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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

POST-HEARING REPLY 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. files his Post-Hearing Reply Brief.

PRELIMINARY STATEMENT

> "There is no doubt that the evidence on which Mr. Hill relies could support a determination that because he never possessed material, nonpublic information about Radiant, he is not liable. Indeed, **after reviewing all the evidence and hearing testimony, it is entirely possible that Mr. Hill will prevail based on that evidence, my assessment of the credibility of the witnesses who testify, and the inferences I will draw from the evidence presented.**"

(May 8, 2015 Order at 6) (emphasis added.)

As the Court anticipated, this case now boils down to credibility and inferences, as well as the burden of proof.

From the start of this case through the close of the evidence, the Division pursued an intentional tipping theory: Andy Heyman tipped Todd Murphy, who tipped Charley Hill. At trial, Heyman testified categorically that he never shared inside information with Murphy. Indeed, when the Division asked whether he might have told Murphy about "any aspect of the merger negotiations," Heyman left no room for doubt: "A: No. Q: It's not possible? A: It's not possible." (Tr. at 653-54.) Likewise, Murphy categorically denied that he had ever possessed or inferred inside information; it would have been impossible for Murphy to pass inside information to Hill because he never had any in the first place. If the Court credits

that testimony, this case is over. Indeed, if the Court finds Heyman credible, the Division's case fails from the outset.

Heyman's and Murphy's honesty were plain to see. So, in closing, the Division changed its theory of the case, arguing that the Court did not need to find that either Heyman or Murphy lied. Rather, Heyman could have just let the information "slip." But as the Court pointed out, the Division's new theory created more problems than it solved: if Heyman wasn't lying, then he must have "slipped" multiple times. (*See* Tr. at 942-43.) And Murphy must have similarly slipped, too. And those slips must have accidentally coincided with deal events.

That theory just doesn't work, so the Division abandoned it. In its Post-Hearing Brief, the Division now argues categorically that Heyman, Murphy and Hill each flat-out lied, while Lynn Carter was disinterested, a literal honest broker. (*See* Division of Enforcement's Post-Hearing Brief ("Division Br."), *passim*.) That is wrong all around. There is no direct or persuasive circumstantial evidence that Heyman or Murphy lied, certainly no red-handed moment, no smoking gun, nor even a significant inconsistency. Unable to attack their credibility head-on, the Division goes at them sideways with innuendo, speculation and unwarranted inferences premised on a presentation of the evidence that is so skewed that it is unfair. What the Division says a witness said is, too often, not what the witness actually said. Moreover, the supposed instances of evasive or contradictory testimony are trivial

exchanges over things like the location of a restaurant, or Bates-labels. These quibbles would not merit any response if the Division did not try to use them to brand Heyman and Murphy as liars.

Of course, the Division bears the burden of proof on each element of its Rule 14e-3 claim. The Division has not met its burden. So, as it has throughout its ill-conceived case, the Division attempts to shift its evidentiary burden to Hill, collapsing all the required elements of Rule 14e-3 into a single element of "aberrational" trading, and then demanding that Hill explain himself. That argument is circular and conclusory. Unable to offer any direct or meaningful circumstantial evidence that Heyman passed inside information to Murphy, who then passed it to Hill, the Division argues that the Court can simply infer that happened because Hill's trading was so allegedly "aberrational" it could only have been based on inside information. The SEC has made this very same circular argument before, and courts have rejected it. *See, e.g., SEC v. Garcia*, 2011 U.S. Dist. LEXIS 148623, at n.6 (N.D. Ill. Dec. 28, 2011) ("[I]f we had some eggs, we could have some ham and eggs, if we had some ham.") (*quoting* defense argument with approval and rejecting the SEC's identical theory); *SEC v. Gonzalez DeCastilla*, 184 F. Supp. 2d 365, 379 (S.D.N.Y. 2002); *SEC v. Truong*, 98 F. Supp. 2d 1086, 1097-98 (N.D. Cal. 2000). This Court should reject it, as well.

ARGUMENT AND CITATION OF AUTHORITIES

A. Heyman Was Credible, And The Division's Attack On Him Is Based on Misstatements Of The Record And Meaningless Trifles.

No one disputes that Heyman and Murphy are close friends, like brothers. But that does not justify the Division's blithe assurances that "[c]ommon sense dictates" Heyman must have told Murphy about the merger. (*See* Division Br. at 32-4.) While a fact-finder is expected to use common sense, "common sense is no substitute for evidence," and a decision must not rest "solely upon the piling of inference upon inference." *See, e.g., United States v. Nesbitt*, 852 F.2d 1502, 1511 (7th Cir. 1988). The inference urged by the Division – that despite "staggering" risks, Heyman told Murphy about the merger anyway because they are friends – is not a common sense conclusion. Rather, it is pure speculation unsupported by the evidence. (*See* Corrected Post-Hearing Brief of Respondent Charles L. Hill, Jr. ("Respondent Br.") at 5, 16-18, 26-28 (citing and discussing Heyman's testimony and corroborating evidence).)

