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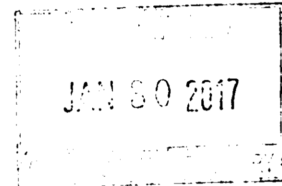
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16383

In the Matter of
CHARLES L. HILL, JR.,
Respondent.



DIVISION OF ENFORCEMENT'S POST-HEARING BRIEF

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INTRODUCTION

Between June 1 and July 8, 2011, Respondent Charles L. Hill, Jr. suddenly invested more than $2 million in Radiant Systems, Inc. ("Radiant"), a point-of-sale technology company used by restaurants and other retailers. At that time, Hill had not bought any stock in four years and he did not even have an active brokerage account. Hill's investment in Radiant totaled more than five times his annual income, nearly sixty percent of his liquid assets, and about one third of his total net worth. This risky investment was also a radical departure from the more conservative investment options that Hill had recently been discussing with a broker at SunTrust Investment Services ("SunTrust"). Hill did not hold his 101,600 shares of Radiant stock for long. He sold all of it just 41 days after his first purchase, netting him around $744,000 in gains.

Hill earned such a staggering return because his investments coincided with the precise two-month period in which NCR Corporation ("NCR") acquired Radiant. Indeed, Hill sold all of his Radiant shares the day after the deal was announced. During this time period, phone records reflect that Hill had numerous calls with Todd Murphy, who is one of his closest friends. Murphy, in turn, spoke incessantly with Andrew Heyman, who is one of Murphy's best friends and was the Chief Operating Officer ("COO") of Radiant. As the company's COO, Heyman was heavily involved in the merger discussions.

Hill claims that he had actually been following Radiant for many years based on his work in the restaurant business, and that even though the company's stock price fluctuated greatly, he just believed in June 2011 that it was likely to increase. Hill's explanation for why he invested $2 million in Radiant is not credible.

Hill also lied to his SunTrust broker when he bought and sold Radiant shares. The SunTrust broker asked him whether he knew people who worked at Radiant when he bought the

company's stock because she was uncomfortable with his sudden desire to invest substantial funds in the company. He lied, saying that he did not. When he sold the stock a few weeks later, the SunTrust broker asked the same question given her concerns, and Hill repeated the lie. In fact, Hill knew Radiant's COO (Heyman), CEO, and CFO. Hill's attempt to conceal his ties to officers at Radiant further supports the conclusion that Hill engaged in insider trading.

At trial, the Division of Enforcement presented compelling circumstantial evidence that Hill violated Section 14(e) of the Securities Exchange Act of 1934 and Rule 14e-3. As described above, this evidence includes: (i) Hill's highly aberrational trading; (ii) Hill's suspiciously timed trades; (iii) Hill's false statements to his SunTrust broker about his connections to Radiant insiders; (iv) Hill's implausible explanations for the trades; (v) the extraordinarily close relationship between Heyman and Murphy; and (vi) frequent communications between Heyman and Murphy and between Murphy and Hill.

Contrary to Hill's contention, the Division does not need a confession to prevail in this case. Heyman and Murphy both acknowledged that they have been friends for forty years, they are as close as brothers, and they routinely share personal information. Their claim that they spoke about everything except the Radiant acquisition is not credible and should be rejected. The Court should find Hill liable for violating Section 14(e) and Rule 14e-3.

Based on these violations, the Court should grant the relief set forth in the Order Instituting Proceedings. Specifically, the Court should: (i) issue a cease-and-desist order against Hill; (ii) require Hill to disgorge his ill-gotten gains totaling $744,509.63, plus order Hill to pay $138,918.83 in prejudgment interest; and (iii) impose a civil penalty in the amount of $150,000.

STATEMENT OF FACTS

A. Charles Hill Background

Hill was born in 1959 and resides in Atlanta, Georgia. (Tr. 86.) He has been married to Julia Hill since 1987. (Tr. 88.) They have three daughters. (*Id.*) Hill works in the real estate business, buying commercial property and then leasing it to restaurant chains like Chick-fil-A. (Tr. 87.) Hill earns about $350,000 annually from these deals, which is his principal source of income. (Tr. 87-88.)

Hill has been close friends with Todd Murphy for more than twenty years. (Tr. 96-97, 880.) As one of his "closest friends," Hill speaks frequently with Murphy by phone. (Tr. 96-97.) In 2011, they generally spoke at least three or four times per week. (*Id.*; Ex. 506; Resp't. Ex. 99.) Hill also saw Murphy in person every few weeks in 2011. (Tr. 881-82.) Hill and Murphy are close enough friends that Murphy, who is an artist, feels comfortable asking Hill to lend him money, and Hill has done so. (Tr. 98-101; Exs. 69, 71.)

B. The Close Relationships Between Andrew Heyman, Todd Murphy, And Hill

Radiant was a point-of-sale technology company for restaurants and retailers. (Tr. 369.) John Heyman worked at the company for 17 years, and was its CEO from 2004 until July 2011. (Tr. 369-70.) John's younger brother Andrew Heyman worked at Radiant for 15 years, and was its COO from the early-2000s until July 2011. (Tr. 506-07.) Mark Haidet was Radiant's CFO. (Tr. 372.) In May 2011, Hill knew all three men and their respective positions at Radiant. (Tr. 102-03, 110, 114.)

Hill met Andrew Heyman in the early 1990s. (Tr. 102-04.) Hill and Andrew Heyman have been acquaintances since that time. (*Id.*) Andrew Heyman and Murphy have known each other for more than forty years. (Tr. 863.) They met in elementary school, attended the University of Georgia together, and were fraternity brothers there. (Tr. 511-12, 863, 883.) They

have an "incredibly close" relationship that is "almost brotherly." (Tr. 512, 864-65, 882; Respn't Ex. 41.) Andrew Heyman does not have a closer friend. (Tr. 513.) In 2011, he and Murphy spoke by phone "very frequently," they texted regularly, and they also saw each other in person "a reasonable amount." (Tr. 514-15; Ex. 506.)

Andrew Heyman and Murphy routinely shared personal information with each other. (Tr. 883.) As Heyman testified: "We talked about everything." (Tr. 517.) Heyman thought that he could confide in Murphy, and regularly sought guidance from Murphy on both personal and professional matters. (Tr. 518, 526, 887.) For example, Andrew Heyman discussed his work at Radiant, divorce from his wife of nearly 20 years, kids, girlfriends, and health issues.[1] (Tr. 518-19, 524-27.) Heyman trusted Murphy and viewed him essentially as a spiritual adviser. (Tr. 518-19, 525.) Heyman has also helped Murphy financially through the years, including by investing in an art gallery that shows Murphy's artwork and by giving Murphy $100,000 in August 2011 when Murphy moved to New York. (Tr. 528, 896-97.)

Hill knew that Murphy and Andrew Heyman grew up together, had known each other for many years, and were very close friends. (Tr. 102.) Murphy, in turn, knew that Hill and Andrew Heyman were acquaintances, and thinks that he may have introduced them to each other in the 1990s. (Tr. 104, 886-87.) Hill and Murphy occasionally talked about common acquaintances, including Andrew Heyman. (Tr. 104.) Murphy talked to Hill about growing up with Andrew Heyman, and spoke "super highly" of him. (Tr. 111.) Hill testified that Murphy also periodically told him about developments in Andrew Heyman's life, including when Heyman got divorced, when Heyman sold his house, and where Heyman liked to stay in New York. (Tr. 104-

[1] Murphy testified that Andrew Heyman was like a brother to him and they routinely shared personal information, *see* Tr. 883, but Murphy claims that they never discussed Heyman's work at Radiant. (Tr. 884.) Murphy acknowledges though that he knew Andrew Heyman was a high level executive at Radiant. (Tr. 888.)

05.) Murphy, however, denies that he ever spoke to Hill about Andrew Heyman during their twenty-year friendship. (Tr. 887-88.)

Hill also knew John Heyman. (Tr. 110-11.) Hill and John Heyman met in 2004 through their children. (*Id.*) Hill and John Heyman occasionally crossed paths since then, including at college football games and once while on vacation in Colorado. (Tr. 112-14.) Murphy also knew John Heyman, but was closer with Andrew Heyman. (Tr. 888.) Hill testified that Murphy spoke to him about John Heyman a few times. (Tr. 114.) Murphy claims that he never spoke to Hill about John Heyman. (Tr. 889.)

John Heyman introduced Hill to Haidet in 2010, when Haidet wanted to open a restaurant as a side business. (Tr. 114-15.) Hill spent around six months with Haidet looking at sites for the restaurant. (*Id.*)

C. Hill Meets With A SunTrust Broker After Selling Chick-fil-A Properties And Discusses Conservative Investment Options

In February 2011, Hill sold a Chick-fil-A restaurant site on Piedmont Road in Atlanta for around $3.6 million. (Tr. 229; Ex. 142 at CH0534.) Hill deposited the proceeds into a SunTrust bank account for a company of his named Grancal LLC. (*Id.*; Tr. 116.) After commission and debt, Hill was left with around $3.4 million. (Tr. 230; Ex. 142 at CH0534.) Hill planned to use $2.55 million of that money on two other real estate deals with Chick-fil-A. (Tr. 231.) One of the sites was located on Northside Drive in Atlanta. (Tr. 230; Ex. 293 at CH1747-48.) The price for the Northside property was $2 million. (Tr. 235, Ex. 293 at CH1748.) Hill's contract for the Northside property was canceled, however, on March 3, 2011. (Tr. 235; Ex. 325 at CH1759.) The funds that Hill planned to use for that deal remained in his SunTrust bank account through May 2011. (Tr. 236-38; Ex. 143 at CH0536; Ex. 144 at CH0538; Ex. 145 at CH0541.)

The other Chick-fil-A deal was in Bremen, Georgia. (Tr. 230, 238-39; Ex. 292 at CH1674; Ex. 294 at CH1684.) The purchase price for the Bremen property was $550,000. (*Id.*) Chick-fil-A unexpectedly terminated the Bremen deal, however, on May 12, 2011. (Tr. 240-41; Ex. 332 at CH1630.) On May 18, 2011, Hill terminated his contract to purchase the Bremen property.[2] (Tr. 241-42; Ex. 340 at CH1609.)

On May 19, 2011, Hill met with a broker at SunTrust named Lynn Carter. (Tr. 752; Ex. 117 at SUNTRUST0185.) Hill was referred to Carter because he wanted to get a higher rate of return on the money that was in his SunTrust bank account. (*Id.* at 116-118, 752-53.) At that time, Hill had a net worth of around $5 million, of which roughly $3 million was in liquid assets. (Tr. 88-89; Ex. 4 at 3; Ex. 117 at SUNTRUST 0185.) Hill claimed that this meeting was merely a courtesy to Carter, but he provided her significant amounts of information about himself and his investment objectives at the meeting. (Tr. 753-54; Ex. 117 at SUNTRUST 0185.) For example, Hill told Carter that after deducting business expenses, paying taxes, and reserving funds for future Chick-fil-A deals, he had $1.1 million to invest.[3] (*Id.*) Hill indicated that preservation of capital was his primary objective for the funds. (Ex. 42 at 98; Tr. 755-56; Ex. 4 at 3.) Hill and Carter accordingly discussed conservative investment options. (Tr. 755-58; Ex. 473 at SUNTRUST0133.) Hill did not tell Carter that he wanted to invest in stocks, nor did he mention the company Radiant or that he had been considering investing in that company. (Tr.

