13-1837-cr(L)
13-1917-cr(con)

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 OF DEFENDANT-APPELLANT TODD NEWMAN

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES AND REGULATIONS

RULES

INTRODUCTION

The government's case against Todd Newman is part of a broad enforcement campaign designed to "level the playing field" so that ordinary investors feel they have the same access to information as the most sophisticated hedge fund traders. Over and over again, the prosecutors in this case emphasized to the jury the disadvantage to ordinary investors when Wall Street insiders make money from trading on information that is not equally available to everyone. The government opened the case by telling the jury that the defendants made "big money" by getting an "unfair advantage" over "honest investors who were playing by the rules," (Tr. 48, 50), and concluded by arguing that the defendants made "big money trading on information that ordinary investors didn't have" (Tr. 3666).[1]

The problem with the government's level playing field paradigm is that, whether or not it is good policy, it is not the law. Twice the government has tried to persuade the Supreme Court to adopt such a theory of insider trading and twice the Supreme Court soundly rejected the government's position. *Chiarella v. United States*, 445 U.S. 222 (1980); *Dirks v. SEC*, 463 U.S. 646 (1983). In these seminal decisions, the Supreme Court made clear that trading on material, non-public, inside information is not unlawful. It is not fraud. Such trading becomes

[1] References to the Joint Appendix are cited as "A-__." References to the trial transcript, which is located at pages A-359 to A-1979 in the Joint Appendix, are cited as "Tr. __."

unlawful *only* in the narrow circumstance in which an insider breaches his fiduciary duty to a company by disclosing information *for personal gain*. Where inside information is disclosed in the course of arm's length business conversations, through carelessness, or out of an insider's perceived interest in benefitting the company, recipients are free to trade, and even to make "big money," notwithstanding that "ordinary investors who play by the rules" do not have equal access. While the government has always resisted this as a policy matter, it is the law and has been the law for over 30 years.

In this case, the government's zeal to enforce a level playing field without regard to these governing legal principles led to a fundamentally flawed prosecution. The jury was charged that Mr. Newman did not have to know of self-dealing by the insider, even though that is the fulcrum fact that distinguishes between legal and illegal conduct. The government did not try to prove that Mr. Newman had such knowledge, or even that he knew who the insiders were. And lest a prosecution of the insiders themselves shed unwanted light on the true, and innocent, circumstances of the disclosures, the government never charged the key insiders involved in this case with any wrongdoing whatsoever, only the hedge fund traders who make such an easy target in the government's crusade against Wall Street inequality.

When all was said and done, Mr. Newman was not convicted of trading on information he knew to be obtained improperly, that is, as a result of the insiders' fraudulent self-dealing. The jury was not instructed that such knowledge needed to be proved and the government offered no evidence to prove it. Instead, Mr. Newman was convicted simply of profiting from information that ordinary investors did not have. That is not a crime.

The government has ample recourse if it wishes to establish a level playing field. It can lobby Congress for changes to the insider trading law to eliminate the personal benefit requirement or, for that matter, any requirement other than knowingly trading on material, non-public, inside information. It can put some energy into its so-far toothless enforcement of SEC Regulation FD, which prohibits companies from selectively disclosing material information. And it can prosecute, in appropriate circumstances, the insiders who are the true gatekeepers of corporate information. But what it cannot do is rewrite the criminal law *ex post facto* so as to persecute unpopular hedge fund traders for conduct they understood at the time to be legal. That is what the government did here and that is why Mr. Newman's conviction must be reversed and a judgment of acquittal entered.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291. On May 10, 2013, Mr. Newman filed a

timely notice of appeal from a final judgment of conviction entered on May 8, 2013.

ISSUES PRESENTED FOR REVIEW

1. Whether Mr. Newman is entitled to a judgment of acquittal because (a) the district court refused to give his proposed jury instruction that he needed to know that the information at issue was provided by corporate insiders in exchange for personal benefits, and (b) under the correct legal standard, the evidence was insufficient to prove that Mr. Newman knew of benefits to the insiders.

2. Whether the jury charge was erroneous and prejudicial insofar as it (a) included a "conscious avoidance" charge without a factual predicate for such a charge; and (b) failed to instruct the jury as to the factors to be considered in determining whether corporate information is "confidential" as set forth by this Court in *United States v. Mahaffy*, 693 F.3d 113 (2d Cir. 2012).

3. Whether Mr. Newman is entitled to a judgment of acquittal because the evidence at trial was insufficient to establish that the corporate insiders breached their fiduciary duties to shareholders, including that they provided information in exchange for personal benefits.

4. Whether the government's proof at trial as to the content of the alleged inside information varied impermissibly from the charges in the Superseding Indictment.

STATEMENT OF THE CASE

Superseding Indictment S2 12 Cr. 121 charged Mr. Newman and co-defendant, Anthony Chiasson, with one count of conspiracy to commit insider trading and, with respect to Mr. Newman, four substantive counts of insider trading in the shares of Dell Inc. and NVIDIA Corporation. A-148.

The case was tried before Judge Richard J. Sullivan and a jury between November 7, 2012 and December 17, 2012. On December 17, 2012, the jury returned a verdict of guilty against both defendants on all counts.

Mr. Newman was sentenced on May 2, 2013 to 54 months in prison, a $1 million fine, and ordered to forfeit $737,724. A-2807. In an order dated May 7, 2012, the district court denied Mr. Newman's request for bail pending appeal. A-2803.

On May 10, 2013, Mr. Newman timely filed a notice of appeal, (A-2814), and the same day filed a motion with this Court seeking bail pending appeal. In his bail motion, Mr. Newman argued that whether a tippee must have knowledge of a personal benefit to the insider raised a "substantial question" pursuant to 18 U.S.C. § 3143(b). On June 18, 2013, this Court agreed and granted the motion for bail pending appeal. A-2997.

STATEMENT OF FACTS

A. Newman's Background as a Portfolio Manager

Todd Newman ("Newman") had a legitimate and successful career in the financial industry for over twenty-five years. He worked his way up through a variety of positions including more than ten years as a research analyst. A-2313–14. In March 2006, Newman became a portfolio manager at Diamondback Capital Management ("Diamondback"), where he was in charge of a portfolio of technology-sector stocks. Tr. 1297. Diamondback allocated to Newman about $150 million to invest on behalf of its clients. A-2319.

As a portfolio manager, Newman was both an active and a profitable trader. On average, he traded the stocks of about 300 different companies per year and made well over 100 trades per day. A-2366–67. Between the time Newman started at Diamondback in March 2006 and the beginning of the alleged conspiracy (September 2007), Newman's portfolio generated about $45 million in profits. A-2368. Over the next 28 months through December 2009 (the alleged conspiracy period), Newman made about $73 million in profits, of which only about $4 million was alleged to be tainted by improperly obtained information. A-2368, 2370, 2373.

B. Overview of the Government's Insider Trading Allegations

The government alleged that Newman received inside information from his research analyst, Jesse Tortora. Tortora was a member of a group of friends who

worked as analysts at different investment firms. Tr. 138-39. The group's members exchanged information they obtained from various sources including company insiders. Tr. 51, 137-38, 143. They allegedly passed the information to their portfolio managers, who traded on it. Tr. 139. Tortora was the conduit for all of the allegedly improper tips that went to Newman. It was undisputed that Newman did not have any substantive contact with the other portfolio managers, other members of the analyst group, or the company insiders. Tr. 1105-10.

The information at issue consisted of quarterly financial data relating to technology companies – particularly Dell and NVIDIA[2] – such as revenue, gross margin, operating margin, and earnings per share. Tr. 150. The government alleged that the analysts obtained this information from insiders before the companies made their official quarterly announcements. Tr. 50-52. The information was provided mostly in the form of ranges or directional guidance (*e.g.*, higher or lower than the consensus of analysts' expectations) rather than precise numbers. Tr. 1418, 1517.

Several witnesses testified that analysts estimated these same metrics through legitimate financial modeling using publicly available information and

[2] The government introduced evidence about four other stocks – Altera, Intel, Advanced Micro Devices, and Texas Instruments – but those stocks were not the focus of the government's case and the government did not discuss them in summation.

educated assumptions about industry and company trends.[3] Tr. 1552-54, 2881. Equally important, the evidence showed that quarterly financial information was routinely leaked by the relevant companies, not for corrupt purposes, but because the companies wanted to develop relationships with hedge funds and other firms that might buy their stock, or to condition the market to unexpected news. *See* pp. 17-20, *infra*.

Newman did not treat the quarterly financial information he received from Tortora as if it was anything other than the product of modeling and conversations with legitimate industry contacts. Many of the alleged tips were contained in emails or instant messages from Tortora to Newman that both knew could be read by Diamondback's compliance department and by regulators like the SEC. Tr. 1087-88, 1342-44. While Tortora sometimes used a personal email account when discussing sensitive information with his analyst friends, Newman *always* used his official Diamondback email address, to which the compliance department had access. Tr. 1313, 1342-44.

[3] For example, one of the government's cooperating witnesses was an analyst at Neuberger Berman who developed a financial model on Dell. When the analyst ran the model in January 2008 without any inside information, he calculated May 2008 quarter results of $16.071 billion revenue, 18.5% gross margin, and $0.38 earnings per share. Tr. 1566. These estimates turned out to be nearly perfect. Tr. 1567-68; A-2243 (Dell reported $16.077 billion revenue; 18.4% gross margin; $0.38 earnings per share).