Bent on attacking Heyman's credibility, the Division misstates his testimony and the record to suit. The Division states that Heyman "regularly sought guidance from Murphy on both personal and *professional* matters." (Division Br. at 4 (emphasis added).) That is not true. Heyman acknowledged that he talked to Murphy about his work as part of talking about his life generally, but he described any references he made to work as just "little bits here and there." (Tr. at 527.) He

testified that he "would share with Todd, you know anything that was going on in my life," with an important caveat: "as long as it wasn't crossing some kind of legal line." (*Id.* at 517.) In sum, Heyman's testimony was that he "shared" what was going on in his life with Murphy, and that they "talked about everything" (*id.*), including "little bits" about his work. (*Id.*) But Heyman did *not* testify, as the Division would have it, that he "regularly sought guidance" on "professional matters" from Murphy. Nor is that a reasonable inference for the Court to draw from his testimony, especially with regard to the merger. Heyman knew that even mentioning the merger in advance of the merger announcement would cross a very bright "legal line" and that the costs of doing so could be "staggering," so he did not discuss it with anyone, including Murphy. (*See* Respondent Br. at 16-18 (citing and summarizing testimony).) Moreover, for the Division's theory to work, Heyman would have had to cross that line no fewer than six times, given the Division's contention that Hill made investments on six occasions, each coinciding with a specific deal event. (*See* Division Br. at 24.) That necessarily implies that Heyman passed specific information about the merger discussions to Murphy on at least six occasions, if not continuously (and that Murphy then passed it on, on at least six occasions, to Hill). That is not a reasonable inference, it is far-fetched.

Attempting to manufacture an inconsistency between Heyman's and Murphy's testimony, the Division asserts, "Murphy, in contrast, denied that he ever spoke to

Heyman about his work. Murphy's contention that he never spoke to Heyman about his work is doubtful . . . ." (Division Br. at 36; *id.* at 4 ("Murphy claims they never discussed Heyman's work at Radiant.")). But Murphy did not say that he *never* spoke to Heyman about his work. Rather, the Division tried to get him to say that:

> Q: Your recollection, though, is that you never spoke to Mr. Heyman about his work at Radiant, correct?
> A: I don't think Andy thinks of me as a business guy to talk to things – about things like that.
> Q: Because you're not a business guy, right?
> A: Yes.

(Tr. at 844.)

While the Division attempted to put words in his mouth with its leading question,[1] Murphy did not adopt those words. And it's certainly not impeachment material. Indeed, Murphy's impression that Heyman doesn't think of him "as a business guy to talk to things – about things like that," is consistent with Heyman's testimony that he only talked to Murphy about work in "little bits here and there."

Unable to shake Heyman's firm denial that he had ever passed inside information to Murphy, the Division now tries to make Heyman out to be a liar. In

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[1] Though the effort failed, the Division's question, when read in context, is an obvious attempt to get a sound-bite. This was no summing-up question. There was no foundation for it, no prior testimony of Murphy's "recollection." Moreover, the preceding questions artfully established a call-and-response rhythm of agreement. (*See* Tr. at 887-88.) Even so, Murphy did not reflexively agree with the Division's premise that he "never" talked business with Heyman, as the Division apparently hoped he would.

support of its claim that Heyman (whom the Division called in its case) was hostile, the Division offers snippets of several inconsequential moments at trial, which it then tries to piece together into a story that Heyman was evasive, unreliable and untrustworthy. It's not convincing. And, as before, these bits of testimony do not actually say what the Division says they do.

