13-1837-cr(L)

13-1917-cr(con)

To Be Argued By:
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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

REPLY BRIEF FOR DEFENDANT-APPELLANT ANTHONY CHIASSON

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I. TO COMMIT FRAUD, A TIPPEE MUST KNOW THAT AN INSIDER DISCLOSED MATERIAL NONPUBLIC INFORMATION FOR PERSONAL GAIN

The main issue on this appeal is what a tippee must know for his trading to be securities fraud. We believe that a tippee commits fraud only if he knows the key fact that makes the trading illegal: A corporate insider disclosed the information for personal gain. If the tippee does not know this, his trading is neither wrongful nor illegal, for he is not then a knowing participant in the insider's fraudulent fiduciary breach, and that is the only basis for liability.

This view of the law comports with the doctrinal basis of the insider trading prohibition. It is consistent with the governing statute and fundamental principles of criminal law. It provides a clear line for participants in the securities market, who constantly receive and act on information: A tippee who knows that an insider disclosed information for personal gain, thereby committing fraud, cannot trade, and a tippee who is ignorant of the fraudulent nature of the disclosure may lawfully trade on confidential information.

The government labors to refute this view of the law, but its analysis clashes with settled insider trading doctrine, misconstrues precedent, and ignores market realities.

1. The critical ingredient missing from the government's analysis is fraud. The prosecution argues that Chiasson "knew the tips were reliable" (Gov't Br. 22, 26), "could have come only from an insider" (Gov't Br. 26), and that the Dell and NVIDIA insiders were disclosing information required to be kept confidential. (Gov't Br. 21-27). But none of this equates to fraud. As the Supreme Court held in *Chiarella* v. *United States*, 445 U.S. 222 (1980), a seminal decision that the government ignores, insider trading liability does not derive from "a general duty between all participants in market transactions to forgo actions based on material, nonpublic information." *Id.* at 233. There is no such general duty. Fraud exists only where the person trading on inside information has a duty to disclose that information or abstain from trading. *Id.* at 232.

The "duty to disclose or abstain from trading 'arises from a specific relationship between two parties.'" *United States* v. *O'Hagan*, 521 U.S. 642, 661 (1997) (quoting *Chiarella*, 445 U.S. at 233); *see Dirks* v. *SEC*, 463 U.S. 646, 657-58 (1983) ("[A] duty [to disclose or abstain] arises from the relationship between the parties…." (quoting *Chiarella*, 445 U.S. at 232-33)). Here, Chiasson had no relationship with anyone that created a duty to abstain from trading on material nonpublic information. Therefore, he committed insider trading only if he knowingly participated in the insiders' fraudulent conduct, and thereby assumed

their duty to company shareholders. *Id.* at 660. This is the doctrinal basis of tippee liability, as the Supreme Court explained at length in *Dirks*, the leading case.

The government gives *Dirks* short shrift and misstates critical portions of the opinion. It claims *Dirks* "required only that the tippee know the tipper disclosed information in breach of a duty." (Gov't Br. 40). This is not what the Court said. Not *any* breach of *any* duty by an insider opens the door to tippee liability. The insider's disclosure must be a breach of his fiduciary duty to shareholders, and that breach, under *Dirks*, must involve exchanging confidential information for personal benefit. "[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.*" 463 U.S. at 662 (emphasis added).

Merely violating a duty of confidentiality without intending to derive personal gain is not a fraudulent fiduciary breach creating tipper liability. When *Dirks* held that a tippee assumes a fiduciary duty to a company's shareholders where "the tippee knows or should know that there has been a breach [by the insider]" (Gov't Br. 40 (quoting *Dirks*, 463 U.S. at 660)), the reference to the insider's "breach" was plainly a reference to the exchange of information for personal gain. That is the breach the tippee must know about in order to assume the insider's fiduciary duty to shareholders and be required to abstain from trading.

The government concedes that in all insider trading cases, whether based on the "classical" or "misappropriation" theory, the insider must intend to exchange confidential information for personal benefit to commit a fraudulent fiduciary breach. (Gov't Br. 54-55). The government acknowledges *Dirks*' focus on the "purpose of the [tipper's] disclosure," 463 U.S. at 662, and that the tipper's purpose to reap personal gain by disclosing confidential information is required to establish a tipper's fraud under Rule 10b-5.

2. The government argues, however, that a tippee can be liable even if ignorant of the tipper's self-dealing intent, provided he knows that the tipper disclosed information in breach of a duty of confidentiality. This is not the law.

The theory of tippee liability, as articulated in *Dirks* and subsequent cases, is that the tippee's liability derives from that of the tipper. The Court in *Dirks* explained that the transactions of a tippee who "knowingly participate[s] with the fiduciary" in the insider's fiduciary breach are "as forbidden" as those of the insider himself. 463 U.S. at 659. Quoting *Chiarella*, the Court explained that "'[t]he tippee's obligation has been viewed as arising from his role as a participant after the fact in the insider's breach of a fiduciary duty.'" *Id.* (quoting 445 U.S. at 230 n.12). Because the insider's breach of fiduciary duty requires the intended exchange of information for personal benefit, a tippee who is ignorant of that exchange does not participate in the insider's breach. The government's contrary

position elides silently over this point. The government nowhere explains how Chiasson, a fourth-level tippee who did nothing to induce the insiders to divulge information for personal benefit, and who was ignorant of their self-dealing intent, was a "knowing participant" in their fraudulent conduct.

The government's position also conflicts with bedrock principles of criminal law. Because the tippee's liability derives from the tipper's liability, and involves participating in the tipper's illegal conduct, the tippee must know the unlawful nature of the tipper's acts. This is true generally of secondary criminal liability. A defendant charged as an aider and abettor or conspirator, *i.e.*, an alleged participant in crimes with others, need not know all the details about how those crimes are committed. But he must know that *crimes* are being committed. *See United States* v. *Snype*, 441 F.3d 119, 142 (2d Cir. 2006) (defendant can be liable as accessory after the fact only if he knew "of the crime's commission and the principal's participation in it"); *United States* v. *Frampton*, 382 F.3d 213, 223 (2d Cir. 2004) (aiding and abetting liability requires government to prove defendant "act[ed] with the specific intent of facilitating or advancing the principal's commission of the underlying crime"); *see also United States* v. *Santos*, 541 F.3d 63, 70 (2d Cir. 2008) (conspiracy liability requires defendant knew of illegal conspiracy and intentionally joined it). By contrast, under the government's view of the law, the tippee can be a "participant after the fact" in the tipper's fiduciary breach without

even knowing of that. This is not how the criminal law works. The tippee's awareness of a different and lesser breach by the tipper—a breach of a confidentiality obligation—does not suffice, because under *Dirks* and its progeny a mere breach of confidentiality is not fraudulent or criminal. It is the tipper's breach of confidentiality *for personal gain* that is forbidden conduct, and the tippee must know of and participate in that conduct to be liable for participating in the tipper's fraud.

In this case, the government decided not even to pursue the tippers, though they must have committed crimes if the tippees are culpable. The government apparently believes that the scienter requirement is lower for a tippee than for an insider-tipper, but this makes no sense because tippers are the more culpable actors in insider trading cases. The insider has the direct fiduciary duty to the issuer's shareholders, and the insider receives the confidential information in trust and knows the details of the company's interest in preserving confidentiality. But under *Dirks,* an insider who intentionally breaches a duty of confidentiality, and who discloses inside information to be used for trading the company's stock, commits no fraud *unless* he exchanged the information for personal benefit. 463 U.S. at 662. If the more culpable tipper cannot be held liable even for a flagrant violation of a confidentiality duty, unaccompanied by personal gain, why should taking advantage of a mere confidentiality breach be enough to imprison a tippee,

who owes no direct duty of any kind and whose liability is secondary to and derives from that of the tipper? As the Supreme Court has explained:

> We disagree … that an investor who engages in such trading is necessarily as blameworthy as a corporate insider or broker-dealer who discloses the information for personal gain. Notwithstanding the broad reach of § 10(b) and Rule 10b-5, there are important distinctions between the relative culpabilities of tippers, securities professionals, and tippees in these circumstances…. In the context of insider trading, we do not believe that a person whose liability is solely derivative can be said to be as culpable as one whose breach of duty gave rise to that liability in the first place.

