No. _____

In The

Supreme Court of the United States

BASSAM YACOUB SALMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the personal benefit to the insider that is necessary to establish insider trading under *Dirks v. SEC*, 463 U.S. 646 (1983), require proof of "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature," as the Second Circuit held in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), *cert. denied*, No. 15-137 (U.S. Oct. 5, 2015), or is it enough that the insider and the tippee shared a close family relationship, as the Ninth Circuit held in this case?

2. Can failure to investigate suspicious circumstances, without more, constitute the "deliberate actions" to avoid knowledge that this Court found necessary to establish willful blindness in *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011)?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit were Petitioner Bassam Yacoub Salman and Respondent United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Bassam Yacoub Salman petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion addressing the first question presented (App. 1-17) is reported at 792 F.3d 1087. The court of appeals' opinion addressing the second question presented (App. 18-25) is unreported. The district court's opinions denying petitioner's motion for release pending appeal (App. 26-33) and denying his motion for new trial (App. 34-52) are unreported.

JURISDICTION

The court of appeals entered judgment on July 6, 2015. App. 1. The court denied a timely petition for rehearing en banc on August 13, 2015. App. 53. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case does not involve interpretation of statutory or constitutional provisions.

INTRODUCTION

In *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), the Second Circuit declared that the personal benefit to the insider necessary for an insider trading conviction requires "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." *Id.* at 452. The Solicitor General filed a petition for writ of certiorari. In the petition, the Solicitor General highlighted the conflict between *Newman* and the Ninth Circuit's decision in this case and emphasized the importance of the Second Circuit's decision to the financial markets and the investing public. The respondents argued in opposition that *Newman* presented a poor vehicle for resolving the definition of "personal benefit," because the Second Circuit had rested its decision on an independent ground (the defendants' lack of knowledge of any personal benefit)--so even a ruling in the government's favor would not change the outcome. The Court denied the government's petition. *United States v. Newman*, No. 15-137 (U.S. Oct. 5, 2015).

This case presents the ideal vehicle for resolving the important question on which the Solicitor General sought review in *Newman*. Here, unlike in *Newman*, resolution of the question is indisputably outcome-determinative. If a close family relationship between the insider and the tippee is enough to establish a personal benefit for the insider, as the Ninth Circuit held here, then Salman loses. But if there must be "an exchange that is objective, consequential, and represents at

least a potential gain of a pecuniary or similarly valuable nature," as the Second Circuit held in *Newman*, then Salman prevails, because there is no evidence of such an exchange here between the insider and the tippee.

This case also presents an excellent vehicle for resolving a second question that has fractured the lower courts: the showing necessary for a willful blindness instruction following this Court's decision in *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011).[1] In *Global-Tech*, the Court held that willful blindness exists only when the defendant takes "deliberate actions" or "active steps" to avoid knowledge. *Id*. at 2070. Following *Global-Tech*, the Seventh Circuit has held that a willful blindness instruction "should not be given unless there is evidence that the defendant engaged in behavior that could reasonably be interpreted as having been intended to shield him from confirmation of his suspicion that he was involved in criminal activity." *United States v. Macias*, 786 F.3d 1060, 1062 (7th Cir. 2015). Other circuits have revised their pattern jury instructions to reflect the *Global-Tech* "deliberate actions" requirement. But the Second, Eighth, and Ninth Circuits adhere to the position that a failure to investigate suspicious circumstances suffices to establish willful blindness, and the First, Fifth, and Eleventh Circuits have approved instructions that omit the "deliberate actions"

[1] The lower courts in this case used the phrase "deliberate ignorance" to describe the instruction at issue. Other courts have used the terms "conscious avoidance" and "willful blindness." We use "willful blindness," because that is the phrase the Court adopted in *Global-Tech*.

requirement. Because it is undisputed that Salman, a remote tippee, took no action to avoid knowledge, but merely failed to investigate the source of stock tips he received from the insider's immediate tippee, this case affords the Court an opportunity to clarify *Global-Tech* and to resolve this split.

STATEMENT OF THE CASE

The grand jury indicted petitioner Bassam Salman on four substantive counts of insider trading and one count of conspiring to engage in insider trading. ER 311.[2] The charges rested on the theory that Salman was a remote tippee. The government alleged that Citigroup investment banker Maher Kara passed confidential information to his brother Mounir ("Michael") Kara, who was not an insider; that Michael passed the information to Salman, in the form of stock recommendations; and that Salman traded on the recommendations through an account that he shared with his brother-in-law Karim Bayyouk.

To prove its case against Salman, the government struck plea deals with Maher and Michael Kara. Maher testified that he provided inside information to Michael on several occasions, but he did not say that he discussed stocks with Salman, and he denied knowing that Michael was passing the inside information on to others. ER 246. Michael testified that he told Salman that Maher was the source of the recommendations, *e.g.*, ER 193-96, 223-26, 232-33, but he was heavily impeached

[2] "ER" refers to the Excerpts of Record filed in the court of appeals.

and his testimony on this point was uncorroborated. The government also presented what it argued was circumstantial evidence of Salman's knowledge, including the fact that he traded through an account in Bayyouk's name, rather than in his own name.

I. THE "PERSONAL BENEFIT" TO MAHER KARA.

Among the elements necessary to convict a remote tippee such as Salman of insider trading are (1) that the insider (here, Maher Kara) personally benefitted from the disclosure of confidential, material, nonpublic information, and (2) that the defendant tippee (Salman) knew that the insider had personally benefitted from the disclosure. *E.g.*, App. 58-59 (district court's jury instruction). The district court instructed the jury, without objection, that "personal benefit" to the insider included "the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend." App. 61.

Consistent with this understanding of "personal benefit," Maher Kara testified that in 2002 he began secretly sharing with Michael confidential information he learned at Citigroup. At first, Maher sought Michael's assistance in understanding the biotech industry. Later, Michael began to press him for information, and Maher reluctantly provided it, hoping that Michael was not using the information to trade. Finally, under continuing pressure from Michael, Maher provided him with confidential information knowing that Michael would trade--even though Michael swore on his daughter's life that he

would not. ER 239, 250-51. Maher provided this information, he testified, to get Michael off his back. ER 240-41. Maher explained: "The way that I thought I was helping myself was just by getting him off my back, and fulfilling whatever needs he had." ER 240; *see* T. 447-49 (Maher acted to help Michael and to benefit himself by getting Michael off his back).

Shortly after Salman filed his reply brief in the court of appeals, the Second Circuit decided *Newman*. *Newman* (in the government's words) "crafted a new, stricter personal benefit test."[3] The Second Circuit noted that it had previously defined "personal benefit" to include "the benefit one would obtain from simply making a gift of confidential information to a trading relative or a friend"--the same standard applied in Salman's case. *Newman*, 773 F.3d at 452. But the court imposed an important limit on that standard:

> This standard, although permissive, does not suggest that the Government may prove the receipt of a personal benefit by the mere fact of a friendship, particularly of a casual or

[3] *United States v. Newman*, No. 15-137, Petition for a Writ of Certiorari at 18 ["Government *Newman* Petition"]; *see also United States v. Newman*, No. 13-1837 (2d Cir.), Petition of the United States of America for Rehearing and Rehearing *En Banc* at 9 (filed Jan. 23, 2015, Doc. 279) (*Newman* "constricted" the existing understanding of "personal benefit" and gave the phrase a "narrow definition"); *id.*, Brief for the Securities and Exchange Commission as Amicus Curiae Supporting the Petition of the United States for Rehearing or Rehearing En Banc at 13 (filed Jan. 29, 2015, Doc. 298) (referring to *Newman*'s "narrowed personal benefit standard").

> social nature. If that were true, and the Government was allowed to meet its burden by proving that two individuals were alumni of the same school or attended the same church, the personal benefit requirement would be a nullity. To the extent *Dirks* [*v. SEC*, 463 U.S. 646 (1983)] suggests that a personal benefit may be inferred from a personal relationship between the tipper and tippee, where the tippee's trades "resemble trading by the insider himself followed by a gift of the profits to the recipient," *see* 463 U.S. at 664, we hold that such an inference is impermissible in the absence of proof of a *meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature*.

Id. (emphasis added).

Applying this standard, *Newman* found the evidence of personal benefit insufficient. One of the insiders had received "career advice" in exchange for confidential information, and the other merely had a "casual acquaintance[]" with his tippee. *Id*. at 453. Neither participated in an "exchange that [was] objective, consequential, and represent[ed] at least a potential gain of a pecuniary or similarly valuable nature." *Id*. at 452. The Second Circuit similarly found the evidence insufficient that the defendants knew the insiders were personally benefitting from

disclosure of the confidential information. *See id.* at 453-54. For both of these reasons, the court reversed both the substantive insider trading counts and a conspiracy count. *See id.* at 455.

With leave of the court of appeals, Salman filed a supplemental brief arguing that the evidence of personal benefit to Maher Kara (and Salman's knowledge of the personal benefit) was insufficient under *Newman*. Although Maher's testimony established that he "ma[de] a gift of confidential information to a trading relative," there was no evidence that he engaged in an "exchange [with Michael] that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." *Newman*, 773 F.3d at 452. Maher received nothing from disclosing the confidential information to Michael except the scant comfort of getting Michael off his back. That "benefit" is not "objective"; it is not "consequential"; and it does not "represent at least a potential gain of a pecuniary or similarly valuable nature." It is therefore insufficient to satisfy the "personal benefit" element of an insider trading offense, as interpreted in *Newman*.

The Ninth Circuit panel (in a published opinion authored by visiting Judge Rakoff) declined to follow the *Newman* requirement that the government prove that the sibling relationship between Maher Kara and Michael Kara "generate[d] an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." App. 15 ("To the extent *Newman* can be read to go so far, we decline to follow

it."). Instead, based on its reading of *Dirks v. SEC*, 463 U.S. 646 (1983), the panel found it sufficient if the government proved that Maher Kara "'ma[de] a gift of confidential information to a trading relative or friend.'" App. 16 (quoting *Dirks*, 463 U.S. at 664) (emphasis omitted). Because the government met this burden (construing the evidence in the light most favorable to the verdict), the panel affirmed Salman's conviction. App. 16-17.

