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UNITED STATES OF AMERICA
SECURITIES AND EXCHANGE COMMISSION

In the Matter of: **Charles L. Hill, Jr.** **Respondent.**	**Administrative Proceeding** **No. 3-16383**

RESPONDENT'S CONSENT MOTION
FOR LEAVE TO FILE
CORRECTED POST-HEARING BRIEF

Respondent Charles L. Hill, Jr. respectfully requests leave to file the attached Corrected Post-Hearing Brief. Due to logistical and computer difficulties on January 27, 2017, Respondent's original Post-Hearing Brief did not contain a Table of Contents, Table of Authorities and a Certificate of Word Count. Respondent has also made fewer than 10 proofreading changes. Respondent has not made any substantive changes.

The Division of Enforcement consents to the relief sought by this motion.

Dated: January 30, 2017.

THE ALBERT LAW FIRM

/s/ Ross A. Albert by John William with express permission

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CERTIFICATE OF SERVICE

I certify that today I filed an original and three copies of this document by FedEx (overnight delivery) with the Office of the Secretary, Securities and Exchange Commission, Attn: Brent Fields, 100 F Street N.E., Mail Stop 1090, Washington, D.C., 20549, by FedEx, with a copy by fax to (202) 772-9324, and e-mail copies to the following:

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Dated: January 30, 2017.

/s/ John Williamson
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CORRECTED POST-HEARING BRIEF OF RESPONDENT CHARLES L. HILL, JR.

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Pursuant to Rule of Practice 340 and this Court's Order dated December 16, 2016, Respondent Charles L. Hill, Jr. ("Charley Hill" or "Hill") files his Post-Hearing Brief.

PRELIMINARY STATEMENT

The Division's theory of this case is, in sum, that Charley Hill's trading in Radiant Systems ("Radiant") was so aberrational that he must have had inside information. But in support of that theory, the Division offered evidence at trial establishing little more than the supposedly aberrational trades themselves, a mutual friendship connecting Hill to a Radiant insider, lots of phone calls and texts, and a few dinners. Strikingly, the Division offered no direct evidence or credible circumstantial evidence of the central and essential element of its case: the transmission of inside information to Hill. The Division's sole theory of transmission was that the Radiant insider, Andy Heyman, passed inside information to his friend, Todd Murphy, who in turn passed the information to Hill. But Heyman[1] flatly denied providing inside information to Murphy. There is not a shred of direct or credible evidence to suggest otherwise. Thus, the Division's case fails from the start. Moreover, for his part, Murphy testified that he neither received nor inferred inside information from Heyman, nor provided inside information to Hill.

[1] Unless otherwise stated, "Heyman" refers to Andy Heyman. His brother is referred to as John Heyman.

Again, there is no direct or credible circumstantial evidence to the contrary. And lastly, wholly consistent with the testimony of Heyman and Murphy, Hill denies receiving inside information. Thus, the Division has failed to satisfy its burden of proving the element of transmission and its case fails entirely.

Because it could offer no compelling evidence of the transmission of inside information, the Division instead went to great lengths to prove weak and largely irrelevant circumstantial facts that were never in dispute: that Heyman and Murphy were close friends who talked frequently on the phone or texted, and who got together for dinner or drinks; and that Murphy and Hill, too, were close friends who talked and texted and socialized. While true, those facts prove nothing here. The evidence reflects probably thousands of phone calls and texts, as well as some in-person conversations, between Heyman and Murphy, and between Murphy and Hill. Yet, the Division presented no evidence of the substance of any of those communications, save for some miscellaneous texts, the substance of which was innocuous. Unable to show any culpable content, the Division argues that the frequency and timing of the calls, texts and dinners is suspicious, that they coincide with significant deal events, or with Hill's purchase of Radiant shares. Thus, the Division argues, the Court could infer illegal trading. In a different case, the timing of calls, texts and dinners might be meaningful. But not in this case. Here, the inference the Division asks the Court to draw could only be based upon the

Division's limited, selective and distorted presentation of the evidence. Heyman and Murphy are close friends, as are Murphy and Hill. These pairs of friends talked regularly, frequently. As years' worth of phone records demonstrate, there is nothing suspicious or even unusual in the frequency or duration of the phone calls and texts during the relevant timeframe. Heyman and Murphy, on the one hand, and Murphy and Hill, on the other, had been talking frequently for years. There was no sudden surge in calls or texts (or meetings) during the relevant timeframe. Thus, the circumstantial showing of frequent calls and texts simply does not warrant the inferences of furtive and urgent communications urged by the Division. Further, federal district courts have repeatedly rejected the Division's efforts, such as it made here, to prove insider trading based on nothing more than weak and speculative circumstantial evidence.

The Division closed its presentation of evidence with Lynn Carter, who it claimed was disinterested, who supposedly had "no dog in this fight." (Tr. at 932.) But she proved to be both self-interested and self-serving, and her testimony was inconsistent with SunTrust's own documents. Despite having had numerous opportunities to memorialize her claim that she had quizzed Hill about knowing Radiant insiders and having inside information, the documents are all but silent on those issues. Apart from a single notation that Hill had no inside information (which is true), there is nothing. Most telling, when SunTrust instructed Carter to document

her discussions with Hill as part of the bank's preparation for inquiries from the SEC, she did not write a word about insiders or insider information. In sum, the most credible account of her discussions with Hill is his: that she asked him whether he knew anyone at Radiant, to which he said "yes," but she did not ask him who. Moreover, that is the only account that makes sense of Hill's comment to her, "I'm happy for those guys." (*See* Tr. at 815.) While Carter tried to explain Hill's comment away by saying she thought it was "odd," that is simply not credible. If she thought it was odd (indeed, she also said it "shocked" her (*id.* at 816)), she could and should have followed up on it. But she did not, because she didn't have to. She knew who "those guys" were because Hill had just told her that he knew people at Radiant. Indeed, his confidence in them was an important factor in his investment decision. Moreover, she continued to do business with Hill, placing more trades for him a few weeks later – which, as a licensed securities professional, she presumably would not have done if she truly believed he had previously placed trades with her based on inside information.

