UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, **Plaintiff,** **v.** **DARYL M. PAYTON, and BENJAMIN DURANT, III,** **Defendants.**	**Civil Action No. 14-cv-04644-JSR** **ECF CASE**

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

SECURITIES AND EXCHANGE COMMISSION
David L. Axelrod
Catherine E. Pappas
A. Kristina Littman
One Penn Center
1617 JFK Blvd, Suite 520
Philadelphia, PA 19103
(215) 597-3100

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INTRODUCTION

Defendants Daryl M. Payton's and Benjamin Durant, III's motion for summary judgment is fatally flawed in two significant ways. First, defendants' motion is more akin to a closing argument than a motion for summary judgment, in that it highlights favorable evidence while completely ignoring evidence that renders their arguments meritless. Second, defendants' motion mischaracterizes the Commission's burden in showing benefit under the Second Circuit's opinion in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014).

The evidence developed by the Securities and Exchange Commission ("Commission") through investigation and discovery establishes that a reasonable jury could, and should, find defendants liable for insider trading. As is evident from the facts set forth in the Commission's Response to Defendants' Statement of Undisputed Facts ("56.1 Response"), Trent Martin misappropriated material, nonpublic information about International Business Machines Corporation's ("IBM") 2009 acquisition of SPSS Inc. ("SPSS") from Michael Dallas, a law firm associate who was working on the transaction for IBM. Dallas had a history of sharing confidences with Martin and reasonably expected Martin not to tip or trade on the information. But in a fraudulent betrayal, Martin traded on the information and tipped Thomas Conradt, Martin's roommate and friend. Conradt traded and tipped his four friends and colleagues, including Payton and Durant, who collectively made more than $290,000 in ill-gotten gains.

During and after their trading, Payton and Durant repeatedly lied to conceal their trading because they knew their trading was illegal and the highly material information on which they traded was improperly disclosed. Indeed, Payton admitted that he knew he was unlawfully trading on inside information when in November 2014 he pleaded guilty to conspiracy to commit securities fraud.

STANDARD OF REVIEW

This case is not appropriate for summary judgment because there are numerous factual disputes that call for adjudication by a jury. Federal Rule of Civil Procedure 56(a) provides that summary judgment is only appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *SEC v. Aronson*, No. 11 Civ. 7033, 2013 U.S. Dist. LEXIS 114687, at *3 (S.D.N.Y. Aug. 6, 2013). On a motion for summary judgment, the court must view the record as a whole and in the light most favorable to the non-moving party and resolve all ambiguities and draw all justifiable inferences in favor of the non-moving party. *Anderson*, 477 U.S. at 255; *SEC v. Obus*, 693 F.3d 276, 284 (2d Cir. 2012). Where the record taken as a whole could lead a rational trier of fact to find for the non-moving party, there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., Ltd.*, 475 U.S. 574, 587 (1986).

ARGUMENT

Defendants make three arguments premised on an exaggerated and one-sided view of the record or an unsupported interpretation of relevant case law. A fair reading of the record and the law demonstrates that this case should be decided by a jury.

I. A REASONABLE JURY COULD FIND THAT MARTIN BREACHED A DUTY OF TRUST AND CONFIDENCE IN TIPPING CONRADT

Defendants argue that there was no breach of a duty of trust and confidence because Dallas's testimony is "self-serving and unbelievable." Defs.' Mem. at 22. But this argument fails because it is not supported by the record and is premised on a credibility determination – an analysis that is not appropriate on summary judgment.

A. Defendants' Credibility Challenges are the Province of the Jury.

Defendants' contention that Dallas's testimony is "unbelievable" shows that there is a factual dispute. Defs.' Mem. at 22. The credibility of a witness's testimony should be left to the jury. Indeed, the Second Circuit has held that it is not appropriate on summary judgment for the court to make credibility determinations. *See Lipton v. Nature Co.*, 71 F.3d 464, 472 (2d Cir. 1995) (holding that the district court erred in granting summary judgment based on finding that witness' testimony was "inherently incredible"). *See also Lavastone Capital LLC v. Coventry First LLC*, Civ. Act. No. 14-7139 (JSR), 2015 U.S. Dist. LEXIS 104475, *18 (S.D.N.Y. Jul. 30, 2015) (finding that "it is not appropriate on summary judgment for the Court to assess credibility.") (citation omitted).

The cases cited by defendants are extreme examples inapposite to this case. *Jeffreys v. City of New York* involved a Section 1983 suit by a serial burglar who alleged he was thrown out of a window by two New York City police officers. 426 F.3d 549 (2d Cir. 2005). The court awarded summary judgment finding that plaintiff's story was incredible, in part, because plaintiff previously said he jumped out of the window to escape arrest and confessed to 12 burglaries but never mentioned police brutality. Given the bizarre and contradictory facts of that case it is surprising that defendants built their argument around it. *Id.* at 552-53. The court also found that in a "rare" case like *Jeffreys* where plaintiff's entire case is premised on his own testimony, a court must assess credibility in determining whether there are issues of material fact. *Id.* at 554. This case could not be any more different than *Jeffreys*.

The other case cited by defendants, *Schmidt v. Tremmel*, is equally unpersuasive. Civ. Act. No. 93-8588 (JSM), 1995 U.S. Dist. LEXIS 97 (S.D.N.Y. Jan. 6, 1994). That case involved a federal inmate's *pro se* complaint alleging Constitutional violations. Again, the allegations were so bizarre that the district court granted summary judgment, finding "No reasonable person would undertake the suspension of disbelief necessary to give credit to the allegations made in Ms. Schmidt's complaint or in her subsequent missives to the court." *Id.* at *3.

Dallas's testimony is credible and defendants' belief there is evidence contradicting it simply means there is an issue of disputed fact and that summary judgment is not appropriate.

