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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 RESPONSE TO RESPONDENT'S POST-HEARING BRIEF

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INTRODUCTION

Respondent's contention that the Division of Enforcement offered "no credible circumstantial evidence" proving "the transmission of inside information to" Hill has no merit. (Hill Br. 1.) The overwhelming evidence shows that Hill invested $2 million in Radiant because he learned about its possible merger with NCR from Murphy, and that Murphy learned about the merger from Andrew Heyman ("Heyman"). As explained in the Division's post-hearing brief, the evidence that Hill committed insider trading 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. As the Division explains below, the remaining arguments raised in Hill's post-hearing brief also lack merit. The Court should find Hill liable for violating Section 14(e) of the Securities Exchange Act of 1934 and Rule 14e-3(a) thereunder, and grant the relief requested in the Order Instituting Proceedings.

DISCUSSION

I. HILL MISSTATES THE ELEMENTS OF SECTION 14(e) AND RULE 14e-3(a)

A. The Division Need Not Show That Heyman Breached Any Duty

Since the inception of this case, the Division has consistently maintained that Heyman confided in Murphy, his best friend of forty years, about the possible NCR merger; Murphy shared news of the merger with Hill, who also knew Heyman; and Hill then traded in Radiant securities while in possession of that information. *See, e.g.*, Order Instituting Proceedings ¶¶ 24, 27; Div.'s Opp. to Mot. Summ Disp. at 14-16 ("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 (who knew Heyman)"); Tr. 18-19, 24-26 ("Mr. Heyman was simply confiding in a man he considered to be like a brother to him, and Mr. Murphy was simply gossiping to someone who he had known as well for more than 20 years") (opening statement); Tr. 932-46 ("Andy Heyman was recently divorced and his closest confidant was Todd Murphy") (closing argument).

Hill's contention that the Division "changed course in closing argument" is incorrect and based on a misunderstanding of Section 14(e) and Rule 14e-3. (Hill Br. 4-5.) Hill writes in his post-hearing brief: "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 Charley Hill[.]'" (*Id.*). But to prevail on its claims under Section 14(e) and Rule 14e-3, the Division does not need to show that Heyman told Murphy about the deal so that Murphy (or Hill) would trade or otherwise benefit. *United States v. O'Hagan*, 521 U.S. 642, 669 (1997) (Rule 14e-3 "creates a duty in those traders who fall within its ambit to abstain or disclose, without regard to whether the trader owes a pre-existing fiduciary duty to respect the confidentiality of the information."); *SEC v. Maio*, 51 F.3d 623, 635 (7th Cir. 1995) ("Rule 14e-3 creates a duty to disclose material non-public information, or abstain from trading in stocks implicated by an impending tender offer, regardless of whether such information was obtained through a breach of fiduciary duty."). Contrary to Hill's claim, the breach of duty by a corporate insider – in this case Heyman – is not an element under Section 14(e) or Rule 14e-3.

Accordingly, the Division has never asserted that Heyman tipped Murphy about the merger with the expectation that Murphy or Hill would trade based on the information or otherwise benefit from it. This is because the Division does not need to show that Heyman breached his fiduciary duty by disclosing the information to Murphy. Hill's possession of

material nonpublic information is sufficient to establish liability under Section 14(e) and Rule 14e-3. *See SEC v. Peters*, 978 F.2d 1162, 1167 (10th Cir. 1992) ("[T]he SEC need only prove that the trader knowingly received the confidential information directly or indirectly from an insider, but need not prove that the trader obtained the information in breach of a fiduciary duty."). The Court may thus find Hill liable under Section 14(e) and Rule 14e-3(a) as long as Hill knew or had reason to know that the information about the merger originated with Heyman, which he plainly did.[1] *United States v. Parigian*, 824 F.3d 5, 10-13 (1st Cir. 2016); *Resser v. C.I.R.*, 74 F.3d 1528, 1536 (7th Cir. 1996).

Indeed, the Division made this exact point in its opening statement at trial:

> It's also important to remember, Your Honor, this is not a Section 10b case. It is brought exclusively under [Section] 14[(e)]. So scienter is not an element of [that offense]. So . . . we're not alleging Mr. Heyman provided information to Mr. Murphy and that Mr. Murphy intentionally provided information about the deal to Mr. Hill so that he would trade on it.