Bateman Eichler, Hill Richards, Inc. v. *Berner*, 472 U.S. 299, 312-14 (1985).

Tippee knowledge that the tipper disclosed information for personal benefit is required not only by *Dirks* and general principles of secondary criminal liability, but also because criminal liability for insider trading requires the defendant to act "willfully." 15 U.S.C. §78ff(a). (*See generally* Chiasson Br. 32-34).

The government attempts an end-run around this statutory requirement, observing first that "the securities fraud statute's *mens rea* provision does not expressly apply to the benefit requirement (which requirement does not appear in the statute itself)." (Gov't Br. 35). This observation adds nothing, as the securities fraud statute does not define insider trading at all. The crime of insider trading is a judge-made offense, and the elements of the offense derive from judicial opinions, not from a statutory listing. *See, e.g.*, Preliminary Note, Rule 10b5-2 ("The law of insider trading is … defined by judicial opinions…."). There is an express

"willfulness" requirement in the Securities Exchange Act, but its application turns on the controlling case law, beginning with *Chiarella* and *Dirks*.

3. The government runs away from *Chiarella* and *Dirks*, and takes refuge in a line of Second Circuit cases that supposedly excuses it from having to prove tippee knowledge that insiders disclosed confidential information for personal gain. But the cases the government cites do not support its view of the law. In every one of those cases, the tippers disclosed inside information for personal benefit, and the tippees *were party to or knew of* the tippers' disclosure for personal gain. These cases therefore do not say, much less establish, that a tippee who was unaware of the insider's intent to benefit personally can violate Rule 10b-5.

- *SEC* v. *Warde*, 151 F.3d 42 (2d Cir. 1998), involved an insider director of Kidde, Inc. The insider had material nonpublic information regarding negotiations for a takeover and relayed that information to the tippee, with whom he had a "close friendship." *Id.* at 49. The tipper and tippee engaged in parallel trading of Kidde securities, suggesting that "they discussed not only the inside information, but also the best way to profit from it." *Id.* at 48. Citing *Dirks*, this Court held that the close friendship allowed a jury finding that the tipper exchanged information for personal benefit, in violation of § 10(b). *Id.* at 49. The tippee obviously knew of the tipper's breach of duty and the benefit, because he was a direct participant in the fraudulent disclosures, and knew that the tipper was providing confidential information to a close friend, himself.

- *United States* v. *Jiau*, 734 F.3d 147 (2d Cir. 2013), featured a tippee who got inside information from two insiders. "To provide an incentive, Jiau promised the tippers insider information for their own private trading." *Id.* at 150. "Jiau treated [one tipper] to meals at restaurants and gave him gifts including an iPhone, live lobsters, a gift card, and a jar of honey. She also

provided [him] with insider information about other stocks and the two formed an investment club." The other tipper "entered into a relationship of *quid* [*pro quo*] with Jiau, and thus had the opportunity to access information that could yield future pecuniary gain." *Id.* at 153. Both tippers therefore exchanged information for personal gain, and the tippee, as a party to the exchange, obviously knew about it.

- *United States* v. *Libera*, 989 F.2d 596 (2d Cir. 1993), involved the clandestine purchase of advance copies of *Business Week* from employees who worked for the printer of the magazine. The tippee-defendants used the purchased information to trade securities. *Id.* at 598. They claimed on appeal that they did not know that the employees who provided the inside information had breached a fiduciary duty owed to the printing company. *Id.* at 602. The court rejected the claim, because each tippee knew that the tippers were being paid for advance copies of the magazines. *Id.* Thus, the tippees' participation in the tippers' fiduciary breach, and their knowledge of the personal gain that the tippers received, doomed the tippees' appeal.

- *United States* v. *Falcone*, 257 F.3d 226 (2d Cir. 2001), also involved a tippee who paid to receive advance copies of *Business Week*. The tipper was an employee of a *Business Week* distributor. An intermediary tippee paid the tipper for advance copies, and the defendant in turn paid this intermediary for the names of the companies mentioned in the magazine. *Id.* at 228. The opinion affirming the conviction noted that the tippee must know of the tipper's fiduciary breach, but did not discuss whether a fiduciary breach requires the tipper to exchange information for personal benefit, and whether the tippee must know of that exchange. The tippee plainly knew of the tipper's disclosure of confidential information in exchange for cash because the intermediary tippee told the appellant "the details of the scheme." *Id.* at 235. As the district court's opinion elaborated, those details included payments to the original tipper for the information. 97 F. Supp. 2d 297, 300 (E.D.N.Y. 2000).

- *United States* v. *Mylett*, 97 F.3d 663 (2d Cir. 1996), involved a tippee who got information about an impending AT&T acquisition directly from his friend, an AT&T executive. This Court stated, "Rule 10b-5 requires that the defendant subjectively believe that the information received was obtained in breach of a fiduciary duty." *Id.* at 668. It had little difficulty finding this element proved, since the tippee-defendant had acquired the information directly from *his friend*, and he knew that his friend worked for AT&T.

- *SEC* v. *Obus*, 693 F.3d 276 (2d Cir. 2012), discussed at length in our opening brief (Chiasson Br. 34-40), involved a tipper who provided confidential information to a college friend about a planned acquisition. The friend immediately passed the "tip" along to his boss. This Court held that the tipper's alleged fiduciary breach involved disclosure of confidential information, and that the tipper may have received a "benefit" by virtue of disclosing the information to his friend, because "personal benefit" may include "making a gift of information to a friend." *Id.* at 291. The ultimate tippee knew of the friendship between the employee and the tipper and offered to find the tipper a job. *Id.* at 281. The evidence therefore supported a finding that all defendants understood that the tipper disclosed information for personal benefit, though the opinion discusses only the requirement that the tipper receive a benefit.

Each of these cases involved tippees who knew that the insiders had breached their fiduciary obligations by disclosing confidential information in exchange for personal gain. Typically, that knowledge arose from the tippee's direct participation in the fraudulent disclosures.[1] None of these cases involved a tippee as remote as Chiasson was from the Dell and NVIDIA insiders, or who knew as little about the tippers and their fraudulent conduct. None of these cases affirms the conviction of a tippee who was entirely unaware of the tipper's intent

[1] Because virtually every reported insider trading case involves tippees who participated directly in the tipper's breach, and who knew that the tipper was exchanging information for some kind of personal benefit, including friendship, the government's concern that culpable tippees will "escape liability" (Gov't Br. 57) is groundless. Remote tippees who do not know that insiders have essentially "sold" their information, and know only that they have received information that should have been kept confidential, are not "escap[ing] liability"; under insider trading law as it has developed since *Chiarella*, they are not facing liability. *Cf. United States* v. *Whitman*, 904 F. Supp. 2d 363, 372 (S.D.N.Y. 2012) ("[O]ne can imagine cases where a remote tippee's knowledge that the tipper was receiving some sort of benefit might be difficult to prove. If, however, this is an unfortunate 'loophole,' it is a product of the topsy-turvy way the law of insider trading has developed in the courts and cannot be cured short of legislation.").

to reap personal gain. None of the opinions actually says that an ignorant tippee violates Rule 10b-5. On the contrary, the opinions collectively make clear that a tippee must know of the tipper's fiduciary breach, and that the tipper's breach must involve an exchange of information for personal gain, even if the gain is merely furthering a friendship by favoring a friend with nonpublic information upon which to trade. These opinions do not explicitly state that the tippee must know of the tipper's benefit, but none of them states affirmatively that the tippee need not know, and in each case the tippee in fact did know.