B. Dallas's and Martin's Testimony Establish that Martin Breached a Duty of Trust and Confidence.

The record establishes that Martin owed a duty of trust or confidence to Dallas based on their history, pattern, and practice of sharing confidences. 17 C.F.R. § 240.10b5-2(b)(2). Rule 10b5-2(b)(2) of the Exchange Act provides that a duty of trust or confidence exists:

> Whenever the person communicating the material nonpublic information and the person to whom it is communicated have a history, pattern, or practice of sharing confidences, such that the recipient of the information knows or reasonably should know that the person communicating the material nonpublic information expects that the recipient will maintain its confidentiality.

17 C.F.R. § 240.10b5-2(b)(2). "Like misappropriation generally, [Rule 10b5-2](b)(2) 'trains on conduct involving manipulation or deception' and proscribes 'feigning fidelity to the source of the information.'" *United States v. McGee*, 763 F.3d 304, 315 (3d Cir. 2014) (quoting *United States v. O'Hagan*, 521 U.S. 642, 655 (1997)). "A trader's 'undisclosed, self-serving use,' of confidential information notwithstanding the parties' history of sharing confidences chills market participation because it 'stems from contrivance, not luck,' and the informational disadvantage to other investors 'cannot be overcome with research or skill.'" *Id.* (citation omitted). *See also United States v. McPhail*, Crim. Act. No. 14-10291, 2015 U.S. Dist. LEXIS 62096 (D. Mass.

May 12, 2005) (applying *McGee*). In addition, Rule 10b5-2(b)(1) provides that Martin owed a duty of trust and confidence to Dallas to the extent that Martin "agree[d] to maintain information in confidence."

Given the record in this case, a reasonable jury could find that Martin knew or reasonably should have known that Dallas expected him to maintain the confidentiality of the information about SPSS and not disclose it to Conradt. Indeed, Martin himself testified that, when he tipped Conradt, Martin was aware that he "was violating the duty of trust and confidence that he owed to [Dallas] who had provided the information." 56.1 Response ¶ 87.

Dallas had a "history, pattern, or practice of sharing confidences" with Martin. 17 C.F.R. § 240.10b5-2(b)(2). Dallas and Martin shared personal information about their careers, women they were dating, families, compensation and job progression, opportunities, friends, and other intimate details of their lives. *Id.* ¶ 68. Dallas shared personal information with Martin that he did not share with other want others because they knew each other very well and he valued Martin's opinion. *Id.* ¶ 69.

Dallas discussed with Martin his work, partners for whom he was working, his schedule, and deals on which he was working. *Id.* ¶ 75. Dallas told Martin about three deals Dallas was working on prior to SPSS: a bond transaction; a transaction for Genentech; and a transaction involving Pepsi. *Id.* ¶ 76. Martin testified that he understood that it was an implicit part of his relationship with Dallas that he not disclose the information Dallas told him about his work. *Id.* ¶ 77. He kept the information about these three deals in confidence, and did not tip or trade based on any of this information. *Id.* Contrary to defendants' conclusion that this evidence

means there was no duty (and breach), the fact that Martin did not trade on three prior occasions where Dallas shared information suggests there was a relationship of trust or confidence.[1]

Martin also shared with Dallas confidential information about Martin's job. 56.1 Response ¶ 78. In or around December 2008, in the context of describing his work to Dallas, Martin handed to Dallas his Blackberry phone, pulled up a "sent" email and showed Dallas an "advice note" to RBS clients. *Id.* ¶ 79. Dallas understood it was confidential information and did not use it because he and Martin were confidants. *Id.*

Similarly, immediately after Martin was released from jail following his June 20, 2009 assault arrest, he contacted Dallas because "he was in trouble, and he didn't have his phone, and he needed someone to" get him some money and a phone and assist a friend of his from Australia who was supposed to be staying with him. *Id.* ¶ 73. Dallas understood that Martin was concerned about the implications of the arrest on Martin's work visa. *Id.* ¶ 74.

Dallas' sharing of the SPSS information was consistent with their history of shared confidences. Dallas explained why he shared the SPSS information with Martin – Dallas was concerned and apprehensive about the SPSS assignment. *Id.* ¶ 80. Dallas was concerned because it was his first mergers and acquisitions transaction advising the principal party, he was working under a partner with a "brutal" reputation, the deal would require a lot of work, and IBM was a prominent client. *Id*. Dallas's testimony was unequivocal. Dallas testified that he expected Martin to keep the information to himself based on their relationship, Martin's

[1] It is emblematic of the material issues of fact that preclude granting defendants summary judgment on this issue that in *SEC v. Conradt, et al.*, Conradt's tippee David Weishaus argued that Dallas's lack of prior disclosure of non-public business material information to Martin undermined the contention that they shared a relationship of trust or confidence. Weishaus Mem. of Law, Civ. Act. No. 12-08676 (JSR), Dkt. 47 at 11-13. Here, defendants claim just the opposite.

knowledge of the securities industry, and Martin's experience and sophistication. *Id.* ¶ 81.

Similarly, Martin recalled that when Dallas first told him about SPSS Dallas expressed concern about his workload and a tough partner. 56.1 Response ¶ 80. Martin also testified that, at the time of the disclosure, he knew the information was nonpublic and that Dallas expected him to maintain its confidentiality and to not tell anyone about it. *Id.* ¶ 82. Indeed, Martin confirmed that, in supplying the information to Conradt, Martin knew he "was violating the duty of trust and confidence that he owed to [Dallas] who had provided the information . . . originally." *Id.* ¶ 87. Martin apologized when he disclosed to Dallas that he had used the SPPS information to trade. *Id.* ¶¶ 54, 55, 86.