Tr. 25-26. *See also* Division's Opp. Respn't Mot. Summ Disp. at 16 n.6 ("[A]s the Court is well aware, the elements of Section 10(b) claims are not the same as the elements for establishing a violation of Section 14(e)."). The Division's position has remained the same throughout this case, including during its closing argument, and is consistent with the elements required to prove a violation of Section 14(e) and Rule 14e-3(a).[2]

B. There Is No Benefit Requirement

Hill also claims that Heyman would not have "deliberate[ly] tip[ped]" Murphy about the

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[1] At trial, Hill argued that the "knew or had reason to know" standard in Rule 14e-3(a) was subjective. (Tr. 29.) Hill now concedes that it is an objective standard. (Hill Br. 22 n.5.)

[2] To prevail under Section 10(b), the Division would have to show a breach of duty by either Heyman or Murphy. *See Dirks v. SEC*, 463 U.S. 646, 659-60 (1983). The reason is that under Section 10(b) "the tippee's duty to disclose or abstain is derivative from that of the insider's duty." *Id.*; *Maio*, 51 F.3d at 632-33. In contrast, the breach of duty is not an element under Section 14(e). Indeed, Rule 14e-3 has a separate provision that addresses the liability of a corporate insider. *See* 17 C.F.R. § 240.14e-3(d).

NCR merger, but instead "would simply have given money to Murphy if he needed it" because they were such close friends. (Hill Br. 27-28.) This argument also misstates the Division's theory of the case and is based on a misunderstanding of Section 14(e) and Rule 14e-3. The Division has never claimed that Heyman "tipped" Murphy about the pending merger so that Murphy (or Hill) could profit from the deal. Rather, the Division has consistently maintained that Heyman told Murphy about the merger because they were close friends and Heyman routinely confided in Murphy about important personal and professional developments. (*See supra* at 1-3; Division Br. 25-26.) The potential merger with NCR was one such important life event. It is reasonable to conclude that Heyman confided in Murphy because, as John Heyman testified, the potential merger and the related negotiations over Heyman's employment agreement with NCR caused Heyman "a lot of angst and nervousness." (Tr. 387.) Given that Heyman was recently divorced at the time, it makes sense that Heyman would turn to his "spiritual adviser" (Murphy) for guidance on these stressful issues.

Moreover, Hill incorrectly suggests that to establish liability under Section 14(e) and Rule 14e-3(a), the Division must show that Murphy (and Heyman) received a benefit from disclosing information about the deal. (Hill Br. 27-28.) The showing of such a benefit, however, is not necessary under Section 14(e) or Rule 14e-3(a). A trader violates these provisions regardless of whether the source of the inside information received a personal benefit as a result of the disclosure. *See SEC v. Downe*, 969 F. Supp. 149, 153 (S.D.N.Y. 1997) (noting that under Section 14(e) and Rule 14e-3 "personal benefit to the tipper is not required").[3]

[3] In contrast, Section 10(b) would require that Heyman or Murphy received a benefit as a result of making the disclosure, depending on the theory of liability. *See Maio*, 51 F.3d at 632-33.

C. There Is No Need To Show That Heyman And Murphy Violated The Law

Hill also erroneously claims that finding him liable "would necessitate that both Heyman and Murphy committed securities fraud (and/or aided and abetted securities fraud)[.]" (Hill Br. 26-27.) Hill has, once again, mistakenly equated the showing necessary to prevail under Sections 14(e) and 10(b). The liability of a remote (or downstream) trader under Section 10(b) derives from the illegal disclosure by the corporate insider and/or downstream tippers. *O'Hagan*, 521 U.S. at 663 ("Absent any violation by the tippers, there could be no derivative liability for the tippee."); *Maio*, 51 F.3d at 632-33 ("Absent such improper disclosure by the tipper, a tippee is not liable, because the tippee's duty is derivative."). Hill's liability under Section 14(e) and Rule 14e-3(a), in contrast, is independent from any wrongdoing by the corporate insider or later source of information. *See* 17 C.F.R. § 240.14e-3(a), (d). This means that Hill may, and in this case did, violate Section 14(e) and Rule 14e-3 even though Heyman and Murphy did not themselves violate the federal securities laws. *Id.*