The Division says Heyman was hostile and "refus[ed] to acknowledge even the most basic and indisputable facts" because he "claimed that he did not know that documents bates-labeled with the prefix 'A-H' were produced by him." (*See* Division Br. at 33.) But Heyman wasn't hostile, just unsure how to respond to counsel's question, which assumed that a layperson would have a working knowledge of document productions: "So the designation AH are documents that were produced by your lawyer to the staff, correct?" (Tr. at 573-74.) Heyman's confusion was no doubt compounded by the ensuing foundation objection and extended lawyer colloquy. (*Id.* at 574-75.) Heyman was finally able to interject, "I'm a little confused here. . . [L]et me just step back and explain what we produced. Then somebody is going to have to tell me what this is." (*Id.* at 575-76.) He then explained that he paid for a firm selected by his lawyer to do whatever it needed to so that he could fully comply with the SEC's subpoena. Then, after a team spent several days at his home gathering documents, "they walked out of the house. I have no idea what happened after that." (*Id.* at 576.) As for his lawyer's cover letter to

the SEC accompanying the production documents, Heyman said, "I've never seen this before." (*Id.* at 577.) He didn't know what a Bates label is: "I have no idea where that code came from." (*Id.* at 573.) Nevertheless, when Division counsel finally said he was only trying to establish that the documents labeled "AH" would have come from him, Heyman readily agreed, "[t]hat would make sense to me." (*Id.* at 578.)

The Division also takes issue with Heyman not immediately acknowledging that the Mercer Kitchen restaurant is located on Mercer Street, in New York City. (*See* Division Br. at 33.) Heyman initially testified, "I don't know where Mercer Kitchen is located." (Tr. at 633.) When Division counsel refreshed Heyman's recollection with a document (a routine matter the Division describes as Heyman having "made counsel . . . show him a document" (Division Br. 33)), Heyman said yes, the restaurant is on Mercer Street. (Tr. at 633.) Heyman's caution was appropriate. Division counsel was not quite right about Mercer Kitchen. It is *not* located on Mercer Street, but around the corner, and the restaurant's address is actually 99 Prince Street. (*See* http://www.themercerkitchen.com/.)

Similarly, the Division argues that Heyman "disputed" whether he had stayed at the Surrey Hotel on a particular night. (Division Br. at 33.) What Heyman said was, "I don't know where I stayed." (Tr. at 635.) Heyman acknowledged a receipt showing a charge for the Surrey, but noted that hotel groups own multiple properties,

so he wasn't positive that he had in fact stayed at the Surrey. (*Id.*) The Division fails to note that, though he wasn't certain, Heyman testified, "So I believe I – it's likely that I stayed at the Surrey." (*Id.*) That is not an evasive answer. It is a straight answer.

Recalling a hectic time in his life more than five years ago, Heyman did not remember the details of taxi rides, credit card charges, restaurant reservations, or hotel stays. He didn't know much about document productions or Bates-labels. But none of that makes him evasive, much less a liar. Indeed, as the examples above illustrate, he was thoughtful, careful and reasonable. Further, he was even-handed and did not shade his testimony for or against either party. In short, he was credible.

B. Murphy, Too, Was Credible.

The Division argues that Murphy was not credible because his testimony was "flatly contradicted by the other witnesses at trial." (Division Br. at 36.) That mischaracterizes the testimony. Murphy categorically denied all of the Division's allegations of wrongdoing: "The only allegation that's true is we spoke on the phone a lot." (Tr. at 876.) Thus, as to the big questions, Heyman and Murphy were entirely consistent.

The Division is therefore forced to make mountains out of molehills. It suggests, for example, that it caught Murphy in a lie, that he denied ever speaking to Heyman about his work when Heyman acknowledges that they did. (*See supra* at

5-6.) But Murphy did not say that they "never" talked about work, only that he didn't think Heyman thought of him as "a business guy." Heyman said he talked about his work, but only "little bits here and there." (*Id.*) That is not even inconsistent, much less a flat contradiction that might support an inference of lying.

Similarly, the Division argues that it "doesn't makes sense" that Murphy learned about the merger while watching CNBC because he is "an artist and not a business person." (Division Br. at 36-37.) The Division's suggestion that Murphy, because he is an artist, wouldn't follow the business news is as wrong as it is condescending. While Murphy would not describe himself as "a business guy" like Heyman (who was, after all, a senior executive of a Fortune 500 company), he does own his own business, one that is particularly sensitive to the broad economy. (Tr. at 911-12.) He testified that he "regularly" followed business news, including watching CNBC. (*Id.* at 912.) And why should that be so remarkable? As Murphy testified, recalling 2011, "I don't think there was a soul in this country who wasn't watching the business news to figure out what was going to happen next." (*Id.*) Sitting in court on December 15, 2016, Murphy could not remember exactly when, more than five years earlier, he had learned of the merger, or whether he saw a CNBC live broadcast, a banner feed, or perhaps something online. The Division argues that Murphy "pivoted" from one "scenario" to another, and that he "ultimately admitted that he has no recollection," so his "shifting explanations" are

not credible. (Division Br. at 37.) That's not what happened. Rather, Murphy repeatedly said he had no particular recollection of watching CNBC that day five years ago, but that he "regularly" would "just tune in just to see what was going on for the day." (Tr. at 912.) He didn't recall when he tuned in, and it might have been live, or maybe not. That's not just credible, it's ordinary.[2]

C. Lynn Carter, On The Other Hand, Was Not Credible.

Hill set out in his opening brief the many reasons why Lynn Carter was not credible. (*See* Respondent Br. at 19-22.) Her credibility is a standalone issue, however, because her testimony in no way contradicts Heyman or Murphy.