In its closing, the Division attempted to salvage what it could from this evidentiary record by offering a substantially new theory of its case. While the Division had consistently asserted – from the allegations of the Order Instituting Proceedings ("OIP") through the close of evidence at trial – that this was an intentional tipping case, it changed course in closing argument. Tacitly conceding

that it had failed to prove its case, the Division argued, "nor are we saying that Andy Heyman intentionally tipped Todd Murphy so that Todd Murphy could then intentionally tell Charl[ey] Hill . . . ." (Tr. at 940.) Instead, the Division offered a substitute theory: maybe Heyman "simply let a little too much information slip . . . ." (*Id.*) But Heyman's firm and credible testimony was devastating to the Division's new theory. He testified that he was always careful not to discuss confidential information if he could be overheard (*id.* at 717), and that it was therefore "highly unlikely" he could have unwittingly disclosed inside information to Murphy (*id.* at 703.) He further testified that he would be "shocked" if Murphy had inferred anything, and dismissed the Division's suggestion that it was nevertheless a possibility as just "guessing." (*Id.* at 739.)

There are still more problems with the inadvertent transmission theory. Heyman must have slipped on multiple occasions if negligence or accident is to account for Hill's trades. (*See* Tr. at 942.) Either that or Heyman was lying. (*See Id.* at 942-43.) And while it must necessarily be one or the other for the slippage theory to hold, neither position is credible. Further, seemingly lost in the mix as the Division tried to avoid both the incredible implications of its slippage theory, or calling Heyman a liar (*see* Tr. at 940-47), is this problem: how does the Division explain the transmission of inside information from Murphy to Hill? For the

Division's newly-minted theory of inadvertent transmission to work, Murphy, too, must have slipped numerous times, or have been lying.

In sum, the Division did not prove the theory of the case it alleged, and then argued in closing a new and incredible theory it hadn't alleged. On this record, Hill submits that the Court must find that the Division did not prove its case, and so find in favor of Hill.

STATEMENT OF RELEVANT FACTS

A. Hill's Background and Longstanding Interest in Radiant

Charley Hill has a totally unblemished record. (Division Ex. 3 at 1-3.) Before this case, Hill had never been investigated, let alone charged, with any violation of federal or state law. (*Id.* at 2-3.) He resides in Atlanta and has worked as a self-employed commercial real estate developer for over 30 years. (Tr. at 87-88.) He purchases fast food restaurant sites, redevelops them, and leases them to single-tenant restaurants, such as Chick-fil-A, Willy's and Taqueria Del Sol. (Tr. at 87.) Hill's business is highly speculative in nature; it requires the routine investment of hundreds of thousands to millions of dollars in commercial real estate sites, as well as hundreds of hours of sweat equity, usually with no guarantee that any individual project will succeed. (Tr. at 305, 307.)

Hill has an extensive understanding of the restaurant business, and in particular fast food restaurants. (Division Ex. 42 at 32.) This knowledge and

experience has been developed not only through years of interacting with his tenants through his commercial real estate business, but also because several family members work or worked in the restaurant industry. (*Id.*) For instance, Hill's father owned a Wendy's franchise for 35 years. (*Id.*) His brother was also a Wendy's franchisee and his brother-in-law is also in the restaurant business. (*Id.*)

Through his widespread experience with the restaurant industry, Hill became familiar with the business model for restaurants. (*Id.* at 32-33.) Of particular significance here, the importance of tracking and controlling food and labor costs was drilled into Hill by his father at the family dinner table when he was growing up. (*Id.* at 32.)

Hill had been familiar with and interested in Radiant for several years because he appreciated that Radiant's point-of-sale machines and technology helped restaurants manage inventory and control labor costs. (*Id.* at 32-33.) In fact, he made his first purchase of around $10,000 of Radiant stock in July 2001, almost a decade before his Radiant purchases in June and July 2011. (Tr. at 49.)

Hill also observed that a number of his tenants, and many other restaurants, used Radiant machines for extended periods of time. (Tr. at 246.) For example, when Hill's Chik-fil-A tenants opened a new store, they installed Radiant machines. (Division Ex. 42 at 34.) Hill noticed that Radiant machines were in many other places of business that he frequented as a customer, such as QuikTrip, RaceTrac,

Zoës Kitchen, and Schlotzsky's. (Tr. at 246.) In addition, he would frequently ask for feedback on Radiant's products from employees at these stores, which was consistently positive. (*Id.*)

Hill followed Radiant's stock in the newspaper and watched Radiant's stock price for over a decade. (Tr. at 49, 95.) Throughout this time period, Hill observed Radiant's stock price trend consistently upwards, even in the face of a severe economic recession. (Tr. at 82.) Hill was not only familiar with the quality of Radiant's products and the enthusiasm they generated in Radiant's customers, but he had met and was favorably impressed with Radiant's most senior officers: John Heyman, the CEO, Mark Haidet, the CFO, and Heyman, the COO. (Division Ex. 51 at 17-18.) All these factors led Hill to believe that Radiant was an excellent investment.

Charley Hill first met John Heyman in July 2004. One of Hill's daughters was dating a young man who was the best friend of John Heyman's son. Hill would frequently pick up his daughter at John Heyman's house. (Tr. at 111.) Hill and his wife also had dinner with John Heyman and his wife when they happened to meet on a ski trip to Park City, Utah. (Tr. at 113-14.)

Hill first met Heyman around 25 years ago when he was looking for a space to open up a coffee shop and high-end magazine and periodical store. (Tr. at 103.)

Hill would also occasionally bump into Heyman at art openings and galleries, including shows that featured Murphy's artwork. (Division Ex. 46 at 10.)

Hill met Mark Haidet around mid-2010 when Hill attempted for a time to assist Mr. Haidet in finding a site for a restaurant in Atlanta. (Tr. at 114-15.)

