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Insider Trading & Disclosure UPDATE

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Editor's Remarks

Welcome to this inaugural edition of the Insider Trading & Disclosure Update, Debevoise's periodic update focusing on recent legal, compliance and enforcement developments in the areas of insider trading, the management of material non-public information, and disclosure-based liability matters.

In this Update, we have taken our cue from prevailing enforcement trends and trained our spotlight on recent key insider trading developments. Also featured prominently in this Update is the Supreme Court's decision in the *Halliburton* case, which was one of the most closely watched legal developments by corporations and securities practitioners during the last Supreme Court term.

We hope that you find this and future editions of this Update useful in your efforts to remain informed about developments in these important and continually shifting areas of practice.

Sincerely,

The Editorial Board

CASELAW & MARKET UPDATES

In the last several years, the Securities and Exchange Commission ("SEC") and the Department of Justice ("DOJ") have made the enforcement of insider trading laws a top priority, with aggressive enforcement and prosecution of insider trading and the devotion of significant resources to their ongoing efforts. Thus far in 2014, the SEC has announced more than twenty new insider trading cases and on April 10, 2014, the DOJ obtained a $1.8 billion settlement from SAC Capital Advisors LP – one of the largest criminal fines ever imposed in an insider trading case. The SEC has specifically noted its increased focus on "combat[ing] serial insider trading schemes, particularly by law firm employees and other professionals who are entrusted with extremely sensitive market-moving information."[1] The SEC is also actively promoting its use of innovative tools to detect potential insider trading earlier and more effectively, including in-house technology called the Advanced Bluesheet Analysis Program used to search for suspicious trading patterns and identify potential relationships among traders that might not otherwise be uncovered.

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Second Circuit Speaks on Source of Duty for Insider Trading and Scope of Disgorgement Remedy

The following pair of recent decisions from the Second Circuit endorses an expansive view of the tools potentially available to the SEC and prosecutors alike in pursuing insider trading claims.

Steginsky v. Xcelera, Inc.

On January 27, 2014, in *Steginsky v. Xcelera, Inc.*, a civil action by a private plaintiff, the Second Circuit expressly established that the duty to disclose, an element of every insider trading claim under section 10(b), is defined and governed by federal common law and not the local law of the entity involved.[1]

The plaintiff, Gloria Steginsky, was a minority shareholder of Xcelera, Inc., a Cayman Islands holding corporation. In the pleadings, Steginsky described how the value of Xcelera stock spiralled down from a peak of $110 per share in 2000 to approximately $1 per share in 2004, at which point the company refused to make required filings with the SEC. Xcelera was delisted by the American Stock Exchange due to this non-compliance, and the registration of all of Xcelera's securities was revoked by the SEC in 2006.

In December 2010, while continuing to avoid any financial disclosures, a vehicle controlled by three officers of Xcelera made a tender offer for Xcelera stock at a price of $0.25 per share. Steginsky tendered her 100,010 shares pursuant to the offer in April 2011. She subsequently filed suit in April 2012, alleging (1) market manipulation, (2) insider trading and (3) breach of fiduciary duty. The district court dismissed Steginsky's claims for failure to state a claim and Steginsky appealed to the Second Circuit, which vacated the dismissal of the insider trading claims.

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In reversing, the Court quickly established that the named defendants constituted insiders for purposes of securities law. It then moved to consideration of whether the defendants had a duty to disclose Xcelera's financial information, in light of the lower court's ruling that the defendants had no such duty because (1) the tender offer was for unregistered stock and (2) the law of the Cayman Islands, which does not recognize a duty of disclosure, applied to the stock sale. The Second Circuit first held that under the plain language of the statute, the duty to abstain from insider trading applies to both registered and unregistered securities.[2] It then ruled that the "fiduciary-like duty against insider trading . . . is imposed and defined by federal common law," noting that "looking to idiosyncratic differences in state law would thwart the goal of promoting national uniformity in securities markets."[3] In doing so, the Court referred to earlier Second Circuit and Supreme Court decisions that implicitly assumed that the duty "springs from federal law."[4]

> *Steginsky* is significant as it is the first time the Second Circuit has explicitly held that the source of the fiduciary-like duty against insider trading is one imposed by federal common law. The decision is also a useful reminder that both registered and unregistered securities are subject to the prohibition on trading while in possession of MNPI. This includes transactions in the tender offer context.