The government's case against Newman was based almost entirely on Tortora's testimony as Tortora was the only witness who said he gave improperly obtained information to Newman.[4] Tortora brought his contacts with him when he joined Diamondback in September 2007, or developed them himself while there, and Tortora continued to exchange information with those same contacts after he left Diamondback in April 2010. Tr. 1132-35. By contrast, Newman did not cultivate or contact any of the alleged sources of inside information himself, and did not have any contact with them after Tortora left Diamondback.

C. The Trading in Dell

Most of the government's case – including three of the four substantive counts – related to Newman's trading in the shares of Dell. The government alleged that Rob Ray, an employee in Dell's Investor Relations department ("IR"), gave Dell quarterly financial information to Sandy Goyal, an analyst at Neuberger Berman, who gave the information to Tortora, who gave the information to Newman. Tr. 52-53.

[4] Tortora's credibility was severely undermined at trial. After his arrest, he made a series of tape recorded telephone calls with his analyst friends in which he referred to Newman as the "scapegoat," (Tr. 663), and agreed to "push every responsibility up to Todd" (Tr. 664-65). Tortora even referred to Newman as the "fall guy" in handwritten notes of these conversations. Tr. 653. Tortora attempted to distance himself from these remarks as something the FBI case agent coached him to say. Tr. 653, 663. But the defense called the case agent, who testified that he never told Tortora to refer to Newman as a "fall guy" or "scapegoat," (Tr. 3467-68, 3472), nor did he instruct Tortora to "push[] every responsibility up to Todd" (Tr. 3471).

1. Ray's relationship with Goyal

Rob Ray was an "acquaintance" of Sandy Goyal whom Goyal knew from business school and when the two worked together at Dell. Tr. 1390; Tr. of Plea Allocution at 17, 19, *United States v. Goyal*, No. 11 Cr. 935 (S.D.N.Y. Nov. 3, 2011), ECF No. 10 (Goyal describing Ray as an "acquaintance"). While at Dell, they had only intermittent contact. Tr. 1390. After Goyal left Dell for jobs at Prudential and then Neuberger Berman, his contact with Ray remained professional in nature; for example, Goyal never socialized with Ray while Ray was at Dell. Tr. 1512. Goyal testified that his relationship with Ray was "not very close or personal." Tr. 1411. When the government asked Goyal at trial if he and Ray were friends, Goyal said "[h]e was not that close." *Id.*[5]

As an IR employee, Ray was authorized to speak to analysts at financial firms. Tr. 2918. An important part of Ray's job was to run Dell's investor "targeting" program, through which IR identified and "targeted" firms that Dell wished to attract as long-term investors. Tr. 2901-04, 2921-22; A-2138. One of the firms that Dell targeted was Neuberger Berman, where Goyal worked.

[5] Goyal told Tortora that he received information from someone at Dell who had access to "overall" financial numbers, but Tortora did not know Ray's name, position, or the circumstances of how Goyal obtained the information. Tr. 156-57, 603. Newman, who learned everything from Tortora, did not know this information either.

Tr. 2903-04. Ray's supervisor knew that Ray spoke to Goyal, which the supervisor agreed "was a normal part of Rob Ray's job." Tr. 2929-30.

2. Ray's conversations with Goyal

Ray did not testify and the government did not offer any written communications between Ray and Goyal purportedly containing inside information. The only account of Ray's disclosure of Dell information came from Goyal's testimony.

According to Goyal, Ray began giving him Dell financial information in late 2007. Tr. 1415. Goyal and Ray's conversations were "casual"; that is, Goyal "didn't press" Ray for information. Tr. 1516. Goyal told Ray he was in Neuberger Berman's "research department," which Ray understood to mean that Goyal worked on financial models. *Id.* Goyal told Ray he was "working on a model and [] wanted to check the accuracy of the model." Tr. 1517. Goyal never told Ray he was sharing the information with anyone else or that anyone was trading on the information.[6] Tr. 1611.

The evidence showed that conversations in which IR personnel assisted analysts with models were a regular part of the business. Goyal testified that he

[6] The government made much of the fact that Ray and Goyal spoke outside of business hours on their personal phones. But Rob Williams, Ray's supervisor in the Dell IR department, testified that IR personnel were expected to be available to analysts at any time, and that "there was nothing wrong" with IR personnel speaking to analysts on nights and weekends. Tr. 2894-96.

spoke to IR departments "a lot" to run his model by them and to ask whether his assumptions were "too high or too low" or in the "ball park." Tr. 1511. Ray's supervisor in the Dell IR department further confirmed that it was "the job of a financial analyst" to use conversations with IR to come up with specific estimates, through modeling, of a company's upcoming financial results. Tr. 2880-81. Dell IR not only tracked analysts' models to monitor street expectations, but assisted analysts with developing their models. Tr. 2925. If an analyst working on a model inquired about a specific Dell financial line-item, IR "would absolutely discuss it." Tr. 2827-29.

Consistent with Goyal's testimony that he led Ray to believe he was seeking routine help in preparing a financial model, the information Ray provided was not precise. While Ray had access to precise numbers as a member of IR, Ray did not give Goyal those numbers, but rather gave "a range of numbers" or expressed the numbers relative to analysts' expectations (*i.e.*, higher/lower than market consensus). Tr. 1417. The ranges Ray provided for gross margin, for example, could be as large as 17% to 17.5%, or provided in more general terms such as "low 18's." Tr. 1417, 1517.

When Tortora received this information from Goyal, Tortora well understood it was not precise and conveyed that lack of precision to Newman. For

example, in advance of Dell's August 2008 quarterly announcement[7] – the basis for two of the substantive counts against Newman – Tortora told Newman he got Dell information from Goyal, based on which he "guess[ed]" that Dell's gross margin would not get as high as analysts were expecting. A-2012. Tortora further said gross margin would "maybe [be] 18 . . . but who knows[?]" *Id.* As to Dell's earnings per share that quarter, Tortora testified at trial that he either used Goyal's information to model the result or he "did a quick swag;"[8] either way, his calculation was incorrect. Tr. 248.

In addition to being imprecise, Ray's information (as filtered through Goyal) was often wrong, including during the two quarters for which Newman was charged with substantive insider trading. In the May 2008 quarter, Ray incorrectly told Goyal that gross margin would be higher than the market expected; in fact gross margin came in lower than expectations. Tr. 828-30. In the August 2008 quarter, Ray incorrectly told Goyal that revenue would be "slightly" higher than $16 billion, a number that proved to be nearly $400 million too low. Tr. 882. When Tortora saw Dell's actual revenue for the second quarter, he "freaked," (A-2019), because the number was so far off from what he had been expecting. On

[7] Dell typically announced its earnings four weeks after the quarter closed. For example, Dell announced earnings on August 28, 2008 for the quarter ended August 1, 2008.

[8] A "swag" is a "scientific wild-assed guess." *See* http://dictionary.reference.com/browse/scientific+wild+ass+guess.

the stand, Tortora admitted that Goyal's information on Dell was accurate only 70% of the time.[9] Tr. 887, 890. At one point, after giving Newman information from Goyal that ultimately proved incorrect, Tortora told Newman "from now on [I'm] goign [sic] to tell you to [do the] opposite of what i think." A-2378.

Goyal did not provide Ray with financial or tangible benefits in exchange for the information from Ray. Tr. 1512. Instead, the government's theory was that Goyal gave Ray advice on advancing his career. However, Goyal's testimony made clear that this "advice" was little more than a gesture to be polite, and certainly did not translate into any concrete assistance in helping Ray find a job. For example, Goyal "put in a good word" with someone who was not looking to hire at the time, (Tr. 1401), encouraged Ray to "keep trying," (Tr. 1402), reviewed Ray's resume, and provided "tips" on how to interview (Tr. 1423). But Goyal never found Ray a job at his own firm, Neuberger Berman, or anywhere else, nor did he arrange for Ray to be interviewed at Neuberger. Tr. 1513. Further, Goyal began giving Ray "career advice" nearly two years *before* Ray began providing information, (Tr. 1514), and Goyal said he would have given Ray advice even

[9] The evidence showed many additional examples of Goyal's information being inaccurate, most of which Tortora passed on to Newman. *See* A-2000 (wrong about gross margin in Dell's earnings announcement); A-2377–78 (wrong about Dell unit data reported by IDC/Gartner); A-2021 (information from Ray did not indicate problems less than three days before Dell pre-announced negative results); A-2396 (Tortora telling another analyst he was "dead wrong" on Dell last quarter).

without receiving information because he routinely did so for industry colleagues (Tr. 1515). Certainly, Ray never said that the career advice was a *quid pro quo* for assistance he was giving Goyal with his model. Tr. 1514.

Significantly, Goyal never told Tortora about any career advice that he was giving to Ray. Tortora was under the mistaken impression that Goyal gave stock tips to Ray. Tr. 1415. Goyal never testified about providing stock tips to Ray and there was no evidence that he did so; Goyal instead claimed that he gave career advice to Ray. Tr. 1423. In any event, Tortora never told Newman about career advice, stock tips or any other benefit Goyal allegedly gave to Ray, and there is no evidence that Newman knew of any benefit.