The government hangs its hat on the particular wording by which some of the cases list the elements of insider trading liability. Some of the opinions refer separately to the tipper's breach of a duty of confidentiality and the tipper's receipt of personal benefit. The government reads them to require a tippee to know of the former and not the latter, but this analysis is unsound. All of the cases cite and rely on the Supreme Court's *Dirks* opinion. *Dirks* made it ineluctably clear that a breach of confidentiality alone is not punishable under Rule 10b-5; there must be an improper disclosure of confidential information *in exchange for personal gain.* The government concedes that, "absent personal benefit to the insider-tipper, there is no tippee liability." (Gov't Br. 56). This is correct, and the concession highlights the flaw in the government's argument: There is no tippee liability because, absent personal benefit to the tipper, there is no fiduciary breach by the

tipper, and a tippee cannot be liable except for being a knowing participant in the tipper's fiduciary breach. A tippee who does not know that the tipper has exchanged information for personal gain does not know that a fraudulent fiduciary breach has taken place, and therefore cannot be held liable as a knowing participant in such a breach. The opinions the government cites do not articulate each step of this analysis, but they do hold collectively that there must be a fiduciary breach by the tipper, that the breach must involve the disclosure of confidential information for personal gain, and that the tippee must know of the breach. These cases, therefore, provide the government with little solace.[2]

4. To bolster its argument, the government claims that it is "plainly wrongful conduct" to trade securities based on material nonpublic information disclosed by a company insider in breach of a duty of confidentiality, and that "[n]o reasonable person" would expect "that he is free to trade securities based on such information." (Gov't Br. 46). Therefore, the government says, the defendants understood that their conduct "was wrongful (and thus willful)."

[2] The cases that do lay out the analysis with precision, *see*, *e.g.*, *Whitman*, 904 F. Supp. 2d at 370-71; *State Teachers Ret. Bd.* v. *Fluor Corp.*, 592 F. Supp. 592, 594-95 (S.D.N.Y. 1984), explicitly support Chiasson's position. The government, with characteristic hubris, dismisses them as "a small handful of district court decisions." (Gov't Br. 53).

(Gov't Br. 53). But this premise is incorrect, and so is the conclusion that supposedly flows from it.[3]

The premise is wrong for multiple reasons. If it were right, *Dirks* would have come out the other way, because the insider there breached a confidentiality duty by telling Dirks that Equity Funding's assets were overstated, and Dirks caused his clients to trade on the confidential information. The dissenters made this argument explicitly. *See, e.g.*, 463 U.S. at 678-79. The Court rejected the argument, along with the notion that an actionable fiduciary breach exists whenever an insider intentionally discloses confidential information to securities traders. 463 U.S. at 667 n.27. The Court articulated the personal benefit requirement to define *which* trading on confidential information triggers insider trading liability, *i.e.*, trading that takes advantage of an insider's exchange of information for the tipper's personal gain.

If trading on *any* material nonpublic information resulting from a confidentiality breach were "plainly wrongful conduct," as the government argues, the result would be the "parity of information" approach that the Supreme Court has repeatedly rejected. Time and again, that Court, along with this one, has

[3] The government's argument is also a tautology (*i.e.*, a self-reinforcing pretense of significant truth). Arguing that the defendants' conduct was wrongful because the defendants knew it was wrongful, and they knew it was wrongful because it was wrong, does not really advance the ball. Also, as discussed below, in the insider trading context criminal intent requires more than an awareness of the "general wrongfulness" of one's conduct.

refused to hold that merely trading on material nonpublic information known to come from an insider is wrong, let alone "plainly wrongful."[4] But this is precisely the implication of the government's legal position. "Nonpublic" information is synonymous with "confidential" information—corporate information is "nonpublic" precisely because a company takes adequate steps to maintain its confidentiality.[5] *See United States* v. *Cusimano*, 123 F.3d 83, 89 (2d Cir. 1997). And in order for confidential information to reach a tippee, there must typically be some kind of confidentiality breach. In the current legal and business environment, virtually the only way "confidential" information can reach a non-insider is by a breach of a duty of confidentiality.[6]

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[4] In *Chiarella*, the Court expressly refused to create "a general duty between all participants in market transactions to forgo actions based on material, nonpublic information," because "[f]ormulation of such a broad duty" "departs radically from the established doctrine that duty arises from a specific relationship between two parties[.]" 445 U.S. at 233. In the three decades since *Chiarella* was decided, the Court has reaffirmed this "key point made in *Chiarella*" several times. *O'Hagan*, 521 U.S. at 663; *see*, *e.g.*, *id*. at 661 ("There is … no 'general duty between all participants in market transactions to forgo actions based on material, nonpublic information" (quoting *Chiarella*, 445 U.S. at 233)); *Dirks*, 463 U.S. at 654-55 (same). *See also Simon DeBartolo Grp.* v. *Richard E. Jacobs Grp.*, 186 F.3d 157, 169 (2d Cir. 1999) ("This duty [to disclose or to abstain from trading] does not … arise from the mere possession of material non-public information."); *United States* v. *Chestman*, 947 F.2d 551, 565 (2d Cir. 1991); *United States* v. *Carpenter*, 791 F.2d 1024, 1031 (2d Cir. 1986).

[5] Indeed, on this appeal the government responds to Newman's attack on the jury instruction defining "nonpublic" information by pointing to evidence that Dell and NVIDIA "took affirmative steps to maintain the confidentiality of their earnings information before its public release." (Gov't Br. 79).

[6] Unauthorized "leaks" of information, by definition, violate duties of confidentiality. And "authorized" disclosures of confidential information are not

As a practical matter, therefore, the view that all trading on information known to derive from an insider's breach of confidentiality is "plainly wrongful" equates to the argument that all trading on material nonpublic information is illegal. However, since this is not the law, the government's position is untenable: It cannot concede that it is lawful to trade on confidential information but also argue that it is "plainly wrongful" to trade on information known to have been disclosed in breach of a confidentiality duty. This is truly trying to squeeze a camel through the eye of a needle.

A hypothetical referenced in *Obus* further illustrates the point. "Assume … a commuter on a train calls an associate on his cellphone, and, speaking too loudly for the close quarters, discusses confidential information and is overheard by an eavesdropping passenger who then trades on the information." *Obus*, 693 F.3d at 287. There should be no insider trading liability for the eavesdropping trader. The

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permitted under Regulation Fair Disclosure ("Regulation FD") unless the information is given to the entire market, which makes the information public and not confidential. Of course, company insiders can and do make selective disclosures without complying with Regulation FD, see *infra* p.17, but as the government points out, public companies like Dell and NVIDIA "do not sanction" such disclosures (Gov't Br. 49-50 n.24). These disclosures therefore violate duties of confidentiality as well as Regulation FD. Even negligent disclosures of material nonpublic information technically violate an insider's confidentiality duty, albeit unintentionally. Accordingly, a breach of a duty of confidentiality typically occurs whenever material nonpublic information escapes from a public company. The government presumably does not dispute this; it argues here that the materiality and confidentiality of the information meant that the defendants knew an insider breached a duty of confidentiality. (*See* Gov't Br. 17-18).

trader owed no independent duty to anyone to refrain from trading on confidential information. And, because the commuter's disclosure of confidential information was negligent and did not involve personal gain, the trader did not participate in a fraudulent fiduciary breach under *Dirks*. *See id.* According to the government's logic, however, the trading would be "plainly wrongful," because the eavesdropper would recognize the information as confidential, and also would understand that the commuter breached his duty of confidentiality by discussing nonpublic matters where he could be overheard. And, if the commuter was speaking to a personal friend (unbeknownst to the eavesdropper), the prosecutors' logic would deem the trading not only "plainly wrongful" but criminal, because the tipper disclosed the confidential information for the personal benefit of furthering the friendship.

The difficulties presented by the government's view of the law are not confined to hypotheticals; adopting its view would have significant real-world implications. Market professionals, like the analysts and portfolio managers involved in this prosecution, deal every day with a flood of news, facts, rumor, and information, much of which emanates from the companies whose stock they trade. In many respects, this is the product of a healthy and efficient market, which requires robust communication between companies and the investment

community.[7] The trial record provided abundant evidence of the selective disclosures by Dell and NVIDIA insiders that reached the defendants, and the government cannot dispute that such disclosures occurred or deny that issuers frequently disclose significant information to some investors and not others, and that investors use such information to trade.[8] These selective disclosures—whether or not they are "authorized" by the issuer—are commonplace, and unquestionably result from breaches of confidentiality. The SEC does not regard them as fraud unless the tipper acted for personal gain.[9] That is why the market professionals

[7] *See Dirks*, 463 U.S. at 658 ("Imposing a duty to disclose or abstain solely because a person knowingly receives material nonpublic information from an insider and trades on it could have an inhibiting influence on the role of market analysts, which the SEC itself recognizes is necessary to the preservation of a healthy market.").