II. THE WILLFUL BLINDNESS INSTRUCTION.

Although the government contended that Salman actually knew Maher Kara was the source of Michael's stock recommendations, it nonetheless requested a willful blindness instruction. At the pretrial conference, the government appeared to recognize that willful blindness requires the defendant to take active steps to avoid knowledge. It urged the district court to await the evidence at trial before deciding whether to give the instruction. The government argued:

> If the conversation between Mr. [Michael] Kara and Mr. Salman is: I have a great tip for you, and Mr. Salman says: Don't tell me where that came from, I don't want to know, that's the equivalent of willfulness. I do think there are facts that could be developed at the trial that would support this instruction.

ER 277.

At trial, however, the government presented no evidence that Salman asked Michael not to tell him the source of his stock recommendations, as the government had posited at the pretrial conference, or took other "deliberate actions" or "active steps" to avoid knowledge that Maher was the source of Michael's recommendations, as this Court required in *Global-Tech*. Instead, the government relied solely on the *absence* of action--Salman's failure to "ask[] questions" about Michael's recommendations. Doc. 244 at 2; *see* ER 73-75 (government argues that failure to investigate constitutes "deliberate action" under *Global-Tech*).

Salman objected to the deliberate ignorance instruction, because the government had not established a factual predicate for it. Doc. 156 at 4-6; ER 132-37, 256-60. Of particular significance, defense counsel declared: "There will be no evidence that Mr. Salman *did* anything to deliberately avoid learning of any illegality. . . . [T]here will not be any evidence that Mr. Salman took *any deliberate* actions to avoid learning the truth." ER 259-60 (emphasis in original); *see* ER 136-37 (same). The district court overruled these objections, *e.g.,* App. 28-32, 44-46, and gave the willful blindness instruction, App. 60.

On appeal, Salman contended that the district court erred in giving the willful blindness instruction, because he did not take "deliberate actions" or "active steps" to avoid knowledge, as *Global-Tech* requires. The Ninth Circuit rejected Salman's contention. The court of appeals held that "at least under circumstances where a reasonable person would make further inquiries, '[a] failure to

investigate can be a deliberate action.'" App. 24 (quoting *United States v. Ramos-Atondo*, 732 F.3d 1113, 1119 (9th Cir. 2013)). The panel concluded that a reasonable person in Salman's position would have sought to discover the source of Michael Kara's information, and thus it found the evidence sufficient to warrant a willful blindness instruction. App. 24-25.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ to decide the two important questions this case presents, both of which have produced circuit splits: the nature of the personal benefit an insider must receive for an insider trading offense, and whether inaction--a mere failure to investigate--constitutes the "deliberate action" necessary for willful blindness.

I. PERSONAL BENEFIT.

1. In its petition for a writ of certiorari in *Newman*, the government argued that the *Newman* personal benefit definition "cannot be reconciled with *Dirks*," "created a conflict with circuits that have faithfully applied *Dirks*," and threatened to "hurt market participants, disadvantage scrupulous market analysts, and impair the government's ability to protect the fairness and integrity of the securities markets." Government *Newman* Petition at 14-15. In its reply, the government added that

Newman "created an upheaval in insider-trading law by rewriting the settled test announced in" *Dirks*.[4]

Addressing the conflict in the circuits on the personal benefit issue, the government cited and discussed Salman's case. *Id*. at 22-24; Government *Newman* Reply at 4-5. It declared that "[t]he Ninth Circuit . . . rejected the novel personal benefit test fashioned by" the Second Circuit in *Newman*. *Id*. at 23. The government noted that the Seventh Circuit decision in *SEC v. Maio*, 51 F.3d 623 (7th Cir. 1995), also conflicts with *Newman*. Government *Newman* Petition at 24-25.

The government stressed the importance of prompt intervention by this Court. It declared that "[d]elay in [overturning the *Newman* personal benefit standard] will result in continuing and serious harm." *Id*. at 26; *see* Government *Newman* Reply at 9 ("Absent this Court's intervention, the Second Circuit's redefinition of the personal-benefit standard will result in significant harm--restricting enforcement of the securities laws against culpable actors, spurring fraudulent activity, undermining the necessary work of legitimate analysts, depriving the financial community of guidance on how to comply with the law, and decreasing public confidence in the securities markets.").

2. In their oppositions to certiorari, the *Newman* respondents maintained that the case presented a poor vehicle for resolving the contours of the personal benefit necessary for insider trading.

[4] *United States v. Newman*, No. 15-137, Reply Brief for the Petitioner, at 1 ["Government *Newman* Reply"].

As Newman put it, "[E]ven if this Court were to agree with the government that the Second Circuit misstated the type of evidence required to support an inference of a benefit, the decision dismissing the indictment on the independent ground that Newman did not know of any benefit would stand."[5] On October 5, 2015, this Court denied the government's petition in *Newman*. *United States v. Newman*, No. 15-137.

3. Contrary to the government's position in *Newman*, the Second Circuit's approach does not conflict with *Dirks*. The *Dirks* Court intended the "personal benefit" requirement to place a meaningful limitation on the otherwise broad sweep of the insider's fiduciary duty. As the Court put it: "[A] purpose of the securities laws was to eliminate use of inside information for personal advantage. Thus, the test is whether the insider personally will benefit, directly or indirectly, from his disclosure. Absent some personal gain, there has been no breach of duty to stockholders. And absent a breach by the insider, there is no derivative breach [by the tippee]." *Dirks*, 463 U.S. at 662 (quotation and citations omitted). The "personal benefit" limitation is particularly important in criminal cases, where liberty is at stake and where the prohibition against vague, judge-made laws is at its greatest. By

[5] *United States v. Newman*, No. 15-137, Brief for Todd Newman in Opposition, at 2; *see id.*, Brief for Respondent Anthony Chiasson in Opposition, at 2 ("This Court's review would prolong this ordeal for no reason: The outcome of this case would be the same, whether or not this Court agreed with the Government's misreading of the decision below. That is because the question presented implicates just one of two independent grounds for the judgment below . . . .").

reading the personal benefit requirement strictly, *Newman* ensures that the criminal sanction will be deployed only where it clearly applies.

4. Although the government misread *Dirks* in its *Newman* petition, it was correct that the personal benefit standard warrants prompt review by this Court. As the government observed, the square conflict between the Second Circuit on one hand and the Seventh and Ninth Circuits on the other "raises the specter of uneven enforcement of the securities laws against individuals who are all participating in the same nationwide capital markets." Government *Newman* Petition at 25. That "uneven enforcement" will only deepen as the courts of appeals choose between the Second Circuit's *Newman* approach on one hand and the Ninth Circuit's *Salman* approach on the other. As the government argued in *Newman*, this Court's review "is urgently needed to restore certainty and order" to the law of insider trading. Government *Newman* Reply at 12.

5. This case presents the identical issue on which the government sought review in *Newman*. Unlike in *Newman*, however, the issue is outcome-determinative here. If a close family relationship between the insider and the tippee is enough to establish a personal benefit for the insider, as the Ninth Circuit held, then Salman loses. Such a relationship plainly existed between Maher and Michael Kara, and Salman knew of that relationship. But if there must be "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable

nature," as the Second Circuit held in *Newman*, then Salman prevails, because there is no evidence of such an exchange between Maher and Michael Kara and no evidence that Salman knew of such an exchange.

II. WILLFUL BLINDNESS.

The Court should also grant the writ to address a recurring question that has split the circuits: whether, following *Global-Tech*, a willful blindness instruction can be given where the government shows only that the defendant unreasonably failed to investigate suspicious circumstances, without taking any "deliberate actions" or "active steps" to avoid knowledge. The Ninth Circuit's conclusion that *inaction*--an unreasonable failure to investigate--constitutes "deliberate action" confuses deliberate indifference with willful blindness, contrary to *Global-Tech*, and it obliterates the careful distinction *Global-Tech* drew between willful blindness (which is tantamount to knowledge) and recklessness and negligence (which are not).

1. In *Global-Tech*, this Court defined the elements of willful blindness as follows: "(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take *deliberate actions* to avoid learning of that fact." 131 S. Ct. at 2070 (emphasis added). The Court emphasized the requirement that the defendant take "deliberate actions" to avoid learning the key fact. It declared: "We think these requirements give willful blindness an appropriately

limited scope *that surpasses recklessness and negligence*. Under this formulation, a willfully blind defendant is one who takes *deliberate actions* to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts." *Id.* at 2070-71 (emphasis added); *see, e.g., Macias*, 786 F.3d at 1062 ("An ostrich instruction should not be given unless there is evidence that the defendant engaged in behavior that could reasonably be interpreted as having been intended to shield him from confirmation of his suspicion that he was involved in criminal activity.") (citing *Global-Tech*).

Global-Tech faulted the Federal Circuit for requiring only "deliberate indifference": "[I]n demanding only 'deliberate indifference' to that risk [that the disputed fact existed], the Federal Circuit's test does not require *active efforts* by an inducer to avoid knowing [the fact]." *Global-Tech*, 131 S. Ct. at 2071 (emphasis added).[6] The Court found the evidence sufficient to support a finding of willful blindness, because the jury could have inferred that the defendant "took *deliberate steps* to avoid knowing [the disputed] fact." *Id.* at 2072 (emphasis added).

2. The record is devoid of evidence that Salman took "deliberate actions" or "active steps" to

[6] In a hearing shortly before trial, the district court and the government referred to the willful blindness instruction as a "deliberate indifference" instruction. ER 276. The district court used this formulation again when overruling Salman's objections to the instruction, ER 42, and again during the argument on Salman's motion for new trial, ER 76. The district court thus used the exact formulation that this Court rejected in *Global-Tech*.

avoid knowledge that Maher Kara was the source of Michael Kara's stock recommendations. The Ninth Circuit found the willful blindness instruction appropriate based on what it deemed Salman's unreasonable failure to investigate the source of Michael's tips. App. 23-24. But the court's ruling on this point cannot be squared with *Global-Tech*. If "deliberate indifference" is not enough for willful blindness, as *Global-Tech* held, then the court of appeals' even less demanding standard of an unreasonable failure to investigate cannot be enough.