[2] Hill testified that he was also actively working on a third Chick-fil-A deal on Ponce de Leon avenue in 2011. (Tr. 230.) The documentary evidence shows, and Hill later admitted, that the agreement for that location was canceled in November 2010. (Tr. 243-45; Ex. 321 at CH 1797; Ex. 322 at CH1838.)

[3] Hill was looking to complete a new Chick-fil-A deal by the end of the year. (Tr. 180-82.) Hill told Marianne McCabe, his contact at Chick-fil-A, that he could close in 30 days or less. (*Id.*) Hill was concerned in 2011 that he either could not get financing or, if he could, it would not be on favorable terms. (Tr. 357.)

759.) In fact, Hill told Carter that he did not want to invest in equities because he wanted to avoid risky investments. (Tr. 756, 758.)

Hill had not traded in any stock since 2007, and the brokerage account he had used for that transaction was no longer active. (Tr. 90, 759; Ex. 42 at 27.) Hill had lost a significant amount of money in the stock market in the 1980s, and he understood that the value of a stock can go down significantly in a short period of time. (Tr. 345-46.) Hill did not invest any of the money in the Grancal bank account with Carter and SunTrust at that time. (Tr. 759-60.) Hill did not have a specific date by which he wanted to invest the funds, nor did it appear to Carter that Hill was in a rush to invest the funds. (Tr. 125, 759.)

D. NCR Initiates Merger Discussions With Radiant

In May 2011, NCR's CEO, Bill Nuti, called John Heyman to discuss the potential merger of their companies. (Tr. 379-81.) NCR had tried to acquire Radiant in April 2010, but those negotiations did not go far. (Tr. 380, 388-91; Ex. 54 at 11-12.) John Heyman told Nuti that NCR would have to pay a per-share price "in the mid-twenties," which NCR was not willing to pay. (Ex. 54 at 11-12.)

In May 2011, however, Nuti contacted John Heyman to renew the offer, saying that he was "now at [John Heyman's] price." (Tr. 393; Ex. 54 at 13.) On May 11, 2011, John Heyman met Nuti in New York to discuss the possible merger. (Tr. 393; Ex. 54 at 13.) On May 12, 2011, NCR sent Radiant a nonbinding indication of interest in the $24-$26 per share price range. (Ex. 54 at 13; Ex. 331 at NCR6085.) NCR's offer was "significantly higher" than Radiant's current stock price of around $20/share. (Tr. 396, Ex. 62 at 43.) NCR's new offer was also at or above Radiant's internal valuations of the company. (Tr. 394-95; Ex. 284; Ex. 329.) As a result, John Heyman knew that NCR was "very serious" about acquiring Radiant. (Tr. 397, 402.)

Around the time that John Heyman received NCR's offer, he told Andrew Heyman, who was in John's "inner circle," about NCR's renewed offer, that Nuti was serious, and that John wanted the process to move quickly. (Tr. 398-99.) Nuti was also acting with a sense of urgency. (Tr. 401; Ex. 337.) Andrew Heyman thought that NCR's offer was good. (Tr. 399, 540.) John Heyman agreed, but thought that he could negotiate an even higher price. (Tr. 398, 419-20.)

On May 23, 2011, Radiant's Board of Directors held a special meeting to discuss NCR's offer. (*Id.*; Ex. 278.) John and Andrew Heyman attended. (Ex. 278; Tr. 414.) Radiant's Board concluded, in consultation with its legal counsel, that NCR's price range was too low, but the Board wanted to move forward with considering strategic alternatives, including a merger with NCR. (*Id.*; Tr. 393.) Radiant retained two investment banks to assist it with the process. (*Id.*; Tr. 409; Ex. 347.)

John Heyman wanted to limit the number of people who knew about the possible merger. (Tr. 382-83.) Andrew Heyman was in the "really close circle" of around seven people at Radiant who knew about it. (Tr. 382-83, 440-41.) John Heyman updated those individuals, including his brother, "probably daily." (*Id.*)

By May 24, 2011, Radiant's investment bankers were already scheduling due diligence meetings with NCR and other potential strategic partners for the following week. (Tr. 425-26; Ex. 360; Ex. 364; Ex. 365.) Andrew Heyman was aware of those meetings and knew that he was going to participate extensively in them and the ongoing due diligence process. (Tr. 417, 420, 425-26, 438-39; Ex. 356; Ex. 360.) By May 25, 2011, Haidet and John Heyman were developing a cover story to preserve the confidentiality of the potential merger. (Tr. 426-429; Ex. 369; Ex. 371.) They also began using the code name "Project Ranger" for the deal. (Tr. 429; Ex. 361.)

E. Andrew Heyman Meets With Murphy The Same Day He Learns Of A Dinner Meeting with NCR

On May 26, 2011, John Heyman emailed Nuti to confirm due diligence meetings in New York on the next Friday (June 3). (Tr. 430-31; Ex. 381.) John Heyman also requested they have a dinner for the night before (June 2) so that Nuti could meet Andrew Heyman for the first time. (Tr. 431-33, 435-36; Ex. 381.) It was important for Andrew Heyman to meet Nuti, because John Heyman did not plan to stay at the company if the merger took place. (Tr. 385, 418-19.) The plan was for Andrew Heyman to take over Radiant's business after the merger. (*Id.*) Andrew Heyman struggled with whether that was something he wanted to do. (Tr. 386-87; Ex. 438.) John Heyman told his brother that afternoon about the dinner the following week. (Tr. 436.) Andrew Heyman's assistant confirmed his attendance by email at 4:44 p.m. on May 26, 2011. (Ex. 319.)

According to Andrew Heyman's email, he met Murphy at 5:30 p.m. that same day. (Tr. 565-66; Ex. 374.) Murphy called Hill at 7:37 p.m. that evening, and they spoke for seven minutes.[4] (Ex. 506 at 3.) At this time, Hill had a good understanding of stocks, and he understood that when a company is acquired its stock price generally increases. (Tr. 179-81; Ex. 4 at 3.)

F. Hill's Suspicious Trading Coincides With Significant Deal Events And Contacts With Murphy

1. Hill Opens A Vanguard Account Shortly After Talking With Murphy

On May 27, the day after talking with Murphy, Hill called Vanguard to open a new account. (Tr. 127-28; Ex. 506 at 4; Ex. 78 at 0:00-2:00.) At the time, Hill was driving to Florida on the Friday before Memorial Day for a week-long beach vacation. (Tr. 145-46.) Hill had

[4] Hill, Murphy, and Heyman claim that they do not recall the contents of their conversations from this period. (Tr. 196, 655-56, 881.)

never opened an account at Vanguard before. (Tr. 128; Ex. 512 at 4.) Hill asked the Vanguard representative the earliest date that he could access funds in his new account. (Tr. 137-38; Ex. 512 at 16-18; Ex. 78 at 11:55-13:45.) The Vanguard representative told Hill that if he submitted the account application by 10:00 p.m. that evening he could execute a trade on Wednesday, June 1, 2011. (*Id.*) Hill pulled off the highway in Clifton, GA and used internet access at a Chick-fil-A restaurant there to submit his online application. (Tr. 149; Ex. 169.) Two minutes after completing his call with Vanguard to open the account, Hill called Murphy and they spoke for more than an hour. (Ex. 506 at 4).

2. While On Vacation Hill Invests $90,000 In Radiant In His Daughters' Wells Fargo Accounts

In May 2011, Hill's three daughters each had a brokerage account at Wells Fargo Advisors. (Tr. 151.) Hill's father had opened the accounts years earlier. (Tr. 152.) In 2006, Hill became the custodian of the accounts. (Tr. 153.) Between 2006 and 2011, Hill did not buy any stock for his daughters. (Tr. 154.) The vast majority of the holdings were in mutual funds. (Ex. 205 at WF0129; Ex. 244 at WF0406; Ex. 224 at WF0641.) Each daughter also had a cash balance of around $40,000. (*Id.*) William Baird was the Financial Advisor for the accounts. (Tr. 155.)

On Wednesday, June 1, 2011, while he was still on vacation, Hill called Baird to buy Radiant stock for his daughters. (Tr. 157-58; Ex. 506 at 4.) At the time, Hill had not looked at any of Radiant's financial reports. (Ex. 42 at 39-41.) Hill also did not have any prior discussions with Baird about Radiant. (Tr. 154.) Baird had been a Financial Advisor in Atlanta for fifty years, but he had not heard of Radiant. (Tr. 213.) This trade was unsolicited. (Tr. 154.)

Hill instructed Baird to purchase 1,500 shares of Radiant stock for each of his daughters. (Tr. 157-58.) These unsolicited investments totaled around $90,000. (Exs. 202, 249, 219.) Hill

claimed at trial that he had been watching Radiant's stock since at least 2001. (Tr. 49.) As a result, he would have seen that Radiant's stock price was volatile. (Ex. 62; Tr. 74-83.) Hill also would have seen that Radiant's stock was trading at around the same price in June 2011 that it had traded at back in 2001. (*Id.*)

3. Unable to Trade In His New Vanguard Account, Hill Opens a New SunTrust Brokerage Account and Buys $1,000,000 In Radiant Stock

On June 1, 2011, Hill called Vanguard. (Ex. 506 at 4.) A representative of Vanguard told Hill that if he wired funds by 8:00 p.m. that evening, he could execute a trade the next day. (Tr. 166; Ex. 512 at 41.) Since he was still on vacation, Hill had to move "heaven and earth" to transfer the funds. (Ex. 82 at 4:20-end; Ex. 512 at 42; Tr. 166 (Hill "was trying to hustle to make sure [he] beat that deadline").) At around 5:00 p.m., Hill wired $1 million from his SunTrust bank account to fund the new Vanguard account. (Tr. 141-43, 162-63; Ex. 173; Ex. 110.)

The next day (June 2), Hill called Vanguard again to purchase Radiant stock. (Tr. 165; Ex. 506 at 4; Ex. 512 at 39.) The funds he had wired the prior afternoon, however, had not yet been deposited into his Vanguard account. (Tr. 164; Ex. 512 at 39; Ex. 82 at 0:00-1:27.) As a result, Hill was unable to execute the trade. (Tr. 165.)