[8] The government has elicited precisely the same facts from one of its own witnesses in a subsequent trial related to the indictment that charged Chiasson. In *United States* v. *Steinberg*, 12 Cr 121 (RJS), the prosecutor established on the direct examination of a government cooperator that Dell management, on occasion, would disclose information selectively at meetings with very large Dell investors, and that Dell stock would move on the days that such meetings took place. *See* Unofficial Trial Tr. at 983-85. The prosecutor also offered a document that identified Dell as a "very leaky" company. *See id*. at 979. The government's suggestion that Regulation FD has stemmed the flow of selective disclosures (Gov't Br. 49 n.24) is speculative and in any case irrelevant, as the trial record showed that Chiasson received a constant flow of selectively disclosed information, and that Adondakis sought out such information as a legitimate part of his job. (*See* Chiasson Br. 14-16).

[9] This is the point of the discussion in our opening brief of the SEC's adoption of Regulation FD, which the government distorts. Which or how many selective disclosures fall under Regulation FD is not what matters. The significance of Regulation FD is that the SEC adopted it because myriad selective disclosures are not fraudulent, and thus outside the scope of the insider trading laws, because insiders often disclose information other than for personal gain. Trading on

who constantly monitor and use this information for trading do not regard themselves as engaging in "plainly wrongful" conduct. The government's logic therefore sweeps far too broadly, because all trading on material and confidential information is not "plainly wrong."[10]

5. Even if it were "plainly wrongful" to trade on information obtained by virtue of a breach of confidentiality—and it is not—the government's conclusion that "plainly wrongful" conduct equates to "unlawful" or "willful" misconduct is wrong. The government grossly mischaracterizes this Court's decisions about what it means to act "willfully" in *insider trading cases*. According to the government, this Court held in *United States* v. *Kaiser*, 609 F.3d 556 (2d Cir. 2010), that "willfulness" "'do[es] not require a showing that the defendant had awareness of the general unlawfulness of his conduct, but rather that he had an

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selective disclosures, even those that result from breaches of confidentiality, is therefore not "plainly wrongful."

[10] The government's "everybody would know this conduct is wrong" theory is also belied by the many cases, in addition to *Dirks*, rejecting insider trading liability where tippees acted on information that an insider had disclosed in violation of some duty of confidentiality (but not for personal benefit). In *United States* v. *Cassese*, for example, a public company CEO told the defendant that the company was going to buy another company before the announcement, yet the Court held that trading based on this information was not criminal, in spite of supposedly "suspicious" facts including the defendant's use of two brokerage accounts and his attempt to undo the trade after the public announcement. 428 F.3d 92, 99-103 (2d Cir. 2005). *See also*, *e.g.*, *United States* v. *Kim*, 184 F. Supp. 2d 1006, 1011 (N.D. Cal. 2002) (not illegal for defendant to trade based on material nonpublic information disclosed by member of "Young CEO" club); Newman Reply 25 (citing additional cases).

awareness of the general wrongfulness of his conduct.'" (Gov't Br. 51; *see also id.* at 52 n.25 (quoting same language from *Kaiser*); *id.* at 58 (same)). Each time it quotes this language, the government intentionally omits language from the opinion that directly contradicts its argument. The *Kaiser* Court specifically noted that, although "general wrongfulness" may suffice in *other* types of securities fraud prosecutions, a higher standard of knowledge of unlawfulness is required in *insider trading* cases. The Court explained that in *United States* v. *Cassese*, 428 F.3d 92 (2d Cir. 2005), this Circuit "seemed to endorse a higher standard for willfulness in insider trading cases," namely "a realization on the defendant's part that he was doing a wrongful act *under the securities laws*." *Kaiser*, 609 F.3d at 569 (emphasis in original). Then, in the paragraph from which the government plucks the selective quotation it repeats three times while omitting the key language highlighted in bold below, the Court held:

> **Whatever the gloss put on [*United States* v. *Peltz*, 433 F.2d 48 (2d Cir. 1970) and *United States* v. *Dixon*, 536 F.2d 1388 (2d Cir. 1976)] by *Cassese* in insider trading cases**, as a general matter, we conclude that *Peltz* and *Dixon* do not require a showing that a defendant had awareness of the general unlawfulness of his conduct, but rather, that he had an awareness of the general wrongfulness of his conduct. **Unlike securities fraud, insider trading does not necessarily involve deception, and it is easy to imagine an insider trader who receives a tip and is unaware that his conduct was illegal and therefore wrongful. The same cannot be said of one who deliberately misleads investors about a security.**

609 F.3d at 569 (emphasis added). Thus, and contrary to the government's argument, in insider trading cases a defendant must believe that his conduct is not just generally "wrongful," but that it violates the law.[11]

Here, the alleged fact that converted lawful trading into criminal conduct was that the Dell and NVIDIA insiders were disclosing material nonpublic information in exchange for personal benefit. Because the law generally requires proof that a defendant is aware of facts that make otherwise innocent conduct illegal, and specifically requires proof that an insider trading defendant is aware that his conduct is unlawful, Chiasson did not commit a crime unless he knew that the Dell and NVIDIA insiders were essentially "selling" their information, *i.e.*, seeking personal gain from their disclosures.

The government cites cases that do not require a defendant to know facts that are elements of the crime charged (Gov't Br. 44-45), but they are inapposite. Virtually all of them involve conduct that is obviously criminal (assault,

[11] This was a point on which the majority and dissent in *Cassese* fully agreed. *Compare* 428 F.3d at 98 (holding that government failed to "adduce enough evidence to prove beyond a reasonable doubt that Cassese believed he was acting unlawfully"), *with id.* at 109 (Raggi, J., dissenting) (agreeing that the government had to prove "the defendant's awareness of the general unlawfulness of his conduct" but opining that government had met this burden). The government's argument that *Cassese*'s articulation of the *mens rea* standard in insider trading cases was mere *dicta* (Gov't Br. 52 n.25) is refuted by the opinion itself, which evaluates whether the defendant was aware he was acting unlawfully (not wrongfully), and by the dissent, which applied the same standard but reached a different factual conclusion. The *Kaiser* Court also explicitly stated that *Cassese* held that knowledge of unlawfulness is required in insider trading prosecutions. *See* 609 F.3d at 569.

prostitution, destruction of another's property, drug distribution, theft), and they hold only that a defendant can be guilty even if he does not know about some jurisdictional fact (for example, that an assault victim was a federal officer, that a prostitute was a minor, that property the defendant destroyed was federal property, that the defendant's drug distribution occurred near a school, or that the items the defendant stole were taken from the mail, belonged to the government, or traveled in interstate commerce).

The two cases not fitting this precise pattern also are easily distinguished, as neither involved a statute requiring proof of "willfulness," and both involved conduct that reasonable people know to be generally wrongful, according to this Court: *United States* v. *Figueroa*, 165 F.3d 111, 119 (2d Cir. 1998) (prosecution for assisting entry into U.S. of illegal aliens; Court held that defendant had to know alien was illegal, but did not have to know particular basis on which alien was excludable); *United States* v. *Weintraub*, 273 F.3d 139, 151 (2d Cir. 2001) (prosecution for improper release of asbestos under Clean Air Act, which does not require knowledge of unlawfulness; Court held that government had to prove that defendant knew of presence of asbestos, but not "the particular type of asbestos to which the standard applies"). Here, by contrast with *Figueroa* and *Weintraub*, the conduct at issue—trading on material nonpublic information—is activity that the Supreme Court and this Court have repeatedly held is *not* inherently wrongful. In

that circumstance, and under this Court's cases, a man should not be sent to prison without proof that he knew the facts that allegedly converted his legal trading into a crime.

II. CHIASSON IS ENTITLED TO ACQUITTAL, OR AT LEAST A NEW TRIAL, UNDER THE CORRECT LEGAL STANDARD

If the law requires a tippee to know the tipper has exchanged material nonpublic information for personal gain, then Chiasson's conviction should be reversed. In its brief, the government cites no evidence proving that Chiasson knew that the Dell and NVIDIA tippers anticipated receiving personal benefits in exchange for their information. (*See* Chiasson Br. 44-45). There was no such evidence. Therefore, the proof of Chiasson's knowledge was legally insufficient, and he is entitled to a judgment of acquittal.