C. Defendants' Arguments about a June 1, 2009 Text Message Suggest Factual Disputes to be Resolved by a Jury.

Defendants breathlessly argue that one enigmatic electronic text message apparently sent by Martin to Dallas on June 1, 2009 stating "I am going to hit that stock I reckon" somehow makes all other evidence about the relationship between Dallas and Martin irrelevant. Defs.' Mem. at 22, 24; Exhibit A to Declaration of Matthew E. Fishbein. However, defendants' argument is belied by the fact that neither Dallas nor Martin has any recollection of this text message, *see* Declaration of A. Kristina Littman, ¶¶ 44, 45 and Declaration of Matthew E. Fishbein, or of having any conversation about Martin trading SPSS stock or options until mid to late July. 56.1 Response ¶ 88. Given that Dallas and Martin have no recollection of this text message and can provide no context, it is difficult to understand defendants' assertion.

In addition to sorting out these myriad factual questions, a jury can also decide whether "the stock" mentioned in the text message refers to SPSS, whether the verb "hit" in the text message refers to purchasing, and whether Dallas "replied" to the text message with "[w]ill call you tonight about the coming weekend, talk soon." Defs.' Mem. at 24. In any event, the June 1,

2009 text does not indisputably prove that there was no breach of a duty of trust or confidence or make Dallas's testimony "ludicrous" or "unbelievable." And, even assuming that Martin intended to tell Dallas he was going to trade, Martin failed to disclose that he intended to, and did, tip Conradt multiple times. Viewing the evidence as a whole and drawing all justifiable inferences in the Commission's favor there is no doubt that a jury could conclude Martin breached his duty to Dallas.

II. A REASONABLE JURY COULD FIND THAT MARTIN TIPPED CONRADT FOR A PERSONAL BENEFIT

Defendants' argument that there is no personal benefit is premised on a misunderstanding of the Commission's burden following *Newman* and a selective reading of the record that is not appropriate for summary judgment.

A. *Newman* Does Not Require the Tipper to Confess Personal Benefit.

Defendants apparently believe that a tipper's confession to tipping for a personal benefit is a necessary condition to prove tippee liability.[2] Defs.' Mem. at 16-18. *Newman* and *Dirks v. SEC*, 463 U.S. 646 (1983), which *Newman* cannot overrule, require no such evidence. The Commission must show that Martin tipped Conradt for a personal benefit. *Newman*, 773 F.3d at 450. *See also SEC v. Payton*, Civ. Act. No. 14-4644, 2015 U.S. Dist. LEXIS 44732, *10 (S.D.N.Y. Apr. 6, 2015). The point of the personal benefit requirement is to ensure that the insider's disclosure was for an improper, non-business purpose – not for some legitimate business purpose. *Dirks*, 463 U.S. at 559. *See also SEC v. Maio*, 51 F.3d 623, 632 (7th Cir.

[2] Defendants' entire argument rests on the premise that Martin and Conradt do not connect Martin's tip with any benefit Conradt provided him. In *Newman's* wake, it is not surprising that Martin and Conradt have sought to minimize any personal benefit Martin received. Indeed, admitting personal benefit risks inviting renewed interest from the United States Department of Justice. It is also not surprising that Conradt testified similarly to Martin. Conradt read Martin's testimony prior to sitting for his deposition. 56.1 Response ¶ 134.

1995) (an insider's disclosure is improper when corporate information, intended to be available only for corporate purposes, is used for personal advantage). But there is nothing in *Dirks*, *Newman*, or any subsequent case that requires a tipper or tippee to confess that a personal benefit exists. Indeed, personal benefit is an element, like all other elements of an insider trading claim, which can be established through objective evidence. *Dirks*, 463 U.S. at 663-64 (stating that courts should focus on "objective criteria, *i.e.*, whether the insider receives a direct or indirect personal benefit from the disclosure" to determine whether the tipper received a personal benefit); *Payton*, 2015 U.S. Dist. LEXIS 44732, *13 n.2 ("*Dirks* states that there are 'objective facts and circumstances that often justify . . . inference of personal benefit"). *See also United States v. Riley*, Crim. Act. No. 13-339-1 (VEC), 2015 U.S. Dist. LEXIS 26400,*8 (S.D.N.Y. Mar. 3, 2015) (a tip to maintain or further a friendship is circumstantial evidence of benefit).

B. The Objective Evidence Supports a Reasonable Jury's Finding that Martin Tipped Conradt for a Personal Benefit.

The Commission's allegations, which the Court found sufficient in connection with defendants' Motion to Dismiss, have been substantiated through discovery. *See Payton,* 2015 U.S. Dist. LEXIS 44732, *14. Viewing the record as a whole and in the light most favorable to the Commission, it is clear that a rational trier of fact could, and likely would, find that Martin tipped Conradt for personal benefit. In *Newman*, the Second Circuit elaborated on the "benefit" standard, requiring proof of a "meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." *Newman*, 773 F.3d at 452. There are three independent ways that *Newman* is satisfied sufficient to bring the question of personal benefit to the jury: (1) Martin and Conradt had a sufficiently close relationship; (2) Martin intended to benefit Conradt; and (3) Martin disclosed information as part of a *quid pro quo* relationship.

1. Martin and Conradt Shared a Sufficiently Close Relationship.

In *Dirks*, the Supreme Court held that personal benefit "exist[s] when an insider makes a gift of confidential information to a trading relative or friend."[3] 463 U.S. at 663-64. *See also United States v. Salman,* 792 F.3d 1087, 1092 (9th Cir. 2015). The panel in *Newman* concluded that there must be evidence of particular circumstances for a "*jury in a [] trial*" to find that a tipper received a personal benefit. 773 F.3d at 453 (emphasis added). But the *Newman* panel did not overrule the Second Circuit's earlier holding in *Obus* that the "undisputed fact that [the tipper] and [tippee] were 'friends' is sufficient to send to the jury the question of whether [the tipper] received a benefit from tipping." *Obus*, 693 F.3d at 291 (reversing summary judgment erroneously granted in favor of defendants).[4] *Cf. SEC v. Jafar*, No. 13-CV-4645 (JPO), 2015 U.S. Dist. LEXIS 74281, *15-*18 (S.D.N.Y. June 8, 2015) (distinguishing between what the SEC must plead "at the motion to dismiss stage" and what *Newman* requires the SEC to prove to "ultimately prevail" at trial). Under the binding precedent of *Obus*, undisputed evidence that the tipper and tippee were "friends" is sufficient to overcome summary judgment.