On Friday, June 3, 2011 – the day that NCR and Radiant were having their due diligence meetings in New York – Hill spoke to Murphy for around twenty minutes. (Ex. 506 at 4; Tr. 168-69.) The next call Hill made was to Vanguard to buy Radiant stock. (*Id.*) At that time, Hill was driving back to Atlanta from his beach vacation. (Tr. 169-70.) Although the wire had gone through, Hill's account was not setup to allow him to purchase stock. (Tr. 170.) The Vanguard representative informed Hill that they could fix the issue but he could not execute a trade until Monday, June 6 or Tuesday, June 7. (*Id.*) Hill told the Vanguard representative: "I just had no idea that this was required or I would have done it, you know, on a previous day. I'm driving

back in a car, you know, to my home in Atlanta. And I don't have access to the internet and *I need to execute a trade today*." (Ex. 512 at 50 (emphasis added); Exs. 84-85.) Although he claims to have been watching Radiant stock for several years (Tr. 49), Hill testified at trial that "I feel like time is always of the essence when you are buying a stock. So I wanted to make the trade that day and thought I would be able to." (Tr. 172, 174.) Hill could not buy Radiant stock on June 3, however, using his Vanguard account. (Tr. 170.)

One minute after getting off the phone with Vanguard, Hill called Carter at SunTrust to buy Radiant stock. (Ex. 506 at 4; Tr. 174.) At the time, Hill had not even opened a brokerage account with SunTrust. (Tr. 759, 767-68). Carter had never heard of Radiant, and she expressed concerns about the trade. (Tr. 761-64.) Hill told Carter that he wanted to buy 50,000 shares of Radiant stock before the market closed, which cost about $1 million. (Tr. 184, 767; Ex. 112.) Hill's million-dollar investment in Radiant was 100 times greater than his only prior investment in the company (in July 2001); it represented "almost all" of the investable assets in his Grancal bank account; and it accounted for 10% of the total trading volume for Radiant that day. (Tr. 184-86, 761-62, Ex. 62 at 43.) Hill acknowledged at trial that there was no guarantee the volatility of Radiant's stock price was over when he made this investment. (Tr. 175.) But he declined Carter's recommendation to put a stop loss order on his sizable investment in the company. (Tr. 188-89, 765-66.)

Carter thought that Hill's sudden change in investment strategy and sudden sense of urgency to invest $1 million in Radiant was suspicious. (Tr. 763-64, 766-67.) Carter asked Hill if he knew anyone who worked at the company. (Tr. at 770-71.) Hill falsely told Carter that he did not know anyone who worked there. (*Id.*) Carter would not have executed the trade if Hill had told her the truth. (Tr. 799.)

4. Hill Invests An Additional $730,000 In Radiant Shortly After NCR Increased Its Offer Price and the Parties Reach A Tentative Agreement

In June 2011, Radiant and NCR continued their merger negotiations. (*See generally* Tr. 448-464; Exs. 279, 408, 423, 424, 427, 428.) On June 21, 2011, NCR indicated to Radiant that it was willing to increase its offer price to acquire the company. (Tr. 465; Ex. 54 at 14.) Specifically, NCR offered to pay Radiant $28 per share, in cash, which was up from the $24-$26 range that NCR had previously offered, and requested an exclusivity period through July 11, 2011. (Ex. 54 at 14.) John Heyman "knew [they] had a deal" at that point, and arranged for a Board of Director's meeting that afternoon at 5:00 p.m. (Tr. 466-67; Ex. 310.) Andrew Heyman attended the meeting. (Tr. 468-69; Ex. 431.) Radiant's Board approved of the $28 share price and agreed to proceed with entering into a definitive agreement with NCR. (Tr. 469-70; Exs. 433-34.)

a. Hill Purchases $250,000 Of Radiant Stock In His Vanguard Account

On June 21, 2011, after the Board meeting, Andrew Heyman called Murphy at 9:18 p.m., and they spoke for more than twenty minutes. (Ex. 506 at 6.) Hill and Murphy did not speak again for more than a few seconds until June 24, 2011. (Ex. 506 at 6.) On June 24, 2011, Hill and Murphy had two calls for a total of eleven minutes in the afternoon. (*Id.*) After the second call, the next call Hill made was to Vanguard. (Ex. 506 at 7; Ex. 74 at 294.) In that call, Hill asked to buy additional shares of Radiant, even though Carter had advised him to develop an exit strategy for his investment in the company. (Tr. 190-92, 196; Ex. 27 at 5-6.) Hill's Vanguard trades were not solicited by the broker. (Tr. 199.) Hill ignored Carter's advice and bought an additional 13,000 shares of Radiant stock for $250,000. (Tr. 198-99; Ex. 196.) At that time, Hill knew that Radiant stock was not heavily traded. (Tr. 203-05; Ex. 91 at 2:20-end; Ex. 512 at 99.)

Because Hill was concerned that his trading alone might cause the stock's price to increase, he split his purchase into two tranches of 6,500 shares. (*Id.*)

b. Hill Purchases Another $400,000 In His Vanguard Account

After Radiant and NCR reached a tentative agreement on June 21, 2011, the companies sought to resolve any outstanding issues. (Ex. 54 at 14-15.) On Wednesday, June 29, 2011, counsel for the companies conferred to "assess, among other things, whether an exclusive negotiations period was likely to result in the negotiation of a definitive agreement satisfactory to both parties." (*Id.*) "Several of the material open issues in the merger agreement were resolved during the June 29 call." (*Id.*; Tr. 472-73.) Andrew Heyman called Todd Murphy that same afternoon at 4:57 p.m., and they spoke for 15 minutes. (Ex. 506 at 8.)

On Thursday, June 30, 2011, Murphy and Hill spoke for around 35 minutes. (Ex. 506 at 8). On Friday, July 1, 2011, Hill and Murphy spoke again for an additional 25 minutes. (*Id.*; Tr. 206-07.) Hill called Vanguard a half hour later to buy another 20,000 shares of Radiant stock for $430,000. (*Id.*; Ex. 198; Ex. 93 at 0:45-end.) Hill again divided his purchase into two tranches to minimize the risk that he would personally raise the stock's price. (Tr. 208-09.) Hill's $430,000 investment in Radiant represented about 10% of the total Radiant trading volume up to that point in the day. (Tr. 210.)

c. Hill Purchases An Additional $80,000 In His Daughters' Accounts

On the next trading day, Tuesday July 5, 2011, Hill bought another 4,100 shares of Radiant stock for around $80,000 in his daughters' Wells Fargo accounts. (Tr. 211-212; Ex. 203; Ex. 220; Ex. 250.) In doing so, Hill invested all of the remaining available cash in his daughters' accounts in Radiant. (Tr. 214-15, 217-18, 220; Ex. 206; Ex. 226; Ex. 254.) Hill also

had to sell a portion of his daughters' investments in mutual funds to execute the Radiant trade. (*Id.*) Hill claims that he wanted to diversify their accounts. (Tr. 351.)

5. Hill Invests Another $200,000 In His SunTrust Account Shortly After Andrew Heyman Meets With NCR

On Wednesday, July 6, 2011, Andrew Heyman traveled to New York to discuss his post-merger employment with NCR's CEO. (Tr. 616, 618.) Andrew Heyman's execution of a retention agreement was a condition of the merger going forward. (Tr. 615-16.) Andrew Heyman exchanged more than 30 text messages with Murphy that day. (Ex. 506 at 9-10.) Murphy was also in New York at the time. (Tr. 893.)

Andrew Heyman met with NCR's CEO at around 7:00 p.m. (Tr. 623.) Although Heyman testified at trial that the meeting did not go well, *see* Tr. 628, he sent an email that evening that the meeting went "really good." (Ex. 439.) Immediately after the meeting ended, Andrew Heyman took a taxicab to a restaurant called Mercer Kitchen. (Tr. 642; Ex. 98 at AH02666.) Andrew Heyman met Murphy there, and they split a bottle of wine. (Ex. 163 at Murphy-061 (showing $144.12 charge); Ex. 102 at AH2691 (showing $144.13 charge).)[5]

The next day (Thursday, July 7), Hill and Murphy spoke in the afternoon and again in the evening for about one hour. (Ex. 506 at 10.) Murphy was flying back to Atlanta. (Tr. 224-25.) Hill asked Murphy to let him know when he "got up and going" on Friday, July 8, 2011. (*Id.*; Ex. 37.) Hill and Murphy do not recall if they saw each other that day. (Tr. 225, 902.)

That afternoon, Hill called Carter at SunTrust to purchase another 10,000 shares in Radiant for around $200,000. (Tr. 225; Ex. 506 at 10; Ex. 113.) Hill's request to buy more shares of Radiant stock on July 8 made Carter uncomfortable. (Tr. 778.) She asked Hill (again) if he knew anyone at Radiant. (Tr. 779.) Hill falsely told Carter (again) that he did not know

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[5] These charges did not post to their accounts until July 7, 2011. (Tr. 640, 899.)

anyone who worked at the company. (*Id.*) Hill tried to reassure Carter by stating that "he just believed in the stock." (*Id.*) After Hill executed this trade, his Grancal SunTrust account was left with a balance of $140,000, far below what Hill needed for another Chick-fil-A deal. (Tr. 267, 326, 358-60, 365; Ex. 147 at CH546.)

G. NCR Announces The Acquisition Of Radiant

On Friday, July 8, 2011, Radiant's Board of Directors met to discuss the NCR merger. (Tr. 483; Ex. 280 at NCR238.) Andrew Heyman attended the meeting. (*Id.*) At the conclusion of the meeting, "it appeared likely that [Radiant] would be in a position to consider on Monday, July 11, approval of a final transaction with NCR." (*Id.*) The Board meeting ended at around 5:00 p.m. (Ex. 280 at NCR0240.) Andrew Heyman called Murphy less than an hour later, and they spoke for about 12 minutes. (Ex. 506 at 10.)

On Monday, July 11, 2011, NCR and Radiant finalized their deal. (Tr. 485; Ex. 281.) The companies announced the merger after the close of the market. (Tr. 486; Ex. 489.) Prior to that public announcement, there had not been any leaks in the press about the deal, nor was there any public speculation about it. (Tr. 384.) Under the terms of the deal, which was a tender offer, NCR agreed to pay Radiant $28/share. (Tr. 376; Ex. 54 at 15.) The closing price of Radiant's stock on Monday, July 11, 2011 was $21.45. (Ex. 62 at 44.) The next day, Radiant's stock price closed at $27.99 per share. (*Id.*)

On Monday, July 11 at 9:34 p.m., Murphy texted John Heyman: "Saw some big news for u guys tonight on cnbc. Congrats, couldn't have happened to a nicer guy." (Ex. 66.) NCR's acquisition of Radiant was a "top ten event" in John Heyman's life. (Tr. 379.) The merger was a "milestone" and "big life event" in Andrew Heyman's life as well. (Tr. 669.) Andrew Heyman made more than 10 million dollars as a result of the deal. (Tr. 535.) Hill claims that he did not

know about the merger until the next day (Tuesday, July 12), when his daughters' Wells Fargo broker told him. (Tr. 248-49.) On Monday, July 11, 2011 at 10:39 p.m., however, Hill emailed Ms. McCabe at Chick-fil-A to see if she had a new deal for him. (Ex. 463 at CH1633.) Hill had not been in touch with McCabe since June 1, 2011. (*Id.*)

H. Hill Sells All 101,600 Shares Of Radiant

On July 12, 2011, Hill sold all 101,600 shares in Radiant that he had acquired for himself and his daughters, generating around $744,000 in gains. (Exs. 114, 199, 204, 221, 251.) When he sold the shares held in his SunTrust account, Hill told Carter that he was happy for "those guys," which she found strange since Hill had told her that he did not know anyone at the company. (Tr. 780-82.)