SEC v. Contorinis

On February 18, the Second Circuit held in *SEC v. Contorinis* that the SEC may require an insider trading defendant to disgorge not only the profits he personally realized from an illegal scheme, but also those realized by an innocent third party who reaped the benefit of the trade.[1] With this holding, the SEC has an additional means to increase the pressure on those who "try to cover their insider trading tracks"[2] through the use of middlemen who may also profit from the scheme.

The defendant, Joseph Contorinis, was a managing director at Jeffries & Company, Inc. ("Jeffries") and received multiple tips from an employee of UBS Investment Bank regarding the acquisition of Albertson's, Inc., a supermarket chain. Using that information, Contorinis executed several opportune trades in Albertson's stock on behalf of a Jeffries fund, which allowed the fund to realize $7 million in profits and avoid $5 million in losses. He also personally profited in the amount of $427,875 due to linked compensation from the trades.

In October 2010, Contorinis was criminally convicted of one count of conspiracy to commit securities fraud and seven counts of securities fraud and sentenced to six years in prison. In addition, he was ordered to pay $12 million in forfeiture penalties, which comprised the combined value of the fund's realized profits and avoided losses. However, the Second Circuit vacated the forfeiture order, holding that Contorinis could not be required to forfeit the fund's profits because he never possessed or controlled them. On remand, the district court entered a forfeiture order representing only Contorinis' personal profit.

Following the completion of the criminal case, the SEC brought a civil action against Contorinis in the Southern District of New York seeking disgorgement of the $7 million in unlawful profits obtained by the fund, along with other civil monetary penalties and an injunction. The district court ordered Contorinis to disgorge $7 million (less any amount paid pursuant to criminal forfeiture) and to pay a civil penalty of $1 million. Contorinis appealed, arguing that the requirement to disgorge $7 million that he never personally controlled represented a misapplication of the equitable principle of disgorgement.

The Second Circuit affirmed the order in its entirety, while confirming that total monies subject to disgorgement are limited to the total proceeds realized by the illegal activity. Disgorgement, according to the Court, was designed to force "wrongdoers to give back the fruits of their illegal conduct."[3] The Second Circuit has long held in tipper-tippee cases that a tippee's gains are attributable to the tipper,[4] and "it must follow that the insider who, rather than passing the tip along to another, directly trades for that other's account must equally disgorge the benefit he obtains for his favored beneficiary."[5] It would, the Court stated, make little sense to allow a trader to escape disgorgement simply because he gave away the proceeds of the trade rather than keeping the proceeds for himself.

Contorinis filed a petition for a rehearing *en banc*, arguing that the Second Circuit's decision to allow for the disgorgement of profits that he never

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received, enjoyed, or controlled is in conflict with long-standing precedent. His petition was recently rejected by the Second Circuit, and the decision will stand for the foreseeable future.

The Second Circuit has already begun to uphold disgorgement orders that demand more than just the profit realized by the trader himself. In *SEC v. Pentagon Capital Management PLC*,[6] the Court affirmed the district court's decision to impose a disgorgement award jointly and severally on all defendants in connection with "late trading" in the mutual fund market. The defendants petitioned the Supreme Court to review the ruling,[7] arguing that if the Second Circuit's ruling is allowed to stand, "nearly every defendant who collaborated with another in a securities fraud case would potentially face joint and several liability for the total gain, equity notwithstanding."[8] Apparently content to let stand the petitioners' warnings of "grave implications for the investment advisory industry,"[9] the Supreme Court recently denied certiorari.

