16-1463

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 16-1463

DAVID GANEK,

Plaintiff-Appellee,

—v.—

DAVID LEIBOWITZ, REED BRODSKY, DAVID MAKOL, MATT KOMAR, JAMES HINKLE, HOLLY J. TRASK, DAVID CHAVES, PATRICK CARROLL, RACHEL ROJAS, DIEGO RODRIGUEZ, MARC P. BERGER, CHRISTOPHER L. GARCIA, RICHARD B. ZABEL, BOYD M. JOHNSON III, PREETINDER S. BHARARA,

Defendants-Appellants.

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

BRIEF FOR DEFENDANTS-APPELLANTS

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Preliminary Statement

In the course of a wide-ranging investigation into insider trading by hedge funds and other financial industry professionals, agents from the Federal Bureau of Investigation ("FBI") and prosecutors from the United States Attorney's Office for the Southern District of New York ("USAO") learned of illegal insider trading at Level Global Investors ("Level Global"), a fund co-founded by plaintiff-appellee David Ganek. Seeking to collect additional evidence of these

crimes and to avoid the destruction of pertinent information, the government obtained a warrant to search, among other places, the offices, records, and electronic devices of several Level Global employees, including Ganek. While Ganek was never charged with a crime, others at the fund were convicted of securities fraud and conspiracy based on their insider trading activities, though their convictions were later reversed on unrelated legal grounds.

Ganek now brings this suit pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), seeking damages from fifteen current and former FBI and USAO employees in their individual capacities as a result of the closure of Level Global in 2011. He alleges that although the search warrant was valid as to other Level Global employees and the fund's servers, it was not valid as to him. Specifically, Ganek alleges that he did not know the source of certain inside information about Dell, Inc. ("Dell") on which he executed trades, that the defendants were aware of that fact, yet nonetheless stated in the warrant affidavit that Ganek knew the source of certain unspecified "Inside Information." Ganek also claims that the defendants further violated his constitutional rights by refusing to publicly exonerate him after the search.

The district court erred in declining to dismiss Ganek's claims as barred by qualified immunity. Contrary to Ganek's allegations, the search warrant affidavit contained no misrepresentations. The complaint relies upon a misreading of the affidavit—Ganek incorrectly equates information about Dell with the

broader term "Inside Information," which was defined in the affidavit to cover material nonpublic information about "certain public companies." The term "Inside Information" as used in the search warrant affidavit was not specific to Dell, and in fact did not even reference Dell. Ganek therefore fails to allege that the affidavit contained a misrepresentation or omission.

Even if the search warrant affidavit had contained an inaccuracy about whether Ganek knew the source of inside information about Dell—which it did not—a corrected affidavit would have demonstrated probable cause to search Ganek's effects for evidence of his trading based on inside information about companies *other* than Dell. Moreover, a corrected affidavit stating more broadly that Ganek did not know any source of "Inside Information" *still* would have provided probable cause to search Ganek's office, records, and devices for evidence about the insider trading crimes of other Level Global employees. Each of these reasons provides an independent basis for dismissing Ganek's claims against all of the defendants.

Ganek's claims against the supervisor defendants should be dismissed on the separate ground that he has not plausibly alleged that the supervisors ever learned of any purported inaccuracy in the warrant affidavit, let alone that they deliberately or recklessly condoned making a misrepresentation. Indeed, Ganek makes *no* particularized allegation as to the personal involvement of any specific supervisor defendant prior to the execution of the warrant. Finally, Ganek's claim that the defendants should have made

a public statement exonerating him after the execution of the search warrant should be dismissed because Ganek had no such clearly established constitutional right, and the defendants accordingly are entitled to qualified immunity.

Jurisdictional Statement

The district court had jurisdiction over this action under 28 U.S.C. § 1331. (Joint Appendix ("JA") 20). On March 10, 2016, the district court partially denied the defendants' motion to dismiss for qualified immunity. (JA 153-87). The defendants filed a timely notice of appeal on May 6, 2016. (JA 238-39). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. *See Drimal v. Tai*, 786 F.3d 219, 223 (2d Cir. 2015) ("Although a district court's denial of a motion to dismiss is not a final judgment, we review it here because the defendants' qualified immunity claim occasions an interlocutory appeal.").

Issues Presented for Review

1. Whether the defendants are entitled to qualified immunity because Ganek fails to allege that the warrant affidavit contained a misrepresentation or omission, and because any alleged misrepresentation or omission was not necessary to the finding of probable cause to search Ganek's office, records, and devices.

2. Whether the supervisor defendants are entitled to qualified immunity because Ganek does not plausibly allege that any of the supervisors knew of or condoned any misrepresentation or omission.

3. Whether the defendants are entitled to qualified immunity because Ganek had no clearly established constitutional right to a public statement of exoneration after the search warrant was executed.

Statement of the Case

A. Procedural History

Ganek brought this *Bivens* action on February 26, 2015. (JA 16). Defendants moved to dismiss the complaint in its entirety, and the district court (William J. Pauley III, J.) denied that motion in part. (JA 153-87).

B. Allegations in the Complaint and the Search Warrant Affidavit

The securities laws of the United States prohibit trading securities based on material nonpublic information from inside a company, knowing that the information came from inside the company in breach of an insider's duty of confidentiality. *See Dirks v. SEC*, 463 U.S. 646, 660 (1983).

In 2007, the FBI and the USAO began a wide-ranging investigation into insider trading by hedge funds and other financial professionals. (JA 28). In or about 2009, the FBI began investigating certain third-party consultants who were hired by money managers, including hedge funds, to provide inside information relating to various public companies. (JA 78). Judicially authorized wiretaps of telephone lines used by one such consulting firm revealed that a former research analyst at Level Global had received

inside information that came from sources within multiple publicly traded companies. (JA 31, 80-85, 89-93).

FBI agents approached the analyst, Spyridon Adondakis, informed him of some of the evidence that had been gathered against him, and sought his assistance with the insider trading investigation; Adondakis eventually agreed to cooperate with the FBI. (JA 31, 96-97). On November 2, 2010, Adondakis met with FBI Special Agents James Hinkle, David Makol, and Matt Komar and Assistant U.S. Attorneys ("AUSA"s) Reed Brodsky and David Leibowitz—five of the six non-supervisor defendants in this case—for a proffer session. (JA 31-32).

According to the complaint, at the proffer session, the FBI agents and AUSAs sought information from Adondakis about insider trading while he was employed by Level Global, and Adondakis admitted to having received "sensitive, non-public information regarding Dell, a publicly-traded company." (JA 32 (¶¶ 68-69)). Adondakis reported that he provided the information about Dell to Ganek and others so that they could use the information in making trading decisions. (JA 32 (¶ 71), 36 (¶ 85 n.1)). Ganek also alleges that Adondakis told the investigators that he informed Anthony Chiasson, the co-founder of the fund along with Ganek, and a fourth Level Global employee—but not Ganek—of the source of the Dell information. (JA 25, 32-33, 48).

Having learned from a confidential source employed at a different hedge fund that the source had been advised to delete and discard evidence of partic-

ipation in illegal insider trading following the publication of news articles about the investigation, and fearing further destruction of records (JA 103-06), investigators sought warrants to search for evidence of insider trading at Level Global and other hedge funds (JA 70-71). To support the Level Global warrant application, FBI Special Agent Holly Trask—the sixth non-supervisor defendant in this case—signed an affidavit detailing information that had been learned during the course of the investigation to date. (JA 35, 75). The relevant portions of this affidavit relating to Ganek were based on Trask's conversations with other law enforcement officers. (JA 35, 96, 98).

While the complaint focuses exclusively on information regarding Dell, the warrant affidavit stated more broadly that Adondakis told the investigators at the proffer session that he obtained "Inside Information from insiders at public companies" and passed that "Inside Information" on to Ganek, Chiasson, and the fourth Level Global employee so that they could execute trades based on the information. (JA 36 n.1, 98-100). In addition, the affidavit represented that Adondakis told the investigators at the proffer session that he had "informed Ganek, Chiasson, and [the fourth Level Global employee] of the sources of the Inside Information." (*Id.*). The affidavit defined the term "Inside Information" as "material, nonpublic information regarding certain public companies' quarterly earnings releases and other market moving events." (JA 76).[1] "Inside Information" did not refer to

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[1] Ganek's complaint quotes from and relies on the affidavit to allege that the affidavit contained a

information about Dell or any other particular company, but rather expressly was defined as information about "certain public companies" in the plural. (*Id.*). Further, the affidavit elsewhere referred to multiple other companies about which Adondakis received "Inside Information." (JA 81, 83-84, 90-92).

