fraud under Section 10(b) and Rule 10b-5.

Having defined the tipper's culpable breach of duty to stockholders as the disclosure of corporate information for personal gain, the *Dirks* Court then addressed tippee liability for insider trading. The Court noted that "the typical tippee" has no independent fiduciary duties to issuers or their shareholders, 463 U.S. at 655, and it rejected the notion that a tippee inherits a duty to disclose or abstain from trading "solely because a person knowingly receives material nonpublic information from an insider and trades on it." *Id*. at 658. Tippees can commit insider trading, the Court held, but only if they "*knowingly* participate with the fiduciary [*i.e.*, the insider] in such a breach," referring back to the insiders' "improper purpose of exploiting the information for their personal gain." *Id.* at 659 (emphasis added). That is, tippee liability exists "only when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee *and the tippee knows or should know that there has been a breach.*" *Id.* at 660 (emphasis added).[10] *See also id*. at 661 n.20 (noting authorities indicating that tippees must have knowledge of the insider's breach).

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[10] The Court's reference to the "knows or should know" standard came in the context of a civil enforcement proceeding. In a criminal case, the "should know" formulation has no place, because the government must prove that the defendant acted "willfully." 15 U.S.C. § 78ff(a). A "willful" violation requires the defendant actually to know that his conduct is illegal, which in turn requires proof that he was aware of the tipper's exchange of information for personal benefit. A "should know" standard equates to negligence, a mental state insufficient for a criminal violation, and insufficient generally to warrant criminal sanctions for serious felonies. *See United States* v. *Temple*, 447 F.3d 130, 137 (2d Cir. 2006) ("'Willful' repeatedly has been defined in the criminal context as intentional,

The SEC's finding that Dirks, as a tippee, violated Rule 10b-5 therefore could not stand. The *Dirks* insider provided information to expose a fraud, not benefit personally, and accordingly he had not fraudulently breached his fiduciary duties to shareholders within the meaning of Rule 10b-5. Dirks could not have been a "participant after the fact" in the insider's nonexistent breach, and therefore was not a culpable tippee.

Under *Dirks,* a culpable tippee must know of the insider's breach of duty to stockholders, and that breach must involve a disclosure of material corporate information for personal gain. It necessarily follows that a tippee cannot be convicted of insider trading unless he knows of the insider's self-dealing. Absent such knowledge, the tippee does not know that the tipper has committed a fraudulent breach of fiduciary duty as defined in *Dirks*. The Supreme Court itself confirmed this in *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U.S. 299 (1985), explaining: "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*

purposeful, and voluntary, as distinguished from accidental or negligent."). Although the trial court's draft jury instructions referred at various points to a "should have known" standard for scienter, the government acquiesced to a defense request to strike that language in favor of a requirement of knowing conduct. (A-1723; A-1902).

'*benefit, directly or indirectly, from his disclosure*.'" *Id.* at 311 n.21 (quoting *Dirks*, 463 U.S. at 660, 662) (emphasis added).

Since 1983, district courts applying *Dirks* have held repeatedly that insiders must disclose information for personal gain, *and tippees must know that the insiders acted for personal gain*, to violate Section 10(b) and Rule 10b-5:

- *State Teachers Ret. Bd.* v. *Fluor Corp.*, 592 F. Supp. 592 (S.D.N.Y. 1984). Judge Sweet read *Dirks* to require that a tippee know of the tipper's fiduciary breach, and held that this "necessitates tippee knowledge of *each element,* including the personal benefit, of the tipper's breach." *Id.* at 594.

- *United States* v. *Santoro*, 647 F. Supp. 153 (E.D.N.Y. 1986), *rev'd on other grounds*, *United States* v. *Davidoff*, 845 F.2d 1151 (2d Cir. 1988). Then-District Judge McLaughlin agreed that a tippee must know of the tipper's personal benefit, and that the jury had to have this explained "as an element of knowledge of the breach." But the court held that the indictment was not facially deficient for alleging simply knowledge of a breach, because "[a]n allegation that the tippee knew of the tipper's breach necessarily charges that the tippee knew that the tipper was acting for personal gain." *Id*. at 170-71.

- *Hernandez* v. *United States*, 450 F. Supp. 2d 1112 (C.D. Cal. 2006). "[U]nder the standard set forth in *Dirks,* an outsider who receives material nonpublic information (i.e., 'tippee') can be liable under § 10(b)/Rule 10(b)-5 if the tippee had knowledge of the insider-tipper's personal gain." *Id*. at 1118.

- *United States* v. *Rajaratnam*, 802 F. Supp. 2d 491 (S.D.N.Y. 2011). Citing *Fluor*, Judge Holwell reasoned that a tippee cannot be a knowing participant in the tipper's fiduciary breach unless the tippee knows that the tipper was divulging information for a personal benefit. *Id.* at 498-99.

- *United States* v. *Whitman*, 904 F. Supp. 2d 363 (S.D.N.Y. 2012). Judge Rakoff noted the *Dirks* requirement of personal benefit to the tipper, and reasoned that "if the only way to know whether the tipper is violating the law is to know whether the 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." *Id*. at 371.

As Judge Rakoff has noted, *Dirks*' "knowledge of personal benefit" requirement may make it more difficult to prosecute "remote tippees." 904 F. Supp. 2d at 371-72. This is because remote tippees like Chiasson, who do not know what led the insider to disclose confidential information, are not parties to the insider's fraudulent exchange of information for personal gain. They are not, in the words of the *Dirks* Court, "participants after the fact" in the insider's self-dealing. *Cf. United States* v. *Snype*, 441 F.3d 119, 142 (2d Cir. 2006) (criminal liability as an accessory after the fact requires "the defendant's knowledge of the crime's commission").

In the years since *Dirks*, the SEC has acknowledged that *Dirks* "rejected the idea that a person is prohibited from trading whenever he knowingly receives material nonpublic information from an insider." Selective Disclosure and Insider Trading, Exchange Act Release No. 34-42259, 71 SEC Docket 732, 1999 WL 1217849, at *5 (Dec. 20, 1999). The SEC has further recognized that liability under Rule 10b-5 does not depend on whether inside information relates to anticipated corporate earnings, or whether the information is so precise and specific that it provides an unfair advantage to a tippee who trades on it. When it adopted Regulation FD, which makes it unlawful for issuers and certain issuer

personnel to make selective disclosures to investment professionals, the SEC noted that selective disclosures by insiders are common, and often "involve advance notice of the issuer's upcoming quarterly earnings or sales—figures which, when announced, have a predictable significant impact on the market price of the issuer's securities." Selective Disclosure and Insider Trading, Release Nos. 33-7787, 34-42259, IC-24209, 64 Fed. Reg. 72590-01, at 72,592-93 (Dec. 28, 1999). This, of course, is precisely the kind of information that underlay the criminal charges against Chiasson in this case. But the SEC enacted Regulation FD because the insider trading laws do not generally prohibit the disclosure of such information, or a tippee's trading on that information.

The adoption of Regulation FD is telling evidence that conduct such as Chiasson's does not violate Rule 10b-5. Recognizing that corporate insiders commonly "leak" material nonpublic information to analysts and investors, who thereby gain an unequal trading advantage, the SEC adopted Regulation FD to restrict issuers from making selective disclosure of confidential business information. But the Commission expressly elected not to "treat selective disclosure as a type of fraudulent conduct or revisit the insider trading issues addressed in Dirks." *Id.* at 72,594; *see* 17 C.F.R. § 243.102 ("No failure to make a public disclosure required solely by § 243.100 shall be deemed to be a violation of

Rule 10b-5 . . . .").[11] Thus, Regulation FD did not purport to expand insider trading liability, or to impose trading restrictions on recipients of selective disclosures of material nonpublic information. In the post-Regulation FD environment, selective disclosures might be "improper," in which case insiders making these disclosures are violating legal duties as well as fiduciary duties of confidentiality. Yet analysts and investors can legally trade on selectively disclosed earnings and other issuer information. This trading becomes fraudulent only when the insider discloses information for personal gain and the tippee knows that to be so.

Tippee knowledge is critical, not just because *Dirks* said so but also because a contrary rule would make no sense, and would make a remote tippee's liability for securities fraud depend on facts entirely outside of his knowledge or control. An investor who receives material nonpublic information that comes from an issuer ordinarily can trade legally on that information. But if it turns out—entirely unbeknownst to him—that the disclosure was motivated by an insider's expectation of personal benefit, then he could be imprisoned for trading. Such a rule of law would be inconsistent with the "willfulness" standard of the Securities Exchange Act and with fundamental *mens rea* principles, *see infra* at 32-34, and

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[10] *See also* Selective Disclosure and Insider Trading, 64 Fed. Reg. 72590-01, at 72,598 (Regulation FD was "not intended to create duties under Section 10(b) of the Exchange Act or any other provision of the federal securities laws.").

would leave market participants with no ability to predict whether their trading would later be deemed illegal.

As the Supreme Court stated in *Dirks*, it is essential that there be "a guiding principle for those whose daily activities must be limited and instructed by the SEC's inside trading rules." 463 U.S. at 664. *Dirks*, read correctly, provides just such a dividing principle: Those who disclose confidential issuer information cross the line into securities fraud if they disclose for personal benefit, and those who trade on material nonpublic information from insiders likewise commit fraud if they know that the tipper has violated a duty of confidentiality in order to obtain a personal benefit.

The government's position, by contrast, would impose liability on remote tippees whenever a tipper exchanged information for personal gain, whether or not the tippee knew this, provided that the tippee was aware that the tipper's disclosure violated some duty of confidentiality. As discussed, this is a misreading of *Dirks*. A mere breach of a duty of confidentiality is not enough to make a tipper liable for securities fraud, even if he knows that the recipient of the information will trade on it. If such a breach does not make the tipper guilty of fraud, then knowing of such a breach, without more, does not make the tippee guilty. Just as the tipper has to be engaging in self-dealing to commit fraud, the tippee has to know this to participate in the fraud. Further, as noted above, many selective disclosures of

material nonpublic information are "improper" in that they violate duties of confidentiality or Regulation FD, so the government's approach would provide no sensible dividing line or "guiding principle" to shape the conduct of market participants.