In its opening brief, the Division contends that, "Carter has no incentive to slant her testimony in favor of the Division or against Hill." (Division Br. at p. 24.) Nonsense. No stockbroker wants to get crosswise with the SEC. Carter is a licensed investment professional subject to FINRA and SEC oversight who placed trades for a customer who was subsequently charged with insider trading based on those trades. Neither she nor her regulated employer wanted to be anywhere near Hill after that, and certainly not caught up in an SEC investigation. Her safest course was to say that she didn't know a thing, and that Hill didn't tell her a thing.

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[2] At trial, the Division also tried to call the credibility of Heyman and Murphy into question by asking them if their attorneys had accompanied them to court. During closing, the Court asked the Division, "what am supposed to infer from that [?]" and "what are you suggesting [?]" (Tr. at 946-47.)

But he did tell her. Hill testified that when he called Carter to sell his Radiant shares, she then asked him for the first time if he knew anyone at Radiant, and he said he did. Carter's denial of this is implausible. To credit her denial, the Court would have to accept that even though she had just learned at the very moment Hill was selling all his Radiant stock that he in fact knew "those guys," and thus believing that she'd been lied to repeatedly, Carter would (i) still process the trade; (ii) not immediately document the conversation; (iii) still continue to do business with Hill and place other trades for him; (iv) not follow up at all when they talked a few weeks after the sale; and (v) fail (again) to document her concerns even when asked by a SunTrust senior compliance officer to memorialize her conversations with Hill in anticipation of SEC inquiries. That's a lot to accept. The truth is easier: she knew Hill knew people at Radiant because when she asked he told her that he did. (*See* Respondent Br. at 3-4, 19-22.)

It also appeared that Carter held a grudge against Hill, that she was put-off because he wasn't interested in what she was selling. It wasn't personal for Hill, he just prefers to manage his own money and would never look to any broker for investment advice. (*See* Tr. at 90, 293-94, 297-98, 347-48, 784.) And he certainly didn't want to pay steep fees, on top of Carter's commissions, to have his money managed by a Dynamic Total Return algorithm, even if it was "designed by a NASA scientist." (*See* Tr. at 347-48, 789-91.)

Moreover, Carter's trial testimony was inconsistent with her investigative testimony in important respects. At trial, during the Division's direct examination, Carter testified that Hill wanted a conservative investment strategy, that he didn't want "to go the equity route" or invest in anything "too risky." (*See, e.g.*, Tr. at 754-56.) But in her prior investigative testimony taken by the Division, she made clear that the conservative approach was her idea, not Hill's. Even when squarely confronted with that testimony, though, she all but denied ever saying the words, claiming they were taken out of context, or that she had been misunderstood. (*See, e.g.*, 785-89, 800-01, 830-32.) For example, in her investigative testimony, Carter plainly said that she believed Hill needed a conservative investment strategy and tried to steer him in that direction, not that it was Hill's idea. (*See* Tr. at 786 (her prior testimony was, "I guess my intent was or my objective for him was that it should be more conservative-based."); *id.* at 787 (her prior testimony was, "So maybe I was leading him to that conclusion of being more conservative."); *id.* at 788 (her prior testimony was, "He didn't come in and say I want something really conservative."); *id.* at 787 (explaining her prior testimony, Carter testified at trial that because Hill is a real estate developer, "he would need chunks of cash. So that in itself makes someone more conservative . . . ."). In short, Carter sees herself as a seasoned professional who knows best what her customers need, so she gives it to them: "I've been in the business over 20 years, and no one comes in and says, you

know, uses our terminology for suitability." (Tr. at 788.) So, she used her judgment, and her terminology, and checked the "conservative" box for Hill. (Division Ex. 116.)

Further, Carter's demeanor during cross-examination was often defensive, argumentative and evasive. (*See, e.g.*, *id.* 786-91, 795-96, 800-01, 809-10, 820-24, 830-32.) For example, Carter balked at acknowledging even a small point that was readily apparent on the face of a document.