Nonetheless, Ganek's complaint alleges that Adondakis never told Ganek the source of inside information about Dell specifically, and that the affidavit's statement that Adondakis had told Ganek the source of the "Inside Information" therefore was false. (JA 33, 36). The complaint further asserts that the non-supervisor defendants allegedly "fabricated evidence" that Adondakis told Ganek he had "received insider information from an inside source at Dell," and that this supposed fabrication led to the statement in the affidavit that Adondakis told Ganek about the source of the "Inside Information." (JA 33 (¶ 76), 36 (¶ 85 n.1)). The complaint also alleges that the substance of Adondakis's proffer and the purported fabrication would have been made known to the supervisor defendants, including U.S. Attorney Preet Bharara and Diego Rodriguez, the head of the crimi-

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misrepresentation. (*See, e.g.*, JA 36 n.1). Accordingly, this Court, like the district court (JA 156 & n.3), may examine the full text of the affidavit, including the portions of the affidavit not quoted in the complaint, such as the definition of "Inside Information." *See Roth v. Jennings*, 489 F.3d 499, 509-10 (2d Cir. 2007).

nal division of the FBI's New York office,[2] because of the supervisors' roles in overseeing this high-profile investigation. (*See, e.g.*, JA 34).

The complaint goes on to assert that a magistrate judge, unaware of the allegedly false representation in the affidavit, issued a warrant to search the offices, records, and electronic devices of Ganek, Chiasson, and the fourth employee, to search Adondakis's computers, and to copy and search Level Global's computer servers. (JA 37, 68-73). The warrant, which authorized the government to search these locations for all evidence relevant to insider trading and related crimes, was executed on November 22, 2010. (JA 37, 73). Warrants also were executed that day at the offices of two other hedge funds. (JA 37-39).

According to the complaint, following the execution of the warrant, Level Global's investors became concerned about keeping their investments in the fund. (JA 42). On December 20, 2010, Level Global representatives met with attorneys from the USAO, including Criminal Division Chief Richard Zabel and AUSA Leibowitz. The Level Global representatives allegedly expressed concerns that the investigation and search warrant execution had damaged the fund. (JA 41). According to Ganek, the USAO representatives assured the Level Global representatives that the warrant "had been carefully considered at the highest levels, with full appreciation for the likely

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[2] Titles used in this brief to refer to the defendants are the titles they held at the time of the events alleged in the complaint.

commercial consequences, and . . . that all necessary precautions had been taken." (*Id.*).

A different attorney representing Level Global allegedly contacted U.S. Attorney Bharara on or around February 4, 2011, and informed him that Ganek would be forced to close Level Global within days unless the FBI or the USAO "would clarify that Mr. Ganek was not a target of the investigation or that the search warrant did not allege probable cause that Mr. Ganek had engaged in insider trading." (JA 43-44). Bharara allegedly responded that the USAO had not proceeded with the search warrant "without thinking through the consequences of doing so," and that "he was unable to say anything about the search or Mr. Ganek that would help Level Global." (JA 44). The complaint further alleges that federal agents, including AUSA Leibowitz, met with Adondakis again on February 11, 2011. (JA 45). Adondakis allegedly confirmed at this meeting that he had never told Ganek anything about the source of his information from inside Dell. (JA 45-46). Level Global closed on February 11, 2011. (JA 45).

Ganek was never indicted. (JA 46). Adondakis pled guilty to securities fraud and conspiracy for his insider trading activities. (JA 47). Following a trial, Chiasson was convicted of securities fraud and conspiracy for his insider trading activities.[3] *See United*

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[3] This Court later reversed Chiasson's conviction on legal grounds unrelated to the representations made in the warrant affidavit. *See United States v. Newman*, 773 F.3d 438, 450-51 (2d Cir. 2014), *cert.*

States v. Newman and Chiasson, 12 Cr. 121 (RJS) (S.D.N.Y.), Dkt. Entries dated Dec. 17, 2012. Level Global's trading in Dell securities was a major focus of the case against Chiasson. At the trial, Adondakis testified that he told Chiasson and another Level Global employee, but not Ganek, about the source of inside information about Dell, and that he had informed the investigators accordingly at the proffer session. (JA 47-48). Special Agent Makol also testified, stating that he did not recall Adondakis specifically saying at the proffer session that he told Ganek the inside source of the Dell information. (JA 49). None of the trial testimony addressed whether Adondakis informed Ganek about the sources of "Inside Information" as more broadly defined in the warrant affidavit, or whether Adondakis told the investigators at the proffer session he had done so. (JA 47-49).

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denied, 136 S. Ct. 242 (2015). Following the Supreme Court's denial of the government's petition for a writ of *certiorari*, the government recommended that an order of *nolle prosequi* be filed as to Adondakis. *See United States v. Adondakis*, 11 Cr. 360 (JFK) (S.D.N.Y.), Dkt. No. 16. The *Newman* decision is irrelevant here, because the defendants' actions must be evaluated based on the clearly established law at the time of the relevant conduct. *See Messerschmidt v. Millender*, 132 S. Ct. 1235, 1245 (2012).

C. *Bivens* Claims and Denial of Qualified Immunity

Ganek claims that the defendants violated his Fourth Amendment right to be free from unreasonable search and his Fifth Amendment right to procedural due process by deliberately fabricating evidence (or failing to intervene to prevent such fabrication) in the warrant affidavit—evidence without which, Ganek claims, there would have been no probable cause to search his office, records, or devices for evidence of insider trading. (JA 51-58). In addition, Ganek claims that some defendants violated his Fourth and Fifth Amendment rights after the execution of the search warrant by becoming aware of the alleged misrepresentation in the warrant affidavit but refusing to issue a statement exonerating Ganek before he had to close Level Global. (JA 58-60).

The defendants moved to dismiss the complaint in its entirety, arguing that Ganek failed to state a claim and that all the defendants are entitled to qualified immunity. (JA 163). While the district court dismissed certain aspects of Ganek's claims[4] (JA 153-

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[4] The district court dismissed Ganek's claims that his Fourth Amendment rights were violated because (i) the government used a search warrant rather than a subpoena to obtain evidence from Level Global's offices, and (ii) unspecified defendants purportedly "tipped" the press about the execution of the warrant. (JA 167-70). Moreover, the court dismissed portions of Ganek's Fifth Amendment claims, finding that the complaint failed to make out a "stigma plus"

87), it concluded that Ganek had adequately alleged that the warrant affidavit contained a misrepresentation. In the district court's view, the affidavit represented that Ganek was informed of the sources of *all* "Inside Information" that Adondakis supplied, whereas Adondakis testified at Chiasson's trial that he had told investigators that he never informed Ganek about the source of *any* such "Inside Information." (JA 165).

The district court further concluded that a hypothetical affidavit correcting this misrepresentation, and informing the magistrate judge that Adondakis "*never* told Ganek his sources," would be relevant to the magistrate judge's determination that there was probable cause to search Ganek's effects, or might have affected the scope of the authorization to search. (JA 166-67 (emphasis in original)). The court did not, however, evaluate whether such a corrected affidavit would have provided probable cause to search Ganek's office, records, and devices for evidence of crimes committed by other Level Global employees. (JA 165-67).

With respect to the supervisor defendants, the district court determined that Ganek had plausibly alleged that "some" of the supervisors would have learned the details of Adondakis's statements at the proffer session, and "at the very least" would have entertained serious doubts about the truth of the warrant affidavit. The court did not identify which su-

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due process claim or a substantive due process violation. (JA 172-74, 177-78).

pervisors, or how they would have gained such knowledge, leaving those questions to be resolved through discovery. (JA 185-86). The court also put off for summary judgment the argument that it was not clearly established that the defendants had a constitutional duty to publicly exonerate Ganek after the search. (JA 182). The court did not conclude that there was such a clearly established right or cite constitutional precedents involving similar circumstances. Instead, the court simply held, without identifying any authority from this Court or the Supreme Court, and without further explanation, that deciding that question on a motion to dismiss would be "premature." (*Id.*).

Summary of Argument

All of Ganek's claims against the defendants should be dismissed for two independent reasons. At bottom, the district court's decision as to Ganek's unreasonable search (Fourth Amendment) and procedural due process (Fifth Amendment) claims rests on the propositions that the warrant affidavit contained a knowing misrepresentation and that the misrepresentation affected the issuance and scope of the warrant to search Ganek's office, records, and devices at Level Global. But both of these propositions are incorrect, and result from the court's fundamental misunderstanding of the complaint and the search warrant affidavit.

First, even accepting the non-conclusory factual allegations in Ganek's complaint as true, Ganek fails to allege that the warrant affidavit contained a mis-

representation. The affidavit, properly read, said only that Adondakis supplied some (broadly defined) "Inside Information" to Ganek and, on occasion, also supplied him with the source of that Inside Information. The complaint alleges only that Adondakis told the investigators at the proffer session that he never told Ganek about the source of inside information regarding Dell in particular. Only by ignoring the broad definition of "Inside Information," and assuming (contrary to that definition) that inside information concerning Dell was the only Inside Information at issue, can Ganek argue that the affidavit contained a false statement. The complaint and the affidavit themselves reveal the fallacy in that argument. *See infra* Point I.A.