The trial record in this case illustrates this point. Senior officials and investor relations personnel at companies whose stock the defendants traded regularly "leaked" material nonpublic information to certain analysts and investors. Under Regulation FD, and issuer policies designed to ensure compliance with Regulation FD, these disclosures may have been "improper," because issuers are not supposed to disclose material nonpublic information unless it is broadly disseminated to the marketplace. Indeed, the government offered evidence in this case that Regulation FD generally requires insiders not to disclose confidential information. (A-1403-06; A-1408; A-2134; A-2150; A-2163).

Since selective disclosures are generally "improper," a rule of law that prohibits recipients from trading whenever they know that an insider has disclosed "improperly" sweeps far more broadly than current insider trading law requires. In practical terms, such a rule would be roughly equivalent to telling tippees that they must not trade on any material nonpublic information known to have been disclosed by an insider. But Rule 10b-5 plainly does not sweep this broadly, and the Supreme Court has thrice rejected the notion that tippees commit securities

fraud whenever they trade on material nonpublic information coming from an insider. *O'Hagan*, 521 U.S. at 661; *Dirks*, 463 U.S. at 654, 658-59; *Chiarella*, 445 U.S. at 233. Such trading may not be socially desirable, and it may erode "market integrity." But it is not against the law. It becomes illegal for tippees only when they learn that the insider has not simply breached a duty of confidentiality, but has traded information for personal gain.

2. Tippee Knowledge of the Insider's Self-Dealing Motive Is Also Required by the "Willfulness" Standard and Fundamental *Mens Rea* Principles

The *Dirks* rule requiring a tippee to know of the tipper's exchange of information for personal benefit is consistent with the particular requirements of the federal securities laws in criminal cases and with general principles of criminal law. Under the Securities Exchange Act, there is no criminal liability for insider trading unless the defendant acts "willfully." 15 U.S.C. § 78ff(a); *see O'Hagan,* 521 U.S. at 665 (Congress intended willfulness standard to provide a "sturdy safeguard[]" in insider trading cases). "Willfulness" requires "'a realization on the defendant's part that he was doing a wrongful act' under the securities laws." *United States* v. *Cassese,* 428 F.3d 92, 98 (2d Cir. 2005) (quoting *United States* v. *Peltz*, 433 F.2d 48, 55 (2d Cir. 1970)); *see also Safeco Ins. Co.* v. *Burr*, 551 U.S. 47, 57 n.9 (2007) ("[W]e have consistently held that a defendant cannot harbor such ["willful"] criminal intent unless he 'acted with knowledge that his conduct

was unlawful." (quoting *Bryan* v. *United States*, 524 U.S. 184, 193 (1998))). Thus, in insider trading cases, as this Court has recognized, there should be a particularly high *mens rea* standard: "Unlike securities fraud, insider trading does not necessarily involve deception, and it is easy to imagine an insider trader who receives a tip and is unaware that his conduct was illegal and therefore wrongful." *United States* v. *Kaiser*, 609 F.3d 556, 569 (2d Cir. 2010).

A defendant does not act "willfully" if he is unaware of a fact that transforms otherwise lawful conduct into an illegal act. *E.g.*, *Safeco*, 551 U.S. at 57 n.9 ("[W]illful' or 'willfully' . . . in a criminal statute . . . limit[s] liability to knowing violations."). Even where criminal statutes do not explicitly require knowledge of unlawfulness, the Supreme Court requires proof that the defendant knew all the facts that "separate[e] legal innocence from wrongful conduct." *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994) (requiring proof of defendants' awareness that performers in pornographic film were underage); *Staples* v. *United States*, 511 U.S. 600, 615 (1994) (requiring proof of knowledge that a semi-automatic had been converted into an illegal machine gun). Here, under *Dirks*, only the insider's intention to reap a personal gain transforms a "leak" of inside information into a fraudulent fiduciary breach that gives rise to a tippee's duty to refrain from trading. Even if the insider's disclosure violates a duty of confidentiality, or Regulation FD, such a violation is not fraudulent in and of itself,

and a tippee who knows of that violation is therefore not on notice that he may not trade. Put otherwise, a tippee who does not know the critical fact that bars his trading—the insider's self-dealing—does not act "willfully" under the Securities Exchange Act or generally as a matter of criminal law. *See, e.g., Whitman,* 904 F. Supp. 2d at 372.

3. The District Court's Reliance on *SEC* v. *Obus* Was Misplaced

At trial, both defendants argued that the government had to prove that the Dell and NVIDIA insiders exchanged material nonpublic information for personal gain, and that the defendants had to know this fact to be found guilty. The defense argued this position in support of their Rule 29 acquittal motions and in connection with the court's jury instructions. Judge Sullivan rejected the argument based on this Court's decision in *SEC* v. *Obus*, 693 F.3d 276 (2d Cir. 2012), which he read to hold that a tippee's knowledge of the tipper's exchange of information for personal benefit is not required to convict. (A-1723; A-1725-26; *see also* A-2804-05).

This was error, which resulted from an overly formalistic misreading of *Obus*. The judge incorrectly read *Obus* to require that the tipper breach a duty "by tipping confidential information," and that the tipper receive a personal benefit, but *not* that the tippee know of that personal benefit. Although the *Obus* opinion lists a tipper's "breach of a fiduciary duty of confidentiality owed to shareholders" and a

tipper's receipt of "personal benefit" as separate elements of tipper scienter, 693 F.3d at 286, this does not mean that the concepts are separable, either for tippers or tippees. *Dirks* made a tipper's "personal benefit" part and parcel of the fiduciary breach, not simply a separate, add-on concept: the opinion states unequivocally that, "[a]bsent some personal gain, there has been no breach of duty to stockholders." 463 U.S. at 662. The exchange of information for personal benefit is not separate from an insider's fiduciary breach; it *is* the fiduciary breach that triggers liability for securities fraud under Rule 10b-5. A breach of a duty of confidentiality is not fraudulent unless the tipper acts for personal gain, and that is how *Dirks* has been understood for the past 30 years. *See*, *e.g.*, *Rothberg* v. *Rosenbloom*, 771 F.2d 818, 826 (3d Cir. 1985) ("The test as to whether a disclosure by an insider amounts to a breach of fiduciary duty focuses on 'objective criteria, i.e., whether the insider receives a direct or indirect personal benefit from the disclosure.'" (quoting *Dirks*, 463 U.S. at 663)); *SEC* v. *Maxwell*, 341 F. Supp. 2d 941, 950 (S.D. Ohio 2004) (granting summary judgment because the tipper "did not derive a personal benefit from the disclosure of material, nonpublic information to [his barber] and, hence, did not breach a duty that he owed to Worthington shareholders"); *SEC* v. *Downe*, 92 Civ. 4092 (PKL), 1993 WL 22126, at *2 (S.D.N.Y. Jan. 26, 1993) ("A corporate insider breaches his fiduciary duty if he improperly discloses material, nonpublic information for

personal benefit." (citing *Dirks*, 463 U.S. at 662)); *Bianco* v. *Texas Instruments, Inc.*, 627 F. Supp. 154, 159 (N.D. Ill. 1985) (summarizing *Dirks*: "[A] tippee does not violate Rule 10b-5 unless the insider's 'tip' was a breach of fiduciary duty, generally determined by the personal benefit the insider derives from the tip.").

Dirks is controlling precedent; obviously, the *Obus* panel could not and did not intend to redefine what constitutes fraudulent insider trading as defined by the United States Supreme Court. On the contrary, *Obus* cites *Dirks* approvingly, particularly with respect to the requirement that "a tippee must have some level of knowledge that by trading on the information the tippee is a participant in the tipper's breach of fiduciary duty." 693 F.3d at 287. *Obus* actually expands on *Dirks* by requiring a tipper to act for his own benefit even in cases based on the "misappropriation theory" of insider trading.[12]

To be sure, *Obus* does not state explicitly that a tippee must know that a tipper is disclosing information for personal gain. It refers only to the requirement that a tippee "knew or had reason to know that the tippee improperly obtained the information (i.e., that the information was obtained through the tipper's breach)." 693 F.3d at 289. At another point, the opinion states that tippee liability turns on whether "a tippee knew or had reason to know that confidential information was

[12] *See supra* at 22-23. *Obus* was a misappropriation case, and the opinion states that it addresses "the scienter requirements for both tippers and tippees *under the misappropriation theory*." 693 F.3d at 286 (emphasis added).

initially obtained and transmitted improperly (and thus through deception)." *Id.* at 288. But, as discussed, and as numerous courts have held, the existence of a fiduciary breach by the tipper, and the essence of what is "improper" tipper conduct for insider trading purposes, is exchanging information for personal gain. Thus, for the tippee, knowing that information was "transmitted improperly" means knowing that the tipper exchanged the information for personal gain. Knowledge of the tipper's personal gain therefore is not, as Judge Sullivan said, the "addition of a totally new element" to tippee liability (A-2805). The requirement may have been "new" when *Dirks* was decided in 1983, but it has been part of the law for the last three decades.

In any event, *Obus* did not squarely address whether it is necessary for the tippee to know of the tipper's expectation of personal gain because the case did not turn on it. The question was whether the SEC's civil case against an alleged tipper and two tippees could withstand summary judgment under the misappropriation theory of insider trading. The SEC contended that Strickland, the tipper, told his friend Black about a forthcoming corporate acquisition involving a client of the tipper's employer. Black in turn relayed the information to his boss, Obus, who traded on the information. 693 F.3d at 279-80. The district court had granted summary judgment against the SEC, based on an internal investigation concluding that Strickland breached no fiduciary duty by providing information to Black, but

had simply "made a mistake." *Id.* at 283, 291. The *Obus* panel decided that the internal investigation was not conclusive, and that the facts would permit a jury to conclude that Strickland had breached a duty by tipping Black. *Id.* at 291.