B. Hill's Investing Experience

Starting in the 1990s, Hill actively invested in the stock market for many years, but because of the global financial crisis which began around 2007, he exited the market. (Tr. at 302.) From 2007 through 2011, like many other Americans, Hill did not participate in the stock market because of uncertainty arising from one of the worst financial environments since the Great Depression. (*Id.*)

Hill has never believed in the conventional wisdom of a diversified stock portfolio. (Tr. at 310.) He agrees with the legendary investment advisor Peter Lynch, who cautioned against diversification merely for its own sake. (*Id.*) Thus, Hill's investment strategy is not to invest in a broad range of stocks, but rather to focus on certain companies and watch them over an extended period of time. (Tr. at 201.) Again, following Peter Lynch's recommended approach, Hill prefers to focus his investments in companies with products or services that he is familiar with, understands, and has confidence in. (Tr. at 307.) Hill conducts his commercial real estate business in the same manner: he prefers to enter leases with companies that he knows, has researched, and has confidence in. (Division Ex. 51 at 10-14.)

In recent years, Hill has thus followed this same strategy, which others might regard as risky or contrarian, to make significant investments in other companies besides Radiant. (*Id.* at 15; Division Ex. 42 at 102.) For example, Hill invested around $490,000 in Freshmarket, $94,000 in Quiksilver, $265,000 in Ford Motor Company, and $435,000 in Zoës Kitchen. (Tr. at 200, 338, 339, 346.)

C. Hill's 2011 Trading in Radiant Stock

In February 2011, Hill sold a Chick-fil-A restaurant site in Atlanta for approximately $3.6 million. (Tr. at 229.) After paying a brokerage commission and paying off a small loan that encumbered the property, Hill received net proceeds of about $3.4 million. (Tr. at 118, 230.) At the time of the sale, he had committed about $2.5 million to purchase two other sites that he believed he could lease to Chick-fil-A, and he already had contracts on both sites. (Tr. at 231.) By May 12, 2011, however, both projects had fallen through. (Division Ex. 46 at 31.) Thus, in mid-May, Hill found himself with approximately $3.4 million cash that was no longer committed to any of his commercial real estate projects, and which was earning very little interest in a money market account. (Tr. at 73.) For months, his wife had expressed concerns about this idle cash, urging Hill to find a more productive and profitable use for it. (Division Ex. 42 at 84.) At the end of May 2011, after discussing the matter with his wife, Hill decided to invest in Radiant, in

part because he had observed the per share price climb from around $17.55 to around $20.00 since February when he sold his Chick-fil-A property. (*Id.*)

At the end of May 2011, Hill opened a joint brokerage account for himself and his wife with Vanguard and an individual account at SunTrust to carry out his plan of investing in Radiant stock. (Tr. at 118, 134.) Hill's three daughters each had a custodial brokerage account with Wells Fargo (collectively, the "Custodial Accounts") for which he was the custodian, with authority to direct investments. (Tr. at 153.) From June 1 through July 8, Hill bought 101,600 shares of Radiant at a total cost of approximately $2.1 million.[2] (Second Amended Answer and Affirmative Defenses of Respondent Charles L. Hill, Jr. ("Answer") at ¶ 4; OIP at ¶ 4.) Hill sold all of the Radiant shares on July 12, 2011 for a total gain of $744,000. (Answer at ¶¶ 5, 45.)

Compared to the property investments he makes in his commercial real estate business, Hill did not view his investment in Radiant as overly or even especially risky. (Tr. at 307, 311.) On several different occasions, Hill put a comparable, if not higher percentage of his net worth at risk in purchasing commercial real estate

[2] Specifically, Hill made the following purchases of Radiant: 1,500 shares in each of the Custodial Accounts on June 1; 50,000 shares in the SunTrust Account on June 3; 13,000 shares in the Vanguard Account on June 24 (Hill also purchased 20,000 shares of Ford Motor Company valued at approximately $265,000 that same day); 20,000 shares in the Vanguard Account on July 1; 4,100 shares in the Custodial Accounts on July 5; 10,000 shares in the SunTrust Account on July 8.

properties and engaging in speculative real estate deals, with no guaranteed result or exit plan. (Tr. at 305, 311-12.) As he testified, if he made a bad decision when buying publicly traded stock, he could still cut his losses by selling, but if he made a bad real estate decision, he was stuck with it. (Tr. at 307.)

D. The Central Figures in This Case: Charley Hill, Todd Murphy and Andy Heyman

Hill and Murphy have been close friends for almost twenty-five years. (Tr. at 861, 880.) Murphy is a prominent and successful artist. (Tr. at 862.) He currently resides in Brooklyn, New York and has worked as a self-employed artist since 1987. (Tr. at 866.) Murphy has not had any brokerage accounts for twenty years. (Tr. at 910.) From about 2006-2007 to August 2011, Murphy lived in Atlanta. (Tr. at 866.) In August 2011, Murphy and his family moved to Brooklyn. (*Id.*)

Until the Division initiated its investigation in this case, Hill and Murphy called and texted each other frequently. From August 2008 through October 2011, they communicated by telephone and text message, on average, twenty-three to twenty-four times a month. (Respondent Ex. 99; Division Exs. 74 & 76.) For example, from August to December 2008, they averaged **24.40** telephone calls a month; for all of 2009, **24.08** calls a month; for all of 2010, **23.45** calls a month, excluding a roughly five-week period when Murphy was on a ship voyaging to

Antarctica and back; and from January to October 2011, **23.70** calls a month.[3] (Tr. at 853-55, 878-79; Respondent Ex. 99.) Of particular relevance, from May 1 to July 12, 2011 (the "Deal Period"), Hill and Murphy averaged **23.33** calls a month between them. Excluding this approximately 10-week time period, there were an average of **23.97** calls a month over the entire period from August 2008 to October 2011. (*Id.*) Thus, from August 2008 to October 2011, Hill and Murphy called each other slightly *more* often *outside* the Deal Period than during it. (Respondent Ex. 99.)