It is undisputed that Martin and Conradt were friends and roommates, not simply casual acquaintances. 56.1 Response ¶¶ 89-103. Properly instructed, the jury can decide at trial

[3] As this Court previously observed, the standard set forth in *Newman* may be at odds with the standard set forth in *Dirks*: "it may not be so easy for a lower court, which is bound to follow both [*Dirks* and *Newman*], to reconcile the two." *Payton*, 2015 U.S. Dist. LEXIS 44732, *13 (footnote omitted). *See also Salman,* 792 F.3d at 1093-94 (rejecting an interpretation of *Newman* that requires tangible compensation and observing that this would allow a person in possession of confidential and proprietary information to disclose that information to relatives for the purpose of trading, as long as the tipper requested no tangible compensation in return).

[4] Because the decision in *Newman* came from a single panel, and not the entire *en banc* Court, it cannot overrule *Obus*. *See United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004). Indeed, to the extent that *Newman* conflicts with other panel decisions, "the *earlier* of two conflicting panel decisions" in *Obus* (2012) "must control" the later panel decision in *Newman* (2014). *United States v. Shellef*, 718 F.3d 94, 110 (2d Cir. 2013) (emphasis added).

whether their relationship is sufficient to satisfy a standard that incorporates *Newman*; the Commission has made a sufficient evidentiary showing to present that question to a jury.

The undisputed nature of the roommate relationship between Martin and Conradt should not be taken lightly. As Judge Kozinski has explained, "*[a]side from immediate family or a romantic partner, it's hard to imagine a relationship more intimate than that between roommates"*:

> [Roommates] share living rooms, dining rooms, kitchens, bathrooms, even bedrooms. Because of a roommate's unfettered access to the home, choosing a roommate implicates significant privacy and safety considerations. The home is the center of our private lives. Roommates note our comings and goings, observe whom we bring back at night, hear what songs we sing in the shower, see us in various stages of undress and learn intimate details most of us prefer to keep private. Roommates also have access to our physical belongings and to our person. As the Supreme Court recognized, "[w]e are at our most vulnerable when we are asleep because we cannot monitor our own safety or the security of our belongings." . . . Taking on a roommate means giving him full access to the space where we are most vulnerable.

Fair Housing Council of San Fernando Valley v. Roommate.com, LLC, 666 F.3d 1216, 1221 (9th Cir. 2012) (Kozinski, C.J.) (emphasis added) (citation omitted). Certainly combined with Martin's and Conradt's friendship, the two shared a "meaningfully close personal relationship" and supports the inference that Martin tipped Conradt as a gift, or a favor for personal benefit. *Newman*, 773 F.3d at 452-53.

The evidence shows that from October 2008 until approximately fall 2010, Martin and Conradt were friends and roommates who often "hung out" in their New York City apartment. 56.1 Response ¶ 89. Martin and Conradt ate dinner together, drank beers together, played video games together, watched TV together, used drugs together, and discussed their respective days, current events, and personal details of their lives. *Id.* ¶ 90. They also occasionally played basketball and met outside the apartment for meals and to socialize. On at least one occasion

around the time of the SPSS tip, Martin and Conradt hosted a joint party on their roof that was attended by Conradt's girlfriend, Dallas, and others. *Id.* ¶ 91. They also did small non-monetary favors for each other. For instance, when Martin had friends visit from out of town, Conradt allowed Martin's friends to use his room. 56.1 Response ¶ 92.

As friends and roommates, Conradt and Martin were familiar with each other's jobs and occasionally discussed work and professional development, including taking licensing exams. *Id.* ¶ 93. Conradt texted Martin his disappointment when he failed a securities licensing exam and then shared the good news when he passed. *Id.* ¶ 94. When Conradt was fired from his job as a broker he texted Martin almost immediately. *Id.* ¶ 95. And when Martin was concerned about the legality of trading in SPSS he sought Conradt's assistance and advice. *Id.* ¶ 109.

Their relationship also included a financial interdependence. They shared rent and expenses associated with their apartment. While Conradt was not responsible for Martin's rent or *vice versa*, they relied on each other to pay their respective share, and jointly bore the consequences of non-payment. Conradt took the lead in organizing and paying shared expenses, and resolving problems at the apartment. *Id.* ¶ 96. Conradt paid the apartment bills, including cable and internet, power, and cleaning service, and then relied on Martin and a third roommate to reimburse him for their portion of these expenses. *Id.* ¶ 97. Conradt also negotiated a rent reduction that lowered Martin's monthly rent from $1,800 to $1,500 and renegotiated the cable bill. Additionally, Conradt hired a cleaning service for the apartment, and engaged in an effective and extensive lobbying effort to have their landlord repair a "buzzer," ceiling leak, and wall outlets. *Id.* ¶ 98.

This evidence is, of course, in sharp contrast to the facts of *Newman* where the tippers and initial tippees were not roommates and did not have such an inextricably intertwined

relationship, including sharing the same living space. One *Newman* tipper and his initial tippee were "not 'close' friends." The other pair was merely "'family friends' that had met through church." 773 F.3d at 452.