After selling all of his Radiant stock, Hill spoke to Murphy about the deal because they both knew Andrew and John Heyman. (Tr. 262-63; Ex. 506 at 11.) Murphy told Hill that he was excited for the Heymans. (Tr. 263.) Hill did not tell Murphy that he had invested around $2 million in Radiant, or that he had earned about $744,000 in profits from those investments. (Tr. 263-64.)

DISCUSSION

I. EXCHANGE ACT SECTION 14(e) AND RULE 14e-3

Section 14(e) of the Exchange Act is "a broad antifraud prohibition" in the area of tender offers. *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 10 (1985); *U.S. v. O'Hagan*, 139 F.3d 641, 650 (8th Cir. 1998). The statute provides that "[i]t shall be unlawful for any person . . . to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer[.]" *See* 15 U.S.C. § 78n(e). Rule 14e–3 expressly prohibits insider trading in connection with a tender offer. *See* 17 C.F.R. § 240.14e–3(a).

To prove a violation of these provisions, the Division must show by a preponderance of the evidence that Hill: (1) traded while "in possession of" material nonpublic information related to a tender offer, *SEC v. Adler*, 137 F.3d 1325, 1340 (11th Cir. 1998); (2) Hill knew or had reason to know that the inside information was acquired from a corporate insider, *see* 17 C.F.R. § 240.14e–3(a); and (3) that NCR and Radiant had taken a substantial step towards a tender offer before Hill purchased Radiant stock in June and July 2011 (*id.*). Notably, Section 14(e) and Rule 14e-3 do not require that Hill "owe[d] a pre-existing fiduciary duty to respect the confidentiality of the information." *U.S. v. O'Hagan*, 521 U.S. 642, 669 (1997); *SEC v. Maio*, 51 F.3d 623, 635 (7th Cir. 1995).

Moreover, the second element is an objective standard.[6] *U.S. v. Parigian*, 824 F.3d 5, 10-13 (1st Cir. 2016) (distinguishing between a criminal violation of the "knew or should have known" standard which must be "willful" under 15 U.S.C. § 78ff, and the lesser scienter standard for a civil violation); *cf. Tolston v. Natl' R.R. Passenger Corp.*, 102 F.3d 863, 865 (7th Cir. 1996) (stating that "knows or has reason to know" is "an objective inquiry"); *Coate v. Montgomery County, Ky*, 234 F.3d 1267 (6th Cir. 2000); *Resser v. C.I.R.*, 74 F.3d 1528, 1536 (7th Cir. 1996). In determining whether a person "has reason to know" that the nonpublic information came from an insider, courts look to several factors. These factors include whether: (i) the trader learned of the information from someone associated with an issuer; (ii) the trading was aberrational; (iii) the trader made efforts to conceal his trading; and (iv) the kind of information conveyed was usually nonpublic and the type of information that would come from a corporate insider. *U.S. v. Chestman*, 947 F.2d 551, 563 (2d Cir. 1991) (en banc); *SEC v. Warde*, 151 F.3d 42, 47-48 (2d Cir. 1998); *U.S. v. Larrabee*, 240 F.3d 18, 21-22 (1st Cir. 2001).

[6] The Court requested that the parties brief this issue. (Tr. 26-28.)

The Division may also prove the second element by showing that Hill consciously avoided knowing where the material nonpublic information originated. *SEC v. Obus*, 693 F.3d 276, 287 (2d Cir. 2012); *SEC v. Payton*, 2016 WL 6948685, at *5 (S.D.N.Y. Nov. 28, 2016); *SEC v. Musella*, 678 F. Supp. 1060, 1063 (S.D.N.Y. 1988).

II. HILL VIOLATED EXCHANGE ACT SECTION 14(e) AND RULE 14e-3

A. Hill Concedes Substantial Step And Materiality

Hill does not dispute that NCR and Radiant had taken a substantial step towards a tender offer before he purchased Radiant stock in June 2011. (Prehearing Tr. 12/7/16 at 36.) Nor could he. In this case, the meetings between the CEOs of NCR and Radiant; the retention of legal counsel and investment bankers; the decision to move forward with the due diligence process; and the discussion of specific transaction terms all represent substantial steps toward a tender offer for purposes of Section 14(e) and Rule 14e-3 liability. *Maio*, 51 F.3d at 636; *SEC v. Suman*, 684 F. Supp. 2d 378, 391 (S.D.N.Y. 2010); *Musella* , 748 F. Supp. 1028, 1041-42 (S.D.N.Y. 1989).

Hill also does not and cannot dispute that information regarding NCR's possible acquisition of Radiant was material. (Prehearing Tr. 12/7/16 at 36.) In this case, the evidence shows that NCR and Radiant were having serious merger discussions by the time Hill invested in Radiant. (*See, e.g.*, Ex. 54 at 13.) Courts have consistently recognized that "[a] merger is an event of considerable magnitude to an investor." *SEC v. Ginsburg*, 362 F.3d 1292, 1302 (11th Cir. 2004). Indeed, "[f]ew matters are considered more material than a corporation's involvement in a possible merger or acquisition." *SEC v. Michel*, 521 F. Supp. 2d 795, 825 (N.D. Ill. 2007); *Castellano v. Young & Rubicam, Inc.*, 257 F.3d 171, 185 (2d Cir. 2001). The fact that the information about the possible deal originated from Andrew Heyman, an insider at

the highest level of Radiant, bolsters the inference that the information was material. *Thrasher*, 152 F. Supp. 2d at 299; *SEC v. Wyly*, 788 F. Supp. 2d 92, 122-23 (S.D.N.Y. 2011); *Mayhew*, 121 F.3d at 52.

B. Information Regarding the NCR Tender Offer Was Nonpublic

Information regarding NCR's acquisition of Radiant was also nonpublic. "Nonpublic information is information not generally available to ordinary investors in the marketplace." *Behrens v. Wometco Ent., Inc.*, 118 F.R.D. 534, 544 (S.D. Fla. 1988); *SEC v. Mayhew*, 121 F.3d 44, 50 (2d Cir. 1997); *U.S. v. Contorinis*, 692 F.3d 136, 144 (2d Cir. 2012). Here, information regarding NCR's possible acquisition of Radiant was only known by a handful of executives at Radiant. There were no press reports regarding the merger negotiations, and there was no public speculation about the deal. In these circumstances, information about NCR's acquisition of Radiant was not generally available to the investing public and was, therefore, nonpublic for purposes of Section 14(e) and Rule 14e-3. *Contorinis*, 692 F.3d at 144; *Mayhew*, 121 F.3d at 50.

C. Hill Knew About The Radiant Merger When He Invested $2 Million In The Company

The primary issue for the Court to resolve is whether Hill knew that NCR might acquire Radiant when he invested more than $2 million in the company. The Division may prove that Hill possessed this information by using "direct or circumstantial evidence." *Ginsburg*, 362 F.3d at 1297-98; *U.S. v. Larrabee*, 240 F.3d 18, 21 (1st Cir. 2001). "Courts have repeatedly held that circumstantial evidence, such as communications between tippers and tippees, the relationship between the tipper and the tippee, suspiciously timed trades, implausible explanations for the trading, and/or efforts to cover up the reasons for a trade adequately support an inference of insider trading." *SEC v. Arrowood*, 2013 WL 4028907, at *5 (N.D. Ga. Aug. 7, 2013); *See also*

Larrabee, 240 F.3d at 21-22; *Singer*, 786 F. Supp. at 1164-65. The inference that Hill knew about the NCR merger is particularly strong because all of these factors are present here.

1. Hill's Substantial Purchase Of Radiant Stock Was Highly Unusual

Hill's sudden decision to invest more than $2 million in Radiant supports the inference that he knew about the NCR merger. *Warde*, 151 F.3d at 48 ("uncharacteristic, substantial and exceedingly risky investments" suggested insider trading); *Musella*, 748 F. Supp. at 1039 (finding that "unusually large" investment by trader "in light of his previous trading history" supported inference that trader had nonpublic information).

In May 2011, Hill had not bought any stock in four years, and he did not even have an active brokerage account. (Tr. 90, 759; Ex. 42 at 27.) As recently as May 19, 2011 – just two weeks before his initial investment in Radiant – Hill was discussing conservative investment strategies with Carter and told Carter that he did not want to invest in equities. (Tr. 755-58.) Hill also told Carter that he had $1.1 million to invest. (Tr. 753-54; Ex. 117.)

Yet, the following week (while he was on vacation), Hill suddenly chose to adopt the risky strategy of investing $2 million in a single stock (without a stop loss order). Indeed, Hill's investment in Radiant totaled more than five times his annual income, sixty percent of his liquid assets, and one third of his total net worth. (Tr. 88-89; Ex. 4 at 3; Ex. 117.) Hill also invested almost twice as much in Radiant as he had just recently told Carter that he wanted to invest. (Tr. 753-54; Ex. 117.) In order to execute these trades, Hill had to open two new brokerage accounts. (Tr. 128, 759.)

Moreover, Hill has never invested so much money in a single stock. (Tr. 176.) In fact, Hill had never bought any stock in his daughters' accounts before. (Tr. 154.) In June and July 2011, however, Hill invested *all* of the available cash in their accounts in Radiant stock. (*See*

supra at 9-10, 14-15.) Hill's highly aberrational trading strongly suggests that he knew about Radiant's possible merger with NCR. *Larrabee*, 240 F.3d at 23 (noting that inference of insider trading was raised when the trader's "purchase was nearly twice as large as any of his previous trades"); *Suman*, 684 F. Supp.2d at 391 (noting that the defendants "made a huge gamble on a sure thing, knowing that [the target company's] price would soar when [the acquiring company] announced its tender offer").

2. The Timing Of Hill's Trades In Radiant Are Highly Suspicious

The timing of Hill's $2 million investment in Radiant also supports the conclusion that he knew about the merger. Hill's investments coincided with the precise two-month period that NCR negotiated to acquire Radiant. Hill claims that he had been watching Radiant since 2001, but he did not invest in the company between July 2001 and May 2011. On May 19, 2011, Hill was discussing conservative investment options with Carter. (*See supra* at 7.) He was not in a rush to invest at that time. (*Id.*) Something made Hill change his investment strategy and gave him a sense of urgency to invest in Radiant in June 2011.