With respect to whether Strickland's breach involved "personal benefit," the *Obus* panel noted that the district court had not reached this issue, but pointed to a statement in *Dirks* that "personal benefit" can "include making a gift of information to a friend." 693 F.3d at 291. Strickland and Black were college friends, permitting a jury to conclude that Strickland did receive a "benefit" from tipping Black. The opinion did not consider whether Black and Obus had been aware that Strickland's fiduciary breach involved personal benefit to him. Neither defendant appears to have argued this point; rather, they argued that there had been no "tip" and that they were unaware that Strickland had acted inappropriately. *See generally* Br. for Defs.-Appellees, *SEC* v. *Obus*, 10-4749 (2d Cir. June 28, 2011). It would have been futile to have argued specifically that they did not know Strickland had "tipped" for personal gain. There was evidence that both defendants were aware that Strickland and Black were close friends, and Obus even offered to find Strickland a job if he were fired on account of tipping Black, *see* 693 F.3d at 281. A jury that found Strickland to have committed a fiduciary breach, because he was intentionally providing his friend with confidential information upon which to trade, could have found that the breach involved

"personal benefit" under *Dirks'* expansive construction of that term, and that this was known to the tippees.

Obus did not change the law as to tippee scienter, and in particular did not dispense with the requirement that a tippee know that the tipper exchanged information for some personal benefit. *Whitman*, which was decided after *Obus* and discusses it, demonstrates this. There the court held that a tippee must have some knowledge of the tipper's self-dealing. 904 F. Supp. 2d at 371. This holding was based squarely on *Dirks* and its progeny. However, Judge Sullivan rejected *Whitman* as unpersuasive and refused to charge the jury that Chiasson needed to know about the tipper's exchange of information for personal gain. Judge Sullivan rejected *Whitman* because it supposedly "disregard[ed]" *Obus* (A-2806)—an odd criticism, as the *Whitman* opinion discusses *Obus,* and Judge Sullivan himself disregarded *Dirks*, which is the controlling case.[13] Judge Rakoff (who wrote *Whitman*) certainly did not regard his analysis as inconsistent with *Obus*, and he

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[13] *Whitman* also distinguished a line of cases—*United States* v. *Falcone*, 257 F.3d 226 (2d Cir. 2001); *United States* v. *Mylett*, 97 F.3d 663 (2d Cir. 1996); *United States* v. *Libera*, 989 F.2d 596 (2d Cir. 1993)—that the government relied upon when it opposed bail pending appeal in this Court. Those "misappropriation" cases were not brought on a *Dirks* (or "classical") insider trading theory. But before *Obus*, this Court had never held that the tipper's personal gain was an element of insider trading based on misappropriation theory, and therefore had no occasion to address whether a tippee has to know of that personal gain. In "classical theory" cases such as this one, it has been clear since *Dirks* that the tipper must anticipate a personal gain and the tippee must know this in order for liability to attach. This Court need not decide here whether the same requirements exist in "misappropriation" cases.

cited *Obus* approvingly in his decision and in a later opinion. *SEC* v. *Conradt*, 12 Civ. 8676 (JSR), --- F. Supp. 2d ---, 2013 WL 2402989, at *6-7 (S.D.N.Y. June 4, 2013).

4. A More Expansive Reading of *Obus* Would Create Due Process, Fair Notice, and Vagueness Problems

If *Obus* altered the substantive law of insider trading in this Circuit, as the district court's decision would suggest, its application to Chiasson's conduct raises serious due process concerns.

First, the last trades at issue occurred in 2009. At that time, it was settled that there is no breach of fiduciary duty by a corporate insider who discloses material nonpublic information—and thus no derivative liability for tippees—unless the tipper acted for his personal benefit. Likewise, it was the law that the tippee had to know that the tipper acted for personal gain. *See Fluor*, 592 F. Supp. at 594-95; *Santoro*, 647 F. Supp. at 170. If *Obus* dispensed with this knowledge of personal benefit requirement, due process would bar its retroactive application to Chiasson. *See*, *e.g.*, *United States* v. *Lanier*, 520 U.S. 259, 266 (1997) ("[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." (citations omitted)); *Casillas* v. *Scully*, 769 F.2d 60, 65 (2d Cir. 1985) ("[D]ue process prevent[s] the enlargement of a criminal statute through judicial interpretation from being applied retroactively . . . .").

Second, the district court's reading of *Obus* broadens the boundaries of insider trading liability and implicates constitutional vagueness concerns. It expands Section 10(b)/Rule 10b-5 beyond the "solid core" of plainly encompassed conduct. *See Skilling* v. *United States*, 130 S. Ct. 2896, 2930-31 (2010) (construing honest services mail fraud statute narrowly to avoid due process problem). Under current law, the Supreme Court has stated again and again that merely trading on material nonpublic information known to have come from an insider does not violate Rule 10b-5, and the SEC has acknowledged that Regulation FD does not make selective disclosures fraudulent. *See supra* at 28-29.

But under a broad reading of *Obus*, a tippee need not know that the tipper has exchanged information for personal benefit, and must only know that "confidential information was initially obtained and transmitted improperly." 693 F.3d at 288. The result from the tippee's perspective would be the potential criminalization of virtually all trading on selective disclosures. As explained, the trial record was replete with instances of selective disclosures. A recipient of such information would have no way of knowing—without knowledge of why the insider disclosed—whether he could trade or not. The result would essentially force analysts and investors to abstain from trading or risk potential prosecution, even in many cases where it would be legal to trade on the information. If this were to become the law, it would be a radical change that should be effected by

legislation. *See United States* v. *Bass*, 404 U.S. 336, 347-50 (1971) (due process requires that "legislatures and not courts . . . define criminal activity").

In short, the district court's construction of *Obus* would expand Section 10(b) and Rule 10b-5 to cover conduct that is not fraudulent, despite the plain language of these antifraud provisions and decades of Supreme Court precedent. This would violate the Supreme Court's teaching that due process requires courts to exercise "restraint" in interpreting criminal statutes "where the act underlying the conviction . . . is by itself innocuous." *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 703-04 (2005). As the Supreme Court explained in *Chiarella*, "the 1934 Act cannot be read more broadly than its language and the statutory scheme reasonably permit." 445 U.S. at 234 (internal quotation marks omitted).

B. There Was Insufficient Evidence to Satisfy *Dirks*' Knowledge of Benefit Requirement

This Court reviews the sufficiency of the evidence *de novo,* and Chiasson's conviction cannot stand if "no rational trier of fact could have found [him] guilty beyond a reasonable doubt." *Cassese*, 428 F.3d at 98. If the law requires a tippee to know that the tipper has exchanged material nonpublic information for personal benefit, then Chiasson's conviction falls. The government offered no proof from which a rational juror could conclude that Chiasson knew that the Dell and

NVIDIA tippers were exchanging inside information for personal gain. This Court should therefore direct a judgment of acquittal.[14]

The vast majority of the evidence at trial focused on Dell and NVIDIA. The proof showed that the Dell insider, Ray, provided Goyal with confidential information about Dell's earnings in advance of their public release. The government argued that he did so because Goyal was giving him "career advice." However, as Newman explains in his brief to this Court, the proof of the alleged exchange of information for the benefit of "career advice" was wispy thin. (Newman Br. at 50-51). Ray himself did not testify, and Goyal denied that there had been an explicit *quid pro quo* of tips exchanged for career advice. *See supra* at 9. Goyal testified that he spent more time speaking to Ray about how to advance his career than he might have otherwise because Ray was giving him useful information. (A-951). However, the government never established that Ray was providing the confidential information in exchange for career advice.[15]

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[14] If the district court erred by failing to require proof of Chiasson's knowledge that the insiders acted for personal benefit, then the conspiracy count falls along with the substantive counts. Conspiracy liability requires proof that "the defendant had the specific intent to violate the substantive statute[s]." *United States* v. *Lorenzo*, 534 F.3d 153, 159 (2d Cir. 2008) (internal quotation marks omitted). Therefore, the knowledge requirement is relevant "to a conspiracy charge to the same extent as it may be for conviction of the substantive offense." *United States* v. *Torres*, 604 F.3d 58, 65 (2d Cir. 2010) (internal quotation marks omitted).

[15] Prior to trial, the government provided defense counsel with letters indicating that Ray denied having ever disclosed material nonpublic information or intentionally breaching any duty to Dell. During an attorney proffer to the prosecutors, Ray's lawyer suggested that Ray, who was a "relatively junior IR

In any case, there was not a scintilla of evidence that Chiasson knew about the alleged corrupt exchange of confidential information for career advice. Indeed, the trial record established affirmatively that Chiasson could not have known about the alleged exchange because all of Chiasson's knowledge about the Dell insider came from Adondakis, who testified he knew nothing about any benefit to Ray. (A-1190-91). Adondakis knew only that Goyal's source was a Dell insider. (A-1001; A-1190-92; A-1200; A-1299). Since Adondakis did not know about any benefit conferred upon Ray, Chiasson could not and did not know about the career advice Ray supposedly received.

There was also no proof that Chiasson knew of any purported benefit to the NVIDIA insider. The government proved that the insider, Choi, provided confidential information to his friend Lim. The prosecutors argued that the Choi/Lim friendship established that Choi received a "benefit" from tipping Lim. (A-1895). Chiasson, however, did not know Choi or Lim, and knew nothing about their relationship. As with Dell, Chiasson's knowledge came from Adondakis, and there was no evidence that Adondakis knew anything about Choi, or why he shared information with Lim. Adondakis told Chiasson only that the information came

professional," had perhaps been "outmaneuver[ed]" by Sandy Goyal into providing Goyal with information, ostensibly to allow Goyal to check the accuracy of his Dell financial model. (A-146). Ray, through counsel, acknowledged that he had received some career advice from Goyal, but maintained that "these conversations were not connected to and did not influence the manner in which he performed his duties at Dell." (A-147).

from an NVIDIA "contact," without even stating that the "contact" worked at NVIDIA. (A-1044). Chiasson, therefore, did not know who the tipper was, or why the tipper disclosed information. He never learned that the tipper was exchanging information for the supposed benefit of enriching a personal friend.