> Q: And for their advice to their dynamic strategies clients, the WST firm charges a management fee of 2 percent a year; is that correct?
>
> A: That's a generic fee. You can – we can charge – we could charge less than that.
>
> Q: Okay. But I mean, the brochure you handed or sent to Mr. Hill says it's 2 percent, right?
>
> A: All brochures are generic, because it's a – it's something that could be sent to every firm, so it doesn't, you know, state that it's going to be 2 percent for Mr. Hill.
>
> Q: Okay. But the document sort of, as we lawyers say, speaks for itself. But the document that you sent him says the management fee is 2 percent, right?
>
> A: I – obviously, yeah.

(Tr. at 790-91.) Yes, it *is* obvious. And it should have been quickly acknowledged.

Similarly, Carter all but refused to confirm the obvious – but far more important – point that she never documented the discussions she claimed to have had with Hill regarding insiders and inside information. At SunTrust's request, Carter prepared a written summary of her discussions with Hill. (*See* Tr. 825-32; Division

Ex. 27.) Nowhere in that document did Carter state that she had asked Hill about knowing insiders or having inside information, or what he said in response.

But she would not admit it. Rather, she insisted that documenting what she said and what Hill said, "was not asked of me," and "was not required of me." (Tr. at 830-31.) Those responses are evasive and false. As Carter admitted, the purpose of the document was to memorialize her discussions with Hill in light of the pending SEC investigation. (Tr. at 830 ("So I think he [the SunTrust senior compliance officer] just wanted some documentation, I think, of our – of the conversation I had with him [Hill] in the event the SEC or someone else was going to come in").) Finally, she admitted the obvious, but only after the Court intervened. Even then she answered grudgingly, still trying to hedge her response:

> Q: [Y]ou were asked to summarize the conversations with Mr. Hill. You claimed that in those conversations you did cover this ground about insider information and knowing insiders, and yet this synopsis doesn't make explicit reference to either insiders or inside information, correct?
> A: You know, my interpretation, again, of insider trading and knowledge of the – of insider trading might be different than yours. I've never been in a trial like this. I don't know how to answer those questions.
> JUDGE GRIMES: Ms. Carter, it's just a "yes" or "no" question. Does it say that?
> A. [THE WITNESS]: Okay.
> JUDGE GRIMES: Does it say that?
> A. [THE WITNESS]: It basically says -
> BY MR. WILLIAMSON:
> Q: Ms. Carter, isn't the answer to my question "no"?
> A: What is the question?
> Q: The answer to my question is "no," is it not?

A:	Ask me the question again, please.
Q:	Does the word – does the phrase "inside information" or alternatively "material non-public information" appear in your e-mail?
A:	What I said was the client –
Q:	"Yes" or "no," please, ma'am. I mean, I've been –
A:	I guess technically no.
Q:	And does it say that you asked him if he had knowledge of any insiders and he said no?
A:	It does not say that specifically.

(Tr. at 831-32.)

Despite all this, the Division still relies heavily on Carter, invoking her testimony time and again to support its arguments that Hill was a self-avowed conservative investor who suddenly changed his investment strategy and who lied to conceal that he had inside information. (*See, e.g.*, Division Br. at 1, 6, 12, 21-22, 24-25.) The Division also uses Carter's testimony to bolster its various contentions that Hill's "sudden" investment in Radiant was a "radical departure" from his supposed conservative investment strategy, that it was "highly unusual," "highly suspicious," that he "ignored Carter's advice," and that he "deceived [Carter] to cover-up his ties to Radiant." (*Id.*) As shown, the Division's reliance on Carter is misplaced. Her untrustworthy testimony does not bolster the Division's case – it undermines it.

D. The Division Offers Speculative Inferences Instead Of Credible Evidence.

As noted, courts caution against speculative conclusions reached by the "piling of inference upon inference." *See, e.g., Nesbitt*, 852 F.2d at 1511. That, however, is precisely the Division's strategy, and the Division's overreaching is not limited to the above examples. Just like its theory of the case, the Division's brief is riddled with speculative inferences that are unsupported by the evidence.

1. The Division's claim that Mrs. Hill's testimony would not have supported her husband is pure speculation.

Attacking Hill's credibility, the Division argues that his testimony that his wife approved of his Radiant investment is "not believable" because he did not call her at trial to bolster him. (Division Br. at 27-28.) The Division has no basis whatsoever for that spurious claim. It did not interview Mrs. Hill or take her testimony. It has absolutely no idea what she would have testified to. Moreover, the Division's argument that Hill's credibility on this point is undermined because "his counsel objected to the Division calling her as a witness" is less than forthcoming. (*Id.*) As the Division is well aware, it was Hill's previous counsel who objected. Current counsel withdrew that objection well before trial and added Mrs. Hill to Respondent's Second Amended Witness List as a "may call" witness. More importantly, the Division listed Mrs. Hill as a "may call" witness throughout this case, including on its final list, served December 6, 2016.