The Second Circuit has already begun to uphold disgorgement orders that demand more than just the profit realized by the trader himself.

The SEC is similarly using the holding in *Contorinis* to bolster its enforcement efforts. In its complaint in a case pending against a former law firm clerk and a trader,[10] the SEC has requested an order that the two defendants disgorge all illicit profits or other ill-gotten gains received by any person or entity.[11] *Contorinis* now dictates that these defendants and many future defendants must face disgorgement (and by operation of the Insider Trading Sanctions Act ("ITSA"), additional civil monetary penalties) for sums that far exceed the amounts they themselves realized as part of their trading scheme. Under the ITSA, the SEC can seek a civil penalty as high as three times the profit gained or loss avoided from the illegal trades.

Supreme Court Revisits "Fraud on the Market" Presumption

Against a backdrop that featured high-profile calls for the Supreme Court to overrule, affirm and modify its ruling in Basic Inc. v. Levinson,[17] *the Court preserved* Basic *as good precedent, thereby preserving the "fraud on the market" presumption available to plaintiffs in class action securities litigations. In doing so, however, the Court potentially shifted the procedural landscape of these types of litigations in favor of defendants by clarifying that a defendant need not wait until the merits stage of an action to rebut the presumption, but may do so at the class certification stage.*

On June 23, 2014, the U.S. Supreme Court issued its much anticipated decision in *Halliburton Co. v. Erica P. John Fund*.[18] Although the Court declined to overrule the "fraud on the market" presumption of reliance adopted in *Basic Inc. v. Levinson*, it held that a defendant may rebut that presumption at the class certification stage by introducing evidence that the alleged misrepresentation did not affect the stock price. The *Halliburton* decision does not fundamentally transform securities class action litigation, but it does arm defendants with a potentially important new weapon to defeat class certification in certain cases.

The *Basic* Presumption of Reliance

In *Basic*, the Court held that plaintiffs asserting claims under Rule 10b-5 may – in most circumstances involving publicly traded securities – satisfy the reliance element of a Section 10(b) action by means of a rebuttable "fraud on the market" presumption. This presumption was predicated upon the "efficient capital markets hypothesis" – an economic theory positing that "the market price of shares traded on well-developed markets reflects all publicly available information," including "any material misrepresentations," and on the premise that an "investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price."[19] According to *Basic*, "[b]ecause most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations . . . may be presumed for purposes of a Rule 10b-5 action."[20] This rebuttable presumption is crucial to a plaintiff's ability to maintain a class action because, without it, each member of the purported class would have to offer proof of individualized reliance, and the requirement under Federal Rule of Civil Procedure 23 that common issues of fact and law predominate over any questions affecting only individual members would not be

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Supreme Court Revisits "Fraud on the Market" ■ Continued from page 4

satisfied. Plaintiffs invariably invoke the presumption of reliance in seeking to certify a class in securities fraud cases.

The *Halliburton* Decision

In *Halliburton*, the Court considered two related questions. First, the Court considered whether *Basic*'s "fraud on the market" presumption of reliance should be overruled or substantially modified. Second, the Court considered whether a defendant may rebut the presumption and defeat class certification by introducing evidence that the alleged misrepresentations did not distort the market price of defendant's stock.

> Defendants in class action securities litigation may now rebut the "presumption of reliance" element of Section 10(b) action at the class certification stage.