3. Newman's Trading in Dell

Newman's trading in Dell showed that he did not treat the information he received from Tortora as if it were the "sure thing" that the government sought to portray. To the contrary, Newman frequently traded in the opposite direction of Tortora's recommendations, even incurring losses after supposedly being tipped with inside information.

Newman traded Dell throughout the quarters in question, not just around the dates of the alleged tips. A-2331–39. Although Newman held significant positions going into Dell's May and August 2008 quarterly announcements, those positions were established through a series of purchases and sales over time, often

in the opposite direction of the information supplied by Tortora. Thus, Count Two of the Superseding Indictment charged that Newman bought Dell shares on May 16, 2008 on the basis of information from Goyal that Dell's results would be better than analysts' expectations. A-163. But a few days after this purchase – and before Dell's results were announced on May 29th – Newman *sold* almost the entire position *for a loss* of about $85,000. A-2369. Even Tortora supported reducing the position based on information wholly unrelated to Goyal. A-2383 (Tortora telling Newman he should "trim" Dell position based on Goldman Sachs analysis of reduced PC production in Taiwan). As the government's summary witness testified, selling stock when a trader expects it to rise in the near future would be "leaving profits on the table." Tr. 3182.

Similarly, Counts Three and Four charged Newman with taking short positions in Dell on August 5 and August 15, 2008 based on information from Goyal that Dell's results would be worse than the market was expecting. A-163. But in each case, Newman "covered" (*i.e.*, closed out) those short positions, sometimes for losses, after the alleged tips and before Dell announced its results on August 28, 2008. A-2371–72. As with the May trading, it would make no sense

for a trader to eliminate his position, especially for losses, if he had what he knew to be accurate inside information. [10]

4. Dell's leaks of quarterly financial results

While the government sought to draw nefarious inferences from the fact that Newman received earnings-related information in advance of Dell's quarterly announcements, the uncontroverted evidence established that Dell routinely leaked this information to analysts. The government's own witnesses acknowledged that these leaks were not made in exchange for personal benefits, and the government never contended that the leaks were improper. *E.g.*, Tr. 567-68, 574, 591, 602,

[10] The government argued that Newman ultimately took large positions in May and August based on Goyal's track record of providing reliable information in prior quarters. But, as explained above, Goyal's information was significantly incorrect in the immediately preceding quarters. *See* n.9, *supra*. Furthermore, Newman's positions going into the quarterly announcements were consistent with market developments separate and apart from the information Goyal learned from Ray. In the May quarter, Newman sold off most of the position he had put on after the alleged tip from Tortora on May 16th; but then Newman increased the position after Hewlett Packard's ("HP") quarterly announcement suggested that Dell won market share from HP, and again after positive comments from Dell's CEO, Michael Dell, just a day before Dell's earnings announcement. A-2335–36, 2384, 2386, 2435. In the August quarter, Newman covered much of the short position he had put on after the alleged tips from Tortora on August 5th and 15th; but then Newman began to short again on August 20th, the day after HP's quarterly announcement showed reduced margins in its business segments that overlapped with Dell. Tr. 866-891; A-2338, 2497, 2518. In addition, Tortora and Newman both thought Dell's gross margin would be low in the August quarter based on a detailed analysis by a Diamondback consultant, Scott Kanowitz, showing that average selling prices of Dell computers were falling sharply, thereby putting pressure on Dell's gross margin. *See* A-2008 (Tortora remarking that Kanowitz's analysis was "very negative for [Dell] margin"); A-2019 (Newman telling Tortora right after August announcement that Kanowitz's analysis had been helpful on gross margin issue).

695, 703-04, 721, 1510, 1644, 2512. The leaks were consistent with Dell's "targeting" program that was designed to build institutional relationships with analysts at firms that might invest in Dell, or were made to condition the market to unexpected news.[11] And while Ray's information was generally in the form of ranges or "directional," and often proved inaccurate, the Dell leaks were both precise and accurate. Among the leaks established at trial were the following:

- Halfway through Dell's quarter ended November 2, 2007, Lynn Tyson (head of Dell IR) told Tortora at a one-on-one breakfast that Dell's reported sales would start to improve, led by the small and medium business segment. A-2401. Tortora testified that this was "one of [Dell's] important segments" and that this was "useful information to get from somebody on the inside at Dell." Tr. 695-96.

- During the "quiet period" leading up to Dell's May 2008 earnings release, Dell's CFO, Don Carty, told an analyst at dinner that Dell would achieve headcount reduction three times larger than what the market was expecting. A-2380. This information proved accurate and material to Dell's earnings, announced two weeks later. Tr. 1576; A-2261–62, 2437.

- Halfway through Dell's quarter ended October 31, 2008, Dell IR told an analyst "offline" that Dell would miss quarterly estimates "by a country mile." A-2387. Dell's revenue missed by nearly $1 billion that quarter. A-2253, 2455.

[11] Ray's supervisor, Rob Williams, testified that it was essential for Dell to establish "trust and credibility" with the analyst community, which in part meant avoiding surprises such as disappointing quarterly results after the CEO had spoken positively about the company. Tr. 2949-50. Williams told the FBI that prior to Dell's August 2008 earnings announcement, Dell released some information because the company knew the quarterly results would not be good. Tr. 2897-98. On the stand, Williams claimed he never made that statement to the FBI, though he acknowledged it was contained in the FBI's report of its interview with him. *Id.*

- During the "quiet period" leading up to Dell's November 2009 earnings release, Tyson told an analyst that gross margin would be stable even if revenue missed expectations. A-2388. When Dell reported earnings, revenue missed expectations by nearly $1 billion, but gross margin was stable. A-2253, 2455.

- Just six days before the November 2008 earnings release, during the "quiet period," Dell IR told an analyst that the company would report earnings of at least 30 cents per share. A-2389.

- Halfway through Dell's quarter ended January 30, 2009, Tyson told Tortora that soon-to-be released industry data would show poor results for Dell. A-2394. When the data was released, it showed that Dell's PC shipments declined more than any other manufacturer. A-2473. Tyson also told Tortora that "low 12%" operating expense was "reasonable" for the quarter and Tyson "sounded fairly confident on [gross margin] and [operating margin]." A-2394.

- Roughly one month before the end of Dell's quarter ended January 30, 2009, Tyson told analysts that "all is well w[ith] share loss yesterday will make it up on margins." A-2395. Tortora testified that he understood this to mean that despite weaker revenues (which had been reported a day earlier), Dell's earnings per share would not suffer because the revenue shortfall would be made up for by higher margins. Tr. 946.

- Two weeks before the end of Dell's quarter ended May 1, 2009, Tyson told analysts at a group lunch that Dell's normalized gross margin would be 18% for the current quarter. Tr. 1506; A-2397. Dell later announced gross margin of 18.1%. A-2403.

- Three weeks before the end of Dell's quarter ended May 1, 2009, Tortora learned from Dell IR that gross margin would be "in-line at best" with market expectations of 17.7%. A-2399. This proved to be accurate when Dell reported gross margin of 17.6%. Dell Inc., Current Report (Form 8-K, Ex. 99-1) (May 20, 2010).[12]

[12] The Court may take judicial notice of "relevant matters of public record." *Giraldo v. Kessler*, 694 F.3d 161, 164 (2d Cir. 2012).

- Rob Williams of Dell IR testified that Dell provides specific unit sales data, a critical component of revenue, to paid research services used by financial analysts to predict earnings. Tr. 2887-88.

- Sandy Goyal testified that, wholly apart from Rob Ray, he had five or so "friends" at Dell who gave him segment financial information in advance of quarterly announcements. Tr. 1384-85, 1409. For example, Goyal's friends told him in January 2008, a month and a half before Dell announced its earnings, that the US corporate business would experience sequential decline in margins and that US consumer revenue growth was fine. A-2100. At trial, Tortora testified that these were "legitimate" contacts with "useful" information that he did not believe "cross[ed] the line." Tr. 961-62.

Even after the trial, Dell continues to leak specific information about current quarter financial results. On May 14, 2013, the *Wall Street Journal* reported that "according to [a] person briefed on the financial results," Dell would report revenue of "roughly $14 billion," operating income of $600 million, and earnings per share of "20 cents," all numbers that were significantly different from analysts' expectations. *See* Shira Ovide, *Dell to Miss Profit Estimates, Beat on Revenue*, Wall St. J. May 14, 2013 (available at http://online.wsj.com/article/SB10001424127887324715704578483151440568828.html). Two days later, on May 16, Dell reported revenue of $14.1 billion, operating income of $590 million, and earnings of $0.21 per share. *See* Dell Inc., Current Report (Form 8-K, Ex. 99-1) (May 16, 2013).

5. Diamondback's payments to Ruchi Goyal

The government introduced evidence that Diamondback paid $175,000 in consulting fees to Sandy Goyal's wife, Ruchi Goyal, and argued that these were

secret payments for inside information. Tr. 3678. The proof at trial, however, told a different story.

Prior to working at Diamondback, Tortora was employed as an analyst at Prudential, where Goyal worked for him. Tr. 127-28. After Prudential shut down its research division in summer 2007, Tortora moved to Diamondback and Goyal moved to Neuberger Berman. Tr. 133, 136, 1375. Shortly after Tortora started at Diamondback, he asked Goyal if Goyal could continue doing the same kind of support work that he had been doing for Tortora at Prudential, and Goyal agreed.[13] Tr. 1519, 1523. Thereafter, Goyal helped Tortora with financial modeling and analysis of various stocks, as he had done at Prudential. Tr. 1523-31. Goyal also provided Tortora information gleaned from various sources, including from several Dell employees whom neither Tortora nor Goyal believed gave information improperly. Tr. 961, 1384-85. Importantly, when this consulting arrangement was put in place, it did not contemplate Goyal getting information from Rob Ray because Goyal had not yet begun to receive information from Ray. Tr. 1523.