Heyman resides in Atlanta. (OIP at ¶ 10; Tr. at 701.) In November 2016, he became CEO of Catalina, a digital marketing company. (Tr. at 728-29.) Before that, starting around August 2011, Heyman was a senior executive at NCR Corporation, a large multinational Fortune 500 company. He ultimately rose to the position of executive vice president of NCR and president of NCR Financial Services, NCR's largest division. Before NCR, Heyman had been a senior executive at Radiant for fifteen years, becoming the COO in the early 2000s. (Tr. at 506-07.) In connection with NCR's acquisition of Radiant, NCR's CEO, Bill Nuti, personally recruited Heyman to stay on and run the former Radiant business, which became NCR's

[3] These figures exclude calls lasting a minute or less because it is doubtful that substantive information could be communicated during such a brief period, particularly when the time taken up by a voicemail greeting is included. Regardless, the statistics during this same period for calls lasting a minute or less are highly comparable. (*See* Respondent Ex. 99.)

largest division. (Tr. at 534, 549-52, 614-15, 627-28.) At the time Heyman announced his resignation from NCR in October 2016, he was on a short list of one to become NCR's next CEO. (Tr. at 729, 731-32.) Heyman's total compensation from NCR in 2015 was $2.8 million. (NCR 2015 Annual Report 70, available at https://www.sec.gov/Archives/edgar/data/70866/000119312516500314/d127170ddef14a.htm#toc127170_41.)

For more than forty years, Heyman and Murphy have been close friends, a relationship they describe as like brothers, like family. (Tr. at 512-13, 699, 864, 882-83.) They talked and texted frequently, sometimes multiple times during a single day. (Division Ex. 506; Tr. at 514; *see also* Division Ex. 76.) From March to December 2010, Heyman and Murphy exchanged an average of **9.4** telephone calls per month, excluding calls that lasted a minute or less.[4] (*See* Ex. B to Respondent's Motion for Summary Disposition ("MSD").) They exchanged an average of **9.2** telephone calls a month from January through September 2011. (*See* Ex. C to RSD.)

In addition to being a close personal friend, Heyman also assisted Murphy financially. Among other things, Heyman invested a total of approximately $500,000 in a business and real estate venture to promote Murphy's artwork, though it proved to be "an unmemorable investment" in which Heyman lost "some money."

[4] *See supra* footnote 3.

(Tr. at 528, 721-22.) To help ease the burden (financial and otherwise) of Murphy's 2011 move from Atlanta to Brooklyn with his wife and five children, and to allow Murphy to devote more time to creating artworks, Heyman became a sponsor and fundraiser for "OrigamiWe," a project to raise a year's financial support for Murphy's family and business. (Tr. at 689-99; Division Exs. 451, 452, 455, 456, 507, 508.) Heyman was also OrigamiWe's main donor, making a gift of $100,000. (*Id.*) Further, he purchased "quite a bit" of Murphy's original artworks, about $300,000 worth, over the years. (Tr. at 719-20.)

E. NCR Acquires Radiant

Radiant was a point-of-sale technology company based in Alpharetta, Georgia. (OIP at ¶ 2.) NCR is also a point-of-sale technology company based in Duluth, Georgia. (*Id.*) In early May 2011, NCR's CEO Bill Nuti contacted Radiant's CEO John Heyman and expressed an interest in a possible acquisition of Radiant. (Tr. at 380; Division Ex. 54 at 13.) On May 12, 2011, NCR sent a letter to Radiant expressing a non-binding indication of interest to acquire Radiant at a price of $24 to $26 per share, and requesting a period of exclusive negotiation. (*Id.*) On May 23, 2011, Radiant's board of directors held a special telephonic meeting and discussed NCR's expression of interest in acquiring Radiant. (*Id.*)

Throughout June and early July 2011, Radiant and NCR continued to negotiate a potential acquisition. (*Id.* at 13-16.) On July 11, 2011, Radiant and NCR

executed a related merger agreement, which was structured to include a tender offer from NCR for Radiant stock. (*Id.* at 16.) After the market close on July 11, 2011, NCR and Radiant issued a joint press release announcing the transaction. (*Id.*; Tr. at 665-66.) NCR's tender offer succeeded, and NCR closed its acquisition of Radiant on August 23, 2011.

F. Heyman Did Not Provide Inside Information to Murphy; And Murphy Did Not Receive Inside Information, Nor Did He Provide Any to Hill

In response to the Division's questioning whether he might have told Murphy about "any aspect of the merger negotiations," Heyman categorically denied it: "A: No. Q: It's not possible? A: It's not possible." (Tr. at 653-54. *See id.* at 655 ("I have no doubt that I did not talk with Todd about the transaction."); *see also id.* at 700-02 (denying allegations of the OIP).) As for the possibility of an inadvertent transmission of inside information, Heyman said it was, "Highly unlikely. . . . I would just say highly unlikely because I know how protective I am about this stuff." (Tr. at 703.)

In addition, Heyman testified at length about his knowledge of, and strict compliance with, Radiant's Insider Trading Policy, which prohibited both deliberate and inadvertent violations. (Tr. at 704-10; Division Ex. 18.) He knew that "[t]he consequences of insider trading violations can be staggering," and that an individual who "tip[s] information to others" would face "a jail term of up to 20 years," as well as substantial civil and criminal fines of "up to $5 million." (Tr. at 704-05; Division

Ex. 18.) In addition to these substantial civil and criminal penalties, he knew Radiant's Insider Trading Policy provided that even an inadvertent violation for tipping would result in "dismissal for cause." (Division Ex. 18 (emphasis in original); *see also* Tr. at 703 (he knew that even inadvertent tipping "would risk my entire career"); *id.* at 535-36, 708-10 (he also knew he stood to lose some $10 to $11 million in employment and stock benefits if he violated the policy).) Accordingly, he testified that he would have been very careful to scrupulously observe the insider trading policy, including being very careful with any material non-public information about the NCR merger in advance of the public announcement. (*See* Tr. at 709-10.)

Among other precautions he took, Heyman stated that if he "was on the phone having a work call in front of a friend, I would typically step away," and that, if "insider information" was involved, he "would make sure that I was in a closed environment in front of nobody." (Tr. at 717.) He further explained that he "would try to not have business discussions in front of family and friends, first of all not because of confidential information, just as a matter of tact" and that "[i]f there's confidential information," he would "have an extra degree of caution" by removing himself from being around "people that could understand anything I would be saying." (Tr. at 745-46.)