At a minimum, this Court should require a new trial with a proper jury instruction. A rational and properly instructed jury plainly *could* have found reasonable doubt that Chiasson possessed the necessary knowledge, which means that the instructional error could not have been harmless.[12]

[12] The government does not separately defend the sufficiency of the evidence, and relegates its sufficiency argument to a short footnote referencing its position that any error was harmless. (Gov't Br. 65 n.30). As we show below, the government's harmless error argument is specious; it rests on speculation and inferences that would be improper even if the jury had been properly charged, and the only issue were sufficiency of the evidence. The government therefore cannot prevail on the sufficiency of the evidence, much less harmless error.

A. Standards Of Review

With respect to sufficiency, Chiasson is entitled to a judgment of acquittal if, viewing the evidence "in the light most favorable to the prosecution," "no rational trier of fact could have found [him] guilty beyond a reasonable doubt." *Cassese*, 428 F.3d at 98. If the evidence "gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, then a reasonable jury must necessarily entertain a reasonable doubt." *Id.; accord United States* v. *Coplan*, 703 F.3d 46, 72 (2d Cir. 2012), *cert. denied*, 134 S. Ct. 71 (2013).

An instructional error is harmless only if the government demonstrates that it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder* v. *United States*, 527 U.S. 1, 18 (1999); *accord United States* v. *Moran-Toala*, 726 F.3d 334, 345 (2d Cir. 2013); *United States* v. *Quattrone*, 441 F.3d 153, 180 (2d Cir. 2006). Unless "no jury could reasonably find" for the defendant on the disputed issue, the error is not harmless. *Neder*, 527 U.S. at 16. If "the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element," the error is not harmless and a new trial is required. *Id.* at 19.

The Court may *not* draw inferences in the government's favor when assessing whether an error is harmless. *See United States* v. *Mejia*, 545 F.3d 179, 199 n.5 (2d Cir. 2008). Indeed, even "substantial evidence" supporting the

government on the disputed issue is insufficient if "the evidence does not all flow in one direction." *United States* v. *Tureseo*, 566 F.3d 77, 86 (2d Cir. 2009); *see Neder*, 527 U.S. at 17 ("If ... the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—it should not find the error harmless."). *See also United States* v. *Smart*, 98 F.3d 1379, 1392 (D.C. Cir. 1996) ("[I]n a case where the evidence at trial is conflicting or ambiguous, the danger that an error will affect the jury's verdict is almost always substantial."). The evidence in the government's favor must be uncontested, or at least "overwhelming," to sustain a finding of harmless error. *United States* v. *Ferrarini*, 219 F.3d 145, 154 (2d Cir. 2000).

B. The Evidence Was Insufficient, And The Error Plainly Was Not Harmless

The government pays lip service to these standards, but its discussion of the evidence (Gov't Br. 61-65) is incomplete and unpersuasive.

It is incomplete because the government ignores the affirmative evidence establishing that Chiasson did not know and could not have known that the tippers had exchanged information for personal benefit. Sam Adondakis, who was Chiasson's conduit for the Dell and NVIDIA inside information, testified as the government's cooperator that he himself did not know that the insiders were

receiving personal benefits in exchange for information. Adondakis had no idea what, if anything, the Dell insider received for providing information to Sandy Goyal. Nor did he know anything about benefits being conveyed to Goyal. Adondakis also knew nothing about the relationship between Kuo's friend and the NVIDIA insider, or about any benefit the insider received. (A-1190-91, A-1221, A-1299).

Since Adondakis did not know that the insiders were receiving any personal benefit, either because he was never told or because the circumstances never suggested that to him, Chiasson also did not know, since his knowledge all came from Adondakis. In fact, Chiasson knew *less* than Adondakis, because Adondakis filtered the information that he passed along. As to NVIDIA, it was not even clear that Chiasson was told that the source was an insider. (*See* A-1044). Adondakis did not forward Chiasson the emails containing the critical information disclosed by the Dell and NVIDIA tippers. (A-1201, A-1210, A-1221). Rather, Adondakis routinely softened and diluted the information he received before communicating it to Chiasson, in order "to take down expectations a bit." (A-1108, A-1117). The trial record contains dozens of such examples. *Compare*, *e.g.*, SA-31(DX1010),[13] *with* SA-35(DX1012) (changing "missed plan by 25-30%" to "best guess is ~20%

[13] "SA" refers to the Supplemental Appendix.

below plan"); *compare*, *e.g.*, SA-11(GX 1412), *with* SA-37(DX 7219) (changing "tracking up 12%" to "potential for upside to +12%").

This affirmative evidence that Adondakis, and therefore Chiasson, did not know of personal benefits flowing to the Dell and NVIDIA insiders alone demonstrates the insufficiency of the evidence. Based simply on Adondakis's uncontradicted testimony, no rational jury could have found that Chiasson knew that the insiders were expecting any benefits from their disclosures.[14]

In any case, there is no record support for the government's claim that there was proof of knowledge. The government chastises the defense for suggesting that "the Government was required to prove that the defendants were explicitly told about [the insiders'] benefits" (Gov't Br. 60), and argues that knowledge can be proved by circumstantial evidence.[15] Of course knowledge can be inferred from circumstantial evidence. But the circumstantial evidence upon which the

[14] Even if the government could point to other evidence establishing Chiasson's knowledge (and it cannot), the error would not be harmless, because Chiasson disputed his knowledge and raised evidence permitting a jury to find a lack of knowledge. *See* cases cited *supra*.

[15] In arguing harmlessness, the government engages in some sleight of hand. It repeatedly cites *United States* v. *Werner*, 160 F.2d 438 (2d Cir. 1947), and *United States* v. *Pabon-Cruz*, 255 F. Supp. 2d 200 (S.D.N.Y. 2003), to argue that circumstantial evidence can support a finding of knowledge, but those cases were about the sufficiency of evidence, not harmlessness. As explained above, the harmless error question is not whether a jury "could find" guilty knowledge, but whether evidence of knowledge was "overwhelming" and "compelling," showing that it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder*, 527 U.S. at 18.

government relies has nothing to do with Chiasson's purported knowledge that the insiders were exchanging information for personal benefit.

For instance, the government cites a conversation between Chiasson and a hedge fund competitor in which Chiasson declined to divulge the source of his insights about Dell's gross margins. (Gov't Br. 63). The conversation was completely irrelevant to Chiasson's knowledge of personal benefit, but in any event there is nothing nefarious about protecting information sources from a competitor. The government also contends that Chiasson directed Adondakis to create "sham reports reflecting false reasons for the trades." (Gov't Br. 64). But this is just government rhetoric; Adondakis did not testify that the reports were "sham" or contained "false reasons." Chiasson did not instruct Adondakis to falsify anything; the evidence was that Chiasson instructed Adondakis to put "something quick" in the firm's internal "Idea" tracing system to document the *actual* rationale for the trade (i.e., the "potl gm [potential gross margins] miss"). (A-2115). Again, this evidence was irrelevant to knowledge of insider benefit. Since this evidence has nothing to do with whether Chiasson knew of any insider benefit, it cannot support any *rational* inference of guilt and fails sufficiency review. *See, e.g.*, *United States* v. *D'Amato*, 39 F.3d 1249, 1256 (2d Cir. 1994) (evidence must be sufficient to "reasonably infer" guilt). At a minimum, on harmless error review, where inferences may not be drawn in the government's

favor, the circumstantial evidence that the government cites is entitled to no weight.[16]

The government's remaining arguments relate to the insiders' breach of confidentiality and the "nature, specificity, and timing" (Gov't Br. 61) of the information the defendants received. It argues that because the information at issue was confidential, and the tips were specific and important, Chiasson must have known that the insiders were acting "for some personal reason." (Gov't Br. 65). These arguments fail both factually and legally.

Factually, the arguments fail because they depend on flawed inferences and a skewed view of the proof. For instance, the government equates the tippers' breach of confidentiality with a lack of "authorization" to disclose the information, and the absence of "a legitimate corporate purpose." The lack of "a legitimate corporate purpose" for the disclosures is then equated with the certain knowledge that the insiders must have been acting for their personal benefit. (Gov't Br. 64-65).

[16] The government also argues that the facts were so suspicious that the defendants "deliberately avoided learning" that the insiders received or expected some benefit in return for their information. (Gov't Br. 65). The government then cross-references its discussion of the "conscious avoidance" evidence against Newman. Whatever force these arguments may or may not have as to Newman, there is no parallel discussion as to Chiasson, and the strength of the evidence as to Chiasson must be evaluated without regard to the facts referenced, for instance, at Gov't Br. 70. Chiasson was not privy to whatever Newman knew or did. Even Adondakis, Chiasson's conduit, was unaware of the evidence upon which the government relies as to Newman's "conscious avoidance."