Second, even if the affidavit were false or misleading with regard to Ganek's knowledge of sources of Inside Information, a corrected affidavit still would have led the magistrate judge to authorize the same search. A corrected affidavit would represent that Adondakis passed Inside Information to Ganek and, on occasion, supplied the source of that information to Ganek, though not for information about Dell. With that correction, a magistrate judge would have had ample probable cause to believe Ganek was knowingly involved in insider trading in other securities. Moreover, even if the corrected affidavit instead represented that Ganek traded based on Inside Information given to him by Adondakis but that Adondakis never told Ganek the source of any Inside Information, the same warrant would have issued. Ganek does not dispute that the affidavit established probable cause to believe that Adondakis, Chiasson,

and another Level Global employee were trading based on Inside Information from public companies with the knowledge of the inside sources of that information. Nor does Ganek dispute that Adondakis provided Inside Information to Ganek to induce him to trade on that information. Accordingly, regardless of Ganek's knowledge of the source of the Inside Information, Ganek was an active participant in the unlawful trades caused by others, and any corrected affidavit thus would establish probable cause to believe that Ganek's office, files, and devices would contain evidence of the insider trading crimes of his business partner and employees. At the very least, a reasonable officer could have concluded that these facts provided probable cause to believe that a search of Ganek's office, records, and devices would uncover evidence of insider trading by other Level Global employees, if not Ganek himself. *See infra* Point I.B. Ganek's failure to adequately allege a Fourth Amendment violation is fatal to his Fifth Amendment claim as well. *See infra* Point I.C.

Ganek's claims against the supervisor defendants should be dismissed for an additional, independent reason: he does not plausibly allege that the supervisor defendants ever learned of, much less deliberately or recklessly condoned, any misrepresentation or omission in the warrant affidavit. To support this allegation, Ganek relies on the supervisors' role in overseeing a high-profile investigation to infer that the supervisors would have been involved in deciding to fabricate evidence to obtain an illegal search warrant. But no such inference is plausible. Permitting such an inference here effectively would make super-

visors individually liable for damages for the constitutional torts of their subordinates in all high-profile cases on a theory of *respondeat superior*, contrary to the Supreme Court's holding in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *See infra* Point II.

Finally, the failure-to-intercede claim should be dismissed because Ganek had no clearly established constitutional right to be publicly exonerated after the execution of a search warrant based on a sealed affidavit that allegedly contained a material misrepresentation about Ganek's level of knowledge regarding his involvement in insider trading at Level Global. Neither Ganek nor the district court identified a single applicable precedent finding such a right to public exoneration at all, let alone one with remotely similar facts. And the general principles the district court drew from dissimilar cases were framed at far too high a level of generality to put a reasonable agent or prosecutor on notice that failure to issue an exonerating statement under the circumstances of this case would clearly violate Ganek's constitutional rights. The defendants are entitled to a determination of this qualified immunity issue at the earliest possible stage in litigation, and there is no legal basis to defer this question to summary judgment, as the district court did here. *See infra* Point III.

The district court's order should be reversed in relevant part, and all of the claims against the defendants should be dismissed.

ARGUMENT

Standard of Review

This Court reviews *de novo* a district court's denial of a defendant's assertion of qualified immunity on a motion to dismiss. *See Warney v. Monroe Cnty.*, 587 F.3d 113, 120 (2d Cir. 2009). The doctrine of qualified immunity "shields Government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Where, as here, officials seek dismissal of the claims against them by invoking qualified immunity, the court reviews whether the plaintiff has pled "factual matter that, if taken as true, states a claim that [the defendants] deprived him of his clearly established constitutional rights." *Id.* at 666. A qualified immunity ruling "should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive." *Saucier v. Katz*, 533 U.S. 194, 200 (2001).

POINT I

Ganek Fails to Allege that the Warrant Affidavit Contained a Material Misrepresentation or Omission

To prevail on his Fourth Amendment claim that the search warrant was issued on less than probable cause, and to overcome the defendants' entitlement to qualified immunity, Ganek must show that (1) the affiant made a false statement or material omission

in the warrant affidavit knowingly and deliberately, or with a reckless disregard of the truth, and (2) the false statement or omission was necessary to the finding of probable cause for the search. *Velardi v. Walsh*, 40 F.3d 569, 573 (2d Cir. 1994). Ganek's remaining Fifth Amendment claim, alleging that he was deprived of his tangible personal property during the execution of the search without procedural due process as a result of the allegedly fabricated evidence, necessarily rests on the same elements and must be dismissed if the Fourth Amendment claim is dismissed.

Ganek's claims against all of the defendants should be dismissed because Ganek has failed to plead facts that, taken as true, establish either that the warrant affidavit contained a misrepresentation or omission, or that any misrepresentation or omission was necessary to the finding of probable cause for the search of his office, records, and devices at Level Global. Accordingly, Ganek has not alleged that any defendant violated any clearly established constitutional right.

A. The Warrant Affidavit Did Not Contain a Misrepresentation or Omission

The core premise of the complaint—that a statement in the search warrant affidavit was "fabricated" because Adondakis "made clear" that he never told Ganek the source of the inside information he obtained *about Dell* (JA 17, 33, 35-36)—is belied by the plain language of the affidavit itself, which was not limited to conduct in connection with a particular

company. Ganek's complaint is framed to give the misleading impression that Adondakis said something in the proffer session that contradicts the affidavit. But it is completely inaccurate to suggest that Adondakis's statements at the proffer session and the statements in the affidavit concerned the same subject or were diametrically opposed. The allegations in Ganek's complaint about Adondakis's statements in the proffer session deal with one subject—Dell—while the affidavit dealt with a broader subject, "Inside Information," a term defined in the affidavit as relating to multiple public companies, not Dell in particular. Even if Adondakis had told the investigators that he never told Ganek the inside source of the Dell information, that fact would not contradict, or even undermine, the representations in the affidavit.

The relevant language of the search warrant affidavit broadly defined "Inside Information" as "material, nonpublic information regarding certain public companies' quarterly earnings releases and other market moving events." (JA 76). That definition did not refer to Dell or any other specific public company, and the term was used in each paragraph of the affidavit that described Adondakis's relevant contacts with Ganek. As set forth in the affidavit, Adondakis obtained "Inside Information from insiders at public companies," passed "Inside Information" on to Ganek, Chiasson, and the fourth Level Global employee, and "informed Ganek, Chiasson, and [the fourth employee] of the sources of the Inside Information." (JA 36 n.1, 98). There was no statement in the affidavit that Adondakis told Ganek about the source of information regarding Dell specifically, and there is no ba-

sis to infer that the use of the term "Inside Information" necessarily referred to inside information regarding Dell transactions, as opposed to transactions involving other public companies.

There was good reason to use the broadly defined term "Inside Information" in the affidavit, as the investigation into insider trading at Level Global—particularly at this preliminary stage—was far from limited to trading in Dell securities.[5] The affidavit described how wiretap evidence revealed that Adondakis received "Inside Information" regarding multiple different companies from multiple different information brokers and inside sources. (*See* JA 81, 83-84, 90-92). In the context of a wide-ranging insider trading investigation involving information about multiple companies, it is unsurprising that the proffer session would have involved discussion about inside information regarding multiple companies. As a result, the warrant affidavit was careful to use the defined term "Inside Information" when explaining that Adondakis provided such information, and the sources of such information, to Ganek and others.

Ganek's complaint attempts to create a contradiction by focusing on inside information about Dell alone; indeed, the three key substantive allegations in the complaint are tightly focused on information about Dell. First, the complaint alleges that, at the

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[5] Indeed, as Ganek alleges, the government "did not even have the relevant trading records for the allegedly illegal transactions" at the time that the warrant application was submitted. (JA 36 (¶ 87)).

proffer session, Adondakis admitted to obtaining "sensitive, non-public information *regarding Dell*" and giving that information to Ganek. (JA 32 (¶¶ 69, 71) (emphasis added)). Second, Adondakis allegedly told the investigators that he never told Ganek that the "information he had obtained *regarding Dell*" came from an inside source at Dell. (JA 32 (¶ 70) (emphasis added)). Finally, he alleges that some of the non-supervisor defendants then fabricated evidence that "Mr. Adondakis had told Mr. Ganek that he had received insider information from an inside source *at Dell* and that he had told Mr. Ganek that the information came from someone breaching his fiduciary duty [to Dell]." (JA 33 (¶ 76) (emphasis added); *see also* JA 42 (¶ 111) (alleging the fabrication of an FBI report stating that Adondakis asserted during the proffer session that Ganek was "interested in the Dell information . . . because the information came directly from contacts at Dell")).

While the affidavit had good reason to define "Inside Information" broadly, Ganek has his own reasons to focus his complaint narrowly on Dell. Although the investigation into Level Global involved multiple different companies and potential targets at the time of the proffer session, Dell had become a major focus of the case against Chiasson by the time insider trading charges were filed against him. At Chiasson's trial in 2012, Adondakis and Special Agent Makol testified about what Adondakis had told the investigators at the proffer session regarding Ganek and Chiasson's knowledge about Dell inside information. Adondakis testified that he never told Ganek the source of the Dell inside information, and

Makol testified that he could not recall Adondakis saying specifically that he passed the source of the Dell information to Ganek. (JA 47-49). Ganek strategically imports the narrow focus on Dell information from Chiasson's trial into his complaint in an effort to cast doubt on the far broader investigation approximately two years earlier.