II. THE DENIALS BY HEYMAN AND MURPHY ARE NOT CREDIBLE

Hill relies heavily on the denials by Heyman and Murphy. (Hill Br. 1-2, 25-29.) But corporate insiders and their confidants rarely admit to discussing material nonpublic information. *See, e.g.*, *O'Hagan*, 521 U.S. at 675 n.20 (noting that a corporate insider may "gratuitously protect the tippee" when they are family members or friends); *SEC v. Roszak*, 495 F. Supp.2d 875, 887 (N.D. Ill. 2007) ("direct evidence is rarely available in insider cases, since usually the only witnesses to the exchange are the insider and the alleged tippee, neither of whom are likely to admit to liability."); *SEC v. Carroll*, 9 F. Supp.3d 761, 768 (W.D. Ky. 2014) (same); 4 Bromberg & Lowenfels on Securities Fraud § 6:548 ("Proof of tipping will often be circumstantial for there will rarely be an objective record or disinterested observer of what was

transmitted, and the alleged tipper and tippee will seldom admit that there was a tip.").

Not surprisingly, numerous juries and courts have concluded that inside information was disclosed despite protestations to the contrary by the corporate insider and the defendant. *See, e.g.*, *SEC v. Ginsburg*, 362 F.3d 1292, 1301 (11th Cir. 2004) (noting that "[i]f it were otherwise, family members . . . could trade based on insider information with impunity"); *SEC v. Adler*, 137 F.3d 1325, 1342 (11th Cir. 1998) (noting that a jury is not "required to believe the allegedly innocent explanations for the telephone calls"); *SEC v. Michel*, 521 F. Supp.2d 795, 803-04, 824-25 (N.D. Ill. 2007) (finding defendants liable "despite their self-serving denials that no insider information was disclosed"); *SEC v. Ferrero*, 1993 WL 625964, at *7 (S.D. Ind. Nov. 15, 1993) (finding defendants liable even though they "deny that any tipping occurred"), *aff'd sub nom. Maio*, 51 F.3d 623 (7th Cir. 1995); *SEC v. Warde*, 151 F.3d 42, 47-48 (2d Cir. 1998) (affirming jury verdict finding defendant liable even though he denied receiving nonpublic information).

In this case, there is ample evidence to support the conclusion that Heyman and Murphy did not testify truthfully when they denied discussing the NCR merger. (Division Br. 31-37.) Heyman and Murphy both had strong incentives to deny discussing the deal; they were hostile to the Division's case; their testimony conflicted on several important points; and their testimony was inconsistent with the overwhelming evidence presented at trial that supports the inference that they discussed the potential merger before it was publicly announced. *Id.* As a result, the Court should not credit their denials.[4] *Id.*

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[4] Another example of Heyman's hostility to the Division came when he refused to acknowledge the likelihood that he participated in, or listened to, an analyst conference call after the merger was announced on July 11, 2011. (Tr. 668-669.) Heyman's refusal was steadfast even though (1) he received a calendar invite for an "Analyst call" on July 11 from 5:45pm to 6:45pm, to which Bill Nuti (NCR's CEO) was also invited (Ex. 459), and (2) he emailed Nuti at 7:01 pm that evening with the subject line "Call" that said ""Excellent job." (Ex. 458.)

Hill claims, however, that for the Court to reach this conclusion it must find "that Heyman and Murphy repeatedly perjured themselves at trial and during their investigative testimony." (Hill Br. 26-27.) Hogwash. A court may not credit a witness's testimony for a variety of reasons, including that the witness is intentionally lying; the witness is mistaken; the witness has a faulty memory; or even where the witness has convinced himself of something that is not true. *See, e.g.*, *United States 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"); *Bradley v. West*, 2005 WL 3276386, at *14 (E.D.N.Y. Dec. 2, 2005) (a "witness commits perjury if he gives false testimony concerning a material matter with the willful intent to provide false testimony, as distinguished from incorrect testimony resulting from confusion, mistake or faulty memory."); *United States v. Tisdale*, 1997 WL 349948, at *2 (S.D.N.Y. June 25, 1997) (instructing jury that: "Usually the witnesses have convinced themselves of the truth of what they are saying before they take the stand. So usually, your problems are to determine . . . whether intervening events have given him or her any reason to mold consciously or unconsciously his or her memory in any particular direction."). The Court may also determine that a witness's testimony on an issue is simply not believable in light of all the evidence in the record. *United States v. Woolfolk*, 197 F.3d 900, 905 (7th Cir. 1999).