In exchange for providing these services, Tortora and Goyal agreed that Diamondback would pay Goyal $18,750 quarterly through its soft dollar

[13] Around the same time, Tortora arranged for Diamondback to hire other consultants, (Tr. 629), none of whom the government has suggested provided information improperly. This process of hiring consultants to assist in research activities was a normal and expected part of a hedge fund analyst's job. Tr. 684.

program.[14] Tr. 1427. Diamondback also paid Goyal a $100,000 bonus at the end of 2008. Tr. 1431-32. However, instead of paying Goyal directly, Tortora and Goyal agreed that Diamondback would pay Goyal's wife. According to both Tortora and Goyal, this was not done because they wanted to conceal that Goyal was working as a consultant; rather, Goyal's visa status prohibited him from working for more than one employer. Tr. 384-85, 1425-26. No portion of the money paid to Goyal was intended to go to Ray and none did. Tr. 1612.

D. The Trading in NVIDIA Corp.

The government also charged Newman with one substantive count of insider trading in the stock of NVIDIA. As with Dell, Newman was several steps removed from the source, Chris Choi, who worked in NVIDIA's finance department. A-2270. Choi passed information to his friend Hyung Lim, (Tr. 3032), who gave information to Danny Kuo, an analyst at Whittier Trust, who gave information to Tortora, who gave information to Newman. Tr. 61-63.

The NVIDIA information – like the Dell information – was often incorrect. For example, in February 2009, Kuo sent an email to Tortora with his calculation for non-GAAP gross margin based on information he received from Choi, which turned out to be 30% off. Tr. 995-98; A-2109. As a result of this incorrect

[14] Asset managers like Diamondback generate "soft dollars" by paying trading commissions to broker/dealers, who give back a portion of those commissions to be used for research and related services, including to pay consultants. Tr. 1315.

information, Kuo's calculation for earnings per share was also incorrect. Tr. 999-1000.

As to why Choi provided information to Lim, Choi did not testify, and his motivation was not apparent from the testimony of others. Lim himself said that he did not provide anything of value to Choi in exchange for the information. Tr. 3067-68. During Lim's direct examination, the government tried to establish that Choi knew that Lim was trading on the information Choi provided, (Tr. 3044, 3083), but Lim testified during cross-examination that Choi did not know that Lim was trading NVIDIA stock. Tr. 3068-69. In addition, Lim did not trade on the information from Choi between April 2009 and July 2009, which includes the period relevant to the only NVIDIA count against Newman. Tr. 3078.

There was no evidence that Tortora had any understanding of why Choi provided information to Lim, and Tortora testified that he did not know whether Choi received any kind of personal benefit. Tr. 994. If Tortora, through whom the information flowed to Newman, did not know these facts, Newman himself could not have known them.

Like Dell, the evidence at trial showed that NVIDIA IR selectively disclosed accurate, confidential information to analysts in advance of the company's earnings announcements. The government witnesses testified that there was nothing improper about these disclosures. Tr. 1006-07, 1043. In one example,

NVIDIA IR told a Diamondback consultant halfway through the company's quarter ended April 26, 2009 that "09 [would] suck" and that "[m]argins have been hit by collapse of workstation demand . . . higher mix to chipsets, [and] drop in [desktop] margins." A-2417. This information proved to be accurate when NVIDIA reported its earnings in May 2009. A-2300. In another example, Mike Hara, head of NVIDIA IR, met with Sam Adondakis (another analyst co-conspirator) one month before the end of NVIDIA's quarter ended April 26, 2009. During the meeting, Adondakis asked Hara about an analyst's recent, precise revenue estimate for the current quarter, in response to which Hara "[d]id not flinch." A-2419. Adondakis's written report from the meeting indicated that gross margin would be flat for the quarter, (A-2421), which proved accurate. A-2300, 2427. Finally, Tortora testified it was well known in the investment community that in May 2009 NVIDIA would post a significant revenue increase over the prior quarter, (Tr. 1008, 1112-13), a fact that could only have come from inside the company.

Newman's trading in NVIDIA, as with Dell, was inconsistent with a belief that he was in possession of reliable inside information. Count Five of the Superseding Indictment charged Newman with taking a short position in NVIDIA leading up to the company's quarterly announcement on May 7, 2009. A-163. But on three occasions in the eight days leading up to the announcement, Newman

covered his short position for losses. A-2374–76. Indeed, Newman eliminated his entire short position the day before NVIDIA's announcement for a loss of over $55,000. A-2376. In the end, and after eliminating a significantly larger short position, Newman held only a small short position at the time of the announcement, which resulted in a gain of about $73,500. A-2373. The government's summary witness confirmed that had Newman kept his larger position from days earlier, he would have made considerably more money. Tr. 3206. The government offered no explanation as to why Newman would take off a potentially profitable position if he knew he had reliable information that no one else had.

E. The Jury Instruction on *Mens Rea*

At the charge conference, Newman requested an instruction – based on *Dirks v. SEC*, 463 U.S. 646 (1983) and decades of Southern District of New York precedent – that to convict, the jury had to find that Newman knew that the insiders provided material, non-public information in exchange for personal benefits. Tr. 3594-605; A-200–01, 203. The district court acknowledged that this request was supported by *Dirks* but concluded that it was inconsistent with this Court's decision in *SEC v. Obus*, 693 F.3d 276 (2d Cir. 2012). Tr. 3595. As a result, the district court instructed the jury that it had to find (i) that the insider breached a duty of trust and confidence by disclosing material, nonpublic information and,

separately, (ii) that the insider personally benefited from the disclosure. Tr. 4028. But with respect to Newman's knowledge, the district court instructed the jury that it had to find only that Newman knew the information was disclosed in breach of a duty; the district court refused to instruct the jury that it needed to find that Newman knew the information was disclosed in exchange for a personal benefit. *Id.*

SUMMARY OF ARGUMENT

Trading on material, non-public, inside information is illegal only if the insider engaged in self-dealing by disclosing the information for personal gain. *Dirks v. SEC*, 463 U.S. 646, 662 (1983) ("[T]he test is whether the insider personally will benefit, directly or indirectly, from his disclosure. Absent some personal gain, there has been no breach of duty to stockholders."). And since personal gain is the key fact that distinguishes legal from illegal activity, standard principles of *mens rea* require that a criminal defendant know about the personal benefit. *E.g.*, *Staples v. United States*, 511 U.S. 600, 605 (1994) ("conventional *mens rea* element" requires "that the defendant know the facts that make his conduct illegal"). This has been the reasoning of nearly 30 years of precedent in the Southern District of New York requiring knowledge of the benefit as a pre-requisite to insider trading liability. *United States v. Whitman*, 904 F. Supp. 2d 363, 371 (S.D.N.Y. 2012); *United States v. Rajaratnam*, 802 F. Supp. 2d 491,

498-99 (S.D.N.Y. 2011); *State Teachers Ret. Bd. v. Fluor Corp.*, 592 F. Supp. 592, 594 (S.D.N.Y. 1984).

The district court acknowledged that requiring knowledge of a personal benefit was "supportable certainly by the language of *Dirks*." Tr. 3595. But the court declined the proposed defense instruction, citing this Court's decision in *SEC v. Obus*, 693 F.3d 276 (2d Cir. 2012). *Obus*, however, was a *civil* case that did not implicate criminal *mens rea* requirements. Moreover, the parties in *Obus* did not address whether a tippee must have knowledge of a benefit provided to the insider and the Court had no occasion to decide that issue. Indeed, Judge Rakoff's decision in *Whitman* was issued *after* the *Obus* decision, yet Judge Rakoff did not read *Obus* to dispense with the knowledge of benefit requirement in a criminal case; in fact, Judge Rakoff held that such knowledge *was* an essential element for criminal tippee liability.

The appropriate remedy for the district court's improper instruction on knowledge of benefit is a judgment of acquittal. The government presented no evidence that Newman knew of any personal benefits to the insiders, and there was no evidence from which a reasonable inference of such knowledge could be drawn. To the contrary, the overwhelming evidence was that Dell and NVIDIA employees routinely gave out financial information in advance of earnings announcements for reasons other than personal gain; the only reasonable inference to someone in

Newman's shoes was that the information he received was disclosed under similar circumstances. Certainly, there was no basis in the record to presume from the fact that an insider provided financial information that it must have been in exchange for a personal benefit.

The erroneous jury instruction on knowledge of benefit was compounded by other flawed instructions that further reduced the government's burden to establish a culpable state of mind. First, the court improperly gave a "conscious avoidance" charge notwithstanding the lack of any foundation for such a charge as required by this Court's precedents. In particular, there was no evidence that Newman deliberately sought to avoid learning the circumstances under which the information was disclosed. Second, notwithstanding that the parties vigorously disputed whether the information at issue in this case was truly "confidential" (in light of the evidence of wide-spread leaks), the district court refused to give a charge guiding the jury as to the definition of "confidential." In *United States v. Mahaffy*, 693 F.3d 113 (2d Cir. 2012), this Court said such guidance was important in cases, like this one, where a company's practical efforts to keep information secret diverge from the lofty goals articulated in generic confidentiality policies.