The district court misread both the affidavit and the complaint in the single paragraph of analysis it devoted to this issue. First, the district court mistakenly characterized the affidavit as stating in "plain language . . . that Ganek was informed of the sources of *all* 'Inside Information'" (JA 165 (emphasis added)), such that an allegation in the complaint that Adondakis had not revealed the source of even one piece of Inside Information would, if true, render the affidavit false. But the affidavit did not say that Adondakis provided the sources of "all" of the Inside Information that he gave to Ganek. Instead, the affidavit said only that "[o]n certain occasions," Adondakis provided Ganek with Inside Information and the sources of the Inside Information. (JA 98). Far from suggesting that Adondakis always provided the source of the Inside Information he gave to Ganek, the affidavit implied that there were instances where Adondakis provided Ganek with Inside Information but did not specify its source. (*Compare* JA 97 (¶ 11)).

Second, the district court incorrectly characterized the complaint as stating that "Adondakis . . . told Defendants he could not implicate Ganek in *any* insider trading." (JA 165 (emphasis in original)). As explained above, the key allegations in the complaint

all focus exclusively on Dell: Adondakis obtaining the Dell information and passing it to Ganek; Adondakis not telling Ganek the source of the Dell information; and the defendants purportedly fabricating evidence that Adondakis did tell Ganek the source of the Dell information. (JA 32 (¶¶ 69, 70), 33 (¶ 76), 42 (¶ 111)). Other passages in the complaint reference these three key allegations using generic shorthand, including "the information," "inside information," and "insider trading." (*See, e.g.*, JA 33 (¶ 73), 34 (¶ 78), 36 (¶ 86)). But these allegations—like the complaint as a whole—refer only to the Dell-specific information and are not independent allegations regarding inside information in general.[6] Again, the district court erred

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[6] Similarly, the complaint also alleges that soon after Level Global closed on February 11, 2011, investigators met with Adondakis again. (JA 45 (¶ 130)). Adondakis allegedly told the investigators that "he had never told Mr. Ganek that any of [the] information came from an inside source" and that "to his knowledge, Mr. Ganek had never engaged in insider trading." (*Id.*). These general statements must be read as referring back to the allegations about Dell from earlier in the complaint. The complaint itself makes this connection by characterizing the February 11 statements as "reiterat[ing]" information relayed during the November 2 proffer session, which the complaint expressly frames as being Dell-specific. (*Id.*; *see* JA 32). And the complaint also frames these February 11 statements as being "contrary to" alleged "fabrications" that the complaint also expressly describes as being Dell-specific. (JA 45; *see* JA 33).

by failing to disaggregate allegations about Dell from allegations about Inside Information as more broadly defined in the affidavit.

Third, the district court mistakenly found that "trial testimony indicated that Adondakis did not inform Ganek of any source of 'Inside Information' as defined by the Affidavit." (JA 165). Not even Ganek alleges that the testimony concerned anything other than Dell information (JA 47 (¶ 141)), and each of the testimony excerpts from Adondakis and Makol included in the complaint is limited to the subject of what Adondakis told investigators regarding his interactions with Ganek about Dell. (JA 47-49 (¶¶ 142-44)). One sentence of the complaint, which precedes a block quote of this Dell-specific testimony, summarizes that testimony as purportedly showing that Adondakis "reiterated . . . that he never told Mr. Ganek about the source of any inside information." (JA 48 (¶ 143)). But the quoted testimony, which focuses exclusively on inside information about Dell, makes clear that the phrase "any inside information" was used only as shorthand for Dell-specific information. (*See* JA 47-48 (¶¶ 142-43)).

Ganek's contention that the affidavit contained a false statement hinges on his attempt to equate—wrongly—the defined term "Inside Information," as used in the affidavit, with inside information about Dell. That is a false equivalence. Even accepting as true the allegation that Adondakis told the investigators that he never passed along the source of Dell information to Ganek and that the investigators understood as much, the affidavit still would have repre-

sented that Adondakis told Ganek the source of Inside Information about at least one other public company. Ganek's complaint offers nothing to dispute this point. Therefore, Ganek has not adequately alleged that the relevant statement in the affidavit was false, and the district court decision should be reversed for this reason alone.

B. Any Alleged Misrepresentation or Omission Was Not Necessary to the Finding of Probable Cause

Even if this Court determines that Ganek adequately alleged the existence of a misstatement or omission in the warrant affidavit, Ganek's Fourth Amendment claim still should be dismissed because any alleged false statement or omission was not "necessary to the finding of probable cause" to search Ganek's office, files, and devices at Level Global. *Velardi*, 40 F.3d at 573. A misstatement or omission in a warrant affidavit is necessary to a finding of probable cause if a hypothetical "corrected affidavit" containing the true statements of fact and supplying any material omissions would not have provided probable cause for the search. *Id.*

Any corrected affidavit in this case still would have demonstrated probable cause to search Ganek's office, files, and devices. Where, as here, law enforcement officers assert the defense of qualified immunity to a claim of a material misrepresentation in a warrant affidavit, the corrected affidavit need only support a reasonable officer's belief that probable cause, or at least arguable probable cause, existed.

See Escalera v. Lunn, 361 F.3d 737, 743-44 (2d Cir. 2004); *see also Garcia v. Does*, 779 F.3d 84, 92, 97 (2d Cir. 2015) (applying the arguable probable cause standard on review of a denial of a motion to dismiss on qualified immunity grounds in the context of warrantless arrests). Ganek's complaint falls far short of that standard.

A corrected affidavit in this case, if one were necessary at all, would merely represent what Ganek alleges to be true: that Adondakis never informed Ganek about the source of inside information about Dell. Accordingly, the corrected affidavit would state that Adondakis passed Inside Information to Ganek and, on occasion, supplied the source of that information to Ganek, though not for information about Dell. With this alteration—which would be sufficient to address the deletion from and addition to the affidavit contemplated by the district court (JA 166)—a magistrate judge clearly still would have had probable cause to believe Ganek was knowingly involved in insider trading based on Inside Information about a company or companies other than Dell.

Moreover, even if the complaint's reference to inside information regarding Dell were conflated with all "Inside Information," thus necessitating a broader correction, the corrected affidavit would still support probable cause to search Ganek's office, records, and devices at Level Global. In that scenario, the corrected affidavit would represent that Ganek traded securities based on Inside Information given to him by Adondakis, but that Adondakis never told Ganek the source of any Inside Information. Ganek repeatedly

insists that if such an affidavit did not implicate him in trading securities based on inside information that he knew came from an inside source, then no search of his effects would have been justified. (JA 20, 31, 33-37, 42, 45). This argument, however, is built on a false premise: that a search warrant must be based on probable cause that Ganek *himself* violated the law. But "[s]earch warrants are not directed at persons; they authorize the search of place[s] and the seizure of things." *Zurcher v. Stanford Daily*, 436 U.S. 547, 555 (1978) (internal quotation marks omitted). So long as there is a "fair probability that . . . evidence of a crime will be found in a particular place," there is probable cause to search that place, *United States v. Raymonda*, 780 F.3d 105, 113 (2d Cir. 2015) (citation and quotation mark omitted), regardless of whether the owner of the property is himself suspected of committing any crime.

A corrected affidavit would make clear that probable cause existed to search Ganek's office, records, and devices for evidence of the insider trading crimes committed by Adondakis, Chiasson, and the fourth Level Global employee. The securities laws make it unlawful not only to trade securities oneself based on known inside information, but also to cause others to trade securities based on information that one knows comes from an inside source. *See* 18 U.S.C. § 2(b); 15 U.S.C. § 78j(b). The hypothetical corrected affidavit would establish probable cause that Adondakis, Chiasson, and the fourth Level Global employee committed such insider trading with Ganek's unwitting participation, and that evidence of those crimes would be present in Ganek's office, records, and de-

vices. There is no dispute that Adondakis admitted receiving "sensitive, non-public information regarding Dell" and passing that information on to Ganek. (JA 32 (¶¶ 69, 71), 90-93 (¶ 8(d)), 96-97 (¶ 11)). The complaint acknowledges that the information Ganek received from Adondakis about Dell was provided so that Ganek "could use [it] in making trading decisions" (JA 32 (¶ 71)), and the affidavit stated that Ganek and other Level Global employees "executed and caused others to execute securities transactions based in part on" Inside Information from public companies (JA 36 (¶ 85 n.1 (quoting JA 97 (¶ 11)))). Based on this information, there is more than a "fair probability" that evidence of Adondakis's crime of causing Ganek to trade, even unwittingly, based on inside information would be found in Ganek's office, records, and devices at Level Global. *See United States v. Martin*, 426 F.3d 83, 86 (2d Cir. 2005) ("probable cause only requires the probability, and not a prima facie showing, of criminal activity") (internal quotation marks omitted).