In an opinion by Chief Justice Roberts, joined by five other justices, the Court declined to overrule or modify the "fraud on the market" presumption. The Court considered and rejected Halliburton's argument that numerous studies have cast doubt on the reliability of the "efficient capital markets hypothesis," noting that "[e]ven the foremost critics of the efficient-capital-markets hypothesis acknowledge that public information generally affects stock prices."[21] The Court stated that "*Basic* recognized that market efficiency is a matter of degree."[22] The Court also rejected Halliburton's argument that investors do not rely on the integrity of the market price when buying stock. Investors, Halliburton argued, frequently make investment decisions believing that shares are undervalued or overvalued and therefore present an opportunity to profit. The Court observed, however, that even such investors rely "on the fact that a stock's market price will eventually reflect material information" – generating the market correction that eventually allows the investor to profit.[23] Having rejected these arguments, the Court concluded that Halliburton had not set forth the "special justification" necessary for the Court to overrule long-settled precedent, particularly in light of the fact that Congress has shown a willingness to address policy concerns in the area of securities litigation.[24]

Although the Court rejected Halliburton's frontal assault on *Basic*, it nevertheless agreed that a defendant should be allowed to rebut the presumption of reliance at the class certification stage by producing evidence that any alleged misrepresentations did not affect the stock price. Prior to *Halliburton*, a defendant was limited at the class certification stage to challenging the prerequisites for the presumption – usually whether the market for the shares was efficient – and could not directly address price impact until the merits stage. This restriction, the Court held, "makes no sense."[25] "Under *Basic*'s fraud-on-the-market theory, market efficiency and the other prerequisites for invoking the presumption constitute an indirect way of showing price impact. . . . [I]t is appropriate to allow plaintiffs to rely on this indirect proxy for price impact . . . [b]ut an indirect proxy should not preclude direct evidence when such evidence is available."[26]

Significance for Securities Litigation

The *Halliburton* decision makes clear that defendants can attack class certification by offering evidence that an alleged misrepresentation did not actually affect the market price of the stock. As a result, the *Halliburton* decision is likely to encourage more defendants to contest class certification vigorously rather than pursuing settlement when a complaint survives a motion to dismiss, particularly when defendants believe – based on statistical analysis or an events study – that their chances of rebutting the presumption of reliance are strong. Moreover, because evidence relating to price impact will often include statistical analyses, such as "event studies," class certification will likely involve expert opinions – increasing the costs of discovery in connection with class certification.

SEC Uses Non-Prosecution Agreement as a Tool to Incentivize Cooperation in Insider Trading Case

In connection with a recent series of insider trading-related charges, the SEC signaled that cooperation can bring with it significant benefits to defendants, including reduced fines – and even non-prosecution agreements for cooperating witnesses. In a series of settled insider trading actions involving *GSI Commerce, Inc.* ("GSI"),[27] the SEC entered into its first ever non-prosecution agreement with an individual trader who was involved in the alleged insider trading scheme, signaling to the market that the SEC will seek to incentivize cooperation to unravel complex insider trading or other fraudulent schemes.

On April 25, 2014, the SEC charged the former Chief Executive Officer of the marketing solutions division of GSI, Christopher Saridakis, for violating his fiduciary duties by providing material non-public information ("MNPI") to two family members and two friends in advance of eBay's March 28, 2011 announcement of its acquisition of GSI. Following the announcement, GSI's stock price increased more than 50 percent.[28] Saridakis has since settled with the SEC and has agreed to an officer-and-director bar and a fine of $664,822 which includes a penalty equal to twice the amount of his tippees' profits. On May 9, 2014, Saridakis also pled guilty to securities fraud in a parallel action brought against him by the U.S. Attorney's Office for the Eastern District of Pennsylvania. His sentencing hearing is scheduled for September 19, 2014 and he faces up to 20 years in prison and a $5 million fine.[29]

The SEC also charged five traders in connection with the insider trading scheme. Jules Gardner and Suken Shah, both friends of Saridakis, purchased thousands of shares in advance of the merger based on the former CEO's tip. Shah passed along the tip to his brother, Shimul Shah, who also traded on the MNPI. Two other traders, Oded Gabay and Aharon Yehuda, were charged for trading in advance of the eBay merger based on a tip provided by another GSI insider and his wife.