Because the prosecution failed to prove Chiasson's knowledge, and because the law requires a tippee to know that the insider has engaged in self-dealing, Chiasson was entitled to an acquittal as a matter of law. It may be, as Judge Rakoff has opined, that "there is no reason to require that the tippee know the details of the benefit provided; it is sufficient if he understands that some benefit, however modest, is being provided in return for the information," *Whitman*, 904 F. Supp. 2d at 371. But here there was no evidence to suggest that Chiasson knew *anything* about personal benefit to the tippees. He was not only ignorant about the specific benefits that the insiders supposedly received; he was ignorant that they received any benefits at all in exchange for information.

In the trial court, the government never argued that Chiasson knew that the insiders were trading information for personal gain; Judge Sullivan ruled that such knowledge was not required, and so the government was relieved of its burden of proof on this issue. However, when it unsuccessfully opposed bail for Chiasson in this Court, and had to confront the prospect of an adverse ruling on the law, the government debuted a new theory with respect to knowledge of personal benefit:

The prosecutors claimed that, as a sophisticated investor, Chiasson "knew that corporate insiders are not authorized to disclose earnings information before it is publicly announced." Because the insiders could not have been making appropriate disclosures, the government claimed, they "must have done so for a personal benefit." (Appellee Opp'n to Appellants' Bail Motions ("Bail Opp'n"), at ¶ 46). The government's view, apparently, is that corporate insiders either disclose confidential information through appropriate channels or the disclosures are "improper," not made for a "legitimate purpose," and therefore are made for personal gain, as the defendants supposedly had to know.[16]

This new argument holds no water. It was never presented to the jury, so the jury's verdict provides the government with no comfort on this score.[17] In any case, the argument flies in the face of market reality. Insiders routinely provide nonpublic information to market participants for myriad reasons—to curry favor with large shareholders, to entice significant investors, to "condition" the market in

[16] The government attempted to bolster its argument by seeking to draw inferences of Chiasson's guilty mind from evidence that he did not divulge his sources to competitors and supposedly instructed Adondakis to create "bogus" and "sham" internal Level Global reports. (Bail Opp'n, at ¶¶ 20, 24). There is nothing nefarious about protecting sources from a competitor hedge fund, and the government mischaracterized the evidence regarding the internal reports. Chiasson told Adondakis to keep the internal reports "high level"—not to misrepresent the facts. (*See* A-2115).

[17] In this circumstance, there is no basis for drawing inferences in the government's favor, or viewing the facts in the light most favorable to the government. *Cf. Chiarella*, 445 U.S. at 236-37.

advance of unexpected earnings results, to bolster their credibility with certain analysts, to provide "comfort" about investment theses, and other reasons. *See*, *e.g.*, Stephen J. Choi, *Selective Disclosures in the Public Capital Markets*, 35 U.C. Davis L. Rev. 533, 543-48 (2002). These disclosures may be "improper" in that they violate corporate policy or Regulation FD, but they happen all the time and are not motivated by "personal gain."

Indeed, when the SEC proposed Regulation FD in 2000, it acted out of concern that selective disclosures of confidential information were commonplace, but very few of those disclosures were motivated by personal gain, and therefore they could *not* be predicates for insider trading actions under *Dirks*. Selective Disclosure and Insider Trading, 64 Fed. Reg. 72590-01, at 72,593. The SEC emphasized that selective disclosures "commonly" related to "upcoming quarterly earnings or sales figures"—precisely the kind of material nonpublic information involved in this case. The new rule was needed not because these disclosures were made for personal benefit, but because so many of them were *not* made for personal benefit. Regulation FD made many selective disclosures "improper," but that obviously did not mean that, as a matter of fact, they involved an exchange of information for personal gain.

Significantly, the trial record was chock full of disclosures, some or all of which were "improper" under company policy, Regulation FD, or both, that did

not involve an alleged exchange of information for personal benefit. *See supra* at 15-16. Chiasson, as a sophisticated investor who was aware of the many reasons company insiders "leak" material nonpublic information to select market participants, had no basis for knowing that the financial information coming from some insiders was tainted by self-dealing. The notion that Chiasson "must have known" or "had to know" that the information coming from Ray at Dell and Choi at NVIDIA had been exchanged for personal gain rests on surmise and speculation, not fact. *See United States* v. *D'Amato*, 39 F.3d 1249, 1256 (2d Cir. 1994) ("[A] conviction based on speculation and surmise alone cannot stand."). Chiasson knew nothing about the tippers or why they provided information. He could not infer an exchange for personal gain simply because he received material nonpublic information from insiders. The SEC has acknowledged, and the trial record confirmed, that such "leaks" typically do not involve an exchange for personal gain. To prove Chiasson's knowledge, the government had to do more than simply establish his receipt of inside information. As the Supreme Court counseled in *Dirks*, "'[i]t is important in this type of case to focus on policing insiders and what they do . . . rather than on policing information *per se* and its possession.'" 463 U.S. at 662-63 (quoting *In re Investors Mgmt. Co.,* Exchange Act Release No. 9267, 1971 WL 120502, at *10 (July 29, 1971) (Smith, Comm'r, concurring in the result)).

* * *

Any fair reading of the trial record reflects that Chiasson did not know that the alleged "tippers" at Dell and NVIDIA were trading information for personal gain. If the law requires the government to prove such knowledge, then the evidence was insufficient and Chiasson's conviction cannot stand. The appropriate remedy is to reverse the judgment and remand the case with instructions to dismiss the indictment. *See*, *e.g.*, *United States* v. *Atehortva*, 17 F.3d 546, 552 (2d Cir. 1994).

C. At a Minimum, Chiasson Is Entitled to a New Trial With a Properly Instructed Jury

If the Court agrees with Chiasson's legal argument, he is entitled to a new trial even if there had been sufficient evidence because the court refused to instruct the jury that it had to find that Chiasson knew the tippers provided inside information for personal benefit. Jury instructions are subject to *de novo* review, and the Court of Appeals must find "'error if [it] conclude[s] that a charge either fails to adequately inform the jury of the law, or misleads the jury as to a correct legal standard.'" *United States* v. *Quattrone*, 441 F.3d 153, 177 (2d Cir. 2006) (citation omitted). "An erroneous instruction, unless harmless, requires a new trial." *United States* v. *Hassan,* 578 F.3d 108, 129 (2d Cir. 2008) (internal quotation marks omitted). An error is harmless only if the government demonstrates that it is "clear beyond a reasonable doubt that a rational jury would

have found the defendant guilty absent the error." *Neder* v. *United States,* 527 U.S. 1, 18 (1999). For purposes of harmless error analysis, unlike sufficiency review, inferences are *not* drawn in favor of the government. *See United States* v. *Mejia*, 545 F.3d 179, 199 n.5 (2d Cir. 2008). Because the charge was legally flawed, and the error plainly was not harmless, Chiasson was denied a fair trial.

First, as explained, the defense requested an instruction requiring the jury to find that the defendants knew that the Dell and NVIDIA insiders disclosed the information for a personal benefit, but the district court refused to give it. *Supra* at 34. Instead, the court charged the jury that the government had to prove: (1) that the insiders had a "fiduciary or other relationship of trust and confidence" with their corporations; (2) that they "breached that duty of trust and confidence by disclosing material, nonpublic information"; (3) that they "personally benefited in some way" from the disclosure; (4) "that the defendant you are considering knew the information he obtained had been disclosed in breach of a duty"; and (5) that the defendant used the information to purchase a security. (A-1902; *see also* A-1903). Under these instructions, a defendant could be convicted merely if he knew that an insider had divulged information that was required to be kept confidential. Although the jury had to find that the tippers acted for personal gain, the defendants could be guilty under the court's instructions even if they did not know that fact. Further, the charge told the jury that the tipper could violate his fiduciary

duty simply by disclosing material nonpublic information; the personal benefit requirement was stated as a separate requirement as to the tippers (who of course were not on trial and who had not testified), but Chiasson as a tippee needed to know only that an insider had disclosed material that should have been kept confidential. For the reasons explained above, these instructions were legally erroneous, because they permitted the jury to convict Chiasson even if he lacked the knowledge required to be guilty of criminal insider trading. *Supra* at 21-49.

Second, the error was not remotely harmless because the evidence on whether Chiasson knew that the insiders acted for personal gain was not overwhelming. It was not even "underwhelming." It was nonexistent. *See supra* at 42-49. Had the court properly instructed the jury, Chiasson's closing argument would have focused on his lack of knowledge of the tippers' personal gain, and the jury could well (and should well) have acquitted him.

It is no answer to argue, as the government did in opposing Chiasson's bail pending appeal, that Chiasson was "sophisticated" and therefore knew that the tippers had provided information "for an improper purpose." (*See*, *e.g.*, Bail Opp'n ¶¶ 15-18, 20-21, 45 (contending Chiasson knew corporate insiders provided information "for an improper purpose," "without authorization" or without "legitimate" corporate purpose); *see also id.* ¶ 46 (claiming Chiasson "had every reason to know" when disclosures are unauthorized and therefore knew that

insiders "must have" disclosed the information "for a personal benefit")). On the contrary, a sophisticated investor like Chiasson would know that companies may have many reasons for leaking financial information to the "street." He would know that sometimes companies release information to temper expectations, so that there is no shock to the marketplace when final results are made public. The truly sophisticated investor also would know that companies like Dell target large institutional investors like Neuberger Berman. Thus, people along the tipping chain could have believed that Dell authorized the release of the information Goyal obtained. Finally, the sophisticated investor might have extensive experience with both Dell and NVIDIA, and know that they were companies that often made selective disclosures notwithstanding Regulation FD.