NCR initiated merger discussions with Radiant in May 2011, and that those discussions intensified by May 26, 2011. (*See supra* at 7-10.) On May 26, 2011, Andrew Heyman learned that he was flying to New York the following week to have dinner, where he would meet with NCR's CEO for the first time, and that he would be participating in due diligence meetings. (*Id.*) Heyman met with Murphy later in the day on May 26. (*Id.*) Murphy then spoke to Hill that evening. (*Id.*) Hill opened up a new brokerage account at Vanguard the following day, and immediately thereafter called Murphy and spoke for more than an hour. (*Id.*)

Hill was able to make his initial $90,000 investment for his daughters on Wednesday, June 1, but he was unable to invest funds using his new Vanguard account. (*Id.*) On Friday,

June 3 – the same day Andrew Heyman was meeting with NCR executives in New York – Hill told Vanguard that he "need[ed] to execute a trade today." (*Id.*) Hill ultimately had to call Carter at SunTrust to make the trade. (*Id.*)

On June 21, 2011, Radiant's Board of Directors met to discuss NCR's latest offer of $28/share. (Ex. 54 at 14.) At a meeting that Andrew Heyman attended, the Board approved that price and agreed to negotiate a definitive agreement with NCR. (Tr. 469-70.) Andrew Heyman spoke to Murphy that evening for 26 minutes. (Ex. 506 at 6.) Also, both Andrew Heyman's personal credit card and Murphy's credit card show a charge that day at the restaurant Bocado. (Ex. 102 at AH2689; Ex. 162 at 3.) Bocado is a restaurant in an area of Atlanta where Heyman and Murphy frequently got together for dinner. (Tr. 515-16, 566-67) (the transcript misspells it as "Piccata").) Murphy did not talk to Hill again (for more than a minute) until June 24, 2011. (Ex. 506 at 6.) After that conversation, the next call Hill made on June 24 was to Vanguard, where he invested an additional $250,000 in Radiant. (*Id.*; Ex. 196.)

On June 29, 2011, NCR and Radiant held a meeting at which they were able to resolve "several of the material open issues." (Ex. 54 at 14-15.) Andrew Heyman and Murphy spoke that same afternoon. (Ex. 506 at 8.) Murphy and Hill talked the next day (June 30) and again on Friday, July 1. (*Id.*) Hill called Vanguard thirty minutes later and invested an additional $430,000 in Radiant. (*Id.*; Ex. 198.) The next trading day (July 5), Hill invested another $80,000 in his daughters' Wells Fargo accounts. (Ex. 203; Ex. 220; Ex. 250.)

Finally, Andrew Heyman traveled to New York on July 6, 2011, to negotiate a new employment agreement with NCR. (Tr. 616-18.) On the trip to New York, Andrew Heyman and Murphy exchanged more than 30 text messages. (Ex. 506.) Immediately following the meeting, Heyman met Murphy at a restaurant. (Tr. 642; Ex. 163; Ex. 102.) Murphy spoke to

Hill the following day (Thursday, July 7) for nearly an hour. (Ex. 506 at 10.) On Friday, July 8, 2011, Hill invested another $200,000 in Radiant. (Ex. 113.)

This timeline demonstrates that Hill did not just purchase Radiant stock on a single date; he made investments on six different dates that each coincided with a specific deal event. As the merger got closer to being finalized, Hill continued to increase his investment in the company. The highly suspicious timing of Hill's trades supports the inference that he had inside information about the merger. *Ginsburg*, 362 F.2d at 1301; *Adler*, 137 F.3d at 1340-42.

3. Hill Deceived His SunTrust Broker To Cover-up His Ties To Radiant

Hill's concealment of his relationship with Radiant's corporate officers also supports the inference that he knew about the merger discussions. Carter specifically asked Hill if he knew anyone who worked at Radiant. (*See supra* at 12.) Hill told Carter that he did not know anyone who worked there, when in fact he knew the company's CEO, CFO, and COO. (*Id.*) Hill's patently false answer to Carter's simple question is probative evidence that he bought Radiant stock because he knew about the upcoming acquisition with NCR. *Warde*, 151 F.3d at 47 (defendant's "resort to deceptive trading practices supports an inference that he was trading illegally on insider information"); *Larrabee*, 240 F.3d at 23 ("[w]e also find significant the efforts of [the tipper and tippee] to conceal their relationship"); *SEC v. Sargent*, 229 F.3d 68, 75 (1st Cir. 2000) (finding that trader's "evasive" answer to advisor's question about how he heard of company supported inference that trader had received nonpublic information).

Hill's claim that he told Carter about his ties to Radiant when he sold the stock is not credible. Hill obviously has reason to testify falsely on this issue. Carter has no incentive to slant her testimony in favor of the Division or against Hill. Moreover, Carter was clearly uncomfortable with Hill's sudden change in investment strategy and the substantial amount he

wanted to invest in Radiant. She even spoke to compliance personnel and her supervisor about him. Hill's contention that she executed the trades after he disclosed his connections to Radiant is not reasonable or supported by the record.

4. Close Relationships And Numerous Contacts Between Heyman And Murphy And Between Murphy And Hill

The close personal relationships between Andrew Heyman, Murphy, and Hill strengthens the inference that Heyman told Murphy about the merger with NCR, and that Murphy conveyed the information to Hill. *See, e.g.*, *Larrabee*, 240 F.3d at 22 (noting that tipper and tippee "had been friends for a long time"); *Warde*, 151 F.3d at 45 (observing that tipper and tippee had a close personal friendship); *Maio*, 51 F.3d at 627 (friendship of 15 years supported inference that tipper and tippee shared nonpublic information).

Andrew Heyman and Murphy have known each other for forty years and have an "incredibly close" relationship that is "almost brotherly." (Tr. 512, 864-65, 882.) Andrew Heyman does not have a closer friend, and Heyman routinely shared personal information with Murphy. (Tr. 517-18, 526, 883, 887.) When the merger negotiations began, Heyman had just recently been divorced from his wife of nearly twenty years, and he regularly sought guidance from Murphy on important life events. (*Id.*; Tr. 608.) The potential acquisition of Radiant was a "big life event" for Andrew Heyman. (Tr. 669.) Andrew Heyman testified that he and Murphy "talked about everything." (Tr. 517.) The Court should conclude that Heyman disclosed information about the potential merger to his confidant Murphy.

The Court should also infer that Murphy told Hill about the NCR deal. Hill has been close friends with Murphy for more than twenty years. (Tr. 96-97, 880.) Murphy knew that Hill was an acquaintance of Andrew Heyman. (Tr. 104, 886-87.) As a result, Murphy periodically

told Hill information about significant events in Andrew Heyman's life. Indeed, the day after the merger was announced, Hill recalls Murphy discussing the deal with him. (Tr. 262-63.)

The inference that Heyman, Murphy, and Hill discussed the Radiant acquisition is further bolstered by the "incessant telephone conversations" between Heyman and Murphy and between Murphy and Hill during the relevant time period (Ex. 506). *U.S. v. McDermott*, 245 F.3d 133, 138-39 (2d Cir. 2001) (finding such contacts sufficient to support a criminal conviction); *Ginsburg*, 362 F.3d at 1299 (noting that the "temporal proximity of a phone conversation between the trader and one with insider knowledge provides a reasonable basis for inferring that the basis of the trader's belief was the insider information.").

Hill contends that no such inference may be drawn from their phone calls because the three men have been in frequent contact for years. But Hill has it exactly backwards. The near constant contact and the close nature of their relationship make it far more likely that Heyman felt comfortable confiding in Murphy about the possible acquisition by NCR, and that Murphy felt at ease sharing that information with Hill. *Ginsburg*, 362 F.3d at 1301 (finding that "[i]f it were otherwise, family members . . . could trade based on insider information with impunity.").

5. Hill's Reasons For Buying Radiant Stock Are Not Credible

Hill's explanations for why he invested $2 million in Radiant stock are not credible. As an initial matter, Hill's testimony regarding when and why he started following Radiant fundamentally changed during this litigation. (Tr. 45-50.) Hill testified during the Division's investigation that he started following Radiant in 2004 after he met John Heyman. (Ex. 42 at 30-31, 38-39.) Hill said that he watched the stock from 2004-2011, and finally decided to invest in the company for the first time in June 2011. (Ex. 42 at 107.) <u>None</u> of that testimony was true. (Tr. 45-50.) At trial, Hill testified that he initially started watching Radiant in 2001 (or perhaps

earlier), and that he had actually invested $10,000 in the company in July 2001. (Tr. 49, 66; Ex. 492.) Hill claims that he did not remember the 2001 investment; his wife found documents in their basement in May 2015 that showed his previous purchase. (Tr. 50-53, 60.) Hill's evolving story and faulty memory significantly undercut his credibility.[7]

Moreover, Hill only produced the documents showing his 2001 Radiant investment after the Court issued a decision that was adverse to him based, in part, on the fact that Hill had never before invested in the company. (Tr. 51-53; Ex. 494.) Hill's testimony that his wife just coincidentally found documents of his prior purchase a few days after the Court issued its adverse decision and on the eve of the initial trial date is dubious.

Regardless, Hill's prior trading history in Radiant strengthens the Division's case. First, Hill put one third of his net worth in a single stock even though he apparently lost money on his prior Radiant investment. (Tr. 70-72, 366.) That makes no financial sense unless Hill knew about the merger. Second, if Hill was watching Radiant from 2001-2011, he would have seen how volatile the stock's price was during that ten-year period. (Tr. 74-85; Ex. 62.) He also would have seen that the stock was trading at around the same price in 2011 that it had traded at back in 2001. (*Id.*) Finally, the fact that Hill was willing to increase his position in Radiant from $10,000 (775 shares) in 2001 to $2 million (101,600 shares) in 2011 strongly suggests that Hill knew about the possible merger.

Hill's self-serving and uncorroborated claim that his wife was "absolutely" fine with his decision to invest $2 million in Radiant is also dubious. (Tr. 160-61.) Julia Hill was a finance major in college, she had a Series 7 securities license, and she worked in the bond business for

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[7] In defending his large investment in Radiant, Hill testified that did not believe in the wisdom of diversification. (Tr. 351.) Yet, in explaining his purchase of Radiant in his daughters' accounts, he testified that they were "overweighted" in mutual funds. (Tr. 310.)

several years. (*Id.*) She also would have been aware that Hill had previously lost money investing in Radiant – the same company in which he now wanted to invest five times his annual income. Hill's claim that his wife approved of this $2 million investment is not believable. Indeed, one can imagine the reaction a securities professional would have upon learning that their spouse wanted to place a significant portion of their net worth in a single stock with no stop loss order. Hill's testimony that his wife knew about and approved of his plan to invest in Radiant is further undermined because his counsel objected to the Division calling her as a witness on the grounds that her "testimony [is] irrelevant, immaterial, cumulative, and solicited for the improper purpose of harassment." (Resp't Objections to Div. Witness List (6/2/15).)