Similarly, Ganek's office, records, and devices also likely would contain evidence of Chiasson's insider trading crimes, and possibly crimes of the fourth Level Global employee identified in the warrant affidavit. The affidavit stated that Adondakis provided Inside Information, obtained from insiders breaching their fiduciary duties, to Chiasson and the fourth Level Global employee and informed them of the sources of the Inside Information. (JA 97-99 (¶¶ 11, 13(c), (e)), 36 (¶ 85 n.1)). Wiretap intercepts also indicated that Chiasson and the fourth Level Global employee directly received improper inside information from

third-party brokers of inside information. (JA 93-94). And the affidavit further stated that Chiasson and the fourth Level Global employee "executed and caused others to execute securities transactions based in part on the Inside Information" they received from Adondakis. (JA 97 (¶ 11)). Ganek does not allege that any of these statements is false. It is only reasonable to conclude that Ganek, the co-founder of Level Global along with Chiasson, was one of the people whom Chiasson and the fourth Level Global employee "caused . . . to execute securities transactions" based on inside information. *See Zurcher*, 436 U.S. at 558 ("once it is established that probable cause exists to believe a federal crime has been committed, a warrant may issue for the search of *any* property which the magistrate has probable cause to believe may be the place of concealment of evidence of the crime") (internal quotation marks omitted).

There is thus no question that even with a corrected affidavit, Ganek's office, records, and devices would have at least a "fair probability" of containing evidence of the insider trading crimes of others. *See Martin*, 426 F.3d at 86 ("it is untenable to conclude that property may not be searched unless its occupant is reasonably suspected of a crime and is subject to arrest") (internal quotation marks omitted). This finding of probable cause would be "based on particularized information" showing that Ganek's trading activity was the conduit for the insider trading crimes of his business associates, and not simply, as the district court determined, on Ganek's "mere propinquity to others independently suspected of criminal activi-

ty." (JA 167 (quoting *Walczyk v. Rio*, 496 F.3d 139, 162-63 (2d Cir. 2007)).

And contrary to the district court's conclusion otherwise, a hypothetical corrected affidavit would not have been relevant to the scope of the Level Global warrant. (JA 166-67). The warrant was appropriately limited to targeted locations within the fund's offices, permitting investigators to obtain evidence of the commission of crimes including securities fraud and conspiracy to commit securities fraud. (*See* JA 70). A corrected affidavit would not have required any alteration to this portion of the warrant application (JA 113), as the scope of a search of Ganek's office, records, and devices for crimes committed by others would be the same as the scope of the search of those same locations for evidence of Ganek's own potential crimes of insider trading.

The warrant affidavit explained the need to search computers, electronic devices, cellular phones, and other books and papers for evidence of the types of criminal activity under investigation. (JA 107-08 (¶¶ 19(a)-(d))). Consequently, the warrant issued in this case permitted the search of Ganek's emails contained on Level Global's servers, and the search of Ganek's office, records, and devices, for "all communications" among Ganek, Chiasson, Adondakis, the fourth employee, and known brokers of inside information implicated by wiretap evidence in supplying Adondakis, Chiasson, and the fourth employee with such information. (JA 72-73). The warrant also authorized a search of Ganek's office, records, and devices for "all documents . . . concerning information

about public companies" or "reflecting communications about trading based on information about public companies." (JA 73). And the warrant authorized a search of those locations for "all other evidence that will assist the FBI in identifying . . . whether other individuals were involved" in providing inside information or trading based on inside information, and any other information regarding violations of the relevant securities and criminal laws. (*Id.*). These searches would not have been any more narrowly tailored if the corrected affidavit described Ganek merely as a conduit for insider trading by others at Level Global rather than as a knowing participant—the same locations would be reasonably likely to contain the same types of information in either scenario.

The district court therefore erred in concluding that a correction of the alleged misrepresentation in the warrant affidavit "would be relevant" as part of the "totality of the circumstances" to the magistrate judge's determination of whether to permit a search of Ganek's computers and cell phone for specified emails and documents because, in the court's view, the search could "ensnare" a "tremendous amount of personal information" about Ganek. (JA 166-67). The search was carefully limited by the terms of the warrant to only those documents likely to reveal evidence of insider trading by someone at Level Global,[7] and

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[7] The district court's reliance on *United States v. Cioffi*, 668 F. Supp. 2d 385 (E.D.N.Y. 2009), is misplaced. (JA 167). In *Cioffi*, a warrant was found to be "unconstitutionally broad" because it "did not, on its face, limit the items to be seized . . . to emails con-

the same would have been true regardless of whether Ganek himself was allegedly a witting participant in the insider trading activity at the fund. Whether an alleged misrepresentation in a warrant affidavit would have been relevant to a probable cause determination is a question of law, *Velardi*, 40 F.3d at 574, and the district court erred in concluding that it would be relevant.

Furthermore, even if the alleged misrepresentation were relevant, the corrected affidavit would have demonstrated at least arguable probable cause, as a matter of law, for the search performed. (JA 166-67). Where law enforcement officers invoke qualified immunity, courts must make the legal determination of whether the warrant provided at least arguable probable cause. *Escalera*, 361 F.3d at 744. That is, the court must determine, as a legal matter, whether the corrected affidavit would "support a reasonable officer's belief that probable cause existed." *Id.* And here, at the very least, "officers of reasonable competence could disagree whether there was probable cause" under the corrected affidavit for the search performed. *Id.* at 747. There is no dispute that Adondakis obtained Inside Information from one or more

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taining evidence of the crimes charged in the indictment or, indeed, any crime at all." 668 F. Supp. 2d at 395; *see id.* at 389 (describing attachment to warrant). In contrast, Attachment A to the Level Global warrant explained that investigators would be searching for evidence of the commission of particular crimes. (JA 70).

sources inside one or more public companies, and gave that information to Ganek so that he could make trading decisions based, in part, on that information. In addition, Adondakis gave such information to Chiasson and the fourth Level Global employee, who then themselves executed, and caused others to execute, trades based on that information. Plainly, reasonable officers could conclude on the basis of this information that there would be a fair probability that Ganek's office, records, and devices would contain evidence of the crimes of others, especially to the extent they may have used him as a conduit for their own insider trading.

Finally, even if the corrected affidavit were to support only a search of a smaller scope, Ganek has not alleged that a search of some portion of his office, records, and devices, but not of other portions, would have averted the harm he alleges: the closure of Level Global due to investor mistrust. Ganek's complaint makes no allegations that it was the *scope* of the search of his effects at Level Global that caused his investors to leave and forced the closure of his firm. Rather, the complaint alleges that it was the *fact* of the search of Ganek's effects that caused the investor concerns, because Ganek was the principal partner in the fund. (JA 42). There is no allegation that a search of some of his records but not others would have mollified the investors, nor would such an allegation be plausible. The district court's discussion regarding the scope of the search is therefore both inaccurate and irrelevant to the corrected affidavit analysis. Because there would have been probable cause to search Ganek's office, records, and devices even using a cor-

rected affidavit, defendants are entitled to qualified immunity.

C. Ganek Has No Independent Fifth Amendment Claim

The deficiencies in Ganek's Fourth Amendment claim are also fatal to his lone remaining Fifth Amendment claim for deprivation of personal property without procedural due process during the execution of the search warrant. (JA 171, 176). Because Ganek has not adequately alleged that the search warrant affidavit contained a misstatement or omission, *see supra* Point I.A, it necessarily follows that any Fifth Amendment claim based on the same purported misstatement also fails. In any event, Ganek's procedural due process claim again cannot survive because the search of Ganek's personal property would have been permitted by a magistrate judge even after correcting the supposed misstatement in the affidavit. *See supra* Point I.B. In that case, the alleged deprivation of property would have followed from a routine and well-accepted form of process: the review of a search warrant application by a neutral magistrate. *See Gerstein v. Pugh*, 420 U.S. 103, 125 n.27 (1975).

POINT II

Ganek Does Not Plausibly Allege That Any of the Supervisor Defendants Knew of or Condoned Any Misrepresentation or Omission

If this Court concludes either that the warrant affidavit did not contain a false statement or omission,

or that any such statement or omission was not necessary to the finding of probable cause, all of Ganek's claims against all of the defendants should be dismissed because those elements underpin the claims against both the supervisor and non-supervisor defendants.

The claims against the supervisor defendants should be dismissed for an additional, independent reason. "Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*." *Iqbal*, 556 U.S. at 676. Rather, supervisors can be held liable under *Bivens* "only if, through their own actions, they satisfy each element of the underlying constitutional tort." *Turkmen v. Hasty*, 789 F.3d 218, 250 (2d Cir. 2015), *petitions for cert. filed*, Nos. 15-1358, 15-1359, 15-1363 (May 9, 2016). Because the underlying constitutional torts in this case require a deliberately or recklessly false statement in the search warrant affidavit, *Velardi*, 40 F.3d at 573, Ganek must allege that each of the supervisor defendants was personally involved in the submission of an intentionally or recklessly false statement to the magistrate judge. Ganek has not plausibly alleged that any of the supervisor defendants knew about or condoned any misrepresentation or omission in the warrant affidavit.

The contents of a complaint are "not entitled to be assumed true" where the allegations are "conclusory," "bare assertions," or a "formulaic recitation of the elements." *Iqbal*, 556 U.S. at 681. Instead, the plaintiff must allege facts sufficient to nudge the plaintiff's claim of supervisory responsibility "across the line

from conceivable to plausible." *Id.* at 680 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). To be plausible, the allegations must set forth "more than a sheer possibility" of supervisory involvement, and the alleged facts must be more than "merely consistent with" the supervisor's involvement; they must actually support that conclusion. *Id.* at 678.