The Ninth Circuit's approach collapses the distinction *Global-Tech* drew between recklessness and negligence on one hand and willful blindness on the other. This Court sought to "give willful blindness an appropriately limited scope that surpasses recklessness and negligence." *Global-Tech*, 131 S. Ct. at 2070. A reckless defendant, according to the Court, "knows of a substantial and unjustified risk of . . . wrongdoing." *Id*. at 2071. Recklessness corresponds to the first prong of the willful blindness standard--"subjective belie[f] that there is a high probability that a fact exists."

The second prong of willful blindness--the "deliberate actions" requirement--is thus what distinguishes the reckless defendant from the willfully blind defendant. A reckless defendant knows of a substantial risk that a fact exists and does nothing about it (or, put differently, is indifferent to it). A willfully blind defendant knows of a substantial risk (or "high probability") that a fact exists and takes deliberate actions to avoid

confirming the fact. But if inaction equals action, as the court of appeals concluded, then this Court's carefully drawn distinction vanishes; a reckless defendant who does not investigate the "substantial and unjustified risk of wrongdoing"--by definition, *every* reckless defendant--will be found willfully blind.

3. The Ninth Circuit's approach not only permits conviction of the merely reckless defendant, contrary to *Global-Tech*; it permits conviction based on the even lower negligence standard. The court of appeals found that a failure to investigate suspicious circumstances constitutes willful blindness "at least under circumstances where a reasonable person would make further inquiries." App. 24.[7] As this Court recently observed, a "'reasonable person' standard is a familiar feature of civil liability in tort law, but is inconsistent with 'the conventional requirement for criminal conduct--*awareness* of some wrongdoing.'" *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015) (quoting *Staples v. United States*, 511 U.S. 600, 606-07 (1994) (emphasis added by

[7] By contrast, in *Macias* the Seventh Circuit left open the possibility that willful blindness could rest on a failure to investigate where there is "a ducking of responsibility, a violation of duty, and perhaps therefore the equivalent of taking evasive action to avoid confirming one's suspicions." 786 F.3d at 1063. But the court found that this possible standard had not been satisfied, because the defendant's "responsibilities to the drug cartel, which had only to do with facilitating the transmission of money from the United States to Mexico, did not require him to know how the money had been obtained. Having no need or duty to know, he was not acting unnaturally in failing to inquire." *Id*. at 1064. Even if the *Macias* "need or duty to know" standard is correct, it is far more stringent than the "reasonable person" standard that the Ninth Circuit embraced.

Elonis; internal quotation omitted)). By permitting a finding of willful blindness based on a defendant's unreasonable failure to investigate suspicious circumstances, the Ninth Circuit adopted the very negligence standard *Global-Tech* rejected and placed itself squarely in conflict with this Court.

4. The Ninth Circuit's decision also conflicts with the Seventh Circuit's decision in *Macias*. In that case, a former smuggler of illegal immigrants was recruited to smuggle drug profits from the United States to Mexico. He was indicted for participating in a drug distribution conspiracy. His defense was that he thought the money came from immigrant smuggling and did not know it represented drug proceeds. *See* 786 F.3d at 1061. The government sought and obtained a willful blindness instruction. On appeal, the Seventh Circuit found the instruction improper, because "[t]here is no evidence that suspecting he might be working for a drug cartel Macias took active steps to avoid having his suspicions confirmed." *Id*. at 1063; *see also, e.g., United States v. L.E. Myers Co.*, 562 F.3d 845, 854 (7th Cir. 2009) ("Failing to display curiosity is not enough; the defendant must affirmatively *act* to avoid learning the truth.") (quotation omitted; emphasis in original).

For the reasons stated in *Macias*, the willful blindness instruction should not have been given in this case. Even if Salman suspected that Michael Kara was obtaining stock tips from his brother Maher, there is no evidence that Salman "took active steps to avoid having his suspicions confirmed." *Macias*, 786 F.3d at 1063. The Ninth Circuit's

decision upholding the willful blindness instruction thus cannot be reconciled with *Macias*.

5. Other circuits have had varied responses to *Global-Tech*. The Third Circuit revised its criminal pattern jury instructions to include the "deliberate actions" requirement.[8] By contrast, the Second and Eighth Circuits have held, consistent with the Ninth Circuit's view in this case, that a failure to investigate satisfies the *Global-Tech* "deliberate actions" standard.[9] The First, Fifth, Sixth, and Eleventh Circuits have upheld willful blindness instructions that omit any requirement that the defendant take deliberate actions to avoid knowledge.[10]

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[8] Third Circuit Model Criminal Jury Instructions § 5.06 (2014); *see also* Pattern Criminal Jury Instructions of the Seventh Circuit, Instruction 4.10, Committee Comment (2012 ed.) (commentary to criminal pattern instructions notes that *Global-Tech* "provided an arguably narrower definition of the sort of willful blindness that equates to knowledge" and suggests that district judges "consider" whether to adopt the *Global-Tech* definition). The Eighth Circuit has also modified its pattern instruction to include the "deliberate actions" requirement. Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit § 7.04 (2013). As noted in text, however, that court has recently found a failure to investigate to be consistent with *Global-Tech*.

[9] *See, e.g. United States v. Hansen*, 791 F.3d 863, 868-69 (8th Cir. 2015); *United States v. Whitman*, 555 Fed. Appx. 98, 104-06 (2d Cir.), *cert. denied*, 135 S. Ct. 352 (2014); *United States v. Goffer*, 721 F.3d 113, 128 (2d Cir. 2013), *cert. denied*, 135 S. Ct. 63 (2014).

[10] *United States v. Reichert*, 747 F.3d 445, 449-51 (6th Cir. 2014); *United States v. Grant*, 521 Fed. Appx. 841, 848 (11th Cir. 2013); *United States v. Denson*, 689 F.3d 21, 24-25 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 996 (2013); *United States v. Brooks*, 681 F.3d 678, 702-03 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 836 (2013).

6. This case presents an ideal vehicle to resolve the division in the circuits over the *Global-Tech* "deliberate actions" requirement. As detailed above, Salman thoroughly preserved his objection to the willful blindness instruction. And the erroneous instruction was not harmless. The instruction "went to the heart and most hotly contested aspect of the case," *L.E. Myers*, 562 F.3d at 855 (willful blindness instruction not harmless): whether Salman knew that Maher Kara was the source of Michael Kara's stock recommendations.

This is not a case where evidence of actual knowledge was overwhelming. To the contrary, the government's actual knowledge theory "was beset by numerous and obvious problems." *United States v. Ciesiolka*, 614 F.3d 347, 355 (7th Cir. 2010) (willful blindness instruction not harmless). Most significantly, the only prosecution witness who provided direct evidence of Salman's knowledge--Michael Kara--had enormous credibility problems, ranging from the deal he had cut with the government to resolve his own criminal case to his prior inconsistent statements to his lies to Maher to delusions he suffered as a result of his mental illness and the drugs used to treat it. *See, e.g., United States v. Kaiser*, 609 F.3d 556, 567 (2d Cir. 2010) (erroneous willful blindness instruction not harmless where "there was ample reason for the jury to question the credibility of the government's witnesses" on actual knowledge). Given Michael Kara's shredded credibility, and under the other circumstances of this case, the erroneous willful blindness instruction was not harmless.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 2015

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. BASSAM YACOUB SALMAN, AKA Bessam Jacob Salman, *Defendant-Appellant.*	No. 14-10204 D.C. No. 3:11-CR-00625-EMC-1 OPINION

Appeal from the United States District Court
for the Northern District of California
Edward M. Chen, District Judge, Presiding

Argued and Submitted
June 9, 2015 – San Francisco, California

Filed July 6, 2015

Before: Morgan Christen and
Paul J. Watford, Circuit Judges, and
Jed S. Rakoff, Senior District Judge.*

Opinion by Judge Rakoff

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* The Honorable Jed S. Rakoff, Senior District Judge for the U.S. District Court for the Southern District of New York, sitting by designation.

SUMMARY**

Criminal Law

The panel affirmed a conviction by jury trial for conspiracy and securities fraud arising from an insider-trader scheme.

The panel held that the defendant did not waive a sufficiency of the evidence issue raised only in a supplemental brief because both parties had an opportunity to brief the issue and to address it at oral argument.

The panel held that the evidence was sufficient to support the conviction because it showed that an insider breached his fiduciary duty by disclosing information to a trading relative, and that the defendant knew of that breach at the time he traded on it. The panel declined to hold that under the Second Circuit's opinion in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), the government also was required to prove that the insider disclosed the information for a personal benefit.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

John D. Cline (argued), Law Office of John D. Cline, San Francisco, California, for Defendant-Appellant.

Merry Jean Chan, Assistant United States Attorney (argued), Melinda Haag, United States Attorney, Barbara J. Valliere, Chief, Appellate Division, United States Attorney's Office, San Francisco, California, for Plaintiff-Appellee.

OPINION

RAKOFF, Senior District Judge:

Defendant-Appellant Bassam Yacoub Salman appeals his conviction, following jury trial, for conspiracy and insider trading. He argues that the evidence was insufficient to sustain his conviction under the standard announced by the United States Court of Appeals for the Second Circuit in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), which he urges us to adopt. We find that the evidence was sufficient, and we affirm.[1]

BACKGROUND

This case arises from an insider-trading scheme involving members of Salman's extended family. On

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[1] Salman raised several additional claims relating to the same conviction. Those claims are addressed in a separate memorandum disposition filed concurrently with this opinion.