Further, as a matter of law, no adverse inference should be made here because Mrs. Hill was available to the Division. *See, e.g., Chevron Corp. v. Donzinger*, 974 F. Supp. 2d 362, 701 (S.D.N.Y. 2014) (discussing the "missing witness" inference rule and noting its applicability to bench trials). Hill had already given investigative testimony that his wife supported his investment in Radiant. (Division Ex. 51 at 57-58.) If the Division wanted to test what Mrs. Hill would have said about her husband's investments, it could and should have called her at trial.

Curiously, while the Division attempts to make hay out of the decision not to call Mrs. Hill, a relatively minor witness, it declined to call a key witness, Todd Murphy. (*See* Tr. at 833.) In a remote tippee case, how does the plaintiff not call the alleged conduit of the inside information? Nevertheless, the Court had the opportunity to hear Murphy's testimony because Hill called him. Perhaps the reason the Division did not call Murphy is that, having twice taken his investigative testimony, it knew that Murphy would credibly deny ever possessing or inferring inside information.

2. Hill did not need large sums of immediately available cash to do a Chick-fil-A deal.

The Division repeatedly suggests that Hill needed to have large amounts of cash on-hand or readily available for a Chick-fil-A deal, should one come along, and that he only pursued a deal Chick-fil-A had promised him once he had the money

for it. This, the Division urges, is evidence that Hill was a conservative investor who made aberrational purchases in Radiant. (Division Br. at 5-6, 17, 29.)

It appears that the Division either misunderstands Hill's business, or has ignored his unequivocal testimony, or both. As Hill testified, Chick-fil-A deals do not happen overnight. Six months "is about as fast as it could go" and it typically takes around nine. (Tr. at 181; *id.* at 315-16 (describing the lengthy requirements of a typical deal); *id.* at 325 (nine months is typical).) Even in the extraordinary case where the deal is all but complete when he gets involved – all of the due diligence is done, including legal and environmental – it would still take a month. (Tr. at 183; *id.* at 323 ("[W]here it's all teed up perfectly, I can even close in 30 days. So that's an extraordinary circumstance for that to happen. That is not typically how the real estate business works.").) Thus, Hill would have had plenty of lead time to raise any money he might have needed should a deal have materialized.

Further, Hill simply didn't need the money he had invested in Radiant to do a deal. For thirty years, he has typically purchased properties with borrowed money. When questioning Hill, the Division suggested that he needed the cash proceeds from the sale of a property to purchase new properties, and thus described those proceeds as "committed." Hill was quick to say, "Committed is the wrong word." (Tr. at 231.) As he explained, having options is good, and he has paid cash for a property, but he usually finances. (*Id.* at 230-32.)

Additionally, Hill's cost on a Chick-fil-A site is typically in the six-figure dollar range, not the multi-millions the Division suggests. As he testified,

> The money that I would have to close on a Chick-fil-A site I already had. And I've closed on Chick-fil-A sites when I didn't have a dime. So I didn't – the idea I need the money from the Radiant sale is preposterous. Chick-fil-A sites, Mr. Roback, the most expensive site I've ever put under contract was the one on Ponce de Leon. The second was the, the Northside. Most Chick-fil-A sites are about – the one I ended up buying was $800,000, in Cordele, Georgia. That's the deal they gave me. Chick-fil-A sites don't cost $5 million.

(Tr. at 267 (emphasis added).) Further, even had the NCR merger never occurred, there would have been nothing to keep Hill from selling Radiant stock on an as-needed basis to fund other projects. In sum, Hill had the ability to close on a Chick-fil-A deal, regardless of his Radiant investment, and there is no evidence to the contrary. (*Id.*)

3. The Division's argument that Hill "coincidentally" discovered documents showing his 2001 purchase of Radiant is nonsensical.

When Hill gave his investigative testimony in 2013 and 2014, he had forgotten that he had purchased $10,000 worth of Radiant stock in 2001. (Tr. at 46-48.) In May 2015, Mrs. Hill was going through old financial records and discovered a confirmation slip for the 2001 purchase. (*Id.* at 50-53.) She discovered the slip too late for Hill to submit it in support of his motion for summary disposition, but he immediately gave it to his attorneys, who produced it to the Division. (*Id.*)

The Division now tries to use the document as a bludgeon, arguing that the discovery of a document that Hill had forgotten even existed somehow discredits him. (Division Br. 26-27.) The Division dismissively describes Mrs. Hill's discovery as "coincidental." (*Id.* at 27.) But if, as the Division suggests, Hill's production of the confirmation slip was somehow strategic, what was the purpose? What possible reason could Hill have had for waiting until after the Court had denied his motion for summary disposition? As Hill testified, he believes the document supports his contentions in this case, so he had every incentive to produce it. (*Id.* at 59 ("it would have been to our advantage" to have found it earlier.))