This argument conflates a breach of confidentiality with the lack of "authorization," and further conflates the lack of corporate "authorization" with the absence of "a legitimate corporate purpose." Then it conflates the absence of corporate purpose with presence of personal gain. *These are not the same concepts.* In today's information-based society, confidential information is "leaked" and passed along on a wholesale basis. Every moment, "confidential" disclosures regarding government investigations, political intrigues, and even national security are being relayed electronically to various parties. A great number of these disclosures are "improper" in the sense that they violate formal organizational policies or rules of confidentiality, and some may be legally improper. But this does not mean that every breach of confidentiality is fraudulent, or the product of the corrupt exchange of information for personal gain.

The disclosure of confidential corporate information does not compel an inference that the disclosure was unauthorized or that the "leak" was not intended to serve a corporate purpose, such as furthering a relationship with a large investor by providing a preview of forthcoming financial results. And even unauthorized disclosures do not warrant, let alone *require*, an inference that the insider is seeking personal gain. The government's chain of inferences amounts to precisely the sort of "false surmise and rank speculation" that requires reversal for insufficiency. *United States* v. *Wiley*, 846 F.2d 150, 155 (2d Cir. 1988). *See also*,

e.g., *Coplan*, 703 F.3d at 76 (reversing conviction for insufficiency because "[i]n the absence of any affirmative proof," the conviction rested on "speculation and surmise"). And in the context of reviewing for harmless error, where this Court should not draw inferences in the government's favor, *Mejia*, *supra*, the government's chain of inferences is even further out of bounds.

There are other factual problems as well. The information that Chiasson received was not as specific, as reliable, or as special as the government claims:

- Adondakis testified only that he "relayed," "would relay," "passed on," or "would pass on" the Dell and NVIDIA information to Chiasson. (*E.g.*, A-1003, A-1010, A-1015, A-1027, A-1034-38, A-1045, A-1100, A-1138). Adondakis provided no specifics as to the timing of these conversations, the words he used, what level of detail he communicated, or what Chiasson said in return. Even the evidence the government cites to show that Chiasson received specific and accurate "tips" showed only that *Adondakis* received the information; it does not reveal what information *Chiasson* received. (*See* Gov't Br. 6 (citing Tr. 159; GX 214), 11 (citing GX 34; GX 52), 14 (citing GX 804; GX 818)). And some of the "tips" the government cites plainly were not "specific." (*See* Gov't Br. 12 (citing GX 231 (email from Tortora reporting that Apple and Dell "sound bad"))).

- Adondakis did not present the "tips" to Chiasson as being consistently reliable. For instance, consider the information Adondakis received regarding Dell's likely gross margins for the August 2008 quarter being below Wall Street expectations, which the government heavily emphasized: Adondakis advised Chiasson that Dell was no more likely to report the disappointing gross margin figure suggested by the "inside information" than to achieve a gross margin that came in higher than Wall Street was predicting (he assigned a 45% probability to each); and he testified that he was "really, really nervous" about what would happen when Dell reported its earnings. (A-1213-14, A-1216, A-2033).

- Chiasson understood that Dell and NVIDIA employees regularly made selective disclosures of specific, material, nonpublic information for

corporate purposes and for no personal benefit. (*See* Chiasson Br. 15-16). *See*, *e.g.*, A-2391 (Adondakis email to Chiasson shortly before Dell publicly announced results, reporting that Dell's investor relations department was "[t]elling folks offline that EPS will not come in sub-30 cents"); A-2116 (Adondakis email to Chiasson and others saying that NVIDIA's management "is not afraid to guide aggressively & miss or guide conservatively and talk it up offline (they did this quarter)"); SA-36(DX 2181) (Adondakis email to Chiasson saying he would "get the run down on margins" when he meets with NVIDIA's investor relations representative); A-2149-22 (Adondakis's internal Level Global reports saying that NVIDIA's IR representative "confirmed … that company is tracking to big upside to April Q guidance" and indicated that gross margins would be "flattish"). *See also* Newman Reply 10-13.[17]

Legally, the government's argument fails because it is based on speculation. Speculation is not appropriate on review for sufficiency, much less harmless error. The jury made no finding, based on the specificity or reliability of the information, that the defendants must have understood that the insiders were receiving personal benefits. And that argument would be unpersuasive even if the facts underlying it were undisputed, which they were not.

While the government points to the jury's finding that the defendants knew that the inside information was disclosed in violation of a duty of confidentiality (Gov't Br. 62), this misses the mark entirely. Chiasson was exposed to lots of

[17] The government offers no substantive response to these and other examples, complaining that they were "hearsay." (Gov't. Br. 30 n.17). But we have not cited them for the truth of the matter asserted; it is immaterial whether the corporate insiders actually made these statements. This evidence bears on Chiasson's mental state, because he understood that Dell and NVIDIA insiders often disclosed nonpublic information without any apparent expectation of personal benefit.

detailed, material information that insiders at Dell and NVIDIA selectively disclosed. Even assuming that all the disclosures breached some duty of confidentiality, Chiasson had no reason to believe that any of them were made for personal benefit. With a proper instruction, Chiasson would have argued that because he knew Dell and NVIDIA management routinely made selective disclosures and leaked nonpublic information, he had no reason to believe that the particular information that (unbeknownst to him) came from Ray and Choi was disclosed for personal benefit.

Put otherwise, Chiasson was deprived of the opportunity to tailor his jury arguments to the lack of evidence that he knew of personal benefit to the insiders. *See Valerio* v. *Crawford*, 306 F.3d 742, 762 (9th Cir. 2002) (with proper jury instruction, defendant's counsel "could have argued much more effectively than under the actual instruction"). *Cf. United States* v. *Kington*, 875 F.2d 1091, 1099 (5th Cir. 1989) (erroneous jury instruction did not warrant reversal because "[t]he jury argument would have been no different had a precisely accurate charge been used").

In short, there was no evidence whatsoever from which a rational jury could find Chiasson's knowledge of the insiders' personal gain beyond a reasonable doubt, and the government's harmless error argument borders on the frivolous. On any reading of the trial evidence, Chiasson knew nothing about the insiders. He

knew nothing about Rob Ray, Chris Choi, Ray's receipt of "career advice" from Sandy Goyal, or Choi's relationship with his "church friend," Hyung Lim. He knew only what his analyst told him: that useful information was coming from unknown, nondescript "checks" and "contacts" at Dell and NVIDIA. Under the cases, and long-established insider trading jurisprudence, this is not enough to establish a criminal violation of Section 10(b) and Rule 10b-5.

III. CHIASSON'S SENTENCE WAS PROCEDURALLY AND SUBSTANTIVELY UNREASONABLE

We have argued that the district court overstated Chiasson's trading gains, resulting in an incorrect Guidelines range, and then relied on the inflated figure to impose a grossly disparate 78-month sentence. The government defends the gain figure, though it has abandoned several arguments it made at sentencing. Its remaining arguments cannot sustain the procedurally defective finding. The government also ignores most of Chiasson's arguments showing that the sentence was substantively unreasonable. It relies solely on the gain figure, which cannot justify the sentence.

A. The Sentence Was Procedurally Unreasonable

Gain includes only trades by the defendant and persons he tipped or "act[ed] in concert with." United States Sentencing Guidelines Manual § 2B1.4 cmt. background. The district court found Chiasson responsible for trades executed by

David Ganek, an unindicted co-founder of Level Global, "largely for the reasons stated by the government in their [sentencing] submission." (A-2888).

As a threshold matter, these findings lack the specificity required to support the court's gain calculation. This Court recently found procedural error in an analogous case that the government ignores. *See United States* v. *Getto*, 729 F.3d 221, 234 (2d Cir. 2013) (remanding for resentencing where district court held defendant liable for losses his co-conspirators caused because "it had 'no quarrel with the [government's] conspiracy theory here from what I have read'"). The district court's adoption of some unspecified portion of the government's brief here is less specific than the explanation in *Getto* and thus constitutes procedural error.[18] Moreover, the government no longer presses the theories from its sentencing submission that Chiasson "arguably *tipped* Ganek" or was responsible for Ganek's trades on "an aiding and abetting theory" (A-2797), further eroding the court's vague finding.