2. Martin Intended to Benefit Conradt.

Under *Dirks*, the tipper's "intention to benefit the recipient" is also sufficient to justify an inference of personal benefit. 463 U.S. at 664. *Newman* explicitly endorses the legal proposition that "an intention to benefit" the recipient is sufficient. 773 F.3d at 452 (quoting *United States v. Jiau*, 734 F.3d 147, 153 (2d Cir. 2013)). Even under *Newman*, "a tipper's intention to benefit the tippee is sufficient to satisfy the benefit requirement so far as the tipper is concerned, and no *quid pro quo* is required." *United States v. Gupta*, Crim. No. 11-907 (JSR), 2015 U.S. Dist. LEXIS 86635, *5 (S.D.N.Y. July 2, 2015). The inference that the tipper intended to benefit the recipient is particularly appropriate here for two reasons. First, the friendship is a "close friendship" rather than the "casual friendship" as in *Newman*. *United States v. Whitman*, Crim. No. 12-125 (JSR), 2015 U.S. Dist. LEXIS 96242, **9-10 n.5 (S.D.N.Y. Jul. 22, 2015) (quoting *SEC v. Warde*, 151 F.3d 42 (2d Cir. 1998) and *Newman*). Second, there is evidence that Martin "intended to 'benefit'" Conradt by "knowing that he intended to trade on it." *Salman*, 792 F.3d at 1092.

Martin was a smart and experienced securities professional. 56.1 Response ¶ 83. Martin knew that the SPSS information was as good as currency because it was a cash transaction with a giant premium, and that by tipping Conradt (another securities professional) he was essentially giving him cash. Because of Martin's experience and training on insider trading laws, he also knew the potential negative consequences (indictment, prison, lawsuits) if he and Conradt were caught. *Id.* ¶¶ 83-84. This is why Martin communicated to Conradt that the information had

come from a source that had access to confidential information and not to tell anyone else, and why he confessed to Dallas after buying SPSS options. *Id.* ¶¶ 53, 86, 105. These facts provide ample evidence for a jury to conclude that Martin intended to benefit Conradt.

Martin's admission that he was glad Conradt made money on SPSS also supports this inference of intended benefit. On or about June 20, 2009, Martin was arrested and charged with assault after he was involved in a street altercation. *Id.* ¶ 99. After the arrest, Martin sought legal advice from Conradt, *id*., and set up a call with Conradt's friend who practiced law, to provide Martin "more colour [sic] on what [he] should do." *Id.* ¶¶ 37, 100. Over the next few days, Conradt and his friend provided Martin names of attorneys and discussed ways to best handle the matter. *Id.* ¶ 101. Martin thanked them for their assistance. *Id.* ¶ 102. This aid was especially valuable because Martin's arrest threatened his status in the United States. *Id.* ¶ 103.

Martin first told Conradt about SPSS in early June 2009. *Id.* ¶ 104. However, after Martin's arrest, Martin updated Conradt with more specific information about the SPSS transaction, telling him, "that SPSS/IBM deal I mentioned, it's going to happen on Wednesday and the share price is going to be 50." *Id.* ¶ 106. Martin provided these later updates to Conradt because he thought it was possible Conradt had traded and he wanted to "cement" for Conradt that the deal was going forward. *Id.* ¶ 107.

In late July, after the public announcement of the SPSS acquisition, Conradt and Martin discussed their respective trading on SPSS. *Id.* ¶ 108. During this conversation, Martin and Conradt disclosed their respective profits and Martin told Conradt: "glad you made some money, you know you're a good guy, you know, thanks for all your help with [the assault arrest at] Grand Central." *Id.* This statement demonstrates Martin's intention to benefit Conradt, including Martin's expectation that Conradt would trade.

Martin's testimony that he tipped Conradt because Conradt just happened to be in the apartment does also not alter this analysis. Given the negative consequences Martin faced if caught tipping inside information, a jury could conclude that it makes no sense that he would tip Conradt out of mere happenstance. Indeed, this excuse also cannot be reconciled with the fact that Martin tipped Conradt additional information weeks later and did not tip anyone else. Taken in the light most favorable to the Commission, these facts support the inference that Martin intended to benefit Conradt.

3. Martin and Conradt Shared a *Quid Pro Quo* Relationship.

Although it is an unjustifiably strict reading of *Newman* to require the Commission to show that Martin tipped Conradt as part of a *quid pro quo*, the evidence also supports that inference. *Newman*, 773 F.3d at 452. Conradt provided Martin with legal help regarding his arrest and Martin then told Conradt that he was glad Conradt made money off SPSS and thanked him for his help with the arrest. 56.1 Response ¶ 108. There is sufficient evidence in the record from which one could reasonably conclude that Martin tipped Conradt valuable, increasingly specific, inside information in exchange for Conradt's legal assistance with the arrest. Because defendants cannot logically explain away this direct testimony they choose to ignore it, erroneously contending that Martin only tipped Conradt before the arrest. Defs.' Mem. at 19.

An inference of *quid pro quo* also can be drawn from the circumstances of Martin's initial disclosure to Conradt. After misappropriating the information from Dallas and placing his initial trades in SPSS securities, Martin testified that he disclosed the information to Conradt, in part, because he knew Conradt was a lawyer who worked in the securities industry and wanted to know whether Conradt thought Martin could legally trade. 56.1 Response ¶ 109. Given that Martin thought Conradt would likely trade based on the SPSS information, it can easily be

inferred that Martin gave the original tip, and then multiple updates, in exchange (and as payment) for the legal advice he sought.

Furthermore, a jury could infer from a history of personal favors that a *quid pro quo* relationship between Martin and Conradt existed. *Newman*, 773 F.3d at 452 ("a history of loans or personal favors between"); *see also Payton*, 2015 U.S. Dist. LEXIS 44732, *14-*15; *Gupta*, 2015 U.S. Dist. LEXIS 86635, *16 ("history of exchanging financial favors"). Conradt's prior favors to Martin—legal assistance, negotiation of rent and utilities reductions, etc. — suggest that Martin provided inside information to return such favors.