The government's proof was also inadequate as to the essential requirement that the insiders breached fiduciary duties to their employers by improperly providing information in exchange for personal benefits. For example, the

undisputed evidence established that the Dell insider, Rob Ray, provided information to assist Sandy Goyal, a research analyst at another firm, in developing a financial model. Goyal never told Ray he was trading on the information or sharing it with anyone else. Such innocuous assistance in modeling was well within Ray's job responsibilities, and does not constitute a deliberate breach of a duty of trust and confidence that the law requires. Likewise, the government's proof that information was provided in exchange for a personal benefit was insufficient because – even accepting that "career advice" can constitute a personal benefit – Goyal began giving Rob Ray the advice years before any improper information was provided, the advice was generic and ineffective, Goyal testified he would have given similar advice to any professional colleague, and Ray never indicated the advice was a *quid pro quo* for him to assist Goyal with his model.

Finally, the government's proof at trial varied impermissibly from the charges in the Superseding Indictment on the core issue of the content of the inside information. As to Dell's May 2008 quarter, the Superseding Indictment specified that the inside information consisted of tips that gross margin would be higher than analysts' expectations. Confronted at trial with evidence that gross margin was actually lower than consensus, the government switched theories and argued that the inside information related to revenue and earnings, not gross margin. Newman was prejudiced because, having refuted the charges in the Superseding Indictment,

he was then confronted mid-trial with a new charge as to which he had inadequate time or opportunity to prepare.[15]

STANDARD OF REVIEW

This Court reviews *de novo* challenges to jury instructions where, as here, the court refused to give an instruction proposed by the defense. *United States v. Applins*, 637 F.3d 59, 72 (2d Cir. 2011). The Court also reviews *de novo* the sufficiency of the evidence, *United States v. Desposito*, 704 F.3d 221, 226 (2d Cir. 2013), and whether the proof at trial materially varied from the conduct charged in the indictment. *See United States v. D'Amelio*, 683 F.3d 412, 416 (2d Cir. 2012).

ARGUMENT

I. THE JURY SHOULD HAVE BEEN INSTRUCTED THAT KNOWLEDGE OF A PERSONAL BENEFIT WAS REQUIRED

Newman is entitled to a judgment of acquittal because the instructions to the jury omitted a key element – the tippee's knowledge of the insider's self-dealing – and the government's proof was insufficient to establish a crime under the correct legal standard.

A. The Personal Benefit Requirement

The Supreme Court has long held that trading on material, non-public information disclosed by a company insider is not, by itself, illegal. *Dirks v. SEC*,

[15] Pursuant to Federal Rule of Appellate Procedure 28(i), Newman joins in Chiasson's arguments, including with respect to forfeiture as discussed in Point III of Chiasson's brief on appeal.

463 U.S. 646, 653-54 (1983) (citing *Chiarella v. United States*, 445 U.S. 222, 235 (1980)). Such trading is illegal only if the insider breached a fiduciary duty to shareholders and the tippee knows about the breach. As the Supreme Court explained in *Dirks*, "a tippee assumes a fiduciary duty to the shareholders of a corporation not to trade on material nonpublic information 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." 463 U.S. at 660.

In the context of insider trading, an essential element of a breach of fiduciary duty giving rise to tippee liability is that the insider engaged in self-dealing. *Id.* at 654. As summarized by the Supreme Court:

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

Id. at 662. Accordingly, tippees do not "assume an insider's duty to the shareholders . . . because they receive inside information[.]" *Id.* at 660; *id.* at 659 ("recipients of inside information do not invariably acquire a duty to disclose or abstain"). Rather, they assume such a duty only when "[inside information] has been made available to them *improperly*," that is, when an insider discloses information in exchange for a personal benefit. *Id.* at 660 (emphasis in original).

The personal benefit requirement as articulated in *Dirks* is not merely advisory or incidental – it goes to the core of the statutory scheme prohibiting insider trading. Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and SEC Rule 10b-5 promulgated thereunder prohibit *fraud* in connection with the purchase or sale of securities. Not all breaches of fiduciary duty are fraudulent. *Dirks*, 463 U.S. at 654 (citing *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 472 (1977)). In an insider trading case, the fraud derives from the "inherent unfairness" of a corporate insider taking advantage of corporate information for *personal gain*. *Id.* at 654, 662 (citing *In re Cady, Roberts & Co.*, 40 S.E.C. 907 (1961)). In other words, it is the insider's corrupt use of corporate information to benefit himself rather than the company that renders the disclosure improper.

Thus, personal benefit to the insider marks a bright line between conduct that is fraudulent (and therefore prohibited) and conduct that is entirely legal. The facts of *Dirks* illustrate this point: Mr. Dirks was cleared of wrongdoing because the company whistleblower who provided him with confidential inside information received no personal benefit for doing so. And numerous courts since *Dirks* have similarly declined to impose liability on traders where they obtained confidential information from company insiders under circumstances that did not involve self-dealing. *See, e.g.*, *SEC v. Anton*, No. 06-2274, 2009 WL 1109324, at *9 (E.D. Pa. Apr. 23, 2009) (no evidence that tipper benefitted because he had limited social or

personal relationship with tippee); *SEC v. Maxwell*, 341 F. Supp. 2d 941, 948 (S.D. Ohio 2004) (tipper gave information to his barber but had no family relationship or close friendship, and no history of gifts between the two men); *SEC v. Switzer*, 590 F. Supp. 756, 762, 764, 766 (W.D. Okla. 1984) (tippee overheard conversation at sporting event but provided no benefit to tipper); *see also United States v. Evans*, 486 F.3d 315, 323 (7th Cir. 2007) (speculating that jury acquitted tipper because he did not receive any personal benefit); *SEC v. Rorech*, 720 F. Supp. 2d 367, 415-16 (S.D.N.Y. 2010) (tipper and tippee had "purely professional working relationship" and "were not friends").

B. Criminal Tippee Liability Requires Knowledge of a Personal Benefit to the Insider

If a personal benefit to the tipper marks a bright line between lawful and unlawful conduct, then it is axiomatic that a tippee must know of the personal benefit. *Dirks* made this clear in its holding that a tippee must "know[] . . . that there has been a breach" of fiduciary duty. 463 U.S. at 660. Since there is no breach giving rise to tippee liability absent a personal benefit, *id.* at 662, a tippee can "know" of a breach only if he knows of the benefit.[16]

[16] This reading of *Dirks* is supported by the Supreme Court's subsequent decision in *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299 (1985) in which the Court cited *Dirks* for the proposition that "[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

The Supreme Court's reasoning in *Dirks* is consistent with the basic proposition in our jurisprudence that, to be convicted of a crime, a person must know the difference between innocent and wrongful behavior, and must know on which side of the line his conduct falls. *Morissette v. United States*, 342 U.S. 246, 250 (1952) (referring to "ancient," "universal," and "persistent" requirement in criminal cases of a culpable state of mind). If wrongfulness turns on the existence of a fact – in this case, the fact that the insider disclosed the information in exchange for a personal benefit – the government must prove the defendant's knowledge of that fact. *Id.* at 271 (in prosecution for stealing government property, defendant "must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion"); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994) (defendant must know that actors in pornographic film were underage because "the age of the performers is the crucial element separating legal innocence from wrongful conduct"); *Staples v. United States*, 511 U.S. 600, 605 (1994) (noting "conventional *mens rea* element, which would require that the defendant know the facts that make his conduct illegal"); *Liparota v. United States*, 471 U.S. 419, 425-26 (1985) (defendant must know that his acquisition or

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

possession of food stamps was in a manner unauthorized by statute or else it would "criminalize a broad range of apparently innocent conduct").[17]

The need to require proof that a defendant knew of a personal benefit to the insider is particularly compelling here because the securities fraud statute limits criminal liability to persons who act "willfully." 15 U.S.C. § 78ff(a). In this context, willfulness means "'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)). This Court has recognized that the *mens rea* standard for insider trading is rigorous so as to prevent criminalization of conduct that a defendant did not understand to be illegal. *United States v. Kaiser*, 609 F.3d 556, 569 (2d Cir. 2010) ("it is easy to imagine an insider trader who receives a tip and is unaware that his conduct was illegal and therefore wrongful"). Since *Dirks* defines the line between legal and illegal conduct in relation to whether there was a personal benefit to the insider, a

[17] In opposition to Newman's motion for bail pending appeal, the government cited a series of cases in which a defendant did not have to know about facts pertaining to the seriousness of a crime or subject matter jurisdiction. *E.g.*, *United States v. King*, 345 F.3d 149, 152 (2d Cir. 2003) (defendant had to know only that he possessed illegal drugs, not the drug type and quantity); *United States v. Griffith*, 284 F.3d 338, 350-51 (2d Cir. 2002) (defendant charged with transporting minor in interstate commerce for purposes of prostitution need not know age of minor because defendant already knows he is promoting prostitution, which is a crime). These cases are inapposite because the personal benefit requirement marks the difference between unlawful and lawful conduct, and is not merely an aggravating circumstance or a basis for the court's jurisdiction.

"willful" criminal violation requires that the defendant be aware of the personal benefit.