Notwithstanding the closeness of his relationship with Murphy, Heyman testified that he would not lie under oath to protect him. (Tr. at 699-700.) Similarly, Heyman testified that he would not break the law, particularly the securities laws' prohibition on tipping, to benefit Murphy. (Tr. at 700.) Heyman received no benefit, financial or otherwise, from Hill's trading in Radiant stock and certainly Heyman would have no reason to do anything illegal or improper to benefit Hill, who was no more than a casual acquaintance. (Tr. at 693-94, 724.)

In turn, Murphy categorically denied all allegations of illegal or improper conduct. (Tr. 871-76.) Specifically, he denied: having any advance knowledge of the NCR acquisition of Radiant; having any advance communications with Heyman about Radiant Systems being bought by NCR; having any advance communications with Heyman about his leaving Radiant to join NCR; overhearing conversations between Heyman and anyone else about a potential acquisition of Radiant; and seeing in advance any documents or any information that may have led him to believe that Radiant's price might increase. (Tr. at 868-70.) And with respect to Hill specifically, Murphy denied ever talking with Hill about Radiant's business, or having any idea prior to the start of the SEC's investigation that Hill had invested in Radiant. (*Id.*)

Because Murphy never had any inside information about Radiant, it would have been impossible for him to transmit inside information to Hill, either

deliberately or inadvertently. (Tr. at 871-76.) Murphy was emphatic in his testimony, affirming that he did not have "any doubt in [his] mind . . . [n]one whatsoever," that all of the allegations in the OIP regarding his purported transmission of inside information were false. (Tr. at 874-76.) He further testified that he would not lie under oath to protect either Hill or Heyman. (Tr. at 880-81.)

G. Lynn Carter Discredited Herself.

The Division put up Lynn Carter in an attempt to discredit Hill, but she succeeded in discrediting only herself. She testified that Hill originally wanted a conservative investment strategy, which would be at odds with his investment in Radiant. (Tr. at 755, 763.) And, of course, she testified that she asked him whether he knew anyone at Radiant, or had inside information, and that he denied both. (*Id.* at 779-82.) Her testimony on both points is not credible. Not only does she contradict herself on these points, her testimony is belied by the documentary evidence.

Hill did not tell Carter that he wanted a conservative investment strategy, a fact Carter grudgingly admitted on cross-examination: "He didn't use that terminology to me, but most clients do not." (Tr. at 788.) Rather, Carter decided to substitute her own opinion of what Hill needed for anything he might have actually told her. (*See* id. at 784-89.) In sum, Carter decided, following a brief meeting with Hill and without fully understanding his financial situation or ever discussing his

investment experience, and based in part on her experience with other real estate investors, that a conservative approach "made sense" to her. (*Id.*; *see also id.* at 786 (her investigative testimony was that a conservative approach was "my intent or my objective for him"); *id.* at 787 ("so maybe I was leading him to that conclusion").) So, on Hill's brokerage account application, Carter ranked his investment objectives conservatively, as she thought was appropriate for him. (*See id.* at 792; *see also* Division Ex. 116.) Curiously, however, for the "risk tolerance" box, she checked "aggressive" because she knew Hill was purchasing stock in a single company. (*Id.* at 792-94; *see also id.* at 802 (acknowledging that "there's a tension" between categories of investment objectives and risk tolerance on Hill's application).) Ultimately, Carter conceded that SunTrust's account application form was "broad and generic," "confusing," and "doesn't really fit multiple objectives." (*Id.* at 794.) Lastly, Carter testified that if SunTrust decided that a client's investment activity did not fit their profile, SunTrust would simply change the profile to fit the most recent investment activity – and without first discussing it with the client. (*Id.* at 804-05.) Indeed, SunTrust changed Hill's profile from "preservation of capital being number one to speculation being number one" in precisely this fashion. (Id. at 804.) In sum, it is plain that neither SunTrust nor Carter took the stated investment objectives on the account application with any degree of seriousness.

Carter testified that Hill denied knowing anyone at Radiant. (Tr. at 779.) But that testimony cannot be squared with Carter's admission that Hill told her, "I'm happy for those guys." (*Id.* at 815.) She now says she thought it was "odd." (*Id.*) But the only thing "odd" here is Carter's incredible denial. She knew in fact who Hill was talking about, because he had told her that he knew people at Radiant. To credit her testimony on this point, one would have to accept that having just learned that Hill knew "those guys" at the very moment he was selling all his Radiant stock, Carter would nevertheless not bother to document that. That seems quite unlikely, to say the least. Nor did she document any concerns about insiders or inside information when SunTrust instructed her to document her discussions with Hill as part of the bank's preparation for inquiries from the SEC. (*Id.* at 825-32; Division Ex. 27 (the memo she prepared for a SunTrust senior compliance officer recounting her discussions with Hill, which does not address insiders or inside information at all).) Again, these omissions seem quite unlikely, had she in fact questioned Hill as she claimed.

Moreover, Carter continued to do business with Hill, placing more trades for him a few weeks later – which, as a licensed securities professional, she presumably would not have done if she truly believed he had previously placed trades with her based on inside information. Indeed, she testified that she would not have continued

to do business with Hill if she thought he had traded on inside information. (*See id.* at 819-21.)