Ganek does not satisfy this standard. Contrary to the district court's conclusion (JA 185-86), the factual allegations in the complaint do not come close to showing that any supervisor defendant ever even learned of a misstatement in the search warrant affidavit—let alone deliberately or recklessly permitted a false statement to be included in the affidavit.

A. Ganek Makes No Plausible Allegation of Wrongdoing by Any Supervisor Defendant

Ganek concedes that none of the supervisor defendants were present at the November 2, 2010 proffer session with Adondakis (JA 32 (¶ 68)), and thus that the supervisor defendants did not have first-hand knowledge of any alleged inconsistency between Adondakis's statements at the proffer and the statements in the warrant affidavit. Nor is there any allegation in the complaint concerning any specific meetings, conversations, or other communications regarding the alleged fabrication between any of the non-supervisor defendants who were present at the proffer session and any supervisor defendant.

Instead, Ganek offers only conclusory and bare assertions that the supervisor defendants were involved in the alleged fabrication. (*See, e.g.*, JA 57 (¶ 175)

("These supervisory defendants either knew that the Affidavit contained false statements, or operated with reckless disregard as to the truth of the statements."); *see also* JA 59 (¶ 186)). But that recitation of the elements of the claim cannot satisfy Ganek's requirement to plead facts plausibly alleging that each supervisor defendant was personally involved in any alleged fabrication in the warrant affidavit. *See Iqbal*, at 556 U.S. at 680-81 (holding conclusory and implausible allegation that a supervisor "knew of" and "condoned" his or her subordinates' unconstitutional actions).

Nor can Ganek satisfy the *Iqbal* standard merely by describing the supervisor defendants' roles as supervisors. Ganek alleges that the supervisor defendants "supervised the warrant application process" and had discussions with the FBI agents and prosecutors "regarding the substance of the evidence against Mr. Ganek." (JA 59 (¶ 183)). But supervising a warrant application, including discussing the evidence generally supporting the warrant, is a routine part of any supervisor's job in an FBI field office or a USAO, and it is a far cry from personally participating in any fabrication of evidence. If Ganek's allegations of routine supervision were sufficient to plausibly allege supervisory complicity in an alleged fabrication of evidence by a subordinate, virtually any FBI or USAO supervisor could be subjected to suit under *Bivens* on a theory of *respondeat superior*—the very result the Supreme Court explicitly rejected in *Iqbal*. *See* 556 U.S. at 677.

Ganek's assertions that the insider trading investigation into Level Global was important, and was treated as such by supervisors, also fail to allege that any supervisor was personally involved in the fabrication of evidence. The complaint alleges that the investigation was "high-profile" (JA 19 (¶ 10), 28 (¶ 49), 57 (¶ 175), 59 (¶ 185)); that the investigation received significant resources (JA 29 (¶ 54)); that the U.S. Attorney made public statements regarding the importance of insider trading investigations into financial firms in general (JA 28 (¶ 50), 29 (¶ 54), 31 (¶ 62)); and that supervisors "carefully considered" the "likely commercial consequences" of obtaining and executing the search warrant at Level Global (JA 41 (¶ 110); *see also* JA 44 (¶ 123)).

The district court erroneously relied on these allegations to infer that the supervisor defendants would have become aware of, and approved, any misrepresentation in the warrant affidavit. (JA 185-86). These allegations provide no plausible basis to infer that any of the supervisor defendants had notice of (let alone personal involvement in) any purported misstatement in the affidavit. At most, they support an inference that at least some of the supervisor defendants were interested in, aware of, and generally informed about an important insider trading investigation (one of many important investigations being conducted by the USAO and the FBI at any given time), and that they would have signed off on key decisions like the plan to execute a search warrant at Level Global and other hedge funds. They do not plausibly support the inference that the supervisor defendants also abdicated their constitutional duties and ap-

proved of an allegedly fabricated warrant affidavit in order to obtain an illegal search warrant. Were these allegations sufficient, supervisors effectively would be deprived of qualified immunity for the constitutional torts of their subordinates in all "high-profile" matters. Yet *Iqbal* forecloses such a conclusion. *See* 556 U.S. at 677 (holding, in a case alleging high-profile misdeeds in a *Bivens* action, that "masters do not answer for the torts of their servants" and that "[a]bsent vicarious liability, each Government official . . . is only liable for his or her own misconduct").

The district court's conclusion that it was "entirely plausible" that the non-supervisor defendants alleged to have fabricated evidence "would have run such a decision 'up the ladder' in shaping the Affidavit" (JA 186 n.19) misconstrues the *Iqbal* plausibility requirement. In evaluating plausibility, the Court must "draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. It defies logic and common sense to conclude that an FBI agent or a prosecutor who had decided to fabricate evidence to obtain an unlawful search warrant would reveal the fabrication to his or her supervisors. And there is not a single allegation of fact that would suggest that any particular agent or prosecutor made the extraordinary decision to convey such information to his or her supervisor in this case.

The district court also erred in relying on Ganek's naked assertion that an unspecified defendant "tipped" the *Wall Street Journal* regarding the impending execution of search warrants at Level Global and other funds, which allegedly would have required

supervisory approval under Department of Justice ("DOJ") policy. (JA 185 (citing JA 39 ¶ 97); *see also* JA 38 (¶ 95)). Even if the allegation is credited, it does not support the inference that any supervisor defendant had notice of a misstatement in the warrant affidavit.[8] Tipping the press about the fact that federal agents were planning to execute a search warrant has nothing to do with the contents of the sealed affidavit supporting the warrant application. It certainly does not support the necessary inference that the supervisor defendants authorized the submission of a knowing or reckless false statement in the affidavit.

At bottom, Ganek's claim for "supervisory liability" rests on the mere fact that the supervisors oversaw a high-priority investigation. From that, he infers that the supervisor defendants would have been told that their subordinates had fabricated evidence in the warrant affidavit, and that they would have signed off on the affidavit anyway. But that inference is not plausible. Supervisory involvement in the law-

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[8] The allegation need not be credited, as Ganek has alleged no facts to support the inference that it was an FBI agent or prosecutor who tipped the press, as opposed to, for example, someone who was present at Level Global's offices or in the vicinity when the execution of the warrant was in progress. The complaint also fails to identify which of the defendants supposedly tipped the *Wall Street Journal*, underscoring the wholly speculative nature of this allegation.

ful aspects of a high-profile case is at most "consistent with" supervisory involvement in the alleged unconstitutional fabrication of evidence. It does not actually support that conclusion or nudge the plaintiff's claim of supervisory involvement "across the line from conceivable to plausible." *Iqbal*, 556 U.S. at 678, 680 (quoting *Twombly*, 550 U.S. at 570). Accordingly, Ganek has not met his pleading burden with regard to the supervisory liability claim.

B. Ganek Makes No Particularized Allegations Regarding Any Specific Supervisor

Underscoring the insufficiency of Ganek's pleading with respect to all of the supervisor defendants is the paucity of particularized allegations in the complaint regarding each individual supervisor.

Aside from identifying their titles within the FBI's New York office and general roles in the investigation, the complaint fails to include *any* particularized allegations regarding FBI supervisors Diego Rodriguez, Patrick Carroll, or Rachel Rojas. (JA 22-23 (¶¶ 26-28), 30 (¶ 57)). The same is true for USAO supervisors Marc Berger, Christopher Garcia, and Boyd Johnson. (JA 23-24 (¶¶ 29-30, 32), 30 (¶¶ 59-60)). With regard to FBI supervisor David Chaves, aside from identifying his title and general role in the investigation (JA 22 (¶ 25), 30 (¶ 57)), the only specific factual allegation in the complaint is that he allegedly knew of and approved the decision initially to approach Adondakis about cooperating with the investigation. (JA 31(¶ 63)). That allegation provides no basis to infer that Chaves learned of a misstatement in

the warrant affidavit concerning what Adondakis said at a proffer session that took place weeks later.[9]

Ganek's allegations regarding U.S. Attorney Bharara and Criminal Division Chief Zabel are similarly scant. Aside from identifying their titles and general roles (JA 23-24 (¶¶ 31, 33), 30 (¶¶ 58, 60)), Ganek alleges that Zabel met with Level Global representatives in December 2010 (JA 18 (¶ 6), 41 (¶ 110)), and that Bharara spoke by phone with a different Level Global representative in early February 2011 (JA 18-19 (¶¶ 7-8), 43-44 (¶¶ 119-23), 57 (¶ 177)). But those conversations have no bearing on the supervisory liability claim because they took place weeks or months after the warrant application was submitted. Nor is there any basis to infer that conversations with Level Global's attorneys after the search warrant had been executed would have put Bharara or Zabel on notice of any misstatement of fact in the warrant affidavit, which at that time was under seal.