Here, the evidence supports the conclusion that Heyman and Murphy were not forthright about their discussions of the NCR merger. The Division does not, however, need to parse their subjective intentions to prevail. What is clear is that their denial of discussing the NCR merger is not credible, regardless of whether it is intentionally false or mistaken for some other reason.[5]

[5] While the circumstantial evidence shows that Heyman shared information about the merger with Murphy, Hill's trading would still violate Section 14(e) even if the Court finds that Heyman only disclosed enough information from which either Murphy or Hill could deduce that a merger

Hill's failure to acknowledge the difference between perjury and mistaken testimony is surprising. He testified under oath during the investigation that he had never bought Radiant stock before June 2011. (Ex. 42 at 107.) Yet, at trial, Hill testified that he had bought Radiant stock in July 2001, but completely forgot about that purchase when he previously testified. (Tr. 45-50.)

Hill also maintains that the denials by Heyman and Murphy are credible because "there was no sudden surge in calls or texts (or meetings) during the relevant timeframe." (Hill Br. 2, 12-14.) But the Division's theory is that Heyman and Murphy spoke frequently because they were such close friends, and that Heyman confided in Murphy about the possible NCR deal during these discussions. In these circumstances, one would not expect to see a "sudden surge" in their communications. They were already talking almost every day. (Respn't Ex. 99.) Evidence of increased communications between Heyman and Murphy might be relevant if the Division claimed that Heyman and Murphy rarely spoke but they suddenly started talking frequently around the time of the merger. That is not the Division's theory in this case though.

Hill further contends that Heyman took precautions not to disclose confidential corporate information. (Hill Br. 17.) Whether Heyman generally took precautions not to disclose inside information, however, does not foreclose a finding that in this instance Heyman confided in his best friend and confidant of forty years about a potentially life-altering event. Such a disclosure by Heyman would not be inconsistent with his general practice given that he trusted Murphy and had every reason to expect that Murphy would keep the information confidential. Indeed, the

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was imminent. *SEC v. Steffes*, 805 F.Supp.2d 601, 610 (N.D. Ill. 2011) ("it is well established that a defendant can be held liable for insider trading when he or she obtains and acts on pieces of information, which, 'piece[d] together,' constitute material nonpublic information.") (*citing United States v. Mylett*, 97 F.3d 663, 668 (2d Cir.1996)). Heyman conceded that this was a possibility, Tr. 654-55, 738, and Hill had reason to know that any such information from Murphy would have originated with Heyman.

overwhelming evidence supports the conclusion that Heyman felt comfortable telling Murphy about the deal for precisely these reasons.

Hill also faults the Division for not producing the text messages between Heyman and Murphy. (Br. 2.) Hill conveniently ignores, however, that the Division served Heyman and Murphy with subpoenas for their text messages with each other from the May-July 2011 time period, but neither one was able to produce them. (Ex. 514; Tr. 903-06.) The inability of Hill's friends to produce these text messages is not a deficiency in the Division's case. *Cf. Leon v. IDX Sys. Corp.*, 464 F.3d 951, 959 (9th Cir. 2006) ("[B]ecause the relevance of destroyed documents cannot be clearly ascertained because the documents no longer exist, a party can hardly assert any presumption of irrelevance as to the destroyed documents.").[6]

Hill also claims that Heyman's testimony "is bolstered by the fact that his then-employer NCR was well-aware of Heyman's involvement with the SEC's investigation . . . and has looked into the situation and determined that it was a 'non-event.'" (Hill Br. 27 fn. 6.) This claim by Heyman is grossly misleading. There is no evidence in the record that NCR conducted an independent investigation into whether Heyman disclosed nonpublic information about the Radiant merger to Murphy. Nor is there any indication that NCR had access to the evidence presented by the Division in this case. Indeed, it is a stretch to think that NCR would have any interest in examining conduct that occurred before Heyman joined NCR, especially when no charges were ever brought against Heyman for this conduct. The suggestion that NCR's inaction somehow corroborates Heyman's testimony is dubious at best.