> "The reduction in penalties for those tippees who assisted us, together with the non-prosecution agreement for one of the traders, demonstrate the benefits of cooperating with our investigations. The increased penalties for others highlight the risks of impeding our work."
>
> - Andrew Ceresney, SEC Enforcement Director

This case is noteworthy because the SEC appeared to strongly incentivize cooperation with the agency's investigation by entering into its first ever non-prosecution agreement with an individual trader who was involved in the scheme.[30] This individual was tipped by Shimul Shah, but the SEC declined to prosecute the unnamed individual because the trader provided "early, extraordinary, and unconditional cooperation."[31] Additionally, the five named traders have settled the administrative proceedings brought against them for amounts that vary based on their level of cooperation with the investigation. The SEC stated that it did not seek a penalty against Gardner because he has agreed to continue cooperating in the ongoing investigation, and Gabay's penalty was reduced in order to reflect his early cooperation in the investigation.

DEVELOPMENTS TO WATCH

U.S. v. Newman: Court to Rule on Scope of Tippee Liability

In the pending case *United States v. Newman*,[32] the Second Circuit is poised to rule on the scope of "downstream" tippee liability for insider trading prosecutions.

The issue before the Second Circuit is whether the government must prove that the person who received MNPI (*i.e.*, the "tippee") had knowledge that the "insider" or person who leaked the MNPI (i.e., the "tipper") received a personal gain in exchange for leaking the MNPI. The outcome of this closely watched case could have far-reaching consequences not only for currently pending insider trading cases but also for future actions brought by the government. If the Second Circuit rules that knowledge of the tipper's personal benefit is required, the government will be faced with a potentially significant hurdle in pursuing remote or "downstream" tippees.

Although the Second Circuit is not expected to rule in the *Newman* case until later in the year, the uncertainty related to the substantive issues in question is affecting the status of other pending actions. For example, the administrative law judge overseeing the SEC's administrative case against SAC Capital Advisors founder Steven Cohen granted a stay of that case, which had been requested by prosecutors for the SDNY, until the Second Circuit issues its decision clarifying the scope of tippee liability. Similarly and as discussed under "Notable Cases" *infra*, in the jury acquittal recently of Rengan Rajaratnam (Raj Rajaratnam's younger brother), the judge dismissed two of the insider trading charges because prosecutors had failed to present evidence that Rengan was aware that the "tip" in question was exchanged for a benefit.

SEC Working to Expand Toolkit

The SEC is evaluating new ways to pursue and ultimately prevail against those who are alleged to have committed insider trading violations. Recent remarks by SEC officials highlight two new tools the SEC might use in its aggressive pursuit of alleged violators.

In a June 11, 2014 speech, SEC Enforcement Director Andrew Ceresney indicated that for some insider trading cases, the SEC plans to bring in-house administrative proceedings instead of bringing those cases to federal court.[33] The Dodd-Frank Act authorized the SEC to seek civil penalties in administrative proceedings. Prior to the passage of the Dodd-Frank Act, the SEC's authority to impose civil penalties in administrative proceedings was limited to certain entities regulated by the SEC, such as broker-dealers, investment advisers and mutual funds.

Administrative proceedings present a potentially more attractive enforcement path for the SEC than jury trials because of the perceived advantages of having an SEC administrative law judge presiding over the hearing, as well as the fact that review of any initial determination in such a proceeding is subject to *de novo* review by the SEC's Commission itself. Further, the procedural protections afforded to respondents in administrative proceedings differ from those available to defendants in federal court actions. In particular, there is limited discovery available to a respondent in an SEC administrative proceeding, as compared to the broad discovery rights afforded defendants in civil actions.[34] The SEC does appear to be open to a much-needed review of the rules governing administrative proceedings, an issue defense counsel have expressed concern about for a number of years.