Finally, the complaint alleges that Bharara oversaw investigations into insider trading at financial firms, made those investigations a high priority, committed resources to pursuing those investigations,

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[9] The complaint also alleges that U.S. Attorney Bharara and a senior FBI official "publicly recognized" Rodriguez, Rojas, Chaves, Garcia, and Berger, as well as several non-supervisor defendants, "for their contributions to the investigation of Level Global." (JA 30 (¶ 61)). Such commendations are irrelevant to the plausibility of the allegations of misconduct in Ganek's complaint.

and made public statements about those investigations. (JA 28 (¶¶ 49-50), 29 (¶ 52-54), 31 (¶ 62), 40 (¶ 104), 46 (¶ 137)). As discussed above, however, allegations about a supervisor overseeing the lawful aspects of a high-profile case are insufficient to plausibly allege that supervisor's personal complicity in the allegedly unconstitutional acts of subordinates.

Having failed to identify any particularized culpable act or omission by any of these defendants, Ganek has not met his pleading burden. *See Iqbal*, 556 U.S. at 676 (plaintiff must identify what "each" supervisor has done through his or her "own individual actions" to violate the defendant's constitutional rights). The district court erred in concluding otherwise. The court held that Ganek had plausibly alleged that "some" of the supervisors would have learned the details of Adondakis's statements at the proffer session and the alleged fabrication in the warrant affidavit. (JA 185). But the court rested that conclusion on nothing more than the "high-profile" nature of the Level Global investigation and the complaint's allegations of the supervisor defendants' involvement in standard aspects of a high-profile case, and none of those allegations make plausible Ganek's claim of supervisory complicity in the alleged fabrication in the warrant affidavit.

Indeed, the district court's conclusion that only "some" supervisor defendants might have learned of the alleged fabrication is a tacit recognition that Ganek did not do enough to allege *each* supervisor defendant's individual liability. The court did not identify which of the nine supervisor defendants would have learned of the alleged fabrication in the

warrant affidavit, nor would it have been possible to do so from the allegations in the complaint. Instead, the court suggested that discovery would reveal which supervisors, if any, were complicit. (JA 186). As the Supreme Court has held, however, qualified immunity provides immunity from suit, including discovery, and should be decided "at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

C. *Turkmen* Underscores the Insufficiency of Ganek's Allegations

The only case cited by the district court in support of its supervisory liability analysis, *Turkmen v. Hasty*, 789 F.3d 218 (2d Cir. 2015), offers Ganek no help. Indeed, *Turkmen* illustrates just how far the allegations in Ganek's complaint are from what would be required to make plausible allegations of the supervisor defendants' complicity in the constitutional torts of their subordinates.[10]

In *Turkmen*, a group of plaintiffs who had been taken into custody during the investigation into the terrorist attacks of September 11, 2001 brought a *Bivens* action against, among others, high-level DOJ officials (including the Attorney General and the FBI

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[10] The government disagrees with the decision in *Turkmen* and has sought review by the Supreme Court. As explained below, however, *Turkmen* does not support the district court decision here regardless of the Supreme Court's ultimate disposition of that case.

Director), alleging unconstitutional conditions of confinement. 789 F.3d at 224. The district court granted those officials' motion to dismiss on qualified immunity grounds, but a divided panel of this Court reversed, holding that the plaintiffs' complaint alleged sufficient facts to adequately plead that the high-ranking officials were aware of and affirmatively condoned the allegedly unconstitutional conditions in which detainees were held. *Id.* at 238-46.

In reaching that conclusion, the panel majority did describe the high-profile nature of the investigation into the September 11 attacks and the role of the Attorney General and FBI Director in overseeing the investigation. *See id.* at 226-27, 239-43. But the court did not rest its decision on that discussion alone. Crucial to the majority's conclusion were specific allegations contained in reports by the DOJ's Office of the Inspector General ("OIG"), which the plaintiffs had incorporated into their complaint. *See id.* at 226, 240-42. The *Turkmen* majority characterized those reports, and thus the complaint, as alleging that the Attorney General had been informed of a specific "allegation of mistreatment" of at least one detainee, from which the majority drew the conclusion that it was also reasonable to infer that reports of more severe mistreatment of other detainees had also made their way to the Attorney General. *Id.* at 239 & n.22. The OIG reports also alleged that the media began reporting on "conditions in the [detention facility] . . . soon after detentions began," and that DOJ officials became aware of the conditions of confinement due to those media reports. *Id.* at 240 & nn.23-24, 242. As a result, the majority concluded that it was reasonable

to infer that higher-level DOJ officials also would have become aware of those media reports and thereby would have become aware of the facts underlying the plaintiffs' claims. *Id.*

These factual allegations from the OIG reports, and the majority's characterization of them, were essential to the *Turkmen* Court's conclusion that the officials, in addition to supervising a high-profile investigation, also were personally aware of the alleged unconstitutional actions of their subordinates.[11] As the majority characterized the allegations from the reports, "a steady stream of information regarding the challenged conditions flowed between the [agency in charge of the confinement] and senior DOJ officials." *Id.* at 240. It was this stream of information that made the plaintiffs' allegations of supervisory complicity plausible.

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[11] The panel majority made clear that the OIG reports played a "significant role" in the analysis of the *Turkmen* complaint. 789 F.3d at 226; *see, e.g., id.* at 239 ("[t]he OIG Report makes plain the plausibility of Plaintiffs' allegations" that the DOJ Defendants were aware of allegedly punitive conditions of confinement); *id.* at 241 ("the OIG reports also support the MDC Plaintiffs' allegation that the DOJ Defendants became aware of the lack of individualized suspicion for some detainees held in the challenged conditions of confinement"); *id.* at 242-43, 247, 249, 258, 260. As previously indicated, the government disagrees with the decision in *Turkmen*, and has sought review by the Supreme Court.

Ganek offers no factual allegations remotely comparable to the Inspector General reports in *Turkmen*, nor does he identify any plausible basis to conclude that any information regarding the alleged fabrication in the warrant affidavit, much less a steady stream of it, ever reached the supervisor defendants. There is no allegation that the supervisor defendants ever learned of a particular incident of their subordinates fabricating evidence, nor are there allegations of media coverage detailing alleged fabrication of evidence such that the supervisor defendants might be inferred to have become aware of it. There is thus nothing to separate this case from any other case involving supervisors overseeing a high-profile investigation.

The district court saw "obvious parallels" between *Turkmen* and this case because, in addition to supervisors in both cases overseeing high-profile investigations, both cases involved allegations of media coverage. (JA 185; *see* JA 183). But media coverage alone is not a sufficient basis for supervisory liability, even under *Turkmen*. The district court erred by focusing on the mere fact of media coverage and not analyzing what the media covered and whether that coverage made plausible supervisory knowledge and complicity in the particular alleged constitutional violation. The press reports in *Turkmen* documented concerns about detainees' conditions of confinement, the very circumstances that were alleged to violate the Constitution in *Turkmen*. That is, the media reports, in the panel majority's view, plausibly could have put high-level officials on notice of unconstitutional conditions of confinement. In contrast, the media coverage here

simply reported that the government was investigating insider trading and was executing search warrants at hedge funds. Nothing in those reports would have given a reader any indication that the affidavit used to secure a warrant to search the offices of Level Global may have been inaccurate in some respect regarding Ganek's level of knowledge of his participation in insider trading at the fund. Accordingly, *Turkmen* highlights how far the allegations in Ganek's complaint are from plausibly alleging supervisory liability.

POINT III

Ganek Had No Clearly Established Constitutional Right to a Public Statement of Exoneration After Execution of the Search Warrant

Ganek also brings a failure-to-intercede claim, arguing that some of the defendants—though it is not clear exactly who—violated his constitutional rights after the execution of the search warrant by failing to publicly correct any material misrepresentation in the sealed warrant affidavit and clarify that Ganek, though he may have acted as a conduit for the insider trading crimes of others at Level Global, did not know the source of the inside information on which he traded. (JA 56-58; JA 179-82 (district court opinion characterizing this claim)).

This claim should be dismissed on qualified immunity grounds. "The doctrine of qualified immunity shields officials from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person

would have known.'" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). "A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Id.* (quoting *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012)). The right must be defined "in light of the specific context of the case," not "at a high level of generality." *Id.* In order for a right to be clearly established, there need not be "a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011); internal quotation marks omitted).

A reasonable official in the position of the defendants would not have understood that he or she had a constitutional obligation to publicly correct a misstatement in a sealed warrant affidavit, after the warrant had been executed, in order to clarify Ganek's level of knowledge of his participation in insider trading at Level Global. There is no Supreme Court or Second Circuit case with remotely similar facts, and neither Ganek nor the district court has identified any precedent anywhere defining constitutional rights in the context of correcting a misstatement in an already-executed warrant. (*See* JA 179-82). Nor has Ganek or the district court identified any precedent establishing general principles that would apply in this context so clearly as to put "beyond debate" the question whether someone in Ganek's position had a constitutional right to an exonerating statement in these circumstances. (*See id.*).