ARGUMENT AND CITATION OF AUTHORITIES

A. The Division Bears the Burden of Proof as to All Elements of its Claim Under Rule 14e-3.

To establish its sole claim under Rule 14e-3, the Division must satisfy its burden of proving each of the following elements: (a) a substantial step had occurred in the commencement of a tender offer; (b) scienter; (c) trading in connection with the tender offer on the basis of material nonpublic information; (d) that the trader knows or has reason to know is nonpublic; and (e) that the trader knows or has reason to know has been acquired directly or indirectly from an insider of the offeror or issuer, or someone working on behalf of the offeror or issuer.[5] *See* Order Denying Respondent's Motion for Summary Disposition on the Merits at 2 (May 8, 2015)

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[5] It appears that the "knows or has reason to know" language requires an objective, not subjective analysis. *See Tolston v. Nat'l R.R. Passenger Corp.*, 102 F.3d 863, 865 (7th Cir. 1996) (in case brought under Federal Employers Liability Act (FELA), "knows or has reason to know" is "an objective inquiry"); *Resser v. Comm'r of Internal Revenue*, 74 F.3d 1528, 1536 (7th Cir. 1996) (statutory language requiring a showing that taxpayer "did not know, and had no reason to know" called for an objective "reasonably prudent person" standard); *see also, e.g., United States v. Parigian*, 824 F.3d 5, 10-13 (1st Cir. 2016) (in dictum, in criminal insider trading case, court seemed to indicate that civil standard of "knew or should have known" was an objective inquiry).

(citing *United States v. O'Hagan*, 521 U.S. 642, 669 (1997)); *SEC v. Ginsburg*, 362 F.3d 1292, 1299 (11th Cir. 2004); *SEC v. Adler*, 137 F.3d 1325, 1338 & n.35 (11th Cir. 1998.) The Division must prove each of these elements by a preponderance of the evidence. *See Steadman v. SEC*, 450 U.S. 91, 95-96 (1981); *SEC v. Schvacho*, 991 F. Supp. 2d 1284, at 1302-03 (N.D. Ga. 2014). In other words, the Division may not rely on a strong showing on one element to overcome an insufficient showing on another element. *Id.*

Although the Division may rely on circumstantial evidence to meet its burden, any such evidence may only be given weight if "'it reasonably establishes [a] fact rather than anything else.'" Order Denying Respondent's Motion for Summary Disposition on the Merits at 6 (quoting *Burrell v. Bd. of Trs. of Ga. Military Coll.*, 970 F.2d 785, 788 (11th Cir. 1992)); *see also, e.g., SEC v. Cassano*, 2000 WL 1512617, at *2 (S.D.N.Y. Oct. 11, 2000) ("The case against the moving defendants, as they contend, appears to turn on circumstantial evidence. The Court is mindful also that care must be exercised lest speculation substitute for reason in such a situation.").

B. The Division's Reliance on Allegedly Suspicious or "Aberrational" Trading is Insufficient for It to Satisfy Its Evidentiary Burden.

Allegedly suspicious or "aberrational" trading in isolation, without other compelling credible proof, is insufficient to allow the Division to satisfy its burden. *See SEC v. Truong*, 98 F. Supp. 2d 1086, 1097-98 (N.D. Cal. 2000); *Schvacho*, 991

F. Supp. 2d at 1299-1300. *See also, e.g., SEC v. Goldinger,* 106 F.3d 409, 1997 WL 21221, at *3 (9th Cir. 1997) ("[T]he SEC cannot merely provide circumstantial evidence to show the possibility of illegal trading."); *SEC v. Gonzalez De Castilla,* 184 F. Supp. 2d 365, 379 (S.D.N.Y. 2002.) In *Truong*, one of the defendants, an employee and shareholder of a publicly traded company, sold shares of the company in the weeks prior to his company's announcement that it had failed to meet revenue expectations. 98 F. Supp. 2d at 1097-98. The SEC offered evidence that, prior to defendant's trades, (i) several individuals in the company were provided financial documents revealing decreased revenue figures, although there was no evidence that defendant saw these confidential reports; and (ii) the company's personnel and outside counsel were working on the annual report which discussed the financial condition of the company during an evening that defendant was working late. *Id.* at 1097-98. The *Truong* Court determined that this evidence was insufficient to preclude summary judgment against the SEC, noting "[s]uspicious trading by itself cannot suffice to warrant an inference" that a defendant traded on the basis of nonpublic information. *Id.*

The *Truong* Court went on to observe that allowing the SEC to prove its case by relying solely on allegedly suspicious trading would improperly "relieve the SEC of its burden to identify the information, prove its materiality, and prove possession and use by the [defendant]." *Id.* Although the SEC "may prove that a defendant

possessed material non-public information through the use of circumstantial evidence (beyond alleged 'suspicious' trading), the Agency may not rest on evidence that would require a jury to *speculate* that the defendant possessed that information." *Id.* (emphasis in original); *see also id.* ("**Courts stress that the SEC may not base insider trading actions on strained inferences and speculation.**") (emphasis added.) *Accord, e.g., Gonzalez De Castilla*, 184 F. Supp. 2d at 379-80 (granting summary judgment when the SEC's case with regard to trades at issues "is ultimately too speculative" as to the alleged possession of inside information); *Schvacho*, 991 F. Supp. 2d at 1302-03 ; *SEC v. Garcia*, No. 10 CV 5268, 2011 WL 6812680, at *9 (N.D. Ill. Dec. 28, 2011) (suspicious trading, even when combined with a doubtful explanation, is insufficient to preclude summary judgment; the SEC may not seek to substitute speculation for reliable evidence.)

C. Heyman and Murphy Gave Consistent and Credible Testimony Negating the Division's Sole Theory Regarding the Transmission of Inside Information.

At bottom, this is a straightforward case. The Division essentially takes the position that Hill's trading was so suspicious and "aberrational" that he must have had inside information. As demonstrated above, that position has been repeatedly rejected in *Schvacho*, *Truong*, *Gonzalez De Castilla* and other cases. (*See supra* at 23-25.) To the contrary, the Division bears the burden of proving all the elements of its sole claim under Rule 14e-3, most notably including the transmission element,

i.e., that Charley Hill traded on the basis of material non-public information that he knew or had reason to know had been acquired directly or indirectly from an insider. At trial, and throughout this case, the Division's sole theory of transmission was that Heyman provided Murphy with inside information, who, in turn, shared that information with Hill.