Applying the foregoing principles, nearly thirty years of precedent in the Southern District of New York (prior to the district court's decision in this case) established that insider trading liability requires a tippee to know that the insider received a personal benefit. *United States v. Whitman*, 904 F. Supp. 2d 363, 371 (S.D.N.Y. 2012); *United States v. Rajaratnam*, 802 F. Supp. 2d 491, 498-99 (S.D.N.Y. 2011); *State Teachers Ret. Bd. v. Fluor Corp.*, 592 F. Supp. 592, 594 (S.D.N.Y. 1984).[18] Each of these decisions found that, under *Dirks*, self-dealing is an essential element of a breach of fiduciary duty giving rise to insider trading liability and, as such, must be known to the defendant. *Whitman*, 904 F. Supp. 2d at 370-72; *Rajaratnam*, 802 F. Supp. 2d at 498-99; *State Teachers*, 592 F. Supp. at 594. As explained by Judge Rakoff in *Whitman*:

> 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.

[18] *See also United States v. Santoro*, 647 F. Supp. 153, 170 (E.D.N.Y. 1986) ("the tippee must know that the tipper has transferred information, that that information is material and nonpublic, and that the tipper has done so for personal benefit"), *rev'd on other grounds sub nom. United States v. Davidoff*, 845 F.2d 1151 (2d Cir. 1988); *Hernandez v. United States*, 450 F. Supp. 2d 1112, 1118 (C.D. Cal. 2006) (tippee can be liable "if the tippee had knowledge of the insider-tipper's personal gain").

904 F. Supp. 2d at 371. Further, because "[d]erivative liability can attach only if the tippee recognizes that the relationship between tipper and tippee is such that the tippee has effectively become a participant after the fact in the insider's breach," the tippee must know each of the facts that gives rise to the tipper's liability in the first place. *Rajaratnam*, 802 F. Supp. 2d at 499 (quoting *Dirks*, 463 U.S. at 659); *State Teachers*, 592 F. Supp. at 594-95 (same).

The court below agreed that requiring knowledge of a personal benefit was "supportable certainly by the language of *Dirks*," (Tr. 3595), but declined to give the requested instruction based on its reading of this Court's decision in *SEC v. Obus*, 693 F.3d 276 (2d Cir. 2012). In *Obus*, a civil case, this Court said that tippee liability requires that "the 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)." *Id.* at 289. That statement is correct as far as it goes. But the *Obus* Court did not decide the further question of what it means to have knowledge of the insider's breach in a criminal insider trading case – *i.e.*, whether the tippee must know of an insider's self-dealing. *Obus* did not reach this issue because the parties did not present it.[19] Specifically, the defendants in *Obus*

[19] The same situation arose in *United States v. Goffer*, No. 11-3591-cr, 2013 WL 3285115 (2d Cir. July 1, 2013). As in *Obus*, the defendant in *Goffer* asserted that the evidence was insufficient to establish knowledge of a breach of duty, but did not raise the knowledge of personal benefit issue. *Id.* at *5. This Court noted that:

disputed whether any tip occurred, arguing that there was no breach of fiduciary duty because the tipper was merely conducting authorized due diligence when he had a conversation with his friend at a hedge fund. *Id.* at 289-90. They did not contest whether the tipper received a personal benefit, *see* SEC Br. at 31 n.5, *SEC v. Obus*, No. 10-4749 (2d Cir. Mar. 29, 2011), nor did they argue that to be found liable they had to have known that the tipper received a benefit. Indeed, the district court opinion in *Obus* makes no mention of any of the tippees' knowledge (or lack of knowledge) of any personal benefits.[20] *SEC v. Obus*, No. 06 CIV 3150, 2010 WL 3703846 (S.D.N.Y. Sept. 20, 2010).

It is also critically significant that *Obus* was a civil case. This is an important distinction because, as discussed above, a criminal conviction under the securities fraud statute requires willfulness while civil liability does not. The *Obus*

> [Defendant] does not challenge, and we therefore do not discuss, any elements of insider trading aside from the knowing use of material nonpublic information obtained in violation of a fiduciary duty.

Id. n.9. This is exactly right and, presumably, this Court had the same principle in mind in *Obus*, namely that courts decide issues as presented to them and do not decide issues that neither party has raised.

[20] It is understandable that the parties in *Obus* did not focus their arguments on personal benefit (or knowledge of personal benefit) because, historically, the Second Circuit has not required a personal benefit in insider trading cases, like *Obus*, that are prosecuted under the misappropriation theory. *See United States v. Libera*, 989 F.2d 596 (2d Cir. 1993); *SEC v. Lyon*, 605 F. Supp. 2d 531, 548 (S.D.N.Y. 2009) ("the Second Circuit has declined to impose a 'benefit' requirement in misappropriation theory cases").

Court was well aware of the civil nature of the claims at hand, including in the context of describing the scienter requirement. *E.g.*, 693 F.3d at 286 ("We read the scienter requirement set forth in *Hochfelder* . . . to apply broadly to civil securities fraud liability . . ."). While the same basic elements may apply in civil and criminal cases, the degree to which a defendant must *know* of the existence of an element can be higher in the criminal context. *See Staples*, 511 U.S. at 616-18 (criminal penalties support imposition of *mens rea* requirement even if statute is silent); *X-Citement Video*, 513 U.S. at 72 (same). This is especially the case where, as here, the statute expressly distinguishes between civil and criminal violations and requires heightened *mens rea* for the latter.

In sum, *Obus* left open the question of whether, in a criminal insider trading case, knowledge of a breach of fiduciary duty means knowledge that the tippee received a benefit. Indeed, the *Obus* decision does not even cite or discuss either *Rajaratnam* or *State Teachers*, the two prior lower court decisions squarely addressing the knowledge of benefit issue. Presumably, this Court would have at least acknowledged this long-standing precedent had it intended to announce a contrary result on such an important issue.[21] Judge Rakoff's written decision in

[21] If *Obus* is read to permit criminalization of trading without knowledge of the insider's self-dealing, then it announced a new rule, contrary to the *State Teachers* and *Rajaratnam* decisions before it, and should not be applied retroactively to Newman's conduct. *See United States v. Lanier*, 520 U.S. 259, 266 (1997) (due

Whitman, issued after *Obus* was decided, is particularly instructive on the limited application of *Obus* to a criminal case. Judge Rakoff undertook a comprehensive analysis of the personal benefit element in insider trading law; in doing so, he did not construe *Obus* as affecting his analysis that in a criminal case, a tippee must know that information was provided in exchange for a personal benefit because, "without such a knowledge requirement, the tippee does not know if there has been an 'improper' disclosure of inside information." *Whitman*, 904 F. Supp. 2d at 371.

C. A Judgment of Acquittal Is Warranted Because the Government's Proof Was Insufficient Under the Correct Legal Standard

Where the government's proof is insufficient, the proper remedy is acquittal. *United States v. Santos*, 449 F.3d 93, 95 (2d Cir. 2006). Applying the correct legal standard, there was *no evidence* in this case, let alone proof beyond a reasonable doubt, establishing that Newman knew the insiders were disclosing information in exchange for personal benefits. Tortora, the sole conduit of information to Newman, never testified that he discussed with or even suggested to Newman that the insiders – Ray and Choi – were receiving personal benefits.

With respect to Dell, Tortora was under a mistaken understanding as to what benefit Ray might have been receiving, but in any case did not pass any information about benefits to Newman. *See* p. 15, *supra*. With respect to

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process bars courts from applying criminal statutes to "conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope").

NVIDIA, Tortora testified that he was unaware of whether Choi was receiving a benefit, (Tr. 994), and so could not have passed any such knowledge to Newman.

Nor could a jury reasonably infer knowledge of a personal benefit from the circumstances of the disclosures. Indications that the information came from insiders or was of a type that official company policies deemed to be confidential are insufficient in view of the extensive trial evidence that Dell and NVIDIA employees routinely disclosed quarterly results in advance of official earnings announcements for reasons other than self-dealing.[22] *See* pp. 17-20, *supra.* Newman was copied on virtually all of the emails describing Dell and NVIDIA leaks and had no reason to think that the information that Tortora obtained from Goyal and Kuo was any different. The leaks included precise information, usually accurate, that was disclosed to analysts even during the "quiet period" leading up to the earnings announcements. Newman's awareness of like circumstances shows only that he was aware of being privy to similar leaks, and says nothing about whether the insiders engaged in self-dealing (which they did not with respect to the myriad leaks revealed during trial). Certainly these circumstances cannot establish

[22] Tortora also acknowledged that, in general, company insiders give out information that is supposed to be confidential without any personal benefit in return. Tr. 688. Again, this negates any inference that there must be a personal benefit whenever confidential information is obtained from an insider.

beyond a reasonable doubt that Newman knew of self-dealing by the insiders. Accordingly, a judgment of acquittal is warranted.

II. THE DISTRICT COURT IMPROPERLY CHARGED THE JURY REGARDING CONSCIOUS AVOIDANCE AND THE DEFINITION OF CONFIDENTIAL INFORMATION

The government's burden to prove criminal responsibility was further, and impermissibly, diminished by two other jury instructions relating to conscious avoidance and whether the financial information at issue was truly "confidential."[23] Each of these errors provides an independent basis for reversal.