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[6] Heyman and Murphy were only able to produce the content of text messages with each other from later time periods. (Respn't Ex. 41.)

III. HILL'S ATTACKS ON LYNN CARTER ARE UNFOUNDED

Hill contends that Carter, his own broker, "proved to be self-interested and self-serving." (Hill Br. 2.) Hill utterly fails, however, to substantiate these allegations. Carter has absolutely no reason to skew her testimony in favor of the Division or against Hill. Carter testified credibly about her interactions with Hill in 2011, including that he had discussed conservative investment options with her in May 2011, and he denied knowing anyone who worked at Radiant when he bought the company's stock in June and July 2011. Hill's claim of bias on her part finds no support in the record.

Hill nevertheless asserts that he "did not tell Carter that he wanted a conservative investment strategy, a fact Carter grudgingly admitted on cross-examination." (Hill Br. 19) (citing Tr. 788). This argument is specious. Carter's statement that Hill "didn't use that terminology" does not mean she fabricated Hill's desire to use a conservative investment strategy. Rather, as Carter explained, she concluded that Hill wanted to invest in conservative options based on what *he* told her he wanted to do with the money and her almost twenty years of experience as an investment professional. (Tr. 750, 753-56.) This includes Hill's statements to Carter that he did not want to invest in anything risky, including equities. (Tr. 756, 758.)

Carter also testified that she asked him if he knew anyone who worked at Radiant, but Hill told her that he did not know anyone at the company. (Tr. 770-71.) Hill claims that Carter's testimony that "Hill denied knowing anyone at Radiant . . . cannot be squared with [her] admission that Hill told her, 'I'm happy for those guys.'" (Hill Br. 21.) This argument is meritless. Carter found Hill's comment about being "happy for those guys" to be memorable precisely because he had previously denied knowing anyone at the company. (Tr. 782.) If Hill had admitted to knowing insiders at Radiant, as he now claims, his statement about being happy

for those guys would not have been odd to Carter. (*Id.*) (Q. And why is that memorable for you? A. Because, you know, he led me to believe that he didn't know anybody at the company . . . But it just seemed odd to me that he would be happy for somebody he didn't know.).

Hill also asserts that Carter's testimony is not credible because her notes do not reflect her questioning him about his contacts at Radiant. (Hill Br. 21.) But Carter expressly wrote in an exchange with SunTrust's compliance department after Hill's initial purchase: "[H]e said that he has no insider information on this company." (Tr. 772-75; Ex. 26 at 1.) Carter explained that "obviously when it says no insider information that means I've asked if he knows anyone at the company or if he obtained any information that was not public or illegal." (*Id.*) Contrary to Hill's claim, Carter did document her questioning of him. To the extent Hill is quibbling with her shorthand, Carter's notes were not intended to be a verbatim transcription of her conversation with him. (*Id.*)

Finally, Hill contends that Carter's testimony is not credible because she "continued to do business with Hill," which she "would not have done if she truly believed he had previously placed trades with her based on inside information." (Hill Br. 21-22.) Carter never testified, however, that she knew Hill engaged in insider trading. (Tr. 781-82.) To the contrary, she testified that Hill was quite convincing when he said that he did not know anyone at Radiant, and she did not know enough about him to disbelieve his claim. (Tr. 779-82.) Moreover, Carter consulted her supervisor before selling Hill's Radiant shares, and he directed her to execute the sell order. (Tr. 816.) The fact that Carter executed a few other trades for Hill does not undermine Carter's testimony about what he told her in June and July 2011.

IV. HILL'S EXPLANATIONS FOR INVESTING IN RADIANT ARE NOT CREDIBLE

The Division addressed in its opening brief why Hill's explanations for buying Radiant stock in 2011 are not credible. (Division Br. 26-31.) Hill's post-hearing brief adds little to this issue, but a few additional observations are worth making.