September 1, 2011, Salman was indicted for one count of conspiracy to commit securities fraud in violation of 18 U.S.C. § 371 and four counts of securities fraud in violation of 15 U.S.C. §§ 78j(b) and 78ff, 17 C.F.R. §§ 240.10b-5, 240.10b5-1 and 240.10b5-2, and 18 U.S.C. § 2. At trial, the Government presented evidence of the following:

In 2002, Salman's future brother-in-law Maher Kara joined Citigroup's healthcare investment banking group. Over the next few years, Maher began to discuss aspects of his job with his older brother, Mounir ("Michael") Kara. At first, Maher sought help from Michael, who held an undergraduate degree in chemistry, in understanding scientific concepts relevant to his work in the healthcare and biotechnology sectors. In 2004, when their father was dying of cancer, the focus of the brothers' discussions shifted to companies that were active in the areas of oncology and pain management. Maher began to suspect that Michael was trading on the information they discussed, although Michael initially denied it. As time wore on, Michael became more brazen and more persistent in his requests for inside information, and Maher knowingly obliged. From late 2004 through early 2007, Maher regularly disclosed to Michael information about upcoming mergers and acquisitions of and by Citigroup clients.

Meanwhile, in 2003, Maher Kara became engaged to Salman's sister, Saswan ("Suzie") Salman. Over the course of the engagement, the Kara family and the Salman family grew close. In particular,

Salman and Michael Kara became fast friends. In the fall of 2004, Michael began to share with Salman the inside information that he had learned from Maher, encouraging Salman to "mirror-imag[e]" his trading activity. Rather than trade through his own brokerage account, however, Salman arranged to deposit money, via a series of transfers through other accounts, into a brokerage account held jointly in the name of his wife's sister and her husband, Karim Bayyouk. Salman then shared the inside information with Bayyouk and the two split the profits from Bayyouk's trading. The brokerage records introduced at trial revealed that, on numerous occasions from 2004 to 2007, Bayyouk and Michael Kara executed nearly identical trades in securities issued by Citigroup clients shortly before the announcement of major transactions. As a result of these trades, Salman and Bayyouk's account grew from $396,000 to approximately $2.1 million.

Of particular relevance here, the Government presented evidence that Salman knew full well that Maher Kara was the source of the information. Michael Kara (who pled guilty and testified for the Government) testified that, early in the scheme, Salman asked where the information was coming from, and Michael told him, directly, that it came from Maher. Michael further testified about an incident that occurred around the time of Maher and Suzie's wedding in 2005. According to Michael Kara, on that visit, Michael noticed that there were many papers relating to their stock trading strewn about Salman's office.

Michael became angry and admonished Salman that he had to be careful with the information because it was coming from Maher. Michael testified that Salman agreed that they had to "protect" Maher and promised to shred all of the papers.

The Government further presented evidence that Maher and Michael Kara enjoyed a close and mutually beneficial relationship. Specifically, the jury heard testimony that Michael helped pay for Maher's college, that he stood in for their deceased father at Maher's wedding, and, as discussed above, that Michael coached Maher in basic science to help him succeed at his job. Maher, for his part, testified that he "love[d] [his] brother very much" and that he gave Michael the inside information in order to "benefit him" and to "fulfill[ ] whatever needs he had." For example, Maher testified that on one occasion, he received a call from Michael asking for a "favor," requesting "information," and explaining that he "owe[d] somebody." After Michael turned down Maher's offer of money, Maher gave him a tip about an upcoming acquisition instead.

Finally, the Government presented evidence that Salman was aware of the Kara brothers' close fraternal relationship. The Salmans and the Karas were tightly knit families, and Salman would have had ample opportunity to observe Michael and Maher's interactions at their regular family gatherings. For example, Michael gave a toast at Maher's wedding, which Salman attended, in which Michael described how he spoke to his younger brother nearly every day

and described Maher as his "mentor," his "private counsel," and "one of the most generous human beings he knows." Maher, overcome with emotion, began to weep.

The jury found Salman guilty on all five counts. Salman then moved for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, on the ground, *inter alia*, that there was no evidence that he knew that the tipper disclosed confidential information in exchange for a personal benefit. The district court denied his motion in full.

Salman timely appealed, but did not raise a challenge to the sufficiency of the evidence in his opening brief. After he filed his reply brief, the United States Court of Appeals for the Second Circuit, in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), vacated the insider-trading convictions of two individuals on the ground that the Government failed to present sufficient evidence that they knew the information they received had been disclosed in breach of a fiduciary duty. *Id.* at 455. After the Second Circuit denied the Government's petition for panel rehearing and rehearing *en banc, United States v. Newman*, Nos. 13-1837, 13-1917, 2015 WL 1954058 (2d Cir. Apr. 3, 2015), Salman promptly moved for leave to file a supplemental brief arguing that the Government's evidence in the instant case was insufficient under the standard announced in *Newman*, which he urged this Court to adopt. We granted Salman's motion and gave the Government an opportunity to respond.

DISCUSSION

A.

The threshold question is whether Salman waived the present argument by failing to raise it in his opening brief on this appeal, even though he had raised it below and, after *Newman* was decided, promptly raised it in a supplemental brief that the Government responded to before oral argument. Ordinarily, we will not consider " 'matters on appeal that are not specifically and distinctly argued in appellant's opening brief.' " *United States v. Ullah*, 976 F.2d 509, 514 (9th Cir. 1992) (quoting *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 738 (9th Cir. 1986)). However, we make an exception to this general rule (1) for "good cause shown" or "if a failure to do so would result in manifest injustice," (2) "when it is raised in the appellee's brief," or (3) "if the failure to raise the issue properly did not prejudice the defense of the opposing party." *Id.* (internal citation and quotation marks omitted).

The third exception applies here. As both parties have had a full opportunity to brief this issue and to address it at oral argument, the Government cannot complain of prejudice. *See Hall v. City of Los Angeles*, 697 F.3d 1059, 1072 (9th Cir. 2012) (finding no prejudice where parties had opportunity to brief the issue); *Ibarra-Flores v. Gonzales*, 439 F.3d 614, 619 n.4 (9th Cir. 2006) (considering issue not raised in opening brief where opponent had an opportunity to address

the issue at oral argument). Accordingly, we address Salman's claim on the merits.

B.

In reviewing a challenge to the sufficiency of the evidence, we must determine whether, when viewed in the light most favorable to the Government, the evidence was "'adequate to allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.'" *United States v. Richter*, 782 F.3d 498, 501 (9th Cir. 2015) (quoting *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc)). Salman urges us to adopt *Newman* as the law of this Circuit, and contends that, under *Newman*, the evidence was insufficient to find either that Maher Kara disclosed the information to Michael Kara in exchange for a personal benefit, or, if he did, that Salman knew of such benefit.[2]

The "personal benefit" requirement for tippee liability derives from the Supreme Court's opinion in *Dirks v. S.E.C.*, 463 U.S. 646 (1983). *Dirks* presented an unusual fact pattern. Ronald Secrist, a

[2] Another holding of *Newman* – that even a remote tippee must have some knowledge of the personal benefit (however defined) that the inside tipper received for disclosing inside information, *see Newman*, 773 F.3d at 450 – is not at issue here, because the jury was instructed that it had to find that Salman "knew that Maher Kara personally benefitted in some way, directly or indirectly, from the disclosure of the allegedly inside information to Mounir ('Michael') Kara."

whistleblower at a company called Equity Funding, had contacted Raymond Dirks, a well-known securities analyst, after Secrist's prior disclosures to the Securities and Exchange Commission ("SEC") had gone for naught. *Id.* at 649 & 650 n.3. Secrist, for no other purpose than exposing the Equity Funding fraud, disclosed inside information about the company to Dirks, who in turn launched his own investigation that eventually led to public exposure of a massive fraud. *Id.* at 649-50. However, in the process of his investigation, Dirks openly discussed the information provided by Secrist with various clients and investors, some of whom then sold their Equity Funding stock on the basis of that information. *Id.* at 649. Upon learning this, the SEC charged Dirks with securities fraud, and this position was upheld by an SEC Administrative Law Judge and affirmed by the District of Columbia Circuit, after which certiorari was granted. *Id.* at 650-52.[3]

When the case came to the Supreme Court, Justice Powell, writing for the Court, began by noting that, whistleblowing quite aside, corporate insiders, in the many conversations they typically have with stock analysts, often accidentally or mistakenly disclose material information that is not immediately available to the public. *Id.* at 658-59. Thus, "[i]mposing

[3] The Department of Justice, which successfully prosecuted the perpetrators of the fraud and viewed Dirks as a hero, took the unusual step of filing an amicus brief in the Supreme Court urging rejection of the SEC's theory. *Id.* at 648.

a duty to disclose or abstain solely because a person knowingly receives material nonpublic information from an insider and trades on it could have an inhibiting influence on the role of market analysts, which the SEC itself recognizes is necessary to the preservation of a healthy market." *Id.* at 658. At the same time, the Court continued, "Nile need for a ban on some tippee trading is clear. Not only are insiders forbidden by their fiduciary relationship from personally using undisclosed corporate information to their advantage, but they may not give such information to an outsider for the same improper purpose of exploiting the information for their personal gain." *Id.* at 659.

"Thus, the test is whether the insider personally will benefit, directly or indirectly, from his disclosure," *id.* at 662, for in that case the insider is breaching his fiduciary duty to the company's shareholders not to exploit company information for his personal benefit.[4] And a tippee is equally liable if "the tippee knows or should know that there has been [such] a breach," *id.* at 660, *i.e.*, knows of the personal benefit.

Of particular importance here, the Court then went on to define what constitutes the "personal benefit" that constitutes the breach of fiduciary duty. It

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[4] The same is true in a so-called "misappropriation" case, like the instant case, where the fiduciary duty is owed, not to the shareholders, but to the tipper's employer, client, or the like. *See United States v. O'Hagan*, 521 U.S. 642, 652-53 (1997).

would include, for example, "a pecuniary gain or a reputational benefit that will translate into future earnings." *Id.* at 663. However, "[*t*]*he elements of fiduciary duty and exploitation of nonpublic information also exist when an insider makes a gift of confidential information to a trading relative or friend*." *Id.* at 664 (emphasis supplied).