Even if the vague allusion to the government's submission did not fail for lack of specificity, the government's argument that Chiasson and Ganek "acted in concert with one another" (Gov't Br. 111) fares no better than the arguments it has

[18] The district court's finding also contradicts its own statements. The court stated that aggregation of trades was reserved for defendants "like Zvi Goffer" (the leader of a separate insider trading conspiracy) who "tip[] or coordinate[]" others. (A-2881). Yet it concluded that Chiasson's conduct was not like that of Zvi Goffer "in any way, shape or form." (A-2930). The government makes no attempt to reconcile these contradictory conclusions.

forsaken. There are few cases on "acting in concert" in the sentencing context, but at minimum: (1) Ganek must have engaged in insider trading, and (2) Chiasson must have known that. *See United States* v. *Royer*, 549 F.3d 886, 905 (2d Cir. 2008) (appellant could be accountable for co-defendant's acts where nature of co-defendant's insider trading scheme was evident to appellant). The evidence does not support either conclusion.

First, there was no evidence that Ganek knew Adondakis's sources disclosed information in violation of confidentiality duties (let alone for personal benefit). Adondakis testified that he did *not* reveal his sources to Ganek. (A-1100; A-1115; A-1331). The government focuses on terms like "check" or "contact" in communications regarding Adondakis's research (*see* Gov't Br. 110 (citing GX 459; GX 438)), but Adondakis testified that such terms can refer to legitimate sources of information. (A-1288).

Nor do the size of the Dell trades or Ganek's supposed knowledge that Adondakis had "incremental checks" that "firmed up" in advance of reporting dates suffice. The government declares that "common sense" suggests that Ganek would not have "permit[ted]" the Dell short, the second largest short in Level Global history, absent knowledge of Adondakis's source (Gov't Br. 110), but positions this size were not unusual at Level Global. (*See* A-1342-43). Level Global had over $4 billion in assets, and between January 2008 and December

2009 had 25 investment positions over $150 million. (*See* A-1180; SA-22(DX-39)). The government emphasizes that the trade was a short, but this means nothing. And the record is replete with evidence that companies often leak earnings information before official releases. (*See supra* p.31; Chiasson Br. 14-16).

Second, assuming that Ganek knew of Adondakis's sources, there was no evidence that Chiasson knew this. There is no evidence Chiasson and Ganek ever discussed Adondakis's sources. The communications between Chiasson and Ganek the government cites either do not mention Adondakis or his sources (A-2062), or use the innocuous and ambiguous term "sam's people" (A-2065). The government cites an August 27 conference call in which Chiasson, Ganek, and Adondakis discussed Dell's earnings announcement, but Adondakis testified that he did *not* reveal his sources to Ganek on that call. (A-1331).

The government's reliance on an August 11 "meeting" (Gov't Br. 111) is misplaced. There was no evidence that Adondakis's sources were discussed at any meeting, and more importantly, the documentary evidence conclusively established Ganek was out of the office on August 11. (A-2488-92). The government argues that Adondakis simply got the date wrong (Gov't Br. 127), but no other date makes sense. An earlier date is impossible because Adondakis testified that the subject of the meeting was an e-mail he wrote on August 11. (A-1214; *see* A-2033). A later

date contradicts the government's argument that the meeting spurred trades that occurred on August 11. (*See* A-1787-88). There simply was no meeting.

Finally, the government argues that Chiasson and Ganek engaged in "concerted action" even if this was not so for tippees of Zvi Goffer, the ringleader of an insider trading group that paid attorneys for information on corporate acquisitions. *United States* v. *Goffer*, 721 F.3d 113, 118-19 (2d Cir. 2013). Judge Sullivan held that two Goffer tippees, Kimelman and Emanuel Goffer, were responsible only for their own trades even though they traded at the same firm; took trading instructions from Zvi Goffer; and frequently met to discuss strategy. *Id.* at 119-20. Kimelman also helped Zvi Goffer assess the illicit information and traded the same stocks as him on the same day 88 times. *Id.* at 118-19. If this evidence of coordination does not warrant aggregation of trades, as the government concedes (Gov't Br. 112), there was no basis for finding that Chiasson and Ganek acted in concert.

Accordingly, the district court committed procedural error by including Ganek's trades in Chiasson's gain calculation.[19]

[19] The government suggests that the district court's finding that Ganek participated in the same conspiracy as Chiasson was sufficient to aggregate their trades. (*See* Gov't Br. 102, 109, 111, 113). The government did not advance this position below, the district court did not adopt it, and it conflicts with the government's argument that Chiasson is liable for more gain than his *co-conspirator* Newman (*see* Gov't Br. 112, 117-18), and the Guidelines, *see generally Getto*, 729 F.3d at 234 n.11 ("[T]he scope of conduct for which a defendant can be held accountable

B. The Sentence Was Substantively Unreasonable

The government's substantive defense of Chiasson's 78-month sentence is notable for what it ignores and thus concedes:

- Chiasson's sentence is likely the longest ever for a passive, remote tippee;
- More culpable defendants—including a corrupt FBI official bribed to leak information on investigations; a public company CEO who traded on his own company's information; a trader who used illicit payments to make $11 million in personal profit, and then lied to authorities—received shorter sentences than Chiasson (see Chiasson Br. 64, 68-69);
- The district court did not explain, or acknowledge, the disparity between Chiasson's sentence and those of similar defendants;
- The district court concluded that Chiasson was less culpable than Newman (see A-2930 ("Unlike Mr. Newman, you weren't paying tens of thousands of dollars to a source using surreptitious means to do it and fraudulent means to do it."), yet still gave him two more years in prison; and
- Trading gain does not correlate with factors courts typically use to distinguish culpability—*i.e.*, offense conduct, motive, state of mind, or role—or with the primary harm that insider-trading prohibition addresses. (Chiasson Br. 67-70).

The government also fails to address the defendants comparable to Chiasson—professional traders, or their tippers, convicted at trial for trading that spanned multiple months or years and multiple stocks—who received sentences *less than*

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under the sentencing guidelines is significantly narrower than the conduct embraced by the law of conspiracy.").

half the length of Chiasson's.[20] (*See* Chiasson Br. 56). The government fails to identify a comparable sentence for a passive remote tippee like Chiasson; indeed, it cannot point to a single insider trading sentence from any other judge that is remotely comparable.

The government, like the district court, relies on Level Global's trading gains to defend the disparity. But gain, and gain alone, cannot justify a substantively unreasonable sentence. *See United States* v. *Dorvee*, 616 F.3d 174, 183 (2d Cir. 2010) (sentence substantively unreasonable where court "place[d] unreasonable weight" on single sentencing factor).

The government contends that a greater gain results in "greater [] loss to other participants in the market" and more "damage" to "the public's confidence in the integrity of the financial markets." (Gov't Br. 115). The government identifies no particular loss or victim, however, and it has conceded elsewhere that "particular investors who trade without the benefit of inside information are not properly understood as the direct and proximate victims of those that do." Letter

[20] These include: Doug Whitman (24 months), a portfolio manager who traded illegally in multiple stocks from 2006 to 2009, *see* Br. of United States at 2-14, *United States* v. *Whitman*, No. 13-491 (2d Cir. July 15, 2013); Michael Kimelman (30 months), who traded illegally in multiple securities in 2007 and 2008, recruited others to his conspiracy, and engaged in multiple efforts to avoid detection, *see Goffer*, 721 F.3d at 119-21; and James Fleishman (30 months), who oversaw a corrupt expert network that provided inside information to multiple hedge funds over a multiyear period, *see* Br. of United States at 2-4, 23, *United States* v. *Nguyen*, No. 12-94 (2d Cir. July 9, 2012).

from United States Attorney's Office to Hon. Laura T. Swain at 2, *United States* v. *S.A.C. Capital Advisors, L.P.*, No. 13 Cr. 541 (S.D.N.Y. Nov. 8, 2013), ECF No. 17; *see also id.* ("'Congress has never treated [insider trading] as a fraud on investors, the Securities Exchange Commission has explicitly opposed any such legislation, and the Supreme Court has rejected any attempt to extend coverage of the securities fraud laws on such a theory.'" (quoting *United States* v. *Gupta*, 904 F. Supp. 2d 349, 352 (S.D.N.Y. 2012)). Furthermore, assuming that insider trading undermines public confidence in the securities market, the government offers no reason why the passive receipt of information that profits third-party investors harms public confidence *more* than conduct resulting in less gain, such as a CEO trading on his own company's information or an FBI agent who leaks information for bribes. Gain does not demonstrably correlate with loss of public confidence. *Cf. United States* v. *Emmenegger*, 329 F. Supp. 2d 416, 427 (S.D.N.Y. 2004) (Lynch, J.) ("emphasis placed on the overly-rigid loss table" prevents "the identification of different types of fraud or theft offenses of greater or lesser moral culpability or danger to society").