Trial has concluded and the evidentiary record is now closed. Each of the three principals involved here – and the only individuals with direct knowledge of the substance of their communications – testified that no inside information had ever been transmitted, received or inferred. As this Court suggested during closing arguments, it is simply not possible to rule in favor of the Division without finding that Heyman and Murphy repeatedly perjured themselves at trial and during their investigative testimony. (Tr. at 940-44.) Individuals with the stature, accomplishments, acumen and integrity of Heyman and Murphy do not lightly commit perjury, or for that matter, securities fraud, particularly when, as here, they have everything to lose and nothing to gain.

In the OIP, the Division took the position that Heyman deliberately shared inside information with Murphy, who then deliberately passed the information along to Hill. This position would necessitate that both Heyman and Murphy committed securities fraud (and/or aided and abetted securities fraud) and then doubled down and perjured themselves by denying what they had done. These actions would have

been contrary to their penal, professional, personal, financial and reputational interests. Among other things, Heyman testified that he was aware that tipping could result in a lengthy jail sentence and substantial criminal and civil fines of up to $5 million. He also testified that even inadvertent tipping – or even just the existence of an investigation by the SEC – could result in termination under Radiant's Insider Trading Policy.[6] (Division Ex. 18.) He further testified that he received between $10 and $11 million in employment and stock benefits as a result of the NCR merger. In 2015, Heyman received total compensation of $2.8 million from NCR. It is inconceivable that any rational individual would risk his personal liberty, plus potentially tens of millions of dollars over the course of time, by making a deliberate tip. To do so would be career suicide. (Tr. at 703.)

Why would he risk it? As Heyman testified, he had "zero" motive to provide any sort of financial benefit to Hill, a casual acquaintance. (Tr. at 703, 733.) And because Heyman was far closer to Murphy, Heyman said he would simply have given money to Murphy if he needed it, as he actually did in becoming the main

[6] Heyman's testimony that he never provided inside information to Todd Murphy is further bolstered by the fact that his then-employer NCR was well-aware of Heyman's involvement with the SEC's investigation (it was served with a subpoena) and had looked into the situation and determined that it was a "non-event." (Tr. at 730-32.) In fact, even after NCR became aware of the investigation, Heyman was given increased responsibilities, was promoted to the position of executive vice president and was placed on a very short list of candidates to become NCR's CEO. (*Id.*)

donor for Project OrigamiWe. Thus, it would have been irrational for Heyman to resort to tipping, an act with severe potential criminal and civil consequences, to benefit Murphy, much less Hill.

Likewise, it would have been against Murphy's penal, professional, personal, financial and reputational interests to tip Hill. Further, while Murphy and Hill were close friends, Murphy's friendship with Heyman was far more significant, and goes father back. Heyman testified that Murphy "had never done me wrong" even once during their forty-year friendship. (Tr. at 525, 743.) Speaking hypothetically, Heyman said that if Murphy had inferred anything about the NCR merger and then tipped anyone, he would have regarded such an act as a betrayal, a serious breach that could possibly result in an irreparable breach of the friendship. (Tr. at 718-19, 743.) Heyman testified without equivocation that he did not believe Murphy had ever or would ever betray him. (Tr. at 525, 718-79.) And though the economic benefits Murphy received from his relationship with Heyman pale in comparison to the value they placed on their friendship, it would have been contrary to Murphy's financial interests to betray Heyman by tipping Hill.

At trial, apparently realizing that its theory of intentional tipping would not fly in the face of actual trial testimony, the Division attempted to pivot to Plan B, a new evidentiary theory that was contrary to what was alleged in the OIP and was based on the speculation that, perhaps, Heyman had let something slip and that Murphy, in

turn, had similarly let something slip to Hill. (Tr. at 948-49.) But the Division's fallback theory of inadvertent transmission is no more worthy of credence than its original theory. First of all, Murphy categorically denied ever having or ever inferring any inside information about Radiant. As shown, there is no reason to disbelieve Murphy's testimony. To the contrary, this Court should credit it. Likewise, Heyman repeatedly testified that it was "highly unlikely" that he might have unintentionally passed inside information to Murphy and that he could not imagine how Murphy might have inferred anything. (Tr. at 703, 717, 743.) Finally, as this Court itself suggested at trial, the notion of multiple unintentional slips that just happened to coincide with deal events is both speculative and unlikely. (Tr. at 943.)

D. *Schvacho* is Particularly Instructive Here.

Hill submits that this Court can and should decide this case solely by crediting the testimony of Heyman and Murphy, thus negating the Division's sole theory of transmission. That being said, it is instructive to examine the striking similarities between *Schvacho* and this case, in which the evidence and inferences of illegality is substantially weaker.

In *Schvacho*, the SEC's theory of the case was that Schvacho's large-scale trading in the stock of Comsys IT Partners, Inc. ("Comsys") was so unusual, suspicious and aberrational that it must have been based on inside information

provided to him in confidence by his long-standing best friend Larry Enterline, who was Comsys' CEO at the time of Schvacho's trades. The significant similarities between *Schvacho* and this case include:

> **Close Relationships**: Schvacho had a personal connection to an insider while the insider was negotiating a merger transaction for his company. Schvacho was the long-time best friend of Comsys's CEO, Larry Enterline. 991 F. Supp. 2d at 1287. The two spoke by phone an average of "two or three times a week." *Id.*
>
> **Timing of Calls and Trades**: Schvacho and Enterline communicated many times during the period when Enterline was negotiating the deal. The two spoke by phone or text message repeatedly, sometimes on successive days and sometimes multiple times per day. *Id.* at 1290-95. The two also met in person and spent significant time together. *Id.* at 1290, 1291-92, 1293. Throughout, Schvacho repeatedly bought Comsys stock often in close conjunction with telephone calls or meetings with Enterline. *Id.* at 1290-95.
>
> **An Alleged "Aberrant" or "Abberational" Investment**: as in this case, the SEC argued that the Comsys investments were inconsistent with Schvacho's stated "trading philosophy." *Id.* at 1302.
>
> **Reason for the Investment**: Schvacho said that he had invested in Comsys stock primarily based on his personal experiences and observations, and confidence in the abilities of an insider. Specifically, he decided to invest in the staffing industry because "he had become familiar with the staffing industry generally based on conversations with" Enterline and also had confidence in Enterline's managerial abilities. *Id.* at 1289.
>
> **Large Investment**: as in this case, Schvacho invested a large portion of his net worth in a single stock. During a three-month period, he invested about $740,000, even though his net worth was only $3.6 million (and his total investible liquid assets were just $1.3 million.)
>
> **Significant Profit**: After the public announcement of the deal, the price of Comsys spiked, enabling Schvacho to reap real and imputed profits of about $513,000 on a total investment of about $741,000, representing a return of 69 percent.