In a May 19, 2014 speech, SEC Chair Mary Jo White referenced a "new" approach to charging individuals under Section 20(b) of the Exchange Act of 1934.[35] Historically, the SEC has rarely utilized Section 20(b), which states: "It shall be unlawful for any person, directly or indirectly, to do any act or thing which it would be unlawful for such person to do under the provisions of this charter or any rule or regulation thereunder through or by means of any other person."[36] Chair White indicated that Section 20(b) charges are focused on individuals who engage in unlawful activities but try to insulate themselves by using other individuals to manipulate the market and defraud investors.

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Importantly, Section 20(b) is a form of primary liability, rather than secondary liability, which would require proof of a separate violation by someone other than the defendant. So, the SEC can use Section 20(b) where aiding and abetting or controlling person theories may fall short because there is no underlying violation by someone else, such as, for example, when the other person who publicly makes the misleading statements lacks knowledge that they were misleading. One potentially powerful application of Section 20(b) could be to sidestep the roadblock erected by the Supreme Court in *Janus Capital Group v. First Derivative Traders*[37] to finding Rule 10b-5 liability for any person who did not "make" (as opposed to contribute to) a materially misleading statement. As noted by Chair White, Section 20(b) lets the SEC "reach those who have participated in disseminating false or misleading information to investors through offering materials, stock promotional materials, or earnings call transcripts, but who might not be liable under Rule 10b-5(b) following the Supreme Court's decision in *Janus* because they may not be the "maker" of the statement."[38]

NOTABLE CASES

The following notable cases from the last several months demonstrate the SEC and DOJ's aggressive focus on enforcement and prosecution of insider trading and other securities violations. They also illustrate the challenges the government might face when testing the outer boundaries of liability under established legal theories or causes of action.

- *SEC v. Wyly, et al.*:[39] In early May, the SEC won an important and high-profile trial victory against Texas tycoon Sam Wyly and the estate of his late brother Charles Wyly, Jr. on claims that the brothers improperly used foreign trusts to secretly sell shares of four public companies for which they served as board members, thereby permitting the Wyly brothers to avoid SEC beneficial ownership reporting. The parties are scheduled to hold a damages trial on the fraud claims on August 4. In a recent development in the case earlier this month, Judge Scheindlin of the SDNY dismissed the SEC's insider trading claims against the Wyly brothers. The insider trading claims were not tried before the jury because the SEC was time-barred from seeking civil penalties. The SEC alleged that the Wylys' *desire* to sell stock constituted MNPI. In her opinion rejecting the SEC's theory of liability, Judge Scheindlin held that, "[a] ccepting the SEC's theory in this case would mean extending the definition of materiality to cover the thought process and personal desires of any director or shareholder with substantial control over a company."[40] Judge Scheindlin acknowledged the challenge of drawing a line between "inchoate desire and something more material," but noted that failing to draw such a line "would both impermissibly broaden civil and criminal insider trading liability and potentially extend the reach of the securities laws, which turn on materiality."[41]

- *SEC v. Obus, et al.*:[42] In May, a jury acquitted hedge fund manager Nelson Obus of all charges, ending what Obus termed a "12-year campaign of regulatory overreach."[43] The charges against Obus and another Wynnefield employee were based on the acquisition of Sunsource Inc. in 2001, which they allegedly learned about ahead of time and traded on, making approximately $1.3 million. According to the SEC, Obus spoke on the phone with the Sunsource CEO shortly after hearing the alleged tip and mentioned that a "little birdie"[44] had told him about the acquisition. Obus defended himself by pointing to his innocent conduct: he waited two weeks after receiving the supposed tip to trade, and negotiated a discount for the shares he did purchase. In addition, Obus's lawyer ridiculed the SEC's theory that "someone who wanted to secretly trade on a tip [would] call up the CEO of the company and say, 'I've been tipped'"; [45] that would have made Obus "the lamest insider trader in history."[46]