A. Conscious Avoidance

Over defense objection, the district court instructed the jury that knowledge "may be established by proof that the defendant you are considering deliberately closed his eyes to what otherwise would have been obvious to him." Tr. 4037. This instruction was error because the necessary factual predicate was absent.

A "conscious avoidance" instruction is permissible only if "the appropriate factual predicate for the charge exists." *United States v. Ferrarini*, 219 F.3d 145,

[23] The district court's refusal to give jury instructions as requested by the defense stands in marked contrast to its willingness to interject itself into witness examinations, which ultimately inured to the benefit of the government. For example, during the cross-examination of Rob Williams, the district court asked questions of Williams that allowed him to retract his defense-favorable answer about public statements by Dell executives on current quarter business. Tr. 2949. In another example, the court *sua sponte* instructed the jury on conspiracy immediately after Hyung Lim admitted that his conduct "had nothing to do with Todd Newman." Tr. 3051-52.

154 (2d Cir. 2000). This requires evidence that the defendant "deliberately avoided confirming" a disputed fact. *United States v. Svoboda*, 347 F.3d 471, 480 (2d Cir. 2003); *Goffer*, 2013 WL 3285115 at *9; *see Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2070-71 (2011) (conscious avoidance consists of "deliberate actions" to avoid knowledge). It is "essential to the concept of *conscious* avoidance that the defendant must be shown to have *decided* not to learn the key fact, not merely to have failed to learn it[.]" *United States v. Rodriguez*, 983 F.2d 455, 458 (2d Cir. 1993) (emphasis in original).

In this case, the government offered no evidence that Newman deliberately decided not to learn that the information he was receiving was improperly obtained. Tortora repeatedly testified that he relayed information to Newman *verbatim*. Tr. 160, 238, 613, 789. There was no evidence that Newman asked Tortora to limit what he provided or that Tortora did so. *Cf. Goffer*, 2013 WL 3285115, at *9 (conscious avoidance charge appropriate where defendant told co-conspirator he was "better off not knowing where [his tips] were coming from"). Much of Tortora's communication with Newman was in the form of emails that Tortora forwarded to Newman just as he received them. *E.g.*, A-2001–05, 2108. 2111. And Newman frequently asked for *more information* about Tortora's sources and their reliability. *E.g.*, A-2012 (asking whether Dell information was from Goyal); A-2112 (asking whether NVIDIA source was "good on gm"). On

this record, the conscious avoidance charge impermissibly allowed the jury to find that Newman *should have known* that the information was obtained improperly, not that he *deliberately* avoided knowing. This is error. *Ferrarini*, 219 F.3d at 157 (improper to establish knowledge on the basis that "the defendant had not tried hard enough to learn the truth").

The government will no doubt argue that the circumstances of Newman's trading were "so overwhelmingly suspicious" that his "failure to question the suspicious circumstances establishes the defendant's purposeful contrivance to avoid guilty knowledge." *Svoboda*, 347 F.3d at 480 (citations omitted). But a "failure to question" does not constitute the "deliberate" action that the Supreme Court has recently held defines the concept of conscious avoidance. *Global-Tech Appliances*, 131 S. Ct. at 2071. And, in any event, the circumstances here were the opposite of "overwhelmingly suspicious." The information Newman received was consistent with legitimate financial modeling and with the many leaks by Dell and NVIDIA that not even the government argued were unlawful. The information was imprecise and frequently incorrect, further suggesting that it was not obtained improperly. Newman certainly did not treat the information as if there was anything suspicious in how Tortora obtained it, as evidenced by his open discussions with Tortora on his office email, which could be read by the compliance department and the SEC. And even the government apparently did not

find the disclosures sufficiently suspicious to justify charging Ray and Choi, the very insiders who made the disclosures and were closest to the relevant facts. Under these circumstances there was no basis for a conscious avoidance charge premised on "overwhelmingly suspicious" circumstances.

B. Confidential Information

A hotly disputed issue at trial was whether the alleged inside information was truly confidential given that Dell and NVIDIA regularly disclosed this type of information to the market. The government argued that Dell and NVIDIA had written policies prohibiting any disclosure of quarterly information prior to their official earnings releases. *E.g.*, Tr. 2807, 3097. The defense countered with extensive evidence of leaks that cast doubt on whether those companies really tried to keep quarterly information secret. *See* pp. 17-20, *supra*.

In *United States v. Mahaffy*, 693 F.3d 113 (2d Cir. 2012), this Court provided important guidance as to how such disputed confidentiality issues should be resolved. The Court explained that a company's information is not "confidential" unless the company takes affirmative steps to treat it as such. *Id.* at 135 n.14. Where confidentiality is at issue, "district courts would do well to provide additional guidance to the jury regarding how to evaluate whether employers treat information as confidential." *Id.* To make this determination, a jury should consider several factors, including: "written company policies,

employee training, measures the employer has taken to guard the information's secrecy, the extent to which the information is known outside the employer's place of business, and the ways in which other employees may access and use the information." *Id.* Importantly, "[i]f employers 'consider' information to be confidential but do not really take affirmative steps to treat it as such and maintain exclusivity," then the information is not confidential. *Id.*

The district court denied Newman's request for a *Mahaffy* charge on the grounds that *Mahaffy* was a wire fraud case, not a securities fraud case. Tr. 3609-10. But that distinction is meaningless. Just as in this case, the "critical issue" in *Mahaffy* "was whether portions of the [leaked] information actually were confidential." 693 F.3d at 121. And just as in this case, the government offered the testimony of corporate representatives that the information was confidential, *id.* at 121-22, while the defense elicited testimony that, in practice, the information was not treated confidentially. *Id.* at 122. Thus, *Mahaffy* addressed precisely the issue presented here. Moreover, *Mahaffy*'s discussion of confidentiality drew heavily on the Supreme Court's decision in *Carpenter v. United States*, 484 U.S. 19 (1987), itself a securities fraud case. Accordingly, the jury should have been provided with additional guidance on the concept of confidentiality as set forth in *Mahaffy* and failure to do so is an additional basis to reverse Newman's conviction.

III. THE GOVERNMENT'S PROOF WAS LEGALLY INSUFFICIENT TO ESTABLISH THE CHARGED OFFENSES

As explained above, an acquittal is warranted in this case because the government's proof that Newman knew of any personal benefit to the insiders was insufficient. In addition, the government's evidence was insufficient to prove an intentional breach of fiduciary duty by Ray or Choi, including that they received the kind of personal benefits required under *Dirks*.

A. Intentional Breach of Duty

The government failed to prove that Ray intentionally breached a fiduciary duty to Dell. Goyal – the only trial witness with knowledge of the circumstances of Ray's disclosures – testified that he led Ray to believe that nothing was wrong. Goyal portrayed himself to Ray in an innocuous way as a research analyst working on his model, affirmatively misled Ray into thinking that Goyal was not trading on the information, and failed to mention that Goyal was sharing the information with anyone else. *See* p. 11, *supra*. On top of this, Ray's supervisor in Dell IR confirmed that there was nothing improper about Ray speaking to Goyal during off hours, and that it was the job of IR employees to assist analysts, including with their models. *See* pp. 11-12 & n.6, *supra*. The extensive evidence of Dell leaks further undermined any inference that advance disclosure of quarterly results was such a serious infraction so as to imply a knowing breach. Finally, Ray has never been charged with any wrongdoing whatsoever, a telling indication of the

government's view of his culpability.[24] *See Dirks*, 463 U.S. at 666 n.27 (noting that insider was never charged).

Similarly, the evidence with respect to Choi was wholly insufficient to prove an intentional breach of fiduciary duty. The government offered the testimony of an NVIDIA representative to show that company policy prohibited the disclosure of quarterly information. Tr. 3097-98. But there was no evidence to show that Choi deliberately breached NVIDIA policies. The government did not call Choi to testify and the person to whom Choi gave information, Hyung Lim, did not give any indication that Choi knew he was doing anything wrong. Instead, the evidence showed that NVIDIA employees, including the head of IR, selectively disclosed confidential quarterly information. *See* pp. 23-24, *supra*. And like Ray, Choi has never been charged with any wrongdoing.

[24] The government's decision not to charge either of the key tippers in this case (Ray and Choi) is consistent more broadly with its focus on demonizing hedge fund managers while not pursuing others who received similar information. For example, the government did not charge Tortora's stepfather, Marshall Ingel, even though Tortora gave him the alleged Goyal tips, including that Dell's results would be weak in August 2008, and Ingel traded on the information. *E.g.*, A-2493. Similarly, Dan Niles, a trader at Neuberger Berman, has not been charged despite receiving information from Goyal that Goyal got from Rob Ray. A-2081. And Victor Dosti, who as Kuo's boss received the same information as Newman regarding NVIDIA, (*e.g.*, A-2108), has been sued civilly by the SEC but has not been subject to any criminal charges.