In sum, viewing the record in the light most favorable to the Commission and drawing all justifiable inferences in the Commission's favor, a rational trier of fact could easily find that Martin tipped Conradt for personal benefit as defined in *Newman* and, accordingly, defendants' arguments in this regard must be rejected.

III. A REASONABLE JURY COULD FIND THAT THE DEFENDANTS KNEW OR SHOULD HAVE KNOWN THAT MARTIN TIPPED CONRADT FOR A PERSONAL BENEFIT

Defendants claim that the evidence fails to support the conclusion they knew or should have known that Conradt was tipped for a personal benefit. This argument is entirely premised on a selective and inaccurate portrayal of the record and a misconstruing of the law.

In *Dirks*—a civil enforcement action—the Supreme Court explained that a tippee has a duty to abstain or disclose "only when the insider has breached his fiduciary duty . . . and the tippee knows or should know that there has been a breach." 463 U.S. at 660. Following the *Newman* decision, this Court recently held that in a civil case, the plaintiff need only show that

the remote tippee "knew or had reason to know" of the benefit to the tipper.[5] *Gordon v. Sonar Capital Management, LLC*, Civ. Act. No. 11-9665 (JSR), 2015 U.S. Dist. LEXIS 99321, **3-4 (S.D.N.Y. July 30, 2015) (citing *Obus*, 693 F.3d at 288 & n.2). Whether the tippee knew or should have known of the tipper's breach and personal benefit is a "fact-specific inquiry turning on the tippee's own knowledge and sophistication and on whether the tipper's conduct raised red flags that confidential information was being transmitted improperly." *Obus*, 693 F.3d at 288.

Defendants argue that the record does not contain enough evidence for a jury to conclude that defendants knew the details of Conradt's and Martin's living situation and relationship. But even under *Newman*, "a tippee does not need to know the details of the insider's disclosure of information," does "not have to know for certain how information was disclosed," "nor the identity of the [tipper]." 773 F.3d at 449-50 n.3. Certainly in a civil case, it is not necessary to demonstrate that the tippees "knew specifically" about the particular personal benefit involved. *Payton*, 2015 U.S. Dist. LEXIS 44732, *16. This Court has also observed that "there is no reason to require that the tippee know the details of the benefit provided; it is sufficient if he understands that some benefit, however modest, is being provided in return for the information." *United States v. Whitman,* 904 F. Supp. 2d 363, 371 (S.D.N.Y. 2012). *See also Salman*, 792 F.3d at 1094 (finding that jury could easily find that Salman knew the benefit between tipper and tippee, despite not being aware of all of the details of the tipper-tippee relationship).

[5] This standard—which has been "repeated in numerous Second Circuit cases"—"pertains to a tippee's knowledge that the tipper breached a *duty*" and the tippee's inheritance of such duty, as opposed to the civil "*scienter* requirement" that the tippee "intentionally or recklessly trade[] while in knowing possession of [inside] information." *Obus*, 693 F.3d at 287-88 (harmonizing *Dirks* and *Hochfelder*) (emphasis added).

A. Defendants Knew that Martin was the Source of the Inside Information Disclosed to Conradt.

In contrast to *Newman*, where the successive tippees "knew next to nothing" about the tippers and were unaware of the circumstances of how the information was obtained, the defendants here knew that Martin was the source of the tips to Conradt. 773 F.3d at 453-54. Payton admitted that Conradt had informed him that SPSS was going to be acquired by IBM for a premium, and that Conradt had received this information from Martin. 56.1 Response ¶ 115. Payton also admitted the he knew who Martin was and had met him. *Id.* ¶ 116. Durant admitted that when Conradt initially told him about SPSS, Conradt revealed that the information about SPSS came from his friend. *Id.* ¶ 117. Conradt further testified that he may have also told Durant Martin's name, profession, and employer. *Id.* ¶ 113. Finally, Conradt also told defendants that "Trent" had told Conradt not to tell anybody, which demonstrates a familiarity that supports the reasonable conclusion that defendants knew Martin and his relationship to Conradt. *Id.* ¶ 114.

Defendants were sophisticated securities professionals with extensive training on insider trading. Given the specificity of the SPSS information it is reasonable to infer they knew that this was valuable monetizable information that they could use to get rich quick, or alternatively could land them in jail. Based on these facts and drawing all inferences in favor of the Commission it is reasonable to conclude that defendants knew or should have known of benefit to Martin. *See Obus*, 693 F.3d at 288. Defendants simply pretend that none of this testimony exists. *See, e.g.*, Defs. Mem. at 19 ("Payton knew only that the SPSS information came from a person named 'Trent'"). Instead, defendants selectively cite to Payton's and Durant's inconsistent testimony, which at most establishes a factual dispute for the jury to resolve.

B. Defendants Knew that Conradt and Martin were Friends and Roommates.

Unlike *Newman*, where the successive tippees "did not know what the relationship between the [tipper] and the first-level tippee was," Conradt testified that he repeatedly told Payton and Durant that the SPSS information came from his roommate. 56.1 Response ¶ 111. Indeed, every time Conradt got additional information from Martin, he told defendants that his roommate had provided more information about SPSS. *Id.* ¶ 112. Defendants inexplicably ignore this testimony and their own testimony regarding their knowledge that the tip came from Martin. *See id.* ¶ 115-17. And instead they base their argument on the unsupportable assertion that "they both knew absolutely nothing about the circumstances of Conradt's and Martin's relationship, *or even that they were roommates*." *See* Defs.' Mem. at 3 (emphasis added). This was not a mere oversight. Defendants understand that their knowledge of the roommate relationship alone is sufficient to send this issue to the jury.