The last-quoted holding of *Dirks* governs this case. Maher's disclosure of confidential information to Michael, knowing that he intended to trade on it, was precisely the "gift of confidential information to a trading relative" that *Dirks* envisioned. *Id.* Indeed, Maher himself testified that, by providing Michael with inside information, he intended to "benefit" his brother and to "fulfill[ ] whatever needs he had." As to Salman's knowledge, Michael Kara, whose testimony we must credit on a challenge to the sufficiency of the evidence, testified that he directly told Salman that it was Michael's brother Maher who was, repeatedly, leaking the inside information that Michael then conveyed to Salman, and that Salman later agreed that they had to "protect" Maher from exposure. Given the Kara brothers' close relationship, Salman could readily have inferred Maher's intent to benefit Michael. Thus, there can be no question that, under *Dirks*, the evidence was sufficient for the jury to find that Maher disclosed the information in breach of his fiduciary duties and that Salman knew as much.

Salman, however, argues that the Second Circuit in *Newman* interpreted *Dirks* to require more than this. Of course, *Newman* is not binding on us, and our

own reading of *Dirks* is guided by the clearly applicable language italicized above. But we would not lightly ignore the most recent ruling of our sister circuit in an area of law that it has frequently encountered.

The defendants in *Newman*, Todd Newman and Anthony Chiasson, both portfolio managers, were charged with trading on material non-public information regarding two companies, Dell and NVIDIA, obtained by a group of analysts at various hedge funds and investment firms. *Newman*, 773 F.3d at 442-43. The information came to them via two distinct tipping chains. The Dell tipping chain originated with Rob Ray, a member of Dell's investor relations department. *Id.* at 443. Ray tipped information regarding Dell's earnings numbers to Sandy Goyal, an analyst. *Id.* Goyal, in turn, relayed the information to Jesse Tortora, another analyst, who relayed it to his manager, Newman, as well as to other analysts including Spyridon Adondakis, who passed it to Chiasson. *Id.* The NVIDIA tipping chain began with Chris Choi, of NVIDIA's finance unit, who tipped inside information to his acquaintance Hyung Lim, who passed it to Danny Kuo, an analyst, who circulated it to his analyst friends, including Tortora and Adondakis, who in turn gave it to Newman and Chiasson. *Id.* Having received this information, Newman and Chiasson executed trades in both Dell and NVIDIA stock, generating lavish profits for their respective funds. *Id.*

The Government presented the following evidence regarding the relationships between the Dell and NVIDIA insiders and their respective tippees. The Dell tipper and tippee, Ray and Goyal, attended business school together and had been colleagues at Dell, but were not "close." *Id.* at 452. Goyal provided career advice and assistance to Ray, for example, discussing the qualifying examination required to become an analyst and editing his résumé. *Id.* This advice began before Ray started to give Goyal information, and Goyal testified that he would have given it as a routine professional courtesy without receiving anything in return. *Id.* As to the NVIDIA tips, the insider, Choi, and his tippee, Lim, were "family friends" who met through church and occasionally socialized with one another. *Id.* Lim testified that he did not provide anything of value to Choi in return for the tips, and that Choi did not know that he was trading in NVIDIA stock. *Id.*

The Second Circuit held that this evidence was insufficient to establish that either Ray or Choi received a personal benefit in exchange for the tip. It noted that, although the "personal benefit" standard is "permissive," it "does not suggest that the Government may prove the receipt of a personal benefit by the mere fact of a friendship, particularly of a casual or social nature." *Id.* Instead, to the extent that "a personal benefit may be inferred from a personal relationship between the tipper and tippee, . . . such an inference is impermissible in the absence of proof of a *meaningfully close personal relationship* that

generates an exchange that is objective, consequential, and *represents at least a potential gain of a pecuniary or similarly valuable nature*." *Id.* (emphasis supplied).

Applying these standards, the court concluded that the "circumstantial evidence . . . was simply too thin to warrant the inference that the corporate insiders received any personal benefit in exchange for their tips," *id.* at 451-52, and furthermore, that "the Government presented absolutely no testimony or any other evidence that Newman and Chiasson knew they were trading on information obtained from insiders, or that those insiders received any benefit in exchange for such disclosures." *Id.* at 453.

Salman reads *Newman* to hold that evidence of a friendship or familial relationship between tipper and tippee, standing alone, is insufficient to demonstrate that the tipper received a benefit. In particular, he focuses on the language indicating that the exchange of information must include "at least a potential gain of a pecuniary or similarly valuable nature," *id.* at 452, which he reads as referring to the benefit received by the tipper. Salman argues that because there is no evidence that Maher received any such tangible benefit in exchange for the inside information, or that Salman knew of any such benefit, the Government failed to carry its burden.

To the extent *Newman* can be read to go so far, we decline to follow it. Doing so would require us to depart from the clear holding of *Dirks* that the

element of breach of fiduciary duty is met where an "insider makes a gift of confidential information to a trading relative or friend." *Dirks*, 463 U.S. at 664. Indeed, *Newman* itself recognized that the "'personal benefit is broadly defined to include not only pecuniary gain, but also, *inter alia*, . . . the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend.'" *Newman*, 773 F.3d at 452 (alteration omitted) (quoting *United States v. Jiau*, 734 F.3d 147, 153 (2d Cir. 2013)).

In our case, the Government presented direct evidence that the disclosure was intended as a gift of market-sensitive information. Specifically, Maher Kara testified that he disclosed the material nonpublic information for the purpose of benefitting and providing for his brother Michael. Thus, the evidence that Maher Kara breached his fiduciary duties could not have been more clear, and the fact that the disclosed information was market-sensitive – and therefore within the reach of the securities laws, *see O'Hagan*, 521 U.S. at 656 – was obvious on its face. If Salman's theory were accepted and this evidence found to be insufficient, then a corporate insider or other person in possession of confidential and proprietary information would be free to disclose that information to her relatives, and they would be free to trade on it, provided only that she asked for no tangible compensation in return. Proof that the insider disclosed material nonpublic information with the intent to benefit a trading relative or friend is

sufficient to establish the breach of fiduciary duty element of insider trading.

In Salman's case, the jury had more than enough facts, as described above, to infer that when Maher Kara gave inside information to Michael Kara, he knew that there was a potential (indeed, a virtual certainty) that Michael would trade on it. And while Salman may not have been aware of all the details of the Kara brothers' relationship, the jury could easily have found that, as a close friend and member (through marriage) of the close-knit Kara clan, Salman must have known that, when Maher gave confidential information to Michael, he did so with the "intention to benefit" a close relative. *Id.*

Accordingly, we find that the evidence was more than sufficient for a rational jury to find both that the inside information was disclosed in breach of a fiduciary duty, and that Salman knew of that breach at the time he traded on it.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BASSAM YACOUB SALMAN, AKA Bessam Jacob Salman, Defendant-Appellant.	No. 14-10204 D.C. No. 3:11-cr-00625-EMC-1 MEMORANDUM* (Filed Jul. 6, 2015)

Appeal from the United States District Court
for the Northern District of California
Hon. Edward M. Chen, District Judge, Presiding

Argued and Submitted June 9, 2015
San Francisco, California

Before: CHRISTEN and WATFORD, Circuit Judges, and RAKOFF, Senior District Judge.**

Defendant-Appellant Bassam Yacoub Salman appeals his conviction, following jury trial, for one count of conspiracy to commit securities fraud in violation

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Jed S. Rakoff, Senior District Judge for the U.S. District Court for the Southern District of New York, sitting by designation.

of 18 U.S.C. § 371 and four counts of securities fraud in violation of 15 U.S.C. §§ 78j(b) and 78ff, 17 C.F.R. §§ 240.10b-5, 240.10b5-1 and 240.10b5-2, and 18 U.S.C. § 2. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.[1]

Salman's convictions arose from an insider-trading scheme involving his extended family. The underlying facts and procedural history are set forth in the opinion filed concurrently with this memorandum disposition. As relevant here, the Government presented evidence at trial that Salman caused his brother-in-law, Karim Bayyouk, to trade on material non-public information that Salman received from other members of his family using a brokerage account in which Salman had an undisclosed interest. On May 31, 2007, attorneys from the Securities and Exchange Commission ("SEC") interviewed Bayyouk, who falsely denied having received information from anyone before making the relevant trades. A recording of that interview (the "Bayyouk Interview") was played for the jury at Salman's trial. Salman now claims the admission of the Bayyouk Interview violated the Confrontation Clause, and, in any event, should have been excluded under Federal Rules of Evidence 401-403. He further argues that the district

[1] The panel granted Salman's motion to file a supplemental brief addressing the effect, if any, of the Second Circuit's opinion in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014). That issue is addressed in a separate opinion filed concurrently with this memorandum disposition.

court erred in giving a "deliberate ignorance" instruction and that the cumulative effect of the district court's errors rendered his trial fundamentally unfair.[2]

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that the Confrontation Clause of the Sixth Amendment bars the use of testimonial out-of-court statements by a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. *Id.* at 68. It is well established, however, that this Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Id.* at 59 n.9; *see also United States v. Mitchell*, 502 F.3d 931, 966 (9th Cir. 2007). Here, it is undisputed that the Bayyouk Interview was chiefly introduced to show that Bayyouk lied to the SEC. Salman notes, however, that on summation, the prosecutor, in response to Salman's argument that his transactions with Bayyouk were somehow related to the restaurant business in which they both had an interest, made the following argument:

> First and most important, to test this defense, I want you to please consider what Karim Bayyouk said about his trading with

[2] With respect to several of Salman's claims, the parties disagree as to the applicable standard of review. Because we find that the district court did not err regardless of which standard is applied, we need not resolve these disputes.