Indeed, given the abundance of evidence showing that Dell and NVIDIA routinely "leaked" confidential business information, a sophisticated investor would have assumed that the disclosures at issue were made for some purpose other than self-dealing.

In any case, Chiasson had the right to have these arguments considered by a properly instructed jury. The trial court's jury instructions deprived him of that right, and that error could not have been harmless. *See Neder*, 527 U.S. at 19 ("[W]here the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—[the court] should not find the error

harmless.").

II. CHIASSON'S SENTENCE WAS PROCEDURALLY IMPROPER AND SUBSTANTIVELY UNREASONABLE

The district court imposed a 78-month prison sentence—what appears to be the longest sentence ever given to a remote tippee like Chiasson, and the *sixth* longest insider trading sentence in the Southern and Eastern Districts of New York over the last twenty years.[18] That sentence is far out of proportion to Chiasson's conduct, and the product of a clearly erroneous gain finding, a myopic focus on gain, and a blind eye to unwarranted sentencing disparity. This Court should vacate this unreasonable sentence.

A. The Sentencing Proceedings

The insider-trading guideline, United States Sentencing Guidelines Manual § 2B1.4, provides a base offense level of 8 for insider trading and an enhancement depending on "the gain resulting from the offense." This gain is not the pecuniary gain to the defendant, but the increase in the value of the securities realized through the defendant's trading. *See* U.S.S.G. § 2B1.4 cmt. background. Chiasson

[18] Counsel, through court records, government press releases, and published reports, identified 149 defendants sentenced for insider trading in the Southern and Eastern Districts from 1993 to the present. *See generally Inside Trades Draw Lengthier Sentences*, Wall St. J., (Oct. 13, 2011), http://online.wsj.com/article/SB10001424052970203914304576629053026510350.html (collecting sentencing data on sentences between 1993 and Oct. 13, 2011). Of those, only Sam Waksal, Amr Elgindy, Hafiz Naseem, Zvi Goffer, and Raj Rajaratnam received sentences longer than 78 months.

traded for the funds he managed, so he did not pocket the total increase in value. His personal gain from the trades at Level Global, which was a share of professional fees, was at most $335,469. (A-2773). The gain to the funds, which included losses avoided in addition to profits, was in the millions.

The key Guidelines dispute at sentencing was whether Chiasson's gain should be calculated from "all the trades done at Level Global, including the ones that were directed or in the fund that was controlled by [Level Global co-founder David] Ganek." (A-2882). Judge Sullivan had concluded at trial that Ganek was a co-conspirator, rejecting Chiasson's argument that the evidence did not show that Ganek knew that Adondakis's information came from insiders who breached duties of confidentiality. However, at sentencing the court did not treat that finding as a sufficient basis for saddling Chiasson with Ganek's trades. Rather, referencing a prior insider trading conspiracy case, the judge explained that aggregation of co-conspirator trades is reserved for defendants who are responsible for their co-conspirators' criminal actions:

> . . . Mr. Zvi Goffer was charged with the gains that were derived from all the people that he *tipped or coordinated*. And so, I mean, I guess *that's the question*. Why do you believe that Mr. Chiasson is more like Emanuel Goffer[19] than he is like Zvi Goffer?

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[19] Emanuel Goffer was a co-conspirator and tippee of Zvi Goffer. Judge Sullivan considered only trades that Emanuel Goffer made personally when calculating his Guidelines range. He did the same for other Zvi Goffer tippees. (A-2881). But

(A-2881) (emphasis added).

The government argued in its sentencing memorandum that Chiasson was "analogous to Zvi Goffer" in that he "*arguably tipped* Ganek" and that Chiasson and Ganek "were jointly responsible for the trades at issue." (A-2797) (emphasis added); *see also* A-2883 (arguing that Chiasson either was the "tipper" or that he and Ganek "were simply making the decisions together"). That approach resulted in a gain of $40.3 million. Chiasson argued that there was no evidence that he tipped Ganek or that they "were doing this together." (A-2574-76). Chiasson argued that he should be responsible only for charged trades that he directed, an approach that yielded a gain of $3.7 million, and a corresponding guidelines range of 63 to 87 months. (A-2769).

The district court stated that it was "persuaded that the loss is greater than 20 million" "largely for the reasons stated by the government in their submission." (A-2888). That determination yielded a Guidelines range of 97 to 121 months. (*Id.*).

Chiasson argued that a sentence even remotely near that range would violate the principles of 18 U.S.C. § 3553(a) because it would reflect undue emphasis on trading gain and create unwarranted sentencing disparity. (A-2578-95); *see also*

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he sentenced Zvi Goffer, the leader of the conspiracy, for trades that others made as well. (*Id.*).

18 U.S.C. § 3553(a)(6). Chiasson cited multiple similarly situated defendants who received sentences of 30 months or less after going to trial:

- Michael Kimmelman, a downstream tippee who did not contribute to the bribes his co-conspirators paid to maintain the flow of inside information. (A-2580-82).
- James Fleishman, a manager at "a totally corrupt" research firm that "was designed" to get company insiders to breach their duties. (A-2582-83).
- Rajat Gupta, a Goldman Sachs director who "stab[bed] Goldman Sachs in the back" by stealing the company's information and passing it to Raj Rajaratnam. (A-2583-85).
- Douglas Whitman, a hedge fund manager who sought out and procured inside information and committed perjury at trial. (A-2586-87).

Chiasson argued that these examples set the benchmark for his sentence because he was not more culpable than any of these defendants.

The 54-month sentence the court imposed on Newman underscored this point. Chiasson and Newman were similarly situated in many respects, beyond being charged in the same conspiracy. Both were hedge fund managers with young families, demonstrated commitments to their community, and no criminal history. However, Judge Sullivan found that Newman had authorized $175,000 in sham payments to Goyal's wife over a two-year period. (A-2746-47). Chiasson

knew nothing about these payments.[20] This distinction, Chiasson argued, warranted a sentence significantly below 54 months.

The district court did not disagree with Chiasson's assessment of his relative culpability, and even acknowledged that Chiasson was less culpable:

> I do agree that you are less involved, less culpable than some of the other defendants I have sentenced over the years. [Zvi] Goffer was a leader and an organizer. He was a corrupter. He was a person who ensnared people who might not otherwise have been involved. I don't think your involvement in this crime can be likened to that in any way, shape or form. Unlike Mr. Newman, you weren't paying tens of thousands of dollars to a source using surreptitious means to do it and fraudulent means to do it.

(A-2930).

Notwithstanding this conclusion, the court imposed a 78-month sentence. The court made no effort to reconcile this sentence with the sentences of the similarly situated defendants Chiasson cited, including Newman. Judge Sullivan did not even mention these sentences, even though they indicated precisely the kind of significant sentencing disparity referenced in § 3553(a)(6).

The court based the severity of the sentence almost entirely on "the amounts of money that are involved."[21] (A-2925). According to the court,

[20] As Newman points out in his appellate brief, the purpose of the Ruchi Goyal payments was a disputed issue at trial. Whether or not the court was correct to view the payments as an aggravating factor for Newman, Chiasson engaged in no similar conduct. Therefore, his offense conduct was, if anything, less culpable than Newman's.

> [The offense] was cheating to realize tremendous profits, tens of millions of dollars. That's a lot of money. Most people would go their whole lives without ever seeing anything close to that, even if they aggregate everything they ever made from the day they were born. So the money matters. The size of the bet matters and the size of the gains matter.

(A-2931).

Comparing Newman and Chiasson highlights the court's emphasis on "the size of the gains." The court in effect concluded that the trading gain attributed to Chiasson—which included the trades of *another person*, and which benefited hedge funds, and not Chiasson personally—warranted (1) eliminating any comparative leniency that might otherwise have resulted from Chiasson's less culpable conduct and (2) an additional two years in prison, *i.e.,* a 44% longer sentence.

B. Standard of Review

This Court reviews sentences for procedural and substantive reasonableness. A sentence is procedurally unreasonable if the court "makes a mistake in its Guidelines calculation" or "rests its sentence on a clearly erroneous finding of fact." *United States* v. *Cavera*, 550 F.3d 180, 190 (2d Cir. 2008) (en banc). A sentence is substantively unreasonable "if affirming it would . . . damage the

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[21] The court also stated that Chiasson's trades spanned "multiple months and even years" and that Chiasson made "some attempt" to keep information about Adondakis's sources out of Level Global's databases. (A-2927; A-2930).

administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *United States* v. *Douglas*, 713 F.3d 694, 700 (2d Cir. 2013) (internal quotation marks omitted).

C. The District Court Erred in Calculating the Guidelines and Relied on Clearly Erroneous Facts

For Guidelines purposes, a defendant's gain derives from "trading in securities by the defendant and persons acting in concert with the defendant or to whom the defendant provided inside information." U.S.S.G. § 2B1.4 cmt. background; *see United States* v. *Royer*, 549 F.3d 886, 891, 904 (2d Cir. 2008) (court properly aggregated trades by persons engaged with defendant in "joint endeavor" whom he tipped and instructed to trade). "[L]argely" agreeing with the "reasons stated by the government in their submission," the district court found that Chiasson was responsible for Ganek's trading and therefore more than $20 million in gain. (A-2888). That finding was clearly erroneous.

To begin with, the district court did not state its finding with precision, which makes it ripe for reversal. *See United States* v. *Archer*, 671 F.3d 149, 161 (2d Cir. 2011) ("[A] conclusion that factual findings are not clearly erroneous is more easily reached when the district court makes those findings explicitly and on the record."). Indeed, it is not clear how the district judge could have made such a finding at all. The court opined that aggregation of co-conspirator trades was reserved for persons "like Zvi Goffer" who tip or coordinate others (A-2881), yet

also determined that Chiasson's "involvement in this crime" could not be "likened" to Zvi Goffer's conduct "in any way, shape or form." (A-2930).