Hill's reliance on his other stock purchases is also unconvincing. As an initial matter, Hill has failed to identify any other stock that he purchased before investing in Radiant in June 2011 (other than the 2001 Radiant investment). On June 24, 2011, Hill invested $265,000 in Ford at the same time he invested another $400,000 in Radiant. (Tr. 201-03.) But Hill only made the Ford investment after Carter had questioned him about knowing insiders at Radiant. The Court may reasonably conclude that Hill invested in Ford to minimize the risk that Vanguard would ask similar questions and potentially not execute the trade. Indeed, Hill notably failed to invest any of his daughters' funds in Ford; he put all of their available cash in Radiant.

Moreover, Hill's second-largest stock purchase of around $500,000 in Fresh Market is a blatant ploy to coverup his insider trading in Radiant stock. Hill made his Fresh Market investment after learning that the Division was continuing its investigation into his Radiant trades. (Tr. 340-42; Resp't Ex. 76; Ex. 46, 517.) In fact, Hill invested in Fresh Market less than a week before he was scheduled to testify again. (*Id.*) Hill's reliance on the Fresh Market trades in his defense should be rejected.

Hill also falsely asserted that his real estate deals with Chick-fil-A fell through in May 2011. (Tr. 302.) The records show that the Ponce de Leon deal was terminated in November 2010, and the Northside deal (which was for $2 million) was terminated on March 3, 2011. (*Supra* at 5-6.) Hill did not invest any of those funds in Radiant during the next three months. The Bremen deal did fall through in May 2011, but that contract was only for $550,000. (*Id.*)

Hill also tries to equate his real estate investments with his stock purchases. (Tr. 307.) They are not remotely similar. Hill earned his living making real estate deals. He knew the commercial real estate market well, and was extremely thorough before buying property. (Tr. 302, 305-07.) In contrast, Hill suddenly and without any substantive research placed $2 million in Radiant. Hill alleges that he did talk to cashiers at fast food restaurants and gas station attendants about Radiant's software. (Tr. 245.) But this "informal market research" is a far cry from the diligence Hill undertook before investing in real estate. (Respn't Mot. for Summ. Disp. at 7.) In addition, investors do not typically buy $2 million of a company's stock based on informal testimonials from cashiers at fast food restaurants and gas station attendants.

Hill's implausible explanations for why he invested such a large portion of his net worth in Radiant stock provides further support for the conclusion that he knew about the possible merger. *Singer*, 786 F. Supp. at 1166; *SEC v. Carroll*, 2011 WL 5880875, at *10 (W.D. Ky. Nov. 23, 2011). Indeed, the Court may use Hill's implausible testimony as substantive evidence against him. *U.S. v. Ellisor*, 522 F.3d 1255, 1272 (11th Cir. 2008); *U.S. v. Brown*, 53 F.3d 312, 314 (11th Cir. 1995).

D. Hill Knew Or Had Reason To Know The Material Nonpublic Information About The Radiant Merger Came From Andrew Heyman

Hill knew the information he received from Murphy regarding the Radiant deal was acquired from Andrew Heyman, the COO of Radiant. Hill testified that he knew Murphy and

Heyman met as children, they were very close, and the two men spoke frequently. Based on these facts, the Court may reasonably infer that Hill knew Murphy obtained information regarding the Radiant merger directly from Andrew Heyman, whom Hill knew was the COO of Radiant. *Chestman*, 947 F.2d at 563 ("Chestman's knowledge of Loeb's status as a Waldbaum family member and the nature of the information conveyed provided sufficient evidence from which a rational trier of fact could infer that the information originated 'directly or indirectly,' from a Waldbaum insider."). At a minimum, Hill "had reason to know" that Murphy received the information from Heyman based on Hill's knowledge of Murphy's almost brotherly relationship with Heyman. *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 363 (2d Cir. 1971).

E. The Tip In This Case Related To A Tender Offer

The Division is not required to prove the precise information that Andrew Heyman confided to Murphy about Radiant. *SEC v. Geon Industries, Inc.*, 531 F.2d 39, 46 (2d Cir. 1976) (the "inability to reproduce the precise content of conversations under these circumstances cannot be an absolute bar to liability; the circumstantial evidence sufficed to justify the court's inference that [the trader] was getting from [the insider] something that was not available to the public."); *U.S. v. McDermott*, 245 F.3d 133, 138-39 (2d Cir. 2001) (upholding insider trading criminal conviction despite the fact that the government was unable to produce any direct evidence of the content of the tip). In addition, "Rule 14e–3 does not require that a person charged with violating the rule have knowledge that the nonpublic information in his possession relates to a tender offer." *Sargent*, 229 F.3d at 79; *See also Ginsburg*, 362 F.3d at 1304; *Mayhew*, 121 F.3d at 48-49, 52-53. A necessary corollary to that rule is that the tipper does not need to tell the trader that it is a potential tender offer specifically that is in the works. *See*

Mayhew, 121 F.3d at 48, 52-53. At a minimum, direct evidence of such a communication is not required. *Warde*, 151 F.3d at 45-46, 47-48. Indeed, liability can accrue under Rule 14e-3 for trades that occur *before* the merger parties have even decided what form the transaction will take. *Ginsburg*, 362 F.3d at 1303-04; *Mayhew*, 121 F.3d at 48-49, 52-53. NCR acquired Radiant through a tender offer. In this case, the same circumstantial evidence that supports the inference that Hill possessed material nonpublic information regarding the Radiant acquisition supports the inference that Hill traded while in possession of information related to that tender offer. *Id.*

III. THE DENIALS BY HEYMAN AND MURPHY ARE NOT CREDIBLE

The Division does not need a confession from Andrew Heyman or Todd Murphy to prove its case. *See, e.g.*, *Ginsburg*, 362 F.3d at 1297-98; *Larrabee*, 240 F.3d at 21; *Warde*, 151 F.3d at 47-48. The law is "clear that proof of insider trading can well be made through an inference from circumstantial evidence and not solely upon a direct testimonial confession." *Singer*, 786 F. Supp. at 1164; *Michel*, 521 F. Supp.2d at 824 (rejecting "self-serving denials that no insider information was disclosed"); *SEC v. Roszak*, 495 F. Supp.2d 875, 887 (N.D. Ill. 2007) ("Proof of tipping will often be circumstantial, for . . . the alleged tipper and tippee will seldom admit that there was a tip."); *SEC v. Carroll*, 9 F. Supp.3d 761, 768 (W.D. Ky. 2014) (noting that "writings against interest, wiretaps, and other direct admissions are not essential to the SEC's case").

In assessing the credibility of Heyman and Murphy, the court "cannot view [their] testimony in a vacuum; it must weigh the testimony against all of the other evidence in the record." *U.S. v. Kelly*, 539 F.3d 172, 189 (3d Cir. 2008); *U.S. v. Woolfolk*, 197 F.3d 900, 905 (7th Cir. 1999) (a "judge, in determining credibility, which is defined as 'that quality that makes a witness worthy of belief,' must look at all aspects of the witness including not only her testimony but the evidence presented at trial."). The denials by Heyman and Murphy

accordingly must be viewed in context with all of the other evidence. As explained above, that evidence overwhelmingly supports the conclusion that Heyman confided in Murphy about the NCR merger and then Murphy shared the information with Hill. Ultimately, based on all the evidence, the Court should not find the denials by Heyman and Murphy credible. *Digsby v. McNeil*, 627 F.3d 823, 832 (11th Cir. 2010) (the court may find a witness credible in whole, in part, or not at all); *U.S. v. Heredia*, 483 F.3d 913, 923 n.14 (9th Cir. 2007) ("The [fact-finder] may conclude a witness is not telling the truth as to one point, is mistaken as to another, but is truthful and accurate as to a third."); *U.S. v. Parr*, 516 F.2d 458, 464 (5th Cir. 1975) (same).

A. Andrew Heyman

Andrew Heyman's denial that he told Murphy about the NCR merger is not credible.[8] To begin with, it conflicts with the compelling circumstantial evidence. Murphy was like a brother to Heyman, and Heyman regularly confided in him. By his own admission, Heyman trusted Murphy and talked to him about "everything." (Tr. 517, 525-26.) The potential merger with NCR was a milestone event in Heyman's life. He stood to make $10 million from the deal; he was going to become the new leader of Radiant's business; and, for the first time in 15 years, he was not going to be working with his older brother. As the negotiations progressed, Andrew Heyman struggled with whether to remain with NCR post-merger or do something else. (Ex 438; Tr. 480-82). Heyman had frequent contacts with Murphy during this time, including multiple calls, texts, and meetings that immediately followed significant deal events. Common sense dictates that, given the significant impact of the merger on Heyman's life, he would seek the

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[8] The fact that the Division called Heyman as a witness does not mean it contends his testimony is credible. *U.S. v. Freeman*, 302 F.2d 347, 351 (2d Cir. 1962) ("That a party may show by other witnesses or evidence that the facts were not as his witness had said is now universally accepted."); Fed. R. Evid. 607, Advisory Committee Notes ("A party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them.").

guidance of his closest friend and spiritual adviser, especially because he was recently divorced at the time and had no spouse in whom he could confide.

Moreover, Heyman has a clear motive to deny that he disclosed information about the deal to Murphy. *U.S. v. Smalley*, 754 F.2d 944, 949 n.9 (11th Cir. 1985). Heyman acknowledged that allegations of insider trading are "embarrassing." (Tr. 657-58; Ex. 18.) He also recognized that his business reputation would be damaged if the Court found that he confided in Murphy about the merger. (Tr. 741-42.) As a result, Heyman testified that he would "not be happy" if the Division prevailed. (Tr. 740, 742.) Heyman is clearly not a neutral witness in this case. As the alleged source of the merger information, he has a strong incentive to slant his testimony in the hope that the Court will not make that finding.

Given his motive, it is not surprising that Heyman exhibited hostility towards the Division's case by refusing to acknowledge even the most basic and indisputable facts. For example, Heyman claimed that he did not know that documents bates-labeled with the prefix "A.H." were produced by him, even though they were his documents and "A.H." are his initials. (Tr. 573-75.)[9] Heyman also made counsel for the Division show him a document with the address of the Mercer Kitchen restaurant – a restaurant he had dined at previously – before he would acknowledge that it was located on *Mercer* street. (Tr. 633-34.) And Heyman disputed whether his hotel charge at the Surrey Hotel was in fact for his stay there because he could not confirm the ownership group that controlled the property. (Tr. 634-35.) Finally, when the Division asked Andrew Heyman whether his dinner meeting with NCR on July 6, 2011 went well, he denied it. (Tr. 628.) Yet, he sent an email the night of that meeting saying that it went "really good." (Tr. 629; Ex. 439.)