> Mr. Salman. He never said his trading with Mr. Salman was business-related. Far from it. *Mr. Bayyouk told the SEC that his trading had nothing to do with business, let alone business with Bassam Salman.*

(Emphasis added.)

Although he did not object at trial, Salman now contends that the final sentence quoted above demonstrates that the Government relied on some of Bayyouk's statements for their truth.

When viewed in context, however, it is clear that in making the above argument, the prosecutor was relying on the Bayyouk Interview, not for what Bayyouk actually said, but rather for what he failed to say.[3] The thrust of the Government's argument was that, if the transactions had been legitimate and business-related, then Bayyouk would have simply told the SEC as much. The fact that he failed to do so suggests that they were not. This was a non-testimonial use of the Bayyouk Interview, and therefore does not offend the Confrontation Clause.

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[3] In fact, at no point during the interview did Bayyouk tell the SEC that "his trading had nothing to do with business, let alone business with Bassam Salman." Thus, there was no underlying statement on which the Government could have relied for its truth. Although the sentence that Salman identifies may have mischaracterized the evidence to some extent, that does not transform the Government's non-hearsay use of the Bayyouk Interview into a Confrontation Clause violation.

Second, Salman argues that the admission of the Bayyouk Interview was erroneous because it is irrelevant. Federal Rule of Evidence 401 provides that evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action," and Federal Rule of Evidence 402 requires that irrelevant evidence be excluded. In this case, however, the fact that Bayyouk lied strongly suggests that he knew the trading to be improper, which, in the circumstances, reasonably suggests in turn that Salman indicated to him it was improper. Therefore, Bayyouk's false statements tended to establish Salman's consciousness of guilt, and their admission was not in error. *See United States v. Hackett*, 638 F.2d 1179, 1185-86 (9th Cir. 1980).

Third, Salman contends that, even if the Bayyouk Interview was relevant, the district court should have excluded it because its probative value was "substantially outweighed" by the danger of "unfair prejudice." Fed. R. Evid. 403. Salman argues that it was unfair to taint him with Bayyouk's false statements, particularly because Bayyouk could have learned that the trading was improper as a result of the SEC investigation and not because of anything that Salman told him at the time the transactions took place. Salman was, however, free to the argue to the jury that any inference about his own state of mind was unwarranted. Evidence is not unfairly prejudicial merely because it damages the defendant's

case. *See United States v. Bowen*, 857 F.2d 1337, 1341 (9th Cir. 1988) ("[T]he more probative the evidence is, the more damaging it is apt to be."). Because the Bayyouk Interview was probative and posed little danger of unfair prejudice, its admission was not erroneous.

Fourth, Salman argues that the district court erred by giving a deliberate ignorance instruction. As a general matter, a party is entitled to a particular instruction "if it is supported by law and has foundation in the evidence." *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002). Deliberate ignorance involves "(1) a subjective belief that there is a high probability a fact exists; and (2) deliberate actions taken to avoid learning the truth." *United States v. Yi*, 704 F.3d 800, 804 (9th Cir. 2013). In deciding whether to give a deliberate ignorance instruction, the district court must determine whether, viewing the evidence in the light most favorable to the party requesting the instruction, "the jury could rationally find willful blindness even though it has rejected the government's evidence of actual knowledge." *United States v. Heredia*, 483 F.3d 913, 922 (9th Cir. 2007) (en banc).

Salman contends that a deliberate ignorance instruction was not warranted because the Government presented no evidence that he took any deliberate action to avoid learning the source of Michael Kara's tips. He relies on *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011), in which the Supreme Court noted that the doctrine of deliberate ignorance (also referred to as willful blindness), has two basic

requirements, "(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact," and that "these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence." *Id.* at 2070. Salman urges that *Global-Tech* established that mere failure to investigate is insufficient to find deliberate ignorance.

Salman's reliance on *Global-Tech* is misplaced. In that case, the Supreme Court did not alter the standard for deliberate ignorance; rather, it imported the well-established criminal standard into the civil context of a claim for inducement to patent infringement. *Id.* at 2068-69; *cf. United States v. Goffer*, 721 F.3d 113, 128 (2d Cir. 2013) (stating that *Global-Tech* "did not alter or clarify the [deliberate ignorance] doctrine" and "simply describes existing case law"). Consistent with this understanding, our post-*Global-Tech* cases make clear that, at least under circumstances where a reasonable person would make further inquiries, "[a] failure to investigate can be a deliberate action." *United States v. Ramos-Atondo*, 732 F.3d 1113, 1119 (9th Cir. 2013); *see also Yi*, 704 F.3d at 805 (citing *Global-Tech* and holding that deliberate ignorance instruction was warranted where jury could infer that defendant "engaged in a deliberate pattern of failing to read documents").

In this case, there were ample reasons why a person in Salman's position would seek to discover the source of the information. The Government's evidence

showed that Salman was investing large sums of money on short notice, in companies in which he had never invested previously. Moreover, the information was both highly accurate and inherently proprietary in nature, suggesting that it came from a source with inside access to the various companies. Finally, Salman knew the Kara family well, and therefore the jury could reasonably infer that he was aware of Maher's employment at Citigroup and of the Kara brothers' close relationship. Thus, if the jury believed that Salman did not actually know that the information was coming from Maher Kara, then it could rationally have concluded that the reason he did not know was that he deliberately refrained from asking. Accordingly, the district court did not err in giving the deliberate ignorance instruction.

Finally, because there was no error, there can be no cumulative error. *See Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002), *overruled on other grounds by Slack v. McDaniel*, 529 U.S. 473, 482 (2000).

AFFIRMED.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

BASSAM YACOUB SALMAN, a/k/a Bassam Jacob Salman,

Defendant. /

No. CR-11-0625 EMC

ORDER DENYING DEFENDANT'S MOTION FOR RELEASE PENDING APPEAL

(Filed Jul. 1, 2014)

(Docket No. 320)

I. INTRODUCTION

Pending before the Court is Defendant Bassam Yacoub Salman's motion for release pending appeal. Docket No. 320. For the following reasons, the Court DENIES Defendant's motion.

II. FACTUAL AND PROCEDURAL BACKGROUND

On September 30, 2013, a jury convicted Defendant on four counts of securities fraud and one count of conspiracy to commit securities fraud. Docket No. 253. Defendant moved for a new trial based, in part, on the argument that the Court erred by instructing the jury on the concept of "deliberate ignorance." The Court denied Defendant's motion for a new trial on December 17, 2013. *United States v. Salman*, No. CR-11-0625 EMC, 2013 WL 6655176 (N.D. Cal. Dec. 17,

2013). On April 11, 2014, the Court sentenced Defendant to 36 months in prison, followed by a three-year term of supervised release. Docket No. 286. Defendant has now moved for release pending appeal. Defendant's motion focuses solely on the propriety of the deliberate ignorance jury instruction and largely restates the arguments made in his motion for a new trial. Defendant argues that it is, at very least, "fairly debatable" whether giving the deliberate ignorance instruction was correct based on the evidence presented at trial. Docket No. 320, at 7.

III. DISCUSSION

A. Legal Standard

Under 18 U.S.C. § 3143(b), a defendant convicted of an offense is to be detained pending appeal unless the court determines (1) that the person is not likely to flee or pose a danger; and (2) that the appeal is "not for the purpose of delay and raises a substantial question of law or fact likely to result" in reversal, a new trial, a non-custodial sentence, or a term of imprisonment less than the total time expected to take the appeal. 18 U.S.C. § 3143(b). A "substantial question" is one that is "fairly debatable" or "fairly doubtful" and involves "more substance than would be necessary to a finding that it was not frivolous." *See United States v. Handy*, 761 F.2d 1279, 1283 (9th Cir. 1985); *see also United States v. Miller*, 753 F.2d 19, 22 (3d Cir. 1985) ("[A] court must determine that the question raised on appeal is a 'substantial' one, i.e. it

must find that the significant question at issue is one which is either novel, which has not been decided by controlling precedent, or which is fairly doubtful."). The burden is on the Defendant to overcome the presumption that he should be detained while his appeal is pending. *See United States v. Montoya*, 908 F.2d 450, 451 (9th Cir. 1990).

B. Defendant Has Failed to Demonstrate the Existence of a "Substantial Question" as to Whether the Deliberate Ignorance Instruction Was Properly Given

The Court instructed the jury on the concept of deliberate ignorance as follows:

JURY INSTRUCTION NO. 38
COUNTS TWO THROUGH FIVE –
DELIBERATE IGNORANCE

> You may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant:
>
> 1. was aware of a high probability that he obtained information that had been disclosed in violation of a duty of trust and confidence, and
>
> 2. deliberately avoided learning the truth.
>
> You may not find such knowledge, however, if you find that the defendant actually believed that the information he obtained was not disclosed in violation of a duty of

> trust and confidence, or if you find that the defendant was simply careless or reckless.

Docket No. 245, at 43. As the Court noted in its order denying Defendant's motion for a new trial, this instruction, modeled after Ninth Circuit Model Jury Instruction 5.7, is an accurate statement of the law. *See United States v. Heredia*, 483 F.3d 913, 924 (9th Cir. 2007). Additionally, the instruction provided by the Court goes beyond the model instruction by explicitly stating that the jury could not find the necessary knowledge if it found that the Defendant had simply acted recklessly.

Defendant argues, however, that it is "fairly debatable" whether giving this instruction was proper because courts of appeal have rejected deliberate ignorance instructions where there is insufficient evidence from which a jury could conclude that the defendant took "deliberate action" to avoid learning the information at issue. Docket No. 320, at 4. Defendant relies primarily on the Seventh Circuit case of *United States v. L.E. Myers Co.*, 562 F.3d 845 (7th Cir. 2009). There, the Seventh Circuit held that "[f]ailing to display curiosity" is insufficient to support a deliberate ignorance instruction – rather, the defendant "must affirmatively *act* to avoid learning the truth." *Id.* at 854 (emphasis in original); *see also id.* (distinguishing between "evidence of deliberate *indifference* to the facts" and "evidence of deliberate *avoidance*"). However, it is clearly established in this Circuit that a "failure to investigate can be a deliberate action" for purposes of the deliberate ignorance

instruction. *United States v. Ramos-Atondo*, 732 F.3d 1113, 1120 (9th Cir. 2013); *see also United States v. Liddle,* ___ F. App'x ___, 2014 WL 1101051, at *2 (9th Cir. Mar. 21, 2014) ("Even if the government failed to show that Rhonda took deliberate steps to avoid discovering the truth, Rhonda's failure to investigate can be a deliberate action." (citation omitted)).