In any event, the evidence does not support the "reasons stated by the government in their submission," namely that Chiasson "arguably tipped Ganek" and that the two "were jointly responsible for the trades at issue." The district court mentioned "testimony that [Chiasson and Ganek] were on conference calls together with Mr. Adondakis." (A-2886). But there was only one such conference call, on August 27, 2008, and it was *Adondakis* who presented information on Dell, not *Chiasson*. (A-1026). Moreover, Adondakis testified specifically that he did not reveal his inside sources to Ganek on that call—or at any other point. (A-1331; *see also* A-1100; A-1115). Participation in a single conference call on August 27 is hardly evidence that Chiasson tipped Ganek or that they "jointly" decided to execute any illegal trades, let alone *all* the illegal trades at issue.

The evidence the government cited at the sentencing hearing fares no better. The government pointed to two communications between Ganek and Chiasson, both from August 26, 2008. (*See* A-2884 (citing GX 513 (A-2062); GX 515 (A-2063-68))). But one of those communications does not even mention Adondakis, and the other simply mentions "sam's people"—an ambiguous phrase that could refer to any of the dozens of people that Adondakis spoke to about Dell. This evidence provides no basis to infer that Chiasson tipped Ganek or was "jointly

responsible" with him for dozens of trades over a period of many months, as the government claimed. Absent evidence that Ganek joined a conspiracy with Chiasson, or that Chiasson told Ganek that Adondakis had illicit sources of information, Chiasson should not have been saddled with Ganek's profits.[22]

This clearly erroneous finding resulted in two procedural errors that should lead this Court to vacate Chiasson's sentence.

First, the district court calculated an incorrect Guidelines range. The court's Guidelines calculation required a finding that Chiasson's gain exceeded $20 million. The government offered no basis for finding that Chiasson's gains exceeded $20 million without Ganek's trades—the government could not even say "what the [gain] number would be if you took out Mr. Ganek's trades." (A-2884-85). Because the court's inclusion of Ganek's trades rested on clearly erroneous findings, its Guidelines determination cannot stand. *See, e.g.*, *Archer*, 671 F.3d at

[22] As an alternative theory, the government argued that "assuming *arguendo* that Ganek was not a coconspirator with Chiasson or that Chiasson did not discuss with Ganek the fact that the [sic] Adondakis had sources inside Dell and NVIDIA, Chiasson should still be held accountable for all of the trades under an aiding and abetting theory of liability." (A-2794; *see also* A-2887-88). The district court gave no indication that it accepted this theory (indeed the district's forfeiture order relied on a finding that Ganek and Chiasson were co-conspirators, *see infra* at 71. It also makes no sense. Aiding and abetting liability would require that Chiasson "knew of the proposed crime," that Chiasson either "acted, or failed to act in a way that the law required him to act, with the specific purpose of bringing about the underlying crime," and that "the underlying crime was committed by" Ganek. *United States* v. *Cruz*, 363 F.3d 187, 198 (2d Cir. 2004). If Ganek was not Chiasson's co-conspirator and Chiasson did not discuss Adondakis's sources with Ganek, then Ganek did not commit insider trading, and Chiasson obviously did not know that Ganek was doing so.

168 (vacating below Guidelines sentence where district court's clearly erroneous findings resulted in an incorrect Guidelines calculation).

Second, and apart from the error in calculating the Guidelines, the district court "err[ed] procedurally" because it "rest[ed] its sentence on a clearly erroneous finding of fact." *Cavera*, 550 F.3d at 190. The district court emphasized that "the size of the gains matter" and that the size of the gain was "tens of millions of dollars." (A-2931). The disparity between Chiasson's and Newman's sentences demonstrates that the court based its sentence virtually exclusively on the "tens of millions of dollars" in "gain." The court reached this dispositive figure on the basis of clearly erroneous findings that led it to count Ganek's trades. This was error apart from the judge's inflated Guidelines calculation. *See United States* v. *DeSilva*, 613 F.3d 352, 358 (2d Cir. 2010) (vacating sentence because district court committed procedural error in relying on a clearly erroneous finding).

D. A 78-Month Sentence for a Remote Tippee Is Substantively Unreasonable

Chiasson's 78-month sentence is also substantively unreasonable. That it is below the district court's Guidelines range (even assuming that range was right) does not render it just. "[T]he amount by which a sentence deviates from the applicable Guidelines range is not the measure of how 'reasonable' a sentence is. Reasonableness is determined instead by the district court's individualized application of the statutory sentencing factors." *United States* v. *Dorvee*, 616 F.3d

174, 184 (2d Cir. 2010). This rule is particularly apt here. From October 1, 2009 through March 31, 2013, courts imposed Guidelines sentences in only 12 of 83 insider trading cases, and none above the Guidelines.[23] This broad rejection of the Guidelines proves they do not measure reasonableness in cases like this and highlights the importance of individualized consideration of the § 3553(a) factors. *See United States* v. *Adelson*, 441 F. Supp. 2d 506, 515 (S.D.N.Y. 2006), *aff'd*, 301 F. App'x 93 (2d Cir. 2008) ("[W]here, as here, the calculations under the guidelines have so run amok that they are patently absurd on their face, a Court is forced to place greater reliance on the more general considerations set forth in section 3553(a), as carefully applied to the particular circumstances of the case and of the human being who will bear the consequences."). The district court's misapplication of the § 3553(a) factors—its disregard for sentencing disparity and its indefensible focus on gain—resulted in a sentence that is manifestly unreasonable.

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[23] *See* United States Sentencing Commission, Preliminary Quarterly Data Report, 2nd Quarter Release at 13 tbl. 5 (2013), *available at* http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2013_Quarter_Report_2nd.pdf; United States Sentencing Commission; 2012 Sourcebook of Federal Sentencing Statistics tbl. 28 (2012), *available at* http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and Sourcebooks/2012/Table28.pdf; United States Sentencing Commission; 2011 Sourcebook of Federal Sentencing Statistics tbl. 28 (2011), *available at* http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_ Sourcebooks/ 2011/Table28.pdf; United States Sentencing Commission, 2010 Sourcebook of Federal Sentencing Statistics tbl. 28 (2010), *available at* http://www.ussc.gov/Research_and_Statistics/ Annual _Reports_and_ Sourcebooks/2010/Table28.pdf.

Courts have imposed sentences of 70 months or more sparingly in insider trading cases, reserving them for the most egregious offenders. Counsel has identified only 10 such sentences (other than Chiasson's) since *United States* v. *Booker*, 543 U.S. 220 (2005). These cases involve persons who directly participated in a breach of a duty of confidentiality for personal gain, coupled with indisputable aggravating factors. Consider:

- Jeffrey Royer (72 months) was an FBI agent who for years leaked information about federal investigations to Amr Elgindy (135 months), who in turn distributed that information to a network of traders. Royer also lied to federal agents and Elgindy committed extortion. *See United States* v. *Royer*, 549 F.3d 886 (2d Cir. 2008).

- Hafiz Naseem (120 months) was a banker who repeatedly stole information from his co-workers and the bank's clients and relayed it to a co-conspirator abroad. *See United States* v. *Rahim*, 339 F. App'x 19 (2d Cir. 2009).

- Michael Guttenberg (78 months) engaged in two different conspiracies in which he breached his duty to UBS by relaying upcoming upgrades or downgrades of public company securities. He did so for personal gain, receiving hundreds of thousands of dollars in illicit payments. *See United States* v. *Guttenberg*, No. 07 Cr. 141, 2007 WL 4115810, at *1-*2 (S.D.N.Y. Nov. 14, 2007); *see also United States* v. *Guttenberg*, No. 07 CR 141 DAB (S.D.N.Y. Nov. 14, 2008) (judgment in a criminal case).

- Joseph Nacchio (70 months) was a public company CEO who had "unusual access and control over [company] information" whom a jury found guilty of 19 substantive counts and whom the court ordered to forfeit more than $44 million in proceeds from the offense. *See United States* v. *Nacchio*, No. 05 Cr 545, Tr. of Sentencing, Vol. 5, at 35:19-20 (D. Colo. June 24, 2010).

- Joseph Contorinis (72 months) received misappropriated information directly from the tipper and was found to have committed perjury at trial. *See United States* v. *Contorinis*, 692 F.3d 136 (2d Cir. 2012).

- Zvi Goffer (120 months) was the "leader[ ] of a fraudulent enterprise who recruited people and poisoned other traders" and paid for information stolen from a law firm. *United States* v. *Goffer*, --- F.3d ---, No. 11-3591-cr(L), 2013 WL 3285115, at *2, *12 (July 1, 2013) (internal quotation marks omitted).

- Raj Rajaratnam's (132 months) criminal activity spanned a decade, involved 19 public companies, more than 20 corrupt insiders, and interlocking conspiracies. *United States* v. *Rajaratnam*, No. 09 Cr. 1184, Tr. of Sentencing at 20-23 (S.D.N.Y. Oct. 13, 2011).

- Matthew Kluger (144 months) and Garret Bauer (108 months) engaged in a 17-year scheme in which they traded for personal gain based on information Kluger stole from law firms. *See United States* v. *Kluger*, --- F.3d ---, No. 12-2701, 2013 WL 3481505 (3d Cir. July 9, 2013).

Chiasson does not belong on this list. He did not participate directly in a breach of a duty for personal gain. He recruited no one to the conspiracy, and engaged in no aggravating conduct. His crime (if it was a crime) was receiving and trading on inside information. He did not even know that the information came from an insider who acted for personal benefit and thus committed fraud. For the district court to have placed Chiasson in the category of persons listed above "damage[s] the administration of justice because the sentence imposed [is] shockingly high." *Douglas*, 713 F.3d at 700 (internal quotation marks omitted).