B. Personal Benefit

While the required personal benefit can take many forms (*e.g.* monetary payment; gift to a trading relative; reputational gain that translates into future earnings), there are nevertheless limits to what constitutes a benefit sufficient to establish insider trading liability. As one court put it, "*Dirks* requires an intended benefit of at least some consequence." *Maxwell*, 341 F. Supp. at 948 (no personal benefit notwithstanding that tipper and tippee knew each other for many years); *Anton*, 2009 WL 1109324, at *9 (no personal benefit notwithstanding tipper and tippee socialized on some occasions and had long-standing professional relationship). Importantly, where the government asserts that the tip was a gift to the tippee there must be "a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the particular recipient." *Dirks*, 463 U.S. at 664; *see also SEC v. Aragon Capital Mgmt., LLC*, 672 F. Supp. 2d 421, 432 (S.D.N.Y. 2009) ("A close personal relationship between the tipper and a tippee who trades suffices because the 'tip and trade resemble trading by the insider himself followed by a gift of profits to the [tippee].'"), *aff'd in part and vacated in part on other grounds sub nom. SEC v. Rosenthal*, 650 F.3d 156 (2d Cir. 2011). Ultimately, the personal benefit must be sufficiently meaningful to support the conclusion that an insider was acting fraudulently by forsaking corporate interests in favor of his own.

With respect to Ray, the evidence was clear that Ray and Goyal did not have a close relationship. During his plea allocution, Goyal repeatedly characterized Ray as an "acquaintance," not a friend. Tr. of Plea Allocution at 17, 19, *United States v. Goyal*, 11 Cr. 935 (S.D.N.Y. Nov. 3, 2011), ECF No. 10. Although they attended the same business school (in different class years) and both worked at Dell for a time, Goyal testified that they had limited contact. Tr. 1390. More importantly, Goyal specifically drew a distinction between Ray and five friends that Goyal knew at Dell. Goyal considered the latter "personal friends" and he travelled to Texas to socialize with them. Tr. 1384-85, 1411, 1469, 1492. In contrast, he had no such contact with Ray until after Ray had left Dell. Tr. 1469, 1512. And when the government specifically asked Goyal if he considered Ray a friend, Goyal responded that they "were not that close." Tr. 1411.

Faced with an alleged tipper and tippee who had a professional, not a personal, relationship – and absent evidence of any monetary or other tangible rewards – the government dug deep to come up with a personal benefit, ultimately arguing that Ray gave Goyal inside information in exchange for career advice. This theory was flatly refuted at trial. The evidence showed that (i) Goyal began giving Ray "career advice" nearly two years *before* Ray began providing financial information, (Tr. 1514), (ii) the alleged career advice amounted to routine and ultimately ineffective courtesies such as assistance with a resume, making an

introduction that went nowhere and telling Ray to "keep trying," (A-2076–78), (iii) Goyal would have given the advice even without receiving the information because he routinely did so for industry colleagues, (Tr. 1515), and (iv) Ray never connected the career advice as a *quid pro quo* to any assistance he was giving Goyal with his model (Tr. 1514). Were common courtesies like these sufficient to establish a personal benefit, the *Dirks* self-dealing requirement would be eviscerated, and only the rude would escape tippee liability by arguing that their dealings with the insider were so devoid of pleasantries that no benefit could possibly be inferred.

With respect to Choi, the evidence was that he and Lim knew each other from church. Tr. 3032. Although Lim described Choi as a "family friend," outside of attending church they only spoke on the phone and occasionally had lunch together. Tr. 3033. When asked directly if he ever provided Choi with anything of value in exchange for information, Lim testified that he did not. Tr. 3067-68. There was also no evidence that Choi benefitted from Lim's trading in NVIDIA, nor that he expected the information he gave to Lim to be a gift in any way. Lim testified that Choi was unaware that Lim was trading NVIDIA stock, (Tr. 3068-69), which in any event Lim did not do between April 2009 and July 2009 (the period that includes Count Five) (Tr. 3078). Thus, because Lim did not trade on the information from Choi during the relevant period, and Choi had no

reason to believe that Lim was ever trading NVIDIA stock, the tip and trade did not resemble "trading by the insider himself followed by a gift of the profits to the recipient." *See Dirks*, 463 U.S. at 664.

IV. THE GOVERNMENT'S PROOF AS TO THE MAY DELL TRADES IMPERMISSIBLY VARIED FROM THE CHARGES IN THE SUPERSEDING INDICTMENT

Count Two of the Superseding Indictment charged Newman with insider trading leading up to Dell's announcement of its quarterly results on May 29, 2008. According to the Superseding Indictment, as well as the Criminal Complaint on which Newman was arrested and the Information to which Goyal pleaded guilty, the content of the inside information was that Dell's gross margin would be *higher* than market expectations.[25] A-153; Criminal Complaint, *United States v. Newman*, 12 Cr. 121 (S.D.N.Y. Jan. 17, 2012), ECF No. 1; Information, *United States v. Goyal*, 11 Cr. 935 (S.D.N.Y. Nov. 3, 2011), ECF No. 3. The proof at trial, however, was the opposite, namely that gross margin was *lower* than market expectations.[26] This blatant mistake clearly showed that the government's effort to

[25] The Superseding Indictment stated that the inside information "indicated, among other things, that gross margins would be higher than market expectations." A-153. While this leaves room for other parameters, gross margin was the only parameter identified in the Superseding Indictment. It was only at trial when the gross margin allegations proved incorrect that the government shifted its focus to other parameters.

[26] The parties stipulated that analysts expected gross margin to be 18.5%. A-2363. Actual gross margin was between 18.1% and 18.4% depending on whether a GAAP or adjusted figure was used. A-2243 (Dell reporting GAAP gross margin

prove specific, accurate tips was fundamentally flawed. Rather than concede error, however, the government simply shifted its theory mid-trial and argued that the inside information pertained to revenue or was "generally" positive without identifying a specific line item. *See* Tr. 3673 (government argument that Dell's earnings in general would beat market expectations); Tr. 178-79 (Tortora testimony that earnings would be positive). This variance substantially prejudiced Newman's defense because, having decisively refuted the factual allegation in the Superseding Indictment, Newman was left with insufficient opportunity to rebut the new theory that the government asserted for the first time at trial.

A variance occurs "'when the charging terms are unaltered, but the evidence offered at trial provides facts materially different from those alleged in the indictment.'" *United States v. Wallace*, 59 F.3d 333, 338 (2d Cir. 1995) (quoting *United States v. Helmsley*, 941 F.2d 71, 89 (2d Cir. 1991)). "Even where there is evidence to support an offense pleaded in the indictment, the error of variance may arise if the evidence actually presented by the government at trial impermissibly shifts the government's theory of proof." *Id.* Where, as here, the variance "caused the defendant 'substantial prejudice' at trial," a reversal is warranted. *See United States v. McDermott*, 245 F.3d 133, 139 (2d Cir. 2001). This is so because a

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of 18.4%); Tr. 829-30 (Tortora acknowledging gross margin was less than consensus); A-2439 (Citibank analyst report showing adjusted gross margin of 18.1%); A-2448 (Lehman Brothers report showing same).

prejudicial variance infringes on the rights that "indictments exist to protect," namely an ability to prepare a defense. *United States v. Dupre*, 462 F.3d 131, 140 (2d Cir. 2006) (internal citations omitted); *Helmsley*, 941 F.2d at 90 (variance deprives defendant of an "opportunity to meet the prosecutor's case").

The prejudice here was substantial because – unlike inconsistencies in dates, times, or other similar details – the *content* of the inside information goes to the very core of the offense and is integral to a defendant's ability to prepare for trial. Newman was prepared to meet, and successfully did meet, the government's charge that he traded based on inside information related to gross margin. But Newman could not be expected to meet on such short notice the government's changed theory that focused on revenue and earnings, not gross margin. These are discrete elements of a company's financial performance – each affected by different variables – which can, and do, move in different directions from each other quarter to quarter. Variance as to these financial parameters is considerably more significant than the kinds of details that have been held insufficient to support a claim of prejudicial variance. *See United States v. Moore*, 639 F.3d 443, 447 (8th Cir. 2011) (date of conspiracy); *United States v. Ramirez*, 482 F.2d 807, 817 (2d Cir. 1973) (type of drugs).

The prejudice in this case was particularly severe because the district court prevented the defense from fully exploring the inconsistencies in the government's

allegations. The three key government witnesses all testified that they could not remember whether they received information on Dell's gross margin for the May 2008 quarter, despite the fact that the government must have questioned them to arrive at the allegations in the Superseding Indictment. Tr. 178-79 (Tortora); Tr. 1571 (Goyal); Tr. 2463-67 (Adondakis). Yet the district court prohibited the defense from showing these witnesses the Superseding Indictment to refresh their memories as to whether they had previously told the government that the inside information indeed related to gross margin. Tr. 827. Similarly, the district court prohibited the defense from questioning the FBI case agent about the criminal complaint he signed, which also specified higher than expected gross margin as the inside information that was disclosed in Dell's May 2008 quarter. Tr. 3431-37.

It is one thing for the government to shift theories mid-trial and to have the inconsistency fully exposed as such so that the jury can take it into consideration in evaluating the government's evidence; it is entirely another to shift theories while at the same time restricting the defense from fully exploring the change. The combination of a variance on a core issue with the inability to explore the inconsistency prejudiced the defense and requires reversal.

CONCLUSION

For the foregoing reasons, the Court should reverse Newman's conviction on all counts.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Stephen Fishbein, hereby certify that:

1. I am an attorney representing Defendant-Appellant Todd Newman in this appeal.

2. This brief complies with the type face requirement of Fed. R. App. P. 32(a)(7)(B) because it contains 13,949 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font.

3. In making this certification, I have relied on the word count feature of the word-processing program used to prepare the brief.

/s/ Stephen Fishbein
Stephen Fishbein