First, Hill now claims that "[s]tarting in the 1990s, [he] actively invested in the stock market for many years, but because of the global financial crisis which began around 2007, he exited the market." (Hill Br. 9.) Hill has failed, however, to identify a single stock purchase before his June 2011 investments in Radiant (other than his July 2001 Radiant investment). Moreover, Hill testified at trial that he did not invest in Radiant between 2001 and 2007 because he was "focused more on real estate, and that's really what I was doing with – as far as investments." (Tr. 303.) This testimony is obviously inconsistent with Hill's post-trial assertion that he "actively invested in the stock market." Hill's evolving explanations for why he suddenly invested $2 million in Radiant in 2011 further undermines his credibility.

Second, Hill states that his "confidence in [Andrew and John Heyman] was an important factor in his investment decision." (Hill Br. 4, 8.) But Hill has known Andrew Heyman for 25 years and John Heyman since 2004. (Tr. 102-04, 110-11.) Both men had worked at Radiant since the 1990s. (Tr. 369-70, 506-07.) Yet, Hill did not invest in the company during the decade between July 2001 and June 2011. Hill wants this Court to believe that he waited ten years to invest in Radiant and just happened to invest $2 million in the company during the precise six-week period that it was being acquired by NCR. Hill's testimony is simply not believable.

Third, Hill claims that he had "followed Radiant's stock in the newspaper and watched Radiant's stock price for over a decade." (Hill Br. 8.) He contends that "[t]hroughout this time period, [he] observed Radiant's stock price trend consistently upward, even in the face of a

severe economic recession." (*Id.*) But Hill testified during the investigation that he only "occasionally" read about Radiant in the newspaper, and he never looked at any of the company's financial reports. (Ex. 42 at 38-39.) Moreover, Radiant's stock price fluctuated greatly during the 2001-2011 time period. (Ex. 62; Tr. 66-85.) Hill's claim that Radiant's stock price went "consistently upward" is objectively false. (*Id.*) Indeed, at trial, Hill admitted that Radiant's stock price was "volatile" and it was an "unpredictable stock." (Tr. 79-81.)

Finally, Hill claims that he invested in Radiant in June 2011 "because he had observed the per share price climb from around $17.55 to around $20.00 since February" 2011. (Hill Br. 10-11.) Radiant's stock price had gone down to $17.55/share in February 2011, however, from $20.00/share in December 2010. (Ex. 62 at 42.) In February 2011, Radiant's stock price was merely back to where it had been three months earlier. (*Id.*) Hill's assertion that he invested in Radiant because its stock price had increased to $20.00/share is not supported by the record.

V. HILL'S ATTEMPT TO REARGUE HIS MOTION FOR SUMMARY DISPOSITION SHOULD BE REJECTED

Hill rehashes the same arguments he made in his motion for summary disposition that this Court denied more than a year ago. Hill first asserts that, "[s]trikingly, the Division offered no direct evidence . . . [of] the transmission of inside information to Hill" and, with respect to the phone calls between Heyman, Murphy, and Hill, "the Division presented no evidence of the substance of any of those communications." (Hill Br. 1-2.) To meet Hill's evidentiary standard would require the Division to predict who will engage in insider trading and obtain a Title III wiretap before any inside information is disclosed. The Division is admittedly not able to do either. Fortunately, the Division does not need "direct evidence" or a wiretap to prevail in this case. *Ginsburg*, 362 F.3d at 1297-98 (the SEC may prove insider trading by using "direct or circumstantial evidence"); *United States v. Larrabee*, 240 F.3d 18, 21 (1st Cir. 2001) (holding

that government may meet its burden "by either direct or circumstantial evidence, or by any combination thereof"); *SEC v. Geon Indus., Inc.*, 531 F.2d 39, (2d Cir. 1976) (noting that the SEC's inability "to provide direct evidence of disclosures" or "to reproduce the precise content of conversations" is not required). Indeed, 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." *SEC v. Singer*, 786 F. Supp. 1158, 1164 (S.D.N.Y. 1992); *see also Adler*, 137 F.3d at 1342 ("[W]e cannot conclude that a reasonable jury was required as a matter of law to believe . . . the allegedly innocent explanations for the telephone calls").