Moreover, the court did not even acknowledge, let alone explain, why Chiasson deserved a sentence two-and-a-half times greater than the sentences of similarly situated defendants he cited and two years longer than the sentence Newman received. Coupled with the Court's explicit recognition of Chiasson's

lesser involvement and culpability than Newman and other insider trading defendants, the trial court's silence demonstrates a failure to give adequate weight to unwarranted disparity. *See Dorvee*, 616 F.3d at 184 (district court's "cursory explanation" evinced failure to observe principles of § 3553); *United States* v. *Ebbers*, 458 F.3d 110, 129 (2d Cir. 2006) ("[W]e may remand cases where a defendant credibly argues that the disparity in sentences has no stated or apparent explanation.").

No doubt the government will point to the gain attributed to Chiasson to justify his sentence. The question on appeal is whether that gain "can bear the weight assigned it under the totality of circumstances in the case." *Cavera*, 550 F.3d at 191. The answer is no.

First, gain cannot explain the vastly disparate sentence Chiasson received as compared to other defendants convicted at trial and responsible for multimillion-dollar gains. Gupta was responsible for more than $5 million in gain, yet received a 24-month sentence. *See United States* v. *Gupta*, 904 F. Supp. 2d 349, 353, 355 (S.D.N.Y. 2012). Newman was held responsible for $4 million and received a sentence two years shorter than Chiasson's. (*See* A-2699; A-2749). And both of these cases had aggravating factors absent from Chiasson's case: Gupta brazenly breached the trust owed to the company he served; Newman, according to the trial

court, employed surreptitious payments to procure access to inside information. Chiasson did neither.

Second, gain cannot serve as a proxy for meaningful consideration of sentencing disparity because it does not correlate to factors that courts traditionally rely on to distinguish defendants' culpability, such as offense conduct, motive, state of mind, role in the offense, or criminal history. This case is a prime example of how using gain as the sole comparator can lead to disparate results and a less culpable defendant—Chiasson—receiving a sentence many times longer than more morally culpable defendants convicted of the same crime. One who bribes a source for inside information is more culpable than the person who, without knowledge of the bribe, receives inside information. *See Royer*, 549 F.3d at 904 (district court was justified in granting passive recipient of information a more lenient sentence than a co-defendant who corruptly procured information from FBI sources). Yet the briber can easily gain less than the passive, unknowing recipient. Likewise, as between a recipient of information who knew that the tipper was breaking the law and a recipient who did not, surely the latter is less culpable. Resting a sentence on gain masks this difference, too. Gain may be relevant, but it should not be the overarching factor used to distinguish among defendants. *Cf. Cavera*, 550 F.3d at 192 ("[A] district court may find that even after giving weight to the large or small financial impact, there is a wide variety of culpability amongst

defendants and, as a result, impose different sentences based on the factors identified in § 3553(a)."); *United States* v. *Emmenegger*, 329 F. Supp. 2d 416, 427 (S.D.N.Y. 2004) (Lynch, J.) (describing the amount of loss as a "relatively weak indicator of the moral seriousness of the offense or the need for deterrence").

This Court's recent decision in *United States* v. *Goffer* illustrates how gain fails to capture meaningful distinctions in culpability between defendants. *Goffer* upheld the 66-month sentence that Judge Sullivan gave to Craig Drimal, an insider trading defendant who pled guilty to one conspiracy count and five substantive counts of securities fraud. *See* 2013 WL 3285115 at *1, *14. Drimal's gain was $11 million, but he was unquestionably more culpable than Chiasson: Drimal knew that he was receiving information from sources who broke the law (he was caught on a wiretap admitting that the lawyers who provided him with information could go to jail). *See id.* at *2. Drimal participated in bribing those sources for information. *See id.* Drimal used prepaid cell phones to avoid detection, *see id.* at *1, and then lied to authorities when questioned, *see United States* v. *Drimal*, No. 10 Cr. 56, Tr. of Sentencing (S.D.N.Y. Aug. 31, 2011) ("*Drimal* Sentencing Tr.") at 53. And Drimal traded on his own account, so gain in his case was *his* gain from *his* trades, not the gain of a fund derived from the trades of others. *See id.* at

32. Yet Chiasson received a longer sentence, because of Judge Sullivan's myopic focus on the gain number.[24]

Third, gain is not a good proxy for the harm the insider-trading prohibition seeks to address, which is the breach of fiduciary duty for personal profit. *See Gupta*, 904 F. Supp. 2d at 352 ("In the eye of the law, Gupta's crime was to breach his fiduciary duty of confidentiality to Goldman Sachs."); *see also United States* v. *Reich*, 661 F. Supp. 371, 373 (S.D.N.Y. 1987) ("[T]he essence of this crime was not the acquisition of dollars (or not in [the defendant's] case) but rather the destruction of trust in the integrity of the financial marketplace and in the specialized lawyers and professionals who are essential to the creation and management of the multimillion—and occasionally billion—dollar transactions. . . . To adjust sentences in crimes of this nature by the amount of profits taken (or available to be taken) would reduce the search for a just result to an accounting."). "Yet the Guidelines assess punishment almost exclusively on the basis of how

[24] The Court in *Goffer* noted the "magnitude of [Drimal's] insider trading" in affirming his sentence. But *Goffer* does not justify the district court's excessive focus on gain in this case. First, the *Goffer* court mentioned the "magnitude" of Drimal's trading in addressing Drimal's argument that his sentence "was substantively unreasonable in light of his community service and his commitment to his family," *id.* at *13, not an argument that gain overstated the seriousness of his offense. Second, in reviewing a sentence for substantive reasonableness, this Court considers whether a particular "factor, as explained by the district court, *can bear the weight assigned it under the totality of circumstances in the case*." *Cavera*, 550 F.3d at 191 (emphasis added). As a result of the aggravating factors described above, the district court had no occasion to give gain dispositive weight when sentencing Drimal. *See Drimal* Sentencing Tr. at 48-53.

much money [is] gained by trading on the information. At best, this is a very rough surrogate for the harm to" the company to which the duty was owed. *Gupta*, 904 F. Supp. 2d at 352. The Guidelines look to financial gain in insider trading cases not because it approximates the harm to victims, but because the "victims and their losses are *difficult if not impossible to identify*." U.S.S.G. § 2B1.4 cmt. background (emphasis added). But gain is not a good substitute for unquantifiable harm to victims. *Cf.* Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L.J. 1420, 1476-77 n.235 (2008) ("[T]he Guidelines' 'loss'-penalty tables appear to have been created out of whole cloth, without either statutory or empirical basis. The great weight the Guidelines attached to quantity had been devastatingly criticized, and nowhere explained." (citations omitted)).

Simply put, gain cannot bear the weight the district court placed on it in this case. The district court's undue emphasis on gain—especially in conjunction with its disregard for unwarranted sentencing disparity—led to a substantively unreasonable sentence that this Court should vacate.

III. THE DISTRICT COURT'S FORFEITURE ORDER WAS BASED ON A CLEARLY ERRONEOUS FACTUAL FINDING AND VIOLATED CHIASSON'S DUE PROCESS AND JURY TRIAL RIGHTS

The district court ordered Chiasson to forfeit $1,382,217, the amount of fees that the court determined Chiasson *and Ganek* to have earned from trades in Dell

and NVIDIA during the relevant period.[25] (A-3002-03). Chiasson had argued that he should not forfeit money Ganek received because there had been no jury finding that Ganek was a co-conspirator and because there had been no specific findings by the judge or the jury as to when Ganek joined the conspiracy or which of his trades rested on inside information. Accordingly, Chiasson argued that the forfeiture award should be limited to the fees he earned personally as a result of the charged trades that he executed, which amounted to $70,801. (A-2772). The court rejected that position based on its finding, by a preponderance of evidence, that Ganek was Chiasson's co-conspirator. (A-3003). Because the court clearly erred in making that finding, the forfeiture award cannot stand. But even if this Court determines that the Ganek finding was not clear error, it should still reverse the forfeiture award: under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and its progeny, the district court's forfeiture order violated Chiasson's due process and jury trial rights because it increased his punishment based on facts not found beyond reasonable doubt and not proved to a jury.[26]

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[25] Language in the court's forfeiture order suggests that the parties agreed that Chiasson received $1,180,498 in incentive fees. (*See* A-3002-03 ("[T]he parties agree that Defendant received incentive fees only in connection with the Nvidia trade in May 2009 and that those fees total $1,180,498.")). However, that figure represents the parties' agreement on the incentive fees earned by Chiasson *and* Ganek, not Chiasson alone.

[26] Chiasson preserved this issue for appeal but acknowledged below that the district court lacked authority to rule that the intervening Supreme Court decisions on which this argument is based superseded this Court's holding in

A. The Lower Court's Finding That Ganek Was a Co-Conspirator Was Clearly Erroneous

David Ganek was Chiasson's partner at Level Global, and he was never charged with a crime. The district court held Ganek to be a co-conspirator, finding that Ganek traded Dell and NVIDIA stock based on inside information from Adondakis, even though Adondakis testified that he did *not* reveal his inside sources to Ganek (A-1100; A-1115; A-1331). This finding, made over defense objection, lacked an evidentiary basis, and the district court therefore erred when it included proceeds from Ganek's trades in its forfeiture order as to Chiasson.

First, the court stated Ganek must have known that Adondakis obtained information improperly because Ganek supposedly knew that Adondakis got "incremental checks" that "firmed up" his information about Dell and NVIDIA as those companies' reporting dates approached. (A-1603). However, for the reasons addressed *supra* at 21-34, even if Ganek knew that Adondakis got inside information, this did not make Ganek a member of a criminal insider trading conspiracy. There was no evidentiary basis for finding that Ganek knew that Adondakis's sources disclosed information in violation of confidentiality duties, let alone in exchange for personal benefit.