- *SEC v. Moshayedi*:[47] A jury in June returned a verdict for the defendant Manouchehr Moshayedi, the co-founder of computer storage device company sTec Inc., in one of the largest insider trading enforcement cases to go to trial. The SEC alleged that Moshayedi knew that one of sTec's primary customers bought more solid state drives than it needed in the third quarter of 2009 (under pressure from sTec) and therefore would order fewer drives in the future. The SEC then alleged that Moshayedi sold $267 million worth of shares in a secondary offering in August 2009 without disclosing his alleged knowledge that there would not be large recurring purchases from certain customers, at least in the near future. While on their face, these allegations present the classic hallmarks of an insider trading claim, the

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jury nonetheless rejected the SEC's theory, finding Moshayedi not liable after less than a day of deliberations. The jury's rejection of the SEC's case illustrates the uncertainties and risks (for both the SEC and individual defendants) of taking cases – even those considered to be strong cases – to trial.

- *United States v. Rajaratnam*:[48] On July 8, 2014, Rengan Rajaratnam was acquitted by a federal jury in lower Manhattan on the sole charge of conspiracy to commit insider trading. Rengan is the younger brother of Raj Rajaratnam, the former hedge fund manager convicted of insider trading in 2011 and sentenced to 11 years in prison in addition to a $10 million fine and disgorgement of $53.8 million. Initially, Rengan was indicted on seven criminal charges, four of which were dropped by the prosecutors before the trial began. During the trial, Judge Naomi Reice Buchwald dismissed two of the insider trading charges because prosecutors had not presented evidence proving that Rengan was aware that the "tip" in question was exchanged for a benefit (the key issue raised in the *Newman* case discussed *supra*). Thus, the jury was left to consider only the conspiracy charge, which was related to an allegation that Rengan conspired with his older brother to obtain information with regard to a potential investment in Advanced Micro Devices in 2008. After only several hours of deliberation, the jury decided that the evidence against Rengan, including wiretapped communications between Rengan and his older brother in which Rengan referred to a friend at McKinsey & Company as a "little dirty,"[49] was not strong enough for a conviction.

NOTES

1. Daniel M. Hawke, Chief of the SEC Enforcement Division's Market Abuse Unit, *SEC Charges Stockbroker and Law Firm Managing Clerk in $5.6 Million Insider Trading Scheme* (March 19, 2014), http://www.sec.gov/News/Press Release/Detail/PressRelease/1370541172895.
2. *Steginsky v. Xcelera Inc.*, 741 F.3d 365, 371 (2d Cir. 2014).
3. 15 U.S.C. § 78j(b).
4. *Steginsky*, 741 F.3d at 371.
5. *See United States v. Whitman*, 904 F. Supp. 2d 363, 369 (S.D.N.Y. 2012).
6. *See SEC v. Contorinis*, 743 F.3d 296, 302-307 (2d Cir. 2014).
7. *Supra* note 1.
8. *Contorinis*, 743 F.3d at 301.
9. *See SEC v. Warde*, 151 F.3d 42, 49 (2d Cir. 1999); *Elkind v. Ligget & Myers Inc.*, 635 F.2d 156, 165 (2d Cir. 1980); *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1308 (2d Cir. 1971).
10. *Contorinis*, 743 F.3d at 303.
11. 725 F.3d 279 (2d. Cir. 2013).
12. *See* Petition for Writ of Certiorari, 82 USLW 3573 (U.S., Mar. 19, 2014) (No. 13-1142).
13. *Id.* at 39-40.
14. *Id.*