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[9] Exhibit 502 was Heyman's own calendar, and had "Confidential Treatment Requested by Andrew Heyman" written on it.

Andrew Heyman's conduct following the merger announcement also undermines his denial. Although he frequently spoke with Murphy during this time, he did not call Murphy that evening to share the news, despite admitting the announcement was a "big life event" and "definitely a milestone." (Tr. 669.) The obvious inference is that Heyman did not call Murphy that night because he had already told Murphy about the merger. Trying to avoid this inference, Heyman testified that he did not call Murphy because he had a slew of other things to do that night. (Tr. 684.) But this testimony conflicts with Heyman's earlier testimony that he could not remember what he did that evening and that he "probably slept." (Tr. 669.)

Heyman's credibility is further eroded because his testimony is contradicted on several important issues by the more credible testimony of his brother and the contemporaneous documents. For example, Andrew Heyman testified that he did not know whether John Heyman wanted the merger negotiations with NCR to progress quickly. (Tr. 542.) John Heyman, however, testified that he told his brother about the expedited timeframe for completing the deal. (Tr. 381, 407.) Andrew Heyman also testified that in May 2011 he did not know whether John Heyman intended to leave Radiant after the merger. (Tr. 559.) John Heyman testified though that he told his brother of his intention to leave and that Andrew Heyman would be in charge of the post-merger business. (Tr. 418-19, 432.) Finally, Andrew Heyman stated that he did not know the deal hinged on his remaining with the company, but John Heyman testified that he told him this. (Tr. 474-75, 614-15; Ex. 438; Ex. 54 at 16.) Taken together, it is clear that Andrew Heyman's equivocations were a thinly-veiled attempt by him to insinuate that it was simply too early in the merger negotiations for him to share information about the deal with his best friend. The documents and testimony of John Heyman indicate otherwise.

Andrew Heyman's lack of memory while testifying also undermines his credibility. Heyman only testified for a few hours, but he answered that he was unable to recall or remember facts more than 50 times while he was on the stand. (Tr. 505-748.) Heyman's inability to recall events was most acute when they supported the Division's case. For example, Heyman "didn't remember anything about being at Mercer Kitchen on July 6th," (Tr. 643), even though: (1) his trip to Mercer Kitchen immediately followed a dinner with NCR to discuss his employment agreement (Tr. 642, 628); (2) he had had a significant ordeal getting to New York for that dinner, including a three hour limousine ride after his flight was diverted to Baltimore (Exs. 441, 443, 444; Tr. 619), during which he exchanged around 30 texts with Murphy (Ex. 506 at 9-10); and (3) he apparently shared a bottle of wine with Murphy at Mercer Kitchen that cost close to $300 (Tr. 728). No other witness at trial exhibited this type of consistent inability to recall the events at issue in this case. In short, Heyman's claim that he talked with Murphy about everything except the NCR merger is simply not credible, particularly when viewed in context with all of the other evidence discussed above. (*Id.*) ("I mean I would share with Todd, you know, anything that was going on in my life, as long as it wasn't crossing some kind of legal line.").

B. Todd Murphy

Murphy's testimony that Andrew Heyman did not tell him about the merger and he did not share the information with Hill is also not credible. For starters, Murphy has strong reasons to deny that he heard about the deal from Heyman. Heyman is like a brother to him. (Tr. 882-83.) Murphy understood that Heyman expected him to keep details about his life private. (Tr. 887.) Murphy would be admitting that he betrayed his close friend of forty years if he testified that Heyman told him about the deal. Such testimony would also embarrass Heyman, something Murphy obviously does not want to do. In addition, Murphy would all but seal Hill's fate if he

testified that he told Hill about the merger. Murphy and Hill have been close friends for twenty years. (Tr. 880.) Murphy undoubtedly does not want to implicate Hill in securities fraud.

Murphy's credibility is also undermined because his testimony was flatly contradicted by the other witnesses at trial. For example, Heyman recognized that he spoke to Murphy about his work at Radiant. (Tr. 517-18, 526-27.) Murphy, in contrast, denied that he ever spoke to Heyman about his work. (Tr. 884.) Murphy's contention that he never spoke to Heyman about his work is doubtful given how close they were and how long they had known each other.

Hill also recognized that he sometimes spoke with Murphy about common acquaintances, including Andrew and John Heyman. (Tr. 104-05, 111, 114.) Andrew Heyman similarly testified that he talked to Murphy about Hill. (Tr. 526, 532-33.) Murphy, however, claimed that he never spoke to Hill about Andrew or John Heyman, and he never talked to Andrew Heyman about Hill. (Tr. 887-89.) Murphy's testimony is not credible – friends typically talk about common acquaintances, and Hill and Heyman admitted that they and Murphy did so. (Tr. 526.)

Murphy also testified that he never discussed Radiant with Hill. (Tr. 888.) But Hill acknowledged that he specifically discussed the Radiant merger with Murphy the day after the deal was announced. (Tr. 108-09.) Murphy's broad denials about ever discussing these topics with Heyman and Hill – when the other evidence (and common sense) shows that they did – supports the finding that Murphy was skewing his testimony in favor of Hill and against the Division. As such, Murphy's claims that he did not learn about the merger from Heyman and did not tell Hill about it should be given no weight.

Murphy's implausible explanation about how and when he learned about the merger undermines his credibility even further. Murphy testified at length that he was an artist and not a business person. (Tr. 884.) In fact, at the time of the merger, Murphy did not even own any

stock or have any investments. (Tr. 910-11.) Yet, Murphy wrote in a text message to John Heyman that he learned about the deal the same day it was announced by seeing news about it on CNBC. (Ex. 66.) When asked, Murphy initially claimed that he "regularly" watched CNBC because it was his "responsibility as – as a business owner" to do so. (Tr. 912.) Murphy next said that he "would just tune in just to see what was going on for the day." (*Id.*) Murphy finally pivoted to claiming that he could have seen the news "online" or read about the deal on a "running ticker[]" on the bottom of the television screen. (Tr. 912-13.) None of these scenarios make sense for an artist who claimed not to be a "business guy" and who held no investments. (Tr. 884.) Leaving aside his shifting explanations, it is highly unlikely that Murphy just happened to be watching CNBC on the exact date and time that the network reported the Radiant deal. Indeed, Murphy ultimately admitted that he has no recollection of watching CNBC on that day. (Tr. 915.) The Court should conclude that Murphy did not learn about the Radiant merger by watching CNBC, but rather was told about the deal beforehand by Andrew Heyman.

IV. THE COURT SHOULD GRANT THE RELIEF REQUESTED IN THE ORDER INSTITUTING PROCEEDINGS

A. Cease And Desist Order

Section 21C of the Exchange Act authorizes the Commission to enter an order requiring any person that violated the statute or a regulation promulgated thereunder to "cease and desist from committing or causing such violation and any future violation of the same provision, rule, or regulation." *See* 15 U.S.C. § 78u-3. When determining whether to impose a cease-and-desist order, the Court should consider several factors, including: "the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's

occupation will present opportunities for future violations." *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979); *Ginsburg*, 362 F.3d at 1304-05; *In the Matter of Richard C. Spangler, Inc.*, 46 S.E.C. 238, 254 n.67 (1976). In assessing the risk of future violations, the Commission has stated that "evidence showing that a respondent violated the law once probably also shows a risk of repetition that merits our ordering him to cease and desist." *KPMG Peat Markick, LLP*, 2001 WL 47245, at *24 (Jan. 19, 2001).

These factors weigh heavily in favor of issuing a cease-and-desist order against Hill. To begin with, Hill's conduct was egregious. He monetized his longstanding friendship with Murphy by trading on confidential information related to a common acquaintance. Hill invested more than $2 million based on information about NCR's acquisition of Radiant. Hill lied to Carter about his connections to Radiant insiders, and he even involved his wife at trial by falsely claiming that she "absolutely" was aware of and supported his trading.

Hill also acted with a culpable state of mind. Hill understood the value of nonpublic information related to a potential merger and profited enormously off of it. Upon learning of the potential Radiant deal, Hill opened two new brokerage accounts and invested more than *five times* his annual income and *thirty percent* of his net worth in the company's stock. Hill knew exactly what he was doing when he invested in Radiant, and ultimately executed trades on six separate dates to accomplish his objective of personally profiting off of the deal. Based on his misconduct, Hill earned more than $740,000 in illicit profits in less than two months.

Moreover, Hill has utterly failed to recognize the wrongful nature of his conduct and he has given no assurances that he will not again engage in future illegal conduct. Indeed, at trial, Hill repeatedly denied engaging in any wrongdoing and, instead, offered false explanations for

his trading behavior. Hill's intransigence in the face of overwhelming evidence of his illegal conduct militates strongly in favor of issuing the cease-and-desist order.

Finally, given Hill's high net worth and connections in the business community as a real estate developer, he may again be privy to material nonpublic information. As a result, Hill may again be in a position to violate Section 14(e) and Rule 14e-3.

Under these circumstances, the Court should enter a cease-and-desist order against Hill. *SEC v. Contorinis*, 2012 WL 512626, at *3-4 (S.D.N.Y. Feb. 3, 2012); *SEC v. Teo*, 2011 WL 4074085, at *8-9 (D.N.J. Sept. 12, 2011); *SEC v. Gowrish*, 2011 WL 2790482, at *4-6 (N.D. Cal. July 14, 2011); *SEC v. Gunn*, 2010 WL 3359465, at *3-8 (N.D. Tex. Aug. 25, 2010).

B. Disgorgement and Prejudgment Interest

Sections 21B(e) and 21C(e) of the Exchange Act allows the Commission to require a respondent to disgorge his illegal gains, including prejudgment interest. *See* 15 U.S.C. §§ 78u-2(e), 78u-3(e). Disgorgement is an equitable remedy designed to deprive a wrongdoer of unjust enrichment and also to deter others from violating the federal securities laws. *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989); *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1474-75 (2d Cir. 1996) ("The deterrent effect of an SEC enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits.").

The Court has broad discretion in determining the amount to be disgorged. *First Jersey Sec., Inc.*, 101 F.3d at 1474-75. "The SEC is entitled to disgorgement upon producing a reasonable approximation of a defendant's ill-gotten gains." *SEC v. Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004); *SEC v. Patel*, 61 F.3d 137, 139-140 (2d Cir. 1995). "Where stock is purchased on the basis of inside information, the proper measure of [disgorgement] is the difference

between the price paid for shares at the time of purchase and the price of the shares shortly after the disclosure of the inside information." *Patel*, 61 F.3d at 139-140.

In this case, the Court should require Hill to disgorge the profits from his June and July 2011 investments in Radiant. Hill sold all 101,600 shares of Radiant stock that he had purchased for himself and his daughters on July 12, 2011 – the day after the deal was announced. Attached as Appendix A is a chart that reflects Hill's illicit gains, which total $744,509.63. The Court should order Hill to disgorge that amount. *SEC v. Platforms Wireless Intern. Corp.*, 617 F.3d 1072, 1096 (9th Cir. 2010).