Citing the need for deterrence, the government argues that "substantial sentences are necessary to counter the incentives to engage in" insider trading. (Gov't Br. 116). But the need for deterrence cannot justify Chiasson's sentence. *First*, "there is considerable evidence that even relatively short sentences can have

a strong deterrent effect on prospective 'white collar' offenders." *United States* v. *Adelson*, 441 F. Supp. 2d 506, 514 (S.D.N.Y. 2006). *Second*, dollar amounts are a "relatively weak indicator of the moral seriousness of the offense or the need for deterrence" because they often are "a kind of accident" resulting from factors other than culpability. *Emmenegger*, 329 F. Supp. 2d at 427. *Third*, the "gain" the government cites here does not measure the incentive to trade illegally because it hugely exceeds Chiasson's personal profit. Of the tens of millions Chiasson "gained," his personal profit was, at most, $335,469. (A-2773). Deterrence does not justify a sentence much longer than those imposed on defendants who lined their pockets with multimillions in illicit profits.

In a final attempt to justify the disparity, the government cites two "example" sentences also imposed by Judge Sullivan: Joseph Contorinis (72 months), who procured information from a friend and was found to have committed trial perjury, *see United States* v. *Contorinis*, 692 F.3d 136 (2d Cir. 2012); and Craig Drimal (66 months), who bribed sources, used prepaid cell phones to avoid detection, and lied to authorities (*see* Chiasson Br. 68). These defendants were far more culpable than Chiasson. *See Royer*, 549 F.3d at 904 (passive recipient of information was less culpable than recipient who bribed source).

The notion that Chiasson deserves one of the longest insider trading sentences in history rests on using gain as an aggravating factor out of all proportion to its relevance. Gain cannot "bear th[at] weight … under the totality of circumstances in the case." *Unites States* v. *Cavera*, 550 F.3d 180, 191 (2d Cir. 2008) (en banc).

IV. THE FORFEITURE ORDER WAS BASED ON A CLEARLY ERRONEOUS FACTUAL FINDING AND VIOLATED *APPRENDI*

Based on finding that Ganek was Chiasson's co-conspirator, the district court ordered Chiasson to forfeit fees that *Ganek* earned. (A-3003). As explained above, the co-conspirator finding was clearly erroneous, and the Court should therefore vacate the forfeiture order.

The Court should also vacate the forfeiture order because it violates *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), which requires that "'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *S. Union Co.* v. *United States*, 132 S. Ct. 2344, 2350 (2012) (quoting *Apprendi*, 530 U.S. at 490). The government does not dispute that forfeiture is a criminal penalty, but cites *United States* v. *Fruchter*, 411 F.3d 377 (2d Cir. 2005), and *Libretti* v. *United States*, 516 U.S. 29 (1995), to argue that the forfeiture order does not violate *Apprendi*.

Fruchter held that *Apprendi* applies to "determinate sentencing" schemes and not to criminal forfeiture because it is based on a defendant's criminal proceeds, rather than a "previously specified range." 411 F.3d at 383. *Southern Union*, however, rejected that position. (*See* Chiasson Br. 77). The Court concluded that statutes defining punishment in reference to gain are subject to *Apprendi*: "the amount of a fine … is often calculated by reference to particular facts [including, *inter alia*] *the amount of the defendant's gain*…. *In all such cases*, requiring juries to find beyond a reasonable doubt facts that determine the fines maximum amount is necessary to implement *Apprendi*[]." *Id.* at 2350-51 (emphasis added). *Fruchter*'s reasoning cannot be correct in light of that holding; *Fruchter* is irreconcilable with *Southern Union*, and is no longer good law. *See In re Zarnel*, 619 F.3d 156, 168 (2d Cir. 2010) (panel may overrule prior panel decision called into doubt by intervening Supreme Court case).[21]

The government's reliance on *Libretti*, which pre-dates *Apprendi*, is also unavailing. *Libretti* concluded that because forfeiture was an "aspect of

[21] The Court should not follow the two post-*Southern Union* circuit court decisions holding that *Apprendi* does not apply to forfeiture. Both cases rely on the same reasoning as *Fruchter*, yet neither reconciles that reasoning with *Southern Union*. *See United States* v. *Day*, 700 F.3d 713, 732-33 (4th Cir. 2012) *cert. denied*, 133 S. Ct. 2038 (2013); *United States* v. *Phillips*, 704 F.3d 754, 770-71 (9th Cir. 2012) *cert. denied*, 133 S. Ct. 2796 (2013). Moreover, *Day* was a plain error case, *see* 700 F.3d at 733, and the Ninth Circuit has recently stated that *Phillips* and similar cases are not "well-harmonized with *Southern Union*" and may need to be reviewed en banc, *see United States* v. *Green*, 722 F.3d 1146, 1151 (9th Cir. 2013), *cert. denied*, No. 13-472, 2013 WL 5636729 (U.S. Nov. 18, 2013).

sentencing," the Sixth Amendment "right to a jury determination" did not apply. 516 U.S. at 49. Since then, *Apprendi* and its progeny have established that the jury trial right *does* apply to facts that increase "criminal sentences, penalties, or punishments." *S. Union*, 132 S. Ct. at 2351 (alterations omitted). Furthermore, *Libretti* principally relied on *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), *see* 516 U.S. at 49, a case the Supreme Court has overruled. *See Alleyne* v. *United States*, 133 S. Ct. 2151, 2157-58 (2013). Although this Court held in *Fruchter* that it would adhere to *Libretti* until the Supreme Court expressly overturns it, 411 F.3d at 381-82, that was before the Supreme Court rejected *Libretti*'s reasoning in *Southern Union* and *Alleyne*.

In any event, *Libretti* addressed the Sixth Amendment jury trial right; it did not consider the burden of proof applicable to forfeiture, which implicates the Fifth Amendment's Due Process Clause. *See generally In re Winship*, 397 U.S. 358, 364 (1970). The government asserts, without any authority, that "[b]ecause Chiasson did not have a right to a jury determination as to forfeiture, the Government was not required to prove the forfeiture amount beyond a reasonable doubt." (Gov't Br. at 132 n.39). This is wrong. Under *Apprendi*, the government must prove beyond a reasonable doubt any fact that increases the maximum sentence even if the defendant has waived a jury. *See, e.g.*, *United States* v. *Yu*, 285 F.3d 192, 198 (2d Cir. 2002). Because the district court did not make its co-

conspirator finding beyond a reasonable doubt, the forfeiture order violates *Apprendi* even if this Court adheres to *Libretti*.

Finally, the government argues that the jury's verdict "authorized forfeiture of a specific sum, namely, any property constituting or derived from proceeds of [Chiasson's] crimes," and the district court, "in determining the extent of those proceeds, was merely giving definite shape to the forfeiture permitted by the jury's verdict." (Gov't Br. 131). But even if the judge can "determin[e] the extent of those proceeds"—a proposition that contradicts *Southern Union*—that does not permit the judge to make a co-conspirator finding by a preponderance of the evidence and use it to enhance Chiasson's criminal penalties. That finding violated *Apprendi*.

CONCLUSION

Chiasson's conviction should be reversed and the case remanded with instructions to enter a judgment of acquittal or at a minimum, remanded for a new trial. If this Court does not reverse the conviction, the sentence and forfeiture order should be vacated and the case remanded for resentencing.

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1. The undersigned counsel of record for Defendant-Appellant Anthony Chiasson certifies pursuant to Federal Rules of Appellate Procedure 32(a)(7)(C) that the foregoing brief contains 11,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the Word Count feature of Microsoft Word 2010.

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