Defendants also had specific information that supports the inference that they knew or should have known Conradt's roommate tipped him for a benefit. Durant clearly understood that Conradt and Martin were close because he repeatedly asked Conradt whether he had gotten more information from his roommate about SPSS. 56.1 Response ¶ 118. And Payton had at least some idea of Martin and Conradt's relationship because he had met Martin (through Conradt) and he discussed with Conradt, Martin's assault arrest – an embarrassing episode one would expect might not be shared absent a meaningfully close relationship. *Id.* ¶ 40.

C. Defendants Consciously Avoided Learning More About Conradt's Source of Inside Information.

The record also supports the inference that defendants purposefully and consciously avoided learning any additional information about Conradt's source. In the face of red flag upon

red flag, these sophisticated securities professionals consciously avoided learning details beyond what they needed to know to trade profitably on the material nonpublic information.

A remote tippee's awareness of the tipper's breach and benefit can be established by showing that the tippee "consciously avoided knowing that the information came from corporate insiders or that those insiders received any personal benefit in exchange for the disclosure." *Newman*, 773 F.3d at 453, 455. Circumstantial evidence such as disregard of "red flags" and warning signs, could lead a reasonable jury to infer that the defendant knew that a tipper had inside information. *United States v. Goffer*, 721 F.3d 113, 126-27 (2d Cir. 2013).

In *SEC v. Musella*, the Commission's motion for summary judgment was granted against two defendants where the court found that the defendants made a conscious and deliberate choice not to ask their tipper about the confidential source they suspected existed. 678 F. Supp. 1060, 1062 (S.D.N.Y. 1988). The court noted that the defendants were both experienced stock market investors, familiar with options trading and market strategy, and knew of the ban on insider trading. *Id*. The court found that the combination of these facts "support the inference that defendants were aware they had tapped into a pipeline of non-public information, did not wish to interrupt the flow, and did not want their source to become known." *Id.* at 1063.

Payton and Durant, both sophisticated securities industry professionals, admit that they never asked Conradt for additional information about the source of the information or the circumstances surrounding the tip to Conradt prior to the public announcement. 56.1 Response ¶¶ 110, 121. Instead, they took this information and reacted with great confidence by making

significant highly-speculative investments in SPSS securities (*e.g.,* Durant incurred an IRA penalty so he could free up money to buy SPSS securities).[6] *Id.* ¶¶ 119.

Indeed, Payton testified that he was aware that the information regarding SPSS was material and nonpublic, and that if the deal materialized the price of SPSS stock would increase exponentially. *Id.* ¶ 123. He also testified that, before he traded, he was aware that it would be improper to trade on this information if the buyout actually occurred. 56.1 Response ¶ 124. Payton testified that it was surprising that such information could come from Conradt for "obvious reasons" because Conradt was so inexperienced, and Durant said that Conradt was less experienced and knowledgeable. *Id.* ¶ 122.

Yet neither defendant attempted to determine the source or circumstances of Conradt's tip. Like the tippees in *Musella*, defendants clearly were aware that "they had tapped into a pipeline of non-public information, did not wish to interrupt the flow, and did not want their source to become known." As such, a jury could reasonably infer that defendants consciously avoided knowing an otherwise obvious fact – that Martin breached a duty for personal benefit in tipping Conradt.

D. Defendants' Attempts to Conceal Their Trading Also Supports the Conclusion They Knew The SPSS Information Had Been Tipped Unlawfully.

The conclusion that defendants knew or should have known that they obtained the SPSS information unlawfully is further supported by the steps they took to conceal their illegal activity. *See Warde*, 151 F.3d at 49 (deceptive behavior, such as concealing trades, supports the

[6] Defendants purchased short-term call options that were significantly "out-of-the-money." 56.1 Response ¶¶ 119, 120. The options represented contracts entitling defendants to purchase SPSS shares, in a matter of just one or two months, at a cost much higher than the present share price. *Id*. This trading is highly suggestive of the fact that defendants knew something the rest of the market did not.

inference of illegal trading); *United States v. Larrabee*, 240 F.3d 18, 23 (1st Cir. 2001) (defendants' efforts to conceal their relationship support inference of illegal insider trading); *United States v. Ruggiero*, 56 F.3d 647, 655-56 (5th Cir. 1995) (same).

Durant was so certain that he was trading on illegally obtained information that when asked about SPSS by his friend, Todd Robertson, he "[made] him go away." 56.1 Response ¶ 128. Durant routinely gave Robertson investment advice but when Robertson saw on Durant's computer screen that he was tracking SPSS and questioned him about it, Durant refused to share the information and reported the incident to Conradt. *Id.* ¶¶ 127-28. Payton also transferred his SPSS securities from his account at his employer broker-dealer and lied to conceal his occupation when he set up an account with a different broker. *Id.* ¶¶ 60, 132.

Defendants' efforts to conceal their illicit trading only increased after the deal became public. The morning of the announcement, Durant, Lehrer, and Conradt decided to go to lunch together outside of the office so they could discuss their trading in SPSS. *Id.* ¶ 129. Durant then paid cash for the lunch, noting his effort not to leave a paper trail. *Id.* ¶ 130. That night, defendants and the other tippees who had profited from SPSS (Conradt, Weishaus, and Lehrer) met in a New York City hotel room to discuss their trading and how they would respond if questioned. *Id.* ¶ 131. Durant told everyone that if they were questioned to say they like "tech." *Id.* Then in November 2009 defendants lied to their employer when questioned about their trading in SPSS, fabricating stories about how they originally learned of the stock. 56.1 Response ¶¶ 62-63, 133. Each of these steps demonstrates a consciousness of guilt and support the inference that defendants knew their trading was illegal.