The Division apparently attaches great importance to this issue because it opened its examination of Hill at trial with it, and crossed him at length about it. (Tr. at 45-60.) But labelling the production of the slip a "coincidence" is not an argument – it is hollow and nonsensical innuendo. Even assuming that the confirmation slip does not help Hill's case (as the Division seems to imply), he produced it. That does not undermine his credibility. It shows that he plays by the rules.

E. This Court Should Reject The Division's Circular and Conclusory Legal Theory.

The Division's legal theory is, at bottom, that Hill's trading in Radiant was so "aberrational," that it need not actually show that Heyman passed information to Murphy, who passed it to Hill. Rather, as the Division would have it, the Court can simply infer all that happened because, well, Hill's trading was so aberrational that

of course it must have happened that way. That is why the Division keeps pointing to what it calls the "dramatic," "highly unusual" and "highly suspicious" nature of the trades themselves. But that, without more, is insufficient to prove insider trading. And the Division has no more.

Courts have rejected the theory advanced by the Division here. *See, e.g., SEC v. Schvacho*, 991 F. Supp. 2d 1284, 1298-1302 (N.D. Ga. 2014); *SEC v. Horn*, No. 10-cv-955, 2010 U.S. Dist. LEXIS 135000 (N.D. Ill Dec. 16, 2010); *Garcia*, 2011 U.S. Dist. LEXIS 148623, at *47. For instance, in *Garcia*, Garcia and Sanchez, residents of Madrid, Spain, purchased risky "out of the money" call options for the stock of a Canadian company, Potash Corporation of Saskatchewan, Inc. ("Potash"), on August 12, 13 and 16, 2010. On August 17, 2010, Potash publicly announced that it had received and rejected a hostile takeover bid from BHP Billiton Plc ("BHP"), which caused the price of its stock on the New York Stock Exchange to spike. Sanchez and Garcia immediately sold their options, realizing profits of $496,953 and $576,000, respectively, in less than a week. Garcia and Sanchez had each used Interactive Brokers ("IB") to execute their trades. After IB reviewed the trades, it reported its findings to the SEC, which filed a complaint against Garcia and Sanchez, and obtained a TRO and asset freeze all on the same day, August 20, 2010.

Garcia was a senior executive at Banco Santander, an advisor to BHP in connection with its tender offer to Potash. The SEC noted that both Garcia and

Sanchez lived in Madrid and both had traded through IB. Those were the only connections between the two that the SEC could establish. *Id.* at *21-22. Garcia settled, consenting to a final judgment, an injunction, disgorgement of $576,033 and a civil penalty of $50,000. *Id.* at *21.

Sanchez refused to settle and moved for summary judgment. In opposition, the SEC argued that a finder-of-fact could properly infer that Garcia had tipped Sanchez, or that Sanchez otherwise had illegally traded on inside information based on the following circumstantial evidence:

- Sanchez had engaged in highly "suspicious" and risky options trading, reaping profits of almost $500,000, representing a return of 1,046%, all in less than a week;

- Starting the day after he sold his Potash options, Sanchez repeatedly attempted to transfer large amounts of money out of his trading account, even after being informed that IB had frozen the account pending review of his trading activity;

- Sanchez's claims about his previous stock and option trading experience were not supported by the record;

- From January 1 to August 12, 2010, Sanchez used his IB account only to trade futures and foreign exchange products;

- Although Sanchez testified that he had always been interested in the fertilizer industry, he had never invested in fertilizer companies;

- Sanchez never purchased Potash securities before or after the BHP tender offer and did not invest in other fertilizer companies after his purchase of Potash options;

- Sanchez's claim that he had based his option trades on "technical signals, confirmation of the technical signals and intuition," was implausible and inconsistent with the evidentiary record – moreover, he had only come up with this claim more than a year after his initial interview with SEC; and

- Sanchez had allegedly attempted to obstruct the SEC's investigation by intentionally throwing away a laptop computer and "scrubb[ing]" his desktop computer to destroy or alter electronic files.