The Court should also order Hill to pay prejudgment interest. Prejudgment interest represents the amount of money the wrongdoer made or could have made by investing monies wrongfully obtained. *SEC v. Koenig*, 557 F.3d 736, 745 (7th Cir. 2009). An award of prejudgment interest is not a punitive award but rather is compensatory in nature. *SEC v. Lauer*, 478 F. Appx 550, 557 (11th Cir. 2012). While an award of prejudgment interest is within the Court's discretion, courts have routinely ordered the payment of prejudgment interest in cases where disgorgement is ordered. *SEC v. Gordon*, 822 F. Supp. 2d 1144, 1161-1162 (N.D. Ok. 2011); *SEC v. Stephenson*, 732 F. Supp. 438, 439 (S.D.N.Y. 1990).

In calculating prejudgment interest, the "SEC has adopted the tax underpayment rate for prejudgment interest on orders of disgorgement in all administrative proceedings." *Platforms Wireless Intern., Corp.*, 617 F.3d at 1099. Applying that methodology here, and using July 12, 2011 as the violation date for ease of calculation, the Court should order Hill to pay $138,918.83 in prejudgment interest. Attached as Appendix B is a chart that shows the calculation.

C. Civil Penalty

Section 21B(a) of the Exchange Act authorizes the Commission to order Hill to pay a civil penalty based on his violations of Section 14(e) and Rule 14e-3. *See* 15 U.S.C. § 78u-2(a)(2). Penalties are important in insider trading cases because "disgorgement alone merely restores a defendant to his original position without extracting a real penalty for his illegal behavior." *Contorinis*, 2012 WL 512626, at *6. In determining the appropriate civil penalty, courts consider "the defendant's culpability, the amount of profits gained, the repetitive nature of the unlawful act and the deterrent effect of a penalty given the defendant's net worth." *SEC v. Sekhri*, 2002 WL 31100823, at *18 (S.D.N.Y. July 22, 2002); *SEC v. Happ*, 392 F.3d 12, 32 (1st Cir. 2004). The Court should also be guided by the three-tier penalty framework set forth in Section 21B of the Exchange Act, as adjusted for inflation. *See* 15 U.S.C. § 78u-2; 17 C.F.R. § 201.1004. A "first tier" penalty for each violation by a natural person (like Hill) may be imposed up to $7,500. *See* 17 C.F.R. § 201.1004 (for violations occurring after March 3, 2009, but before March 5, 2013). A "second tier" penalty for each violation by a natural person that involved fraud may be imposed up to $75,000. *Id.* The Court may impose a "third tier" penalty up to $150,000 for each violation that involved fraud and resulted in substantial pecuniary gain to the defendant. *Id.*

This case warrants a third-tier penalty of $150,000. As explained above, Hill's illegal conduct in this case was egregious. Hill executed trades – on six separate occasions – totaling $2 million based on nonpublic information about a possible merger that he learned from Murphy. Hill made more than $740,000 from his illegal conduct. Hill has not shown any contrition for, or recognized the gravity of, his misconduct. To the contrary, Hill testified falsely before this Court about his trading and he is still utterly unremorseful. *SEC v. Lipson*, 278 F.3d 656, 664 (7th Cir.

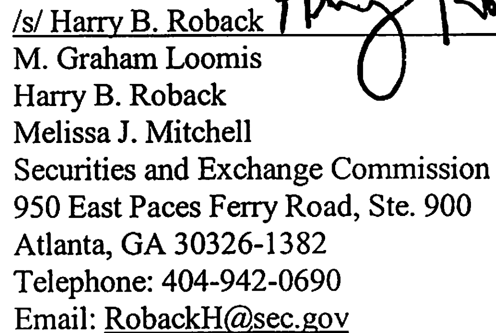
2002). Given Hill's high net worth and the above facts, the Court should impose a $150,000 penalty in this case.[10] *Gunn*, 2010 WL 3359465, at *4 ("Insider trading is a flagrant, deliberate, and serious violation of the federal securities laws; in no sense is it merely technical.").

CONCLUSION

For the foregoing reasons, the Court should find Respondent liable for violating Section 14(e) of the Exchange Act and Rule 14e-3(a) thereunder, and grant the relief sought in the Order Instituting Proceedings.

January 27, 2017

Respectfully submitted,



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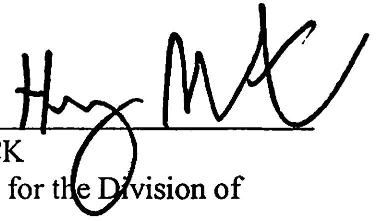
[10] The Court could impose an even higher penalty by counting each purchase of Radiant stock as a separate violation. *SEC v. Coates*, 137 F. Supp. 2d 413, 430 (S.D.N.Y. 2001).

CERTIFICATE OF WORD COUNT

I hereby certify that, pursuant to Commission Rule 450 and this Court's Order dated December 19, 2016, this brief contains 13,987 words.



/s/ Harry B. Roback
HARRY B. ROBACK
Senior Trial Counsel for the Division of Enforcement

CERTIFICATE OF SERVICE

On January 27, 2017, I served the foregoing by causing to be sent true and correct copies as shown below in sealed envelopes, postage prepaid, for overnight delivery addressed to:

Honorable James E. Grimes (also by email)
Administrative Law Judge
Securities and Exchange Commission
100 F Street NE, Room 2557
Washington, DC 20549-2557

Office of the Secretary (original, plus three copies)
Securities and Exchange Commission
100 F Street NE, Room 10900
Mail Stop 1090
Washington, DC 20549

Ross A. Albert, Esq. (also by email)
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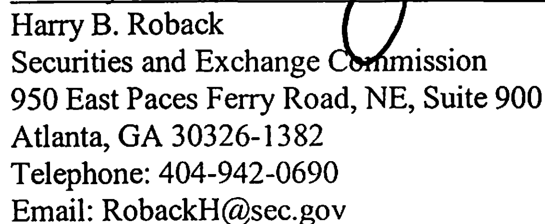
127 Church Street, NE, Suite 360
Marietta, GA 30060



/s/ Harry B. Roback
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APPENDIX A

(DISGORGEMENT CALCULATION)

SUNTRUST ACCOUNT

TRADE DATE	SHARES BOUGHT/SOLD	AMOUNT INVESTED	RECORD CITES
June 3, 2011	50,000 shares bought	$1,013,565.00	Ex. 112
July 8, 2011	10,000 shares bought	$219,521.00	Ex. 113
TOTAL INVESTMENT	60,000 shares bought	$1,233,086.00	Exs. 112, 113
July 12, 2011	60,000 shares sold	$1,681,806.00	Ex. 114
	ILL-GOTTEN GAINS	**$448,720.00**	

VANGUARD ACCOUNT

TRADE DATE	SHARES BOUGHT/SOLD	AMOUNT INVESTED	RECORD CITES
June 24, 2011	13,000 shares bought	$259,626.25	Ex. 196
July 1, 2011	20,000 shares bought	$430,264.00	Ex. 198
TOTAL INVESTMENT	33,000 shares bought	$689,890.25	
July 12, 2011	33,000 shares sold	$924,660.00	Ex. 199
	ILL-GOTTEN GAINS	**$234,769.75**	

WELLS FARGO ACCOUNTS FOR HILL'S DAUGHTERS

TRADE DATE	SHARES BOUGHT/SOLD	AMOUNT INVESTED	RECORD CITES
June 1, 2011 (A. Hill)	1,500 shares bought	$30,474.75	Ex. 202

June 1, 2011 (S. Hill)	1,500 shares bought	$30,481.80	Ex. 249
June 1, 2011 (G. Hill)	1,500 shares bought	$30,473.40	Ex. 219
July 5, 2011 (A. Hill)	1,100 shares bought	$23,659.01	Ex. 203
July 5, 2011 (S. Hill)	1,300 shares bought	$27,950.90	Ex. 250
July 5, 2011 (G. Hill)	1,700 shares bought	$36,630.26	Ex. 220
TOTAL INVESTMENT	8,600 shares bought	$179,670.12	
July 12, 2011 (A. Hill)	2,600 shares sold	$72,787.00	Ex. 204
July 12, 2011 (S. Hill)	2,800 shares sold	$78,357.40	Ex. 251
July 12, 2011 (G. Hill)	3,200 shares sold	$89,545.60	Ex. 221
TOTAL SALES	8,600 shares sold	$240,690.00	
	ILL-GOTTEN GAINS	**$61,019.88**	

APPENDIX B

(Prejudgment Interest Calculation)

Quarter Range	Annual Rate	Period Rate	Quarter Interest	Principal+Interest
Violation Amount				$744,509.63
08/01/2011-09/30/2011	4%	0.67%	$4,977.00	$749,486.63
10/01/2011-12/31/2011	3%	0.76%	$5,667.35	$755,153.98
01/01/2012-03/31/2012	3%	0.75%	$5,632.71	$760,786.69
04/01/2012-06/30/2012	3%	0.75%	$5,674.72	$766,461.41
07/01/2012-09/30/2012	3%	0.75%	$5,779.87	$772,241.28
10/01/2012-12/31/2012	3%	0.75%	$5,823.46	$778,064.74
01/01/2013-03/31/2013	3%	0.74%	$5,755.55	$783,820.29
04/01/2013-06/30/2013	3%	0.75%	$5,862.55	$789,682.84
07/01/2013-09/30/2013	3%	0.76%	$5,971.30	$795,654.14
10/01/2013-12/31/2013	3%	0.76%	$6,016.45	$801,670.59
01/01/2014-03/31/2014	3%	0.74%	$5,930.17	$807,600.76
04/01/2014-06/30/2014	3%	0.75%	$6,040.41	$813,641.17
07/01/2014-09/30/2014	3%	0.76%	$6,152.46	$819,793.63
10/01/2014-12/31/2014	3%	0.76%	$6,198.99	$825,992.62
01/01/2015-03/31/2015	3%	0.74%	$6,110.08	$832,102.70
04/01/2015-06/30/2015	3%	0.75%	$6,223.67	$838,326.37
07/01/2015-09/30/2015	3%	0.76%	$6,339.13	$844,665.50

10/01/2015-12/31/2015	3%	0.76%	$6,387.06	$851,052.56
01/01/2016-03/31/2016	3%	0.75%	$6,348.01	$857,400.57
04/01/2016-06/30/2016	4%	0.99%	$8,527.15	$865,927.72
07/01/2016-09/30/2016	4%	1.01%	$8,706.60	$874,634.32
10/01/2016-12/31/2016	4%	1.01%	$8,794.14	$883,428.46

Prejudgment Violation Range	Quarter Interest Total	Prejudgment Total
08/01/2011-12/31/2016	$138,918.83	$883,428.46