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15. Complaint at 1, *SEC v. Eydelman*, (D.N.J. March 19, 2014), *available at* http://www.sec.gov/litigation/complaints/2014/comp-pr2014-55.pdf.
16. *Id*. at 69.
17. 485 U.S. 224 (1988).
18. *Halliburton Co. v. Erica P. John Fund*, No. 13-317, 2014 WL 2807181.
19. *Basic*, 485 U.S. at 246.
20. *Id.* at 247.
21. *Halliburton,* at 10.
22. *Id.*
23. *Id.* at 12.
24. *Id.* at 4, 12-16.
25. *Id.* at 19.
26. *Id.* at 20.
27. *See SEC v. Saridakis*, Civil Action No. 152397 (E.D. Pa. 2014); *In the Matter of Sunken A. Shah*, Adm. Proc. File No. 3-15856 (2014); *In the Matter of Oden Gabay*, Adm. Proc. File No. 3-15854 (2014); *In the Matter of Aharon R. Yehuda*, Adm. Proc. File No. 3-15855 (2014).
28. *SEC Charges Six Individuals With Insider Trading in Stock of E-Commerce Company Prior to Acquisition by eBay* (April 25, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370541642140.
29. *Former eBay Executive Pleads Guilty to Insider Trading Charges* (May 9, 2014), http://www.fbi.gov/philadelphia/press-releases/2014/former-ebay-executive-pleads-guilty-to-insider-trading-charges.
30. To date, the SEC has reached non-prosecution agreements with four companies. *See* Press Release, U.S. Sec. and Exch. Comm'n, SEC Charges Former Carter's Executive With Fraud and Insider Trading, Rel. No. 2010-252 (Dec. 20, 2010), http://sec.gov/news/press/2010/2010-252.htm; SEC Charges Former Fannie Mae and Freddie Mac Executives with Securities Fraud, Rel. No. 2011-267 (Dec. 16, 2011), http://www.sec.gov/news/press/2011/2011-267.htm; SEC Announces Non-Prosecution Agreement With Ralph Lauren Corporation Involving FCPA Misconduct, Press Release No. 2013-65 (Apr. 22, 2013), http://www.sec.gov/news/press/2013/2013-65.htm.
31. *Supra* note 28.
32. *United States v. Newman*, No. 13 1837 (2d Cir. filed May 10, 2013).
33. Brian Mahoney, *SEC Could Bring More Insider Trading Cases In-House* (June 11, 2014), www.law360.com/articles/547183/print?section=securities.
34. *Id.*
35. Mary Jo White, NYC Bar Association's Third Annual White Collar Crime Institute (May 19, 2014), www.sec.gov/news/speech/detail/speech/137041858285.
36. 15 U.S.C.A. § 78t (West).
37. *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011).
38. *Supra* note 35.
39. No. 1:10-CV-05760 (S.D.N.Y.).

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Notes ■ Continued from page 10

40. *Id.* at 26.
41. *Id.* at 26-27.
42. No. 1:06 CV-02150 (S.D.N.Y.).
43. Nate Raymond, *SEC Loses Insider Trading Case Against New York Fund Manager*, Reuters, May 30, 2014, *available at* http://www.reuters.com/article/2014/05/30/us-sec-insidertrading-idUSKBN0EA26Q20140530.
44. Bob Van Voris, *SEC's Insider-Trading Case Against Obus Revived on Appeal*, Bloomberg News, May 20, 2014, *available at* http://www.bloomberg.com/news/2014-05-19/sec-s-insider-trading-case-against-obus-revived-on-appeal.html.
45. *Id.*
46. Joe Palazzolo, *Nelson Obus's Lawyer Says His Client Is Honest or the 'Lamest Insider Trader in History'*, Wall St. J., May 19, 2014, *available at* http://online.wsj.com/news/articles/SB10001424052702304422704579572473569781570.
47. Civ. No. 12-1179 (C.D. Cal.).
48. 1:13-cr-00211 (S.D.N.Y.).
49. Matthew Goldstein, *If Convicted, Rengan Rajaratnam Faces Light Insider Trading Sentence*, N.Y. Times, July 3, 2014, *available at* http://dealbook.nytimes.com/2014/07/03/if-convicted-rengan-rajaratnam-faces-light-insider-trading-sentence/?_php=true&_type=blogs&_r=0.