Though the SEC acknowledged that it could not tie Sanchez to an insider, it argued that the extensive circumstantial evidence of "suspicious" trading, coupled with Sanchez's "implausible reasons" for his trades were enough to establish insider trading. *Id.* at *37-38. The district court rejected the SEC's arguments and instead granted summary judgment to Sanchez, even though much of his explanation, including his claims about previous stock and option trading experience and the reasons for his Potash option trades, were suspect or were not directly supported by the record. The court thus ruled that the SEC could not establish liability based merely on aberrational trading, even when combined with a suspicious explanation for that trading. The chain of speculation, the piling of inference upon inference, that was urged by the SEC was legally insufficient. *See id.* at n.6 ("Or, as Sanchez's counsel prefers to put it, 'if we had some eggs, we could have some ham and eggs, if we had some ham.'"); *id.* at *47 ("[W]e are still left with the mere suspicion of insider trading".)

While Hill acknowledges that he knows Heyman casually, and has an indirect connection to him through Murphy, this case is essentially the same as *Garcia*. The Division's circumstantial evidence of its Heyman to Murphy to Hill theory is so weak that it proves no relevant connection between Heyman and Hill at all. There is no evidence of the content of even a single allegedly incriminating communication. (*See* Respondent Br. at 2.) There is no evidence of a suspicious pattern of communications. *See id.* at 12-13 (no change in Hill and Murphy communications during relevant period); *id.* at 14 (same for Murphy and Heyman communications). Apart from friendship, the Division offers no motive Heyman would have to pass inside information to Murphy. (Division Br. at 32.) Strikingly, while the Division argues that Murphy has reason to *deny* passing information to Hill (*see id.* at 35-36), *it offers no motive for Murphy to pass the information to Hill in the first place.* (*See id.*) And Heyman had nothing to gain and everything to lose by tipping Murphy. This evidence – or lack of evidence – is simply insufficient to support any inference that inside information passed from Heyman to Murphy to Hill. Thus, the SEC's theory of the case must be rejected.

F. The Sufficiency Of The Evidence Appellate Opinions Cited By The Division Are Not Persuasive.

In claimed support of its circular legal theory, the Division largely relies on appellate opinions applying a sufficiency of the evidence standard. Those cases are not persuasive. First, the inquiry in those cases is of course simply whether there is

sufficient evidence to support the decision below. Second, in each of those cases, the government made a far stronger evidentiary showing than what the Division mustered here. That stark contrast not only makes the Division's authorities less persuasive, it militates against drawing an inference of insider trading here. In this case, the Division's evidence pales in comparison to that presented in the cases on which the Division relies. *See, e.g.*, *SEC v. Warde,* 151 F.3d 42 (2d Cir. 1998) (tipper and tippee (a CEO, and close friend and director, respectively) both purchased stock warrants on four occasions shortly after phone calls, and would have suffered almost total losses if takeover hadn't materialized, and the director (i) used an offshore, pseudonymous account to conceal trades; (ii) failed to file the required director transaction disclosures or report the profits on his income tax returns, and (iii) hid the transactions from the CEO) (affirming jury verdict); *SEC v. Ginsburg*, 362 F.3d 1292 (11th Cir. 2004) (CEO spoke with family members on multiple occasions, each close in time to substantial family trading in two target companies involved in different planned acquisitions, with trades resulting in nearly $2m in profit – and brother admitted to discussing at least one target with CEO) (reversing judgment as a matter of law for defendant entered after an unfavorable jury verdict, and noting that it "was up to the jury to choose between [] competing plausible theories of fact."); *United States v. Larrabee*, 240 F.3d 18 (1st Cir. 2001) (law firm employee accessed confidential merger information and, one minute later, thirty

Respectfully submitted, February 10, 2017.

THE ALBERT LAW FIRM

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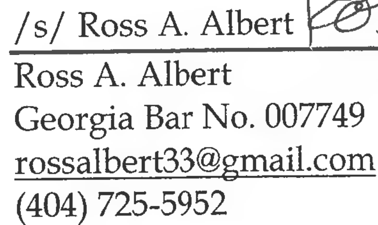

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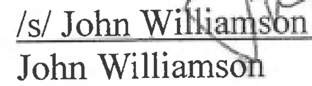
CERTIFICATE OF WORD COUNT

I hereby certify that, pursuant to Commission Rule 450 and this Court's Order dated December 19, 2016, this brief contains 6,935 words.



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CERTIFICATE OF SERVICE

I certify that today I filed an original and three copies of this document 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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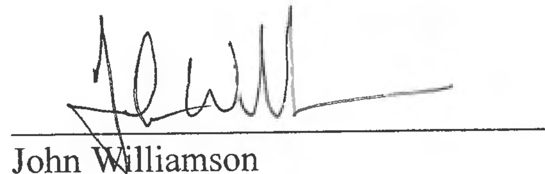

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