As one court observed: "Somers argues that without written evidence, records of the content of telephone conversations, and confirming testimony from Stitt's alleged sources of nonpublic information, the SEC's case fails. However, writings against interest, wiretaps, and other direct admissions are not essential to the SEC's case. Direct evidence is rarely available in insider trading cases, since the tipper and tippee are usually the only witnesses to the exchange. The SEC is entitled to prove its case through circumstantial evidence." *Carroll*, 9 F. Supp.3d at 768.

Hill next asserts that "the Division's reliance on allegedly suspicious or aberrational trading is insufficient for it to satisfy its evidentiary burden." (Hill Br. 23-25.) But, as discussed previously, the Division's evidence is not limited to aberrational trading. (Div.'s Br. 20-29.) Numerous juries and courts have been persuaded by the same type of circumstantial evidence that the Division presented here. *See, e.g.*, *Larrabee*, 240 F.3d at 21-24 (affirming jury verdict based on circumstantial evidence of insider trading); *United States v. McDermott*, 245 F.3d 133, 139 (2d Cir. 2001) (affirming jury verdict based on circumstantial evidence even though "the government was unable to produce direct evidence of the content of any conversation"); *United*

States v. Hughes, 505 F.3d 578, 594 (6th Cir. 2007) ("[I]t is well settled that when a defendant offers an innocent explanation for the incriminating facts proved by the government, the jury is free to disbelieve it"); *SEC v. Musella*, 748 F. Supp. 1028, 1038-41 (S.D.N.Y. 1989) (finding defendant liable for insider trading following bench trial based on circumstantial evidence).

Finally, Hill devotes six pages of his post-hearing brief to *SEC v. Schvacho*, 991 F. Supp.2d 1284 (N.D. Ga. 2014), *see* Hill Br. 29-34, even though the Court has already stated that *Schvacho* is different from this case. (Tr. 33-34.) In *Schvacho*, the Court found the corporate insider credible. *Schvacho*, 991 F. Supp.2d at 1296. As discussed above and in the Division's post-hearing brief, Heyman's and Murphy's denials are not credible in this case.

Moreover, in *Schvacho*, the defendant "regularly traded" in stocks, including Comsys, the company in which he allegedly committed insider trading. *Schvacho*, 991 F. Supp.2d at 1288-89. Indeed, *Schvacho* had "an extensive history as an aggressive and contrarian investor over a period of several decades," and "[a]t various times, Schvacho invested a significant portion of his net worth in Comsys." *See SEC v. Schvacho*, Civil Action No. 12-cv-2557 (N.D. Ga.), ECF No. 40 at 10-11 (Def.'s Proposed Findings of Fact And Conclusions of Law). Hill has no such trading history in Radiant. To the contrary, his only prior investment in Radiant was for $10,000. (Tr. 66.) In June and July 2011, however, Hill suddenly invested *$2 million* in Radiant. And Hill was only able to invest in Radiant after he opened up two new brokerage accounts, which is something that Schvacho did not have to do. *Schvacho*, 991 F. Supp.2d at 1288. Hill's trading history is thus manifestly different from Schvacho's. In short, the *Schvacho* case provides no support to Hill.

The other cases on which Hill relies are also readily distinguishable from the Division's case against him (Hill Br. 23-25). *See SEC v. Truong*, 98 F. Supp.2d 1086, 1098-99 (N.D. Cal.

2000) (being in "open cubicle environment of corporation" does not give rise to inference of possession of nonpublic information); *SEC v. Garcia*, 2011 WL 6812680, at *15 (N.D. Ill. Dec. 28, 2011) (making well-timed trades, without any evidence identifying the tipper or how trader received nonpublic information, is insufficient to defeat summary judgment); *SEC v. Goldinger*, 1997 WL 21221, at *1-3 (9th Cir. 1997) (plaintiff lacked, among other things, evidence that trader lied to investment advisor); *SEC v. Gonzalez De Castilla*, 184 F. Supp.2d 365, 377-79 (S.D.N.Y. 2002) (granting summary judgment to defendant where trading occurred before possible transmittal of inside information).

CONCLUSION

For the foregoing reasons and the reasons provided in the Division's post-hearing brief, 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.

February 10, 2017

Respectfully submitted,

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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 5,330 words.

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CERTIFICATE OF SERVICE

On February 10, 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:

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