Accordingly, when the evidence at trial is such that a jury could infer that the defendant deliberately failed to investigate in the face of a "high probability" of illegality, the deliberate ignorance instruction is proper. Thus, in *United States v. Svoboda*, 347 F.3d 471 (2d Cir. 2003), the court affirmed a deliberate ignorance instruction in a securities fraud action materially similar to this case. The court found that the suspicious source, timing, and success of the suspect trade information all combined to "suggest a high probability that Svoboda's tips were based on inside information and that any lack of actual knowledge on Robles' part was due to a conscious effort to avoid confirming an otherwise obvious fact." *Id.* at 481. Similarly, in *Ramos-Atondo*, the Ninth Circuit found a deliberate ignorance instruction to be proper in a drug trafficking case because

> [t]he jury could have inferred that Corona-Vidal, Martinez, and Ramos deliberately chose not to ask why they were going to unload packages at the beach in dark, wearing dark clothing, without any identification or possessions. The jury could have inferred that Ramos-Atondo chose not to examine the

> packages on the boat, or ask why he was taking a boat full of packages from Mexico to a beach in the United States in the dark using a pre-programmed GPS.

Id. These cases negate Defendant's reliance on *L.E. Myers* in arguing that deliberate inaction cannot suffice. Rather, the cases establish at least in this circuit and others (besides the Seventh Circuit) that the government need not show evidence of an *affirmative act* by the defendant before the deliberate ignorance instruction can be given – a failure to investigate may suffice. *See United States v. Heredia*, 483 F.3d 913, 923 (9th Cir. 2007) (en banc).

Defendant argues, however, that both *Ramos-Atondo* and *Svoboda* are distinguishable because they presented overwhelmingly suspicious circumstances that are not present in this case. Specifically, he asserts that "[n]othing about the source of the information or the other circumstances permitted the jury to infer beyond a reasonable doubt that Salman deliberately avoided knowledge that Mounir's information came from Maher." Docket No. 320, at 5-6. The Court disagrees. As noted above, as a legal matter, these cases negate the argument that deliberate *inaction* cannot support a deliberate ignorance instruction. Further, as a factual matter, and as discussed in its prior order, the jury in this case could have inferred from powerful evidence that Defendant deliberately failed to investigate the source of his information given, *inter alia*, (1) the relationship between Michael Kara, Mounir Kara, and the Defendant;

(2) the timing of the trades at issue (specifically that they were all made very close to major corporate announcements prior to public dissemination of that information); (3) the success of the numerous trades; and (4) Defendant's efforts to conceal his trading activity. *Salman*, 2013 WL 6655176, at *4. In short, there was substantial evidence of deliberateness.

The Court further notes that in reviewing the Court's decision to give the "deliberate ignorance" instruction, the Court of Appeals will apply an abuse of discretion standard of review. *See, e.g.*, *United States v. Yi*, 704 F.3d 800, 804 (9th Cir. 2013) ("A district court's decision to give a particular jury instruction is reviewed for abuse of discretion."); *see also Heredia*, 483 F.3d at 922 (noting that the "decision to give a deliberate ignorance instruction" is reviewed for an abuse of discretion).

The Court concludes the issue raised by Defendant does not rise to the level of a "substantial question" of law or fact. *See United States v. Warner*, No. 02 CR 506-1,4, 2006 WL 2931903, (N.D. Ill. Oct. 13, 2006) ("Accordingly, the court will, when determining if a question raised by Defendants is 'substantial,' consider whether this court's previous resolution of the question was committed to its discretion.").

IV. CONCLUSION

For the foregoing reasons, Defendant's motion for release pending appeal is **DENIED**.

This order disposes of Docket No. 320.

IT IS SO ORDERED.

Dated: July 1, 2014

/s/ Edward Chen
EDWARD M. CHEN
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

BASSAM YACOUB SALMAN, a/k/a Bassam Jacob Salman

Defendant. /

Case No. CR-11-0625 EMC

ORDER DENYING DEFENDANT'S MOTION FOR A NEW TRIAL

(Filed Dec. 17, 2013)

(Docket No. 262)

I. INTRODUCTION

Pending before the Court is Defendant's motion for a new trial. Dkt. No. 262. In September 2013, Defendant stood trial on one count of conspiracy and four counts of securities fraud. On September 30, 2013, the jury returned a verdict of guilty on all counts. Dkt. No. 253. Defendant now brings a motion for new trial under Fed. R. Crim. P. 33 asserting that the government failed to introduce evidence at trial as to two essential elements of the securities fraud claims. Defendant also argues that two jury instructions contained legal errors which lowered the government's burden of proof. For the following reasons, Defendant's motion for a new trial is **DENIED**.

II. FACTUAL AND PROCEDURAL BACKGROUND

The indictment in this case was filed on September 1, 2011. Dkt. No. 1. It alleged the following facts.

Maher Kara is a former investment banker who was employed by Citigroup in the firm's Investment Banking Division in the Healthcare Group. *Id.* ¶ 2. Defendant is Maher Kara's brother in law. *Id.* ¶ 5. From 2004 through 2007, Maher Kara provided his brother, Mounir "Michael" Kara with material, non-public information relating to a number of companies Citigroup was advising in the context of potential acquisitions. *Id.* ¶ 9-11. Michael Kara would, in turn, provide Defendant with this material, non-public information. *Id.* ¶ 16(d). Defendant would then disclose this material, non-public information to his brother in law, Karim Bayyouk, with the understanding Bayyouk would use the information to buy and sell securities in part on Salman's account and for his benefit as well. *Id.* ¶ 16(e). Defendant did this in order to conceal the purchase and sale of securities based on the material, non-public information. *Id.* ¶ 16(f).

The indictment charged Defendant with four counts of securities fraud regarding to four purchases of securities. First, on November 7, 2006, Defendant purchased 58 securities in United Surgical Partners International, Inc. ("USPI"). *Id.* ¶ 19. Second, on December 15, 2006, Defendant purchased 6,200 more securities in USPI. *Id.* On January 8, 2007, Citigroup

client Welsh, Carson, Anderson & Stowe publically announced a buyout involving USPI. *Id.* ¶ 9(c). Third, on March 23, 2007, Defendant purchased 59 securities in Biosite Incorporated. *Id.* ¶ 19. On March 25, 2007, a public announcement was released announcing that Citigroup client Beckman Coulter, Inc. would be acquiring Biosite Incorporated. *Id.* ¶ 9(d). The indictment also charged Defendant with conspiracy to commit securities fraud based on these (as well as other) transactions.

Additional facts, and a discussion of the evidence produced at trial, are included below as necessary to address the arguments raised by Defendant.

III. DISCUSSION

A. Legal Standard

Under Federal Rule of Criminal Procedure 33, a "court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). "'A district court's power to grant a motion for a new trial is much broader than its power to grant a motion for judgment of acquittal . . . '" *United States v. Inzunza*, 638 F.3d 1006, 1026 (9th Cir. 2009) (quoting *United States v. Alston*, 974 F.2d 1206, 1211-12 (9th Cir. 1992)). Accordingly, a district court "'need not view the evidence in the light most favorable to the verdict; it may weigh the evidence and in so doing evaluate for itself the credibility of the witnesses.'" *United States v. Kellington*, 217 F.3d

1084, 1095 (9th Cir. 2000) (quoting *Alston*, 974 F.2d at 1211).

A new trial may be granted to correct erroneous jury instructions. *See, e.g.*, *United States v. Mann*, Cr. No 11-1528, 2013 WL 6037681 (D.N.M. Nov. 7, 2013) ("A motion under Rule 33 may be 'grounded on any reason other than newly discovered evidence,' including improper jury instructions."); *United States v. Carter*, 966 F. Supp. 336, 340 (E.D.Pa. 1997) ("A Rule 33 motion for a new trial is the more appropriate method for addressing the allegedly erroneous evidentiary rulings and improper jury instructions."). In determining whether instructions are misleading or inadequate to guide the jury's deliberation, the Court evaluates the instructions as a whole. *See United States v. Chang Da Liu*, 538 F.3d 1078, 1088 (9th Cir. 2008); *see also United States v. Turner*, 189 F.3d 712 (8th Cir. 1999) ("In so doing, we do not consider portions of a jury instruction in isolation, but rather consider the instructions as a whole to determine if they fairly and adequately reflect the law applicable to the case.").

A defendant may also move for a new trial based on the weight of the evidence. Even where there exists sufficient evidence to support the verdict, a district court may nonetheless grant a motion for new trial if it "'concludes that . . . the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred.'" *Kellington*, 217 F.3d at 1087 (quoting *Alston*, 974 F.2d at 1211); *see also United States v. Martinez*, 763 F.2d

1297, 1312-13 (11th Cir. 1985) (recognizing that the district court may not "set aside the verdict simply because it feels some other result would be more reasonable. The evidence must preponderate heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand." (citation omitted)). This is a stringent standard, and the Ninth Circuit has held that such motions are generally disfavored and should only be granted in "exceptional" cases. *See United States v. Del Toro-Barboza*, 673 F.3d 1136, 1153 (9th Cir. 2012); *see also United States v. Camacho*, 555 F.3d 695, 705 (8th Cir. 2009) ("New trial motions based on the weight of the evidence are generally disfavored. . . .").