Notwithstanding the much stronger case presented by the SEC in *Schvacho*, including a close personal relationship between the alleged tipper and tippee, Judge Duffey held that the SEC had failed to prove insider trading under Rule 10b-5 and Rule 14e-3 by a preponderance of the evidence.

Judge Duffey noted that "the SEC acknowledges that it does not have any direct evidence of misappropriation of insider information . . . ." 991 F. Supp. 2d at 1298. Here, the SEC likewise admits that it relies on what the it calls "compelling circumstantial evidence" to prove Mr. Hill's guilt. (SEC Opposition to Summary Disposition at 2.)

Judge Duffey deemed unconvincing the "pattern" of "conversations and stock transactions" that coincided with the deal negotiations. 991 F. Supp. 2d at 1299. While that pattern might be "facially interesting," it was not enough to "prove, by a preponderance of the evidence, that Schvacho misappropriated insider information to make the trades . . . ." *Id.* All the less so because (i) the SEC had failed to introduce evidence of the substance of the calls, and (ii) Enterline and Schvacho were close friends who regularly spoke with each other with "enormous frequen[cy]." Thus, there was nothing inherently suspicions or unusual about the frequency of Schvacho's and Enterline's communications during the deal period. *Id.* at 1290, 1302.

So, too, here, the Division clings to an alleged pattern of calls/texts and trades during the deal negotiation period to prove the insider trading claim. The Division has no culpable evidence about the substance of any of the calls; the texts it has elicited similarly do not support any inference of insider trading. And, here too, the Division has failed to demonstrate that there was anything suspicious or unusual about the pattern of communications between either Heyman and Murphy, or Hill and Murphy, during the deal period. *Cf. Schvacho*, 991 F. Supp. 2d at 1299 n.4 ("[T]he SEC does not present any evidence . . . to show that the frequency or pattern of communication . . . was any different during the [deal period] than it was before the insider trading allegedly began.".)

Judge Duffey noted that Enterline testified that "he did not disclose inside information to Schvacho." 991 F. Supp. 2d at 1300. Judge Duffey also emphasized that Enterline "was well-versed in Comsys' policy prohibiting and guarding against the disclosure of inside information." *Id.* at 1300-01. Judge Duffey also noted that Enterline had an "unblemished" record and the "SEC did not offer any evidence that [Enterline's] testimony was other than credible and truthful." *Id.* Here, Heyman has credibly and categorically denied that he ever deliberately provided inside information to Murphy and testified that it was "highly unlikely" that he ever let anything slip and that he "can't imagine" how Murphy might have inferred something. Heyman testified that he was aware of and took care to comply with

Radiant's Insider Trading Policy. As for Murphy, he categorically denied that: (i) he had any advance knowledge or inside information about the NCR merger; (ii) Heyman had ever provided him with inside information; and (iii) he had ever inferred anything in advance of the NCR merger.

As to the SEC's contention that Schvacho's Comsys purchases "varied from his stated trading philosophy," Judge Duffey concluded that the evidence was "not sufficient . . . to allow the Court to find the SEC met its burden of proof in this case." 991 F. Supp. 2d at 1302. Here, the Division's arguments regarding the supposed inconsistencies in Hill's explanation for his Radiant trades are likewise insufficient to enable the Division to satisfy its burden of proof.

Finally, Judge Duffey concluded that the SEC's evidence about Schvacho's relationship and communications with Enterline at most showed that Schvacho had potential "access" to insider information and that "access . . . to material, nonpublic information, without more, is insufficient to prove the defendant actually possessed that information." *Id.* at 1298-99. As compared to *Schvacho*, the evidence surrounding Hill's trading in Radiant is more attenuated because there is no evidence that Hill ever had any had direct communications with Heyman or any other Radiant insider during the deal period. Instead, the Division merely speculates that Hill could have had potential access to inside information indirectly through Murphy, who was close friends with Heyman. The Division cannot identify what alleged

inside information Murphy might have been able to infer, how he was able to infer it, or when he allegedly came into possession of this purported inside information. Just as in *Schvacho*, these speculative allegations of potential access to inside information are insufficient. *Cf.* 991 F. Supp. 2d at 1298-99.

In sum, the SEC made strikingly similar (yet stronger) evidentiary arguments in support of its insider trading claim in *Schvacho*. Judge Duffey rejected those arguments for reasons that also apply here. If the SEC's evidence in *Schvacho* was insufficient to prove its insider-trading claim, as Judge Duffey so ruled, a fortiori, the Division's evidentiary theories are insufficient to prove its claim against Charley Hill in this case.[7]

CONCLUSION

The Division has failed to satisfy its burden of proof by, among other things, failing to demonstrate that Heyman ever transmitted inside information to Todd Murphy and that Todd Murphy ever possessed inside information. This Court

[7] Lastly, Hill recognizes that the Court is bound by Commission precedent and must adhere to its previous rulings, but for purposes of preserving the record, Hill hereby incorporates by reference his previously asserted constitutional arguments. Specifically, Hill incorporates his Motion For Summary Disposition On His Constitutional Affirmative Defenses And Memorandum Of Points And Authorities In Support Thereof, dated April 15, 2015; Respondent's Pre-Hearing Brief, dated June 1, 2016; and Motion of Respondent Charles L. Hill, Jr., To De-Institute Administrative Proceeding, dated October 5, 2016. Hill also relies upon the recent decision, *Bandimere v. SEC*, 844 F.3d 1168, 2016 U.S. App. LEXIS 23308 (10th Cir. Dec. 27, 2016).

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 8,579 words.

/s/ Ross A. Albert
Ross A. Albert