United States v. *Fruchter*, 411 F.3d 377, 382-83 (2d Cir. 2005), that the *Apprendi* rule does not apply to forfeiture determinations. (A-2607; A-2999).

Second, the court relied on the size of Ganek's trades. But the evidence at trial established that Level Global's positions in Dell and NVIDIA were not unusually large given the fund's size. (*See generally* A-1342-43).

Third, the court inferred that there was "a discussion [] about Adondakis' source" during a closed door meeting between Chiasson, Ganek and Brenner, another Level Global employee. (A-1603). None of the attendees at the supposed meeting testified, so any conclusions about the discussion were necessarily based on speculation. Further, the evidence unequivocally showed that this meeting did not occur. Adondakis testified that he prepared a report containing inside information received from Tortora that Chiasson brought to Ganek in the supposed closed door meeting. The report was dated August 11, 2008 (A-2033), and Adondakis testified that he created it on that date. (A-1214). He said that he "physically handed [the report] to Mr. Chiasson and Mr. Brenner and they went into Mr. Ganek's office with it" on what he "believe[d] was the same day." (A-1214). Documentary evidence established that that testimony could not have been accurate, because Ganek was not in the office on Monday, August 11. (A-2488-91). The district court thus clearly erred in finding that Ganek was a co-conspirator based on speculative inferences that contradicted Adondakis's direct testimony and the documentary record. *See Trans-Orient Marine Corp.* v. *Star Trading & Marine, Inc.*, 925 F.2d 566, 571 (2d Cir. 1991) ("If a finding is directly

contrary to the only testimony presented, it is properly considered to be clearly erroneous.”).

B. The Forfeiture Order Violates *Apprendi*

The forfeiture order should be vacated in any event for a different reason. Under evolving Supreme Court case law, the forfeiture process employed in this case was unconstitutional, because the operative facts had to be found by a jury beyond a reasonable doubt. Instead, the district judge made his own factual findings using what appears to have been a preponderance of the evidence standard.[27] Chiasson objected to this procedure in his sentencing submissions. (A-2607).

Apprendi was the landmark Supreme Court case requiring certain sentencing facts to be determined beyond a reasonable doubt by a jury. “Under *Apprendi* ‘[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.’” *S. Union Co.* v. *United States*, 132 S. Ct. 2344, 2350 (2012) (quoting *Apprendi*, 530 U.S. at 490). *Southern Union* extended the *Apprendi* rule to monetary penalties, and requires the factfinder to determine, beyond a reasonable doubt, the facts needed to support a maximum monetary fine

[27] The court’s short forfeiture order as to Chiasson did not explicitly reference the preponderance standard. However, the district judge cited this Court’s decision in *United States* v. *Gaskin,* 364 F.3d 438, 461 (2d Cir. 2004), (A-3003), which states that sentencing facts need be found only by a preponderance of evidence.

calculated based on the period of the violation. In so holding, the Supreme Court rejected the government's argument that *Apprendi* should be limited to facts that affect the length of incarceration. The Court explained:

> Criminal fines, like these other forms of punishment, are penalties inflicted by the sovereign for the commission of offenses. . . . And the amount of a fine, like the maximum term of imprisonment or eligibility for the death penalty, is often calculated by reference to particular facts. Sometimes, as here, the fact is the duration of a statutory violation; under other statutes it is the amount of the defendant's gain or the victim's loss, or some other factor. In all such cases, requiring juries to find beyond a reasonable doubt facts that determine the fine's maximum amount is necessary to implement *Apprendi*'s animating principle: the preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense.

132 S. Ct. at 2350-51 (internal citations and quotation marks omitted).

It is well settled that criminal forfeiture is a form of punishment. *See*, *e.g.*, *Austin* v. *United States*, 509 U.S. 602, 622 (1993). Accordingly, under *Southern Union*, any facts, like the amount of the defendant's gain, that underlie the fixing of a maximum criminal forfeiture judgment must be proven to the jury beyond a reasonable doubt.

The Supreme Court's recent decision in *Alleyne* v. *United States*, 133 S. Ct. 2151 (2013), reinforces *Apprendi*'s application to criminal forfeiture judgments. *Alleyne* overruled prior Supreme Court precedent limiting *Apprendi* to maximum statutory penalties, and held that mandatory minimum sentences are also subject to

Apprendi. *Id.* at 2163. The Court rejected the government's argument that *Apprendi* should apply only to those sentencing schemes that provide for a maximum sentence and not those that provide mandatory minimum sentences. It held that "[i]t is indisputable that a fact triggering a mandatory minimum alters the prescribed range of sentences to which a criminal is exposed." *Id.* at 2160. Accordingly, a fact triggering a mandatory minimum "aggravates the [defendant's] punishment," and the *Apprendi* rule applies. *Id.* at 2158. In reaching this conclusion, the Court expressly overruled *Harris* v. *United States*, 536 U.S. 545 (2002), which had held otherwise. *Id.* at 2163.

In this case, the government employed a mandatory forfeiture requirement that functions as a mandatory minimum sentence within the meaning of *Alleyne*. The statute at issue, 28 U.S.C. § 2461(c), provides that the district court "shall order" a forfeiture penalty in addition to any sentence of imprisonment. This is not discretionary. It is a statutory mandatory minimum penalty. Accordingly, *Apprendi* applies to the forfeiture judgment at issue here.

To be sure, prior cases have held to the contrary. The Supreme Court held in *Libretti* v. *United States*, 516 U.S. 29, 49 (1995), that defendants do not have a Sixth Amendment right to a jury determination on forfeiture, and this Court held in *Fruchter*, 411 F.3d at 383, that forfeiture is not subject to the *Apprendi* rule. However, the recent decisions in *Southern Union* and *Alleyne*

invalidate these authorities, and indicate that *Apprendi* does indeed apply to criminal forfeiture sentences.

Fruchter held that the *Apprendi* rule does not apply to criminal forfeiture statutes because they do not have a "previously specified range" of punishments and thus lack a statutory maximum. 411 F.3d at 383. The Supreme Court rejected that rationale in *Southern Union*. The statute at issue in *Southern Union* did not specify a range or provide a definite statutory maximum—a fine of no more than $50,000 accrued every day that a violation occurred, no matter how long. The fine was indeterminate without reference to certain facts. The same is true of criminal forfeiture, for which the statute defines the maximum penalty in reference to any property that "constitutes, or is derived from proceeds traceable to [an offense]." 18 U.S.C. § 981(a)(1)(C). There is no meaningful distinction between a statute that sets a maximum fine in reference to specific facts and a statute that sets a maximum forfeiture in reference to specific facts; both prescribe maximum criminal punishments that are subject to *Apprendi*.

Furthermore, *Alleyne* precludes reliance on *Libretti*, which held that "the right to a jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protection." 516 U.S. at 367-68. The Court in *Libretti*, decided pre-*Apprendi*, concluded that "a defendant does not enjoy a constitutional right to a jury determination as to the appropriate sentence to be imposed," citing *McMillan*

v. *Pennsylvania*, 477 U.S. 79, 93 (1986), in support of this proposition. 516 U.S. at 49. *McMillan* held that facts that increase a mandatory minimum sentence need not be proven to a jury beyond a reasonable doubt. *Alleyne* overruled that holding. *See* 133 S. Ct. at 2164, 2166 (Sotomayor, J., concurring) ("I join the opinion of the Court, which persuasively explains why *Harris* v. *United States* and *McMillan* v. *Pennsylvania* were wrongly decided. . . . With *Apprendi* now firmly rooted in our jurisprudence, the Court simply gives effect to what five Members of the Court recognized in *Harris*: *McMillan* and *Apprendi* are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both." (internal quotation marks and brackets omitted)). Whatever remains of *Libretti* can no longer exclude forfeiture judgments from *Apprendi*'s reach

Even if this Court were to continue to follow *Libretti*, and to permit forfeiture orders to be fixed by judges rather than jurors, it should still reverse the forfeiture order here. *Libretti* concerned only the right to a jury determination on forfeiture under the Sixth Amendment, not the burden of proof the government must bear in a forfeiture proceeding. It thus does not control as to that issue, which implicates the due process protections of the Fifth Amendment. *See Alleyne*, 133 S. Ct. at 2156 ("The Sixth Amendment provides that those 'accused' of a 'crime' have the right to a trial 'by an impartial jury.' This right, *in conjunction with the Due Process Clause*, requires that each element of a crime be proved to the jury

beyond a reasonable doubt." (emphasis added)). *Southern Union* and *Alleyne* make clear that the government must prove beyond a reasonable doubt any fact that increases the maximum forfeiture.[28]

The district court's forfeiture order relied on findings it apparently made on a preponderance standard. The finding that Ganek was Chiasson's co-conspirator alone increased the maximum forfeiture amount by more than $1 million. As discussed, the evidence supporting that finding was insufficient, *see supra* at 72-74, and certainly that finding could not be made "beyond a reasonable doubt." Accordingly, this Court should vacate the forfeiture order as to Chiasson.

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[28] This Court in *United States* v. *Bellomo*, a case that predated *Apprendi*, held that a preponderance standard applies to criminal forfeiture proceeding because "[f]act-finding at sentencing is made by a preponderance of the evidence." 176 F.3d 580, 595 (2d Cir. 1999). *Apprendi* and its progeny have invalidated that rationale.

CONCLUSION

The judgment of conviction should be reversed and the case remanded with instructions to enter a judgment of acquittal. In the alternative, the judgment should be vacated and the case remanded for a new trial. If an acquittal or a new trial is not ordered, the sentence and forfeiture order should be vacated, and the case remanded for resentencing.

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1. The undersigned counsel of record for Defendant-Appellant Anthony Chiasson certifies pursuant to Federal Rules of Appellate Procedure 32(a)(7(C) that the foregoing brief contains 19,793 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the Word Count feature of Microsoft Word 2003.

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