B. The Deliberate Ignorance Jury Instruction Was Proper

Defendant argues that it was error for the Court to give the following deliberate ignorance instruction:

> **JURY INSTRUCTION NO. 38**
> **COUNTS TWO THROUGH FIVE –**
> **DELIBERATE IGNORANCE**
>
> You may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant:
>
> 1. was aware of a high probability that he obtained information that had been disclosed in violation of a duty of trust and confidence, and

> 2. deliberately avoided learning the truth.
>
> You may not find such knowledge, however, if you find that the defendant actually believed that the information he obtained was not disclosed in violation of a duty of trust and confidence, or if you find that the defendant was simply careless or reckless.

Dkt. No. 245, at 43. This instruction, modeled after Ninth Circuit Model Jury Instruction 5.7, is an accurate statement of the law. *See United States v. Heredia*, 483 F.3d 913, 924 (9th Cir. 2007). In fact, this instruction (like the deliberate ignorance instruction given in *Heredia*), goes beyond the Model Instruction by making it explicit that the jury may not find the requisite knowledge if it found that the Defendant was merely reckless. *Id.*

Defendant argues, however, that the instruction was improper in the circumstances of this case. Defendant begins with the correct assertion that a conviction under Section 10(b) requires a showing that the defendant acted "willfully," that is, with a "'realization . . . that he was doing a wrongful act' under the securities law." *United States v. Cassese*, 428 F.3d 92, 98 (2d Cir. 2005). The Defendant then argues that the Court deviated from this *mens rea* requirement because the deliberate ignorance instruction "lowered the standard of the burden of proof on an essential element from beyond a reasonable doubt" – specifically, the requirements that Defendant know the inside information was disclosed in

violation of a duty of trust for a personal benefit. Dkt. No. 262, at 7.

The Court disagrees. First, this Court rejects Defendant's implication that the deliberate ignorance instruction "effectively substitut[ed] a negligence standard for the requirement that the defendant acted with guilty knowledge." *Id.* The instruction given by the Court expressly stated that the jury could not find that Defendant acted with the requisite knowledge if it found that Defendant was "simply careless or reckless." Dkt. No. 245, at 43. Therefore, the jury could not have concluded that Defendant was simply negligent about the unlawful nature of the trading information and still convicted him. *See United States v. Heredia*, 483 F.3d 913, 923-24 (9th Cir. 2007) ("Nor do we agree that the *Jewell* instruction risks lessening the state of mind that a jury must find to something akin to recklessness or negligence. . . . Recklessness or negligence never comes into play, and there is little reason to suspect that juries will import these concepts, as to which they are not instructed, into their deliberations."). Further, Defendant's more general argument, which appears to imply that the deliberate ignorance is inconsistent with a *mens rea* requirement of "willfully" or "knowingly" cannot be reconciled with the Ninth Circuit's recognition that the "substantive justification for the rule is that deliberate ignorance and positive knowledge are equally culpable." *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir. 1976) (en banc).

Second, the Court notes that federal courts have routinely applied deliberate ignorance or conscious avoidance principles in securities cases which similarly required a showing that defendant acted "willfully" or with scienter. *See, e.g.*, *United States v. Whitman*, 904 F. Supp. 2d 363, 372 (S.D.N.Y. 2012) ("[W]here appropriate (as here), the Government is entitled to 'willful blindness' or 'conscious avoidance' instruction to the jury on the issue of such knowledge [regarding whether the tipper were receiving actual or anticipated benefits]."); *United States v. Berger*, 188 F. Supp. 2d 307, 329 (S.D.N.Y. 2002) (relying on deliberate ignorance principles to conclude that there was a sufficient factual basis for defendant's guilty plea in a Section 10(b) case); *see also S.E.C. v. Musella*, 678 F. Supp. 1060, 1063 (S.D.N.Y. 1988) ("I cannot accept that conscious avoidance of knowledge defeats scienter in a stock fraud case, any more than it does in the typical *mens rea* criminal context.").

There was an evidentiary basis for applying the deliberate indifference instruction in this case. The case of *United States v. Svoboda*, 347 F.3d 471 (2d Cir. 2003) is directly on point. In that case, Defendants Robles and Svoboda were long-time friends. *Id.* at 475. Mr. Svoboda was employed as a "credit policy officer" at a financial institution engaged in commercial lending. *Id.* At trial Mr. Svoboda testified against Mr. Robles and stated that he obtained confidential information about certain securities and tender offers and passed the information to Robles, who then used the insider information to execute trades. *Id.* Mr.

Robles testified in his own defense and argued that he had no knowledge of the unlawful source of Svoboda's information. *Id.* The district court gave a conscious avoidance instruction. *Id.* at 475-76.

The Second Circuit affirmed the propriety of the conscious avoidance instruction. First, consistent with the instruction given in this case, the Court recognized that a conscious avoidance instruction is appropriate where there is evidence that the defendant "(1) was aware of a high probability of the disputed fact and (2) deliberately avoided confirming that fact." *Id.* at 480. The Court then found that there was a sufficient factual predicate for the instruction. The Court found the following factors relevant:

- "First, the source of Svoboda's information was suspicious – Robles knew that Svoboda was a credit officer at Nations Bank and would thus be privy to confidential financial information." *Id.*
- "Second, the timing of Robles' trades was suspicious – for example, some of Robles' trades occurred as little as a day before a tender offer announcement." *Id.*
- "Third, the success of the trades was suspicious – Robles realized huge returns, up to 400%, on trades based on Svoboda's advice." *Id.*

The Court found that these three factors combined to "suggest a high probability that Svoboda's tips were based on inside information and that any lack of actual knowledge on Robles' part was due to a conscious effort to avoid confirming an otherwise obvious

fact." *Id.* at 481. In addressing the defendant's knowledge of the conspiracy, the court noted: "The conscious avoidance doctrine provides that a defendant's knowledge of a fact required to prove the defendant's guilt may be found when the jury is persuaded that the defendant consciously avoided learning that fact while aware of a high probability of its existence." *Id.* at 477.

As in *Svoboda*, the government introduced sufficient evidence laying the foundation for a deliberate ignorance instruction. The government introduced evidence showing that Defendant knew that Maher Kara – the brother of Michael Kara from whom Defendant received his trading tips – was an investment banker at Citigroup. Further, the government showed that the trades which formed the basis of the indictment were made shortly before major corporate announcements. Moreover, the government introduced evidence of the large profits Defendant and Karim Bayyouk realized as a result of their trading. Finally (and unlike *Svoboda*), the government introduced evidence showing that Defendant utilized accounts belonging to his brother-in-law, Karim Bayyouk, to execute the trades, rather than using his own accounts; this strongly suggests consciousness of wrongdoing[1]

[1] The one difference between the *Svoboda* case and the instant case is that here, Defendant was a "remote tippee" in that the evidence at trial suggests the insider information went from Maher Kara (the tipper), through his brother Michael Kara, and

(Continued on following page)

At the hearing on December 11, 2013, Defendant argued that the evidence at trial was insufficient to support the deliberate ignorance instruction because the government failed to introduce evidence that Defendant took "deliberate actions" to avoid learning the truth about the nature of the "tips." He points to the Supreme Court's statement in *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011), where the Court stated that willful blindness/deliberate ignorance requires that an individual take "deliberate actions" to avoid learning the requisite facts. Defendant argues that the government, at most, showed that Defendant *failed* to act, and that omissions of this kind cannot constitute "deliberate action" as required by *Global-Tech*.

The Court disagrees. First, as the Second Circuit has expressly recognized, *Global-Tech* did not alter the deliberate ignorance standard. Rather, "*Global-Tech* simply describes existing case law" and "did not alter the conscious avoidance standard." *Id.* at 128. Second, and more significantly, since *Global-Tech*, the Ninth Circuit has affirmed the use of a deliberate ignorance instruction where the defendant merely failed to confirm a fact. In *United States v. Yi*, 704

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then to Defendant. In the circumstances of this case, however, given the familial relationship between the parties, the Court finds this distinction immaterial as it does not negate the probative value of the evidence regarding whether there was a "strong possibility" that defendant knew the trading information was unlawful and deliberately avoided confirming the fact.

F.3d 809 (9th Cir. 2013), a defendant who had been convicted of conspiracy to violate the Clean Air Act appealed, arguing in part that the district court erred in giving a deliberate ignorance instruction regarding his knowledge of the presence in the ceiling of his condominium complex. *Id.* at 804. The Ninth Circuit affirmed the use of a deliberate ignorance instruction and, expressly addressing *Global-Tech*, stated:

> Turning to the second *Global-Tech* prong, if the jury could infer that Yi was aware of a high probability that the ceilings contained asbestos, it also could infer that Yi engaged in a deliberate pattern of failing to read documents that might clarify whether asbestos was in fact present. . . . The evidence regarding Yi's real estate experience and pattern of failing to read documents common to real estate transactions supports a finding that Yi deliberately avoided learning the truth about whether the Forest Glen ceilings contained asbestos.

Id.

Similarly, in *United States v. Ramos-Atondo*, 732 F.3d 1113 (9th Cir. 2013), a case relied on by the government at the hearing,[2] the Ninth Circuit expressly

[2] This case was raised by the government for the first time at the hearing. The Court provided Defendant an opportunity to address this case in a supplemental brief, ordering Defendant to file any such brief by Friday, December 13, 2013. Dkt. No. 267. Defendant opted to not file a brief.

held that a "failure to investigate can be a deliberate action." *Id.* at 1120. As a result, the Court found the district court properly instructed the jury on deliberate ignorance in a case involving a conspiracy to import marijuana drugs because:

> The jury could have inferred that Corona-Vidal, Martinez, and Ramos deliberately chose not to ask why they were going to unload packages at the beach in dark, wearing dark clothing, without any identification or possessions. The jury could have inferred that Ramos-Atondo chose not to examine the packages on the boat, or ask why he was taking a boat full of packages from Mexico to a beach in the United States in the dark using a pre-programmed GPS.

Id. It is thus apparent that the Ninth Circuit has held that the failure to ask questions or otherwise confirm a fact – such