The authorities the district court relied on do not identify any such clearly established constitutional right. The district court first referenced the "general principle[]" that "government attorneys are ethically obligated to limit the collateral damage resulting from government investigations." (JA 180, 181). Next, the court cited a provision of the U.S. Attorneys' Manual, labeling as a "general principle[]" that prosecutors should consider "'collateral consequences, including whether there is disproportionate harm to . . . others not proven personally culpable' when contemplating the prosecution of business organizations." (JA 181 (quoting JA 209)). But even assuming such obligations exist as "general principles," they are irrelevant here because they do not establish any *constitutional* duty. *See Davis v. Scherer*, 468 U.S. 183, 194 (1984) ("Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision."). Thus, even if Ganek could plausibly allege that the defendants violated an ethical rule or the U.S. Attorneys' Manual—and they did not—those allegations would not defeat qualified immunity.[12]

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[12] In any event, it is not clear that these non-constitutional "general principles" would apply here. The cases cited by the district court do not establish the broad proposition that "government attorneys are ethically obligated to limit the collateral damage resulting from government investigations," as the district court appeared to acknowledge by using a "*cf.*" signal. (JA 180-81 (citing *SEC v. Caledonian Bank,*

The district court also relied on two cases discussing constitutional rights to intervention in contexts that are very different from this case. (*See* JA 181-82). In *Anderson v. Branen*, 17 F.3d 552, 557-58 (2d Cir. 1994), this Court addressed an alleged failure to intervene by a Drug Enforcement Administration ("DEA") agent who was present while another agent physically assaulted a suspect. The district court relied on language from *Anderson* stating that "[a]n officer who fails to intercede is liable for the preventable harm caused by the actions of the other officers where that officer observes or has reason to know . . .

Ltd., 145 F. Supp. 3d 290, 310-11 (S.D.N.Y. 2015) (discussing SEC's obligation to timely alert court to foreseeable collateral damage in *ex parte* proceeding to freeze assets), and *Gate Guard Servs., LP v. Perez*, 792 F.3d 554, 555 (5th Cir. 2015) (noting that the government "preserves public trust and confidence" when it "acknowledges mistakes"))). As non-binding cases decided years after the events at issue, moreover, the cases could not provide any relevant notice to the supervisor defendants. *See Messerschmidt*, 132 S. Ct. at 1245; *Ying Jing Gan v. City of New York*, 996 F.2d 522, 532 (2d Cir. 1993) (to determine whether right was clearly established "at the time defendants acted," courts consider Supreme Court and applicable circuit court decisions). Furthermore, the cited provision of the U.S. Attorneys' Manual regarding "the prosecution of business organizations" does not specifically address decisions relating to search warrants or public statements about the culpability of particular individuals.

that any constitutional violation has been committed by a law enforcement official." (JA 181 (omission in district court decision) (quoting *Anderson*, 17 F.3d at 557)). In *Ying Jing Gan v. City of New York*, 996 F.2d 522, 534 (2d Cir. 1993), the other case relied upon by the district court, this Court held that a witness to a crime who helped law enforcement officers identify a gang member as a suspect and who then was murdered by members of the same gang did *not* have a clearly established constitutional right to have the prosecutor protect him from such harm. Even though *Ying Jing Gan* held in favor of the defendant prosecutor, the district court quoted that case for the proposition that "courts have recognized a constitutional obligation to protect an individual when a 'governmental entity itself has created or increased the danger to the individual.'" (JA 182 (quoting *Ying Jing Gan*, 996 F.2d at 533)).[13]

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[13] In the passage from *Ying Jing Gan* quoted by the district court, moreover, this Court did not articulate a broad duty to intervene, but rather noted that certain language in the Supreme Court's decision in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 201 (1989), had been interpreted by this Court in *Dwares v. City of New York*, 985 F.2d 94, 98-99 (2d Cir. 1993), as recognizing that "*in exceptional circumstances* a governmental entity *may* have a constitutional obligation to provide . . . protection [against harm by private actors] . . . because the governmental entity itself has created or increased the danger to the individual." *Ying Jing Gan*, 996 F.2d at 533 (emphasis added).

The district court drew two very broad principles from *Anderson* and *Ying Jing Gan*: that officials have a duty to intervene to prevent harm of which they are aware and have a reasonable opportunity to avoid, and that officials who have created or increased a risk of harm to a person have a duty to protect that person from the harm. The district court then concluded that those general principles defeated the defendants' qualified immunity defense in this case, at least at the pleading stage, because Ganek may have had a clearly established right under the distinct facts of this case. (*See* JA 181-82). That was error.

The very broad principles of law identified by the district court are framed at too high a level of generality to be used in determining whether Ganek had a clearly established constitutional right here because they are wholly divorced from the factual circumstances at issue. *See Mullenix*, 136 S. Ct. at 308 (clearly established right must be defined "in light of the specific context of the case," not "at a high level of generality"). Both *Anderson* and *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993), the state-created danger case discussed in *Ying Jing Gan*, in-

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Ying Jing Gan did not involve an alleged duty to protect an individual from state-created danger, but rather an alleged duty to protect based on a special relationship with the victim. *Id.* In any event, any such right to protection would be grounded in substantive due process, *see id.*, and as the district court correctly held, Ganek cannot assert a substantive due process claim here. (JA 177-78).

volved officers standing by while the plaintiff was subjected to physical harm in their presence. *Anderson* found a potential duty to intercede where a DEA agent personally observed a physical assault on the plaintiff that took place in close physical proximity to him. 17 F.3d at 558. *Dwares* found a potential duty to protect where police officers allegedly "(a) agreed in advance with a certain group to allow members of that group to assault the plaintiff with impunity, (b) stood by without interfering when plaintiff was in fact beaten, and (c) did not arrest the assaulters." *Ying Jing Gan*, 996 F.2d at 533 (quoting *Dwares*, 985 F.2d at 99).

None of that is remotely analogous to the constitutional obligation Ganek asserts in this case: the obligation to issue a public statement of exoneration following the execution of a search warrant supported by a sealed affidavit that allegedly contained a misrepresentation of one person's knowledge of his direct participation in insider trading activities. The type of indirect, after-the-fact, and speculative economic harm alleged by Ganek is entirely distinct from the direct, contemporaneous, and physical harm at issue in *Anderson* and *Dwares*.

Moreover, permitting liability in the circumstances presented in *Anderson* and *Dwares* (or contemplated in the abstract in *Ying Jing Gan*) was unlikely to create negative collateral effects on other law enforcement duties or on third parties. Here, by contrast, third parties could have been harmed by any public statement even hinting at exoneration. Investors would have relied on such a statement, and then

could have suffered harm, for example, when Level Global employees were later charged and convicted of insider trading. And Ganek was never in a position to receive a clean bill of health. After all, the district judge overseeing Chiasson's criminal trial for insider trading, at which Chiasson was convicted, concluded after briefing and argument that Ganek was an unindicted coconspirator in the insider trading ring for purposes of Federal Rule of Evidence 801(d)(2)(E). (JA 125-27). It would have been unreasonable and improper to have publicly exonerated anyone at that stage, let alone the founder and principal investment professional at Level Global who was an active participant in the relevant trading activity.

Distinctions like these underscore why the Supreme Court insists that a constitutional right in a qualified immunity case must be clearly established in the context of the facts alleged in that particular case. At a minimum, reasonable officers could disagree about what the Constitution requires in these distinct contexts, in which widely varying considerations might reasonably be thought to be relevant to the lawfulness of the officer's conduct.

Ying Jing Gan, rather than supporting Ganek's position, only illustrates this point further. There, this Court held that the defendant prosecutor was entitled to qualified immunity because there was no precedent "in which the lodging of a complaint with law enforcement officials, or the complainant's compliance with a request to identify suspects, either singly or in combination," had been held "(a) to create a relationship that gives the complaining witness a

constitutional right to protection, or (b) to impose the corresponding duty on a prosecutor." 996 F.2d at 534. The Court noted that, "in the absence of any such holdings," and in light of the Supreme Court's precedents limiting the circumstances in which the government has a duty to act to prevent harm to others, "it could not have been clear to a reasonable prosecutor that his failure to provide protection . . . would have violated [the witness's] rights under the Constitution." *Id.* Just as the lack of any analogous case law was fatal in *Ying Jing Gan*, so, too, is it fatal to Ganek's claims here.

Indeed, the district court appeared to recognize these deficiencies in its own analysis. Rather than wade into the nuanced question of whether a government official would have had a clearly established duty to act in the context of the specific facts of this case under the general principles invoked in *Anderson* and *Ying Jing Gan*, the district court instead concluded that deciding that issue would be "premature" at this stage and "is a better question for summary judgment." (JA 182). But a district court has no authority to put off for a later stage of litigation a qualified immunity question that can be resolved at an earlier stage. *See Hunter*, 502 U.S. at 227. The district court should have analyzed whether existing precedents gave Ganek a clearly established right to a publicly exonerating statement in order to correct a misstatement in a sealed warrant affidavit—after the warrant had been executed—concerning the degree of Ganek's knowledge of his involvement in insider trading at Level Global. Had the district court conducted

that analysis, it would have found no such clearly established right.

CONCLUSION

For the foregoing reasons, the order of the district court denying the defendants qualified immunity should be reversed and the claims against the defendants should be dismissed.

Dated: New York, New York
August 19, 2016

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 13,837 words in this brief.

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