In the face of compelling factual evidence, defendants' arguments premised on the recent decisions in *Gordon* and *Newman* are of no moment. In *Gordon*, the Court found insufficient

allegations to infer that the remote tippee should have known that the tipper received a benefit from the direct tippee. 2015 U.S. Dist. LEXIS 99321, *14-15. Unlike the present case, the plaintiff in *Gordon* did not know the identity of the tipper's source and incorrectly speculated as to the tipper's identity. *Id*. at *15 n.5, *16. Similarly, the Second Circuit concluded that the *Newman* defendants "knew next to nothing" about the source of the inside information. *Newman*, 773 F.3d at 453-54. Durant and Payton knew Conradt's source was his friend and roommate, Trent Martin. Moreover, neither *Gordon* nor *Newman* involved both conscious avoidance and active attempts to conceal the unlawful trading.

E. Payton is Judicially Estopped from Arguing that he Did Not Know Conradt's Source.

Defendants' claim that Payton did not know that Martin tipped Conradt or that they were roommates is directly undercut by his guilty plea colloquy. In November 2014, Payton pled guilty to conspiracy to commit securities fraud based on his trading in SPSS stock. Pursuant to Rule 11 of the Federal Rules of Criminal Procedure, Payton admitted, among other things, that the SPSS tip came from Conradt's roommate. That admission, which formed the basis of Payton's plea, is in direct contradiction to factual statements he has made in discovery and in his motion.[7] Payton should be estopped from now arguing contrary facts to gain an advantage here.

The doctrine of judicial estoppel exists to "protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the

[7] Rule 410(a) of the Federal Rules of Evidence has no effect here. Rule 410(a) only precludes the "admission" of a party's guilty plea colloquy. The Commission is not asking the Court to "admit" Payton's guilty plea colloquy but preclude Payton's new position to "protect the integrity of the judicial process." That Payton's plea was ultimately vacated due to other legal reasons is of no moment to this analysis. The court accepted his plea based on one set of facts. He now asks this Court to make a different legal conclusion based on a wholly contrary factual position. This inconsistency is precisely what judicial estoppel is meant to prevent.

moment." *State of New Hampshire v. State of Maine*, 532 U.S. 742, 749-50 (2001) (internal quotations and citations omitted). Under the doctrine of judicial estoppel, "[w]here a party assumes a certain position in a legal proceeding, and succeeds . . . he may not thereafter, simply because his interests have changed, assume a contrary position" *Uzdarvines v. Weeks Marine, Inc*., 418 F.3d 138, 147 (2d Cir. 2005).

Payton has clearly assumed contradictory positions. In defendants' brief, relying on self-serving statements from Payton's May 8, 2015 deposition, they assert that "Payton knew only that the SPSS information came from a person named 'Trent,' whom Payton recalled being an 'acquaintance' of Conradt's and whom Payton may have 'met once in passing.'" Defs.' Mem. at 19. They further argue Payton "knew absolutely nothing about the circumstances of Conradt's and Martin's relationship, or even that they were roommates." *Id.* at 3. But this is inconsistent with Payton's guilty plea colloquy, where only six months earlier, the court asked Payton to describe the facts that led him to plead guilty, and Payton responded:

> PAYTON: In July of 2009 I was working as a stockbroker for a brokerage firm in Manhattan. *One of the brokers at the brokerage firm told me his roommate told him that IBM would soon be acquiring a software company called SPSS at a specific price per share and that we should invest in this stock.* I understood that once this acquisition was announced, the price of SPSS shares would rise dramatically. I purchased, from Manhattan, on a national securities exchange, options of SPSS based on this information. After the deal was announced I sold my options for a profit. Given the specificity of the information, it was apparent that this information was obtained in a breach of fiduciary duty. *In other words, I understood that this was inside information that was supposed to be kept confidential and that it was illegal for me to trade on.* I apologize and I am very sorry for my actions.

Littman Declaration, Ex. 40 (emphasis added). Importantly, the court accepted Payton's plea based on these facts. *See id.* Ex. 41 at 5.

Payton has set forth these inconsistent factual positions in each case to benefit himself. Presumably, Payton chose to plead guilty to secure himself the benefits described in his plea

agreement. Littman Declaration, Ex. 28. Having convinced the court to accept his plea, Payton now reverses course and argues opposite facts in an attempt to prevail on summary judgment. This type of opportunism is precisely what is prohibited by the doctrine of judicial estoppel. *See Lowery v. Stovall,* 92 F.3d 219 (4th Cir. 1996) (applying judicial estoppel in civil matter to prevent party from making assertions contrary to facts in guilty plea); *United States v. Capoccia*, No. 1:03-cr-35-1, 2010 U.S. Dist. LEXIS 42797, *6 (D. Vt. Apr. 29, 2010) (applying judicial estoppel based on inconsistency with plea) (citation omitted); *Hudson v. Goob*, No. 2:07cv1115, No. 2:07cv1115, 2009 U.S. Dist. LEXIS 24468, *25-*27 (W.D. Pa. Mar. 24, 2009) (same); *Perlleshi v. County of Westchester*, No. 98-cv-6927, 2000 U.S. Dist. LEXIS 6054, *17 (S.D.N.Y. Apr. 24, 2000) (same).

Facts are facts. Payton cannot simply assert one set of facts to a court when it suits him as part of a guilty plea and then turn on a dime and assert the opposite facts to this Court when he believes that the winds have changed and he is better suited by opposite facts. Payton should be estopped from arguing that he was unaware of the illegality of his actions and that he was unaware that the information regarding the SPSS acquisition had come from Conradt's roommate, and the Court should disregard any arguments in his briefing to the contrary.

CONCLUSION

For the reasons above, defendants' Motion for Summary Judgment should be denied.

Dated: August 24, 2015

Respectfully Submitted,

SECURITIES AND EXCHANGE COMMISSION

s/David L. Axelrod
David L. Axelrod
Catherine E. Pappas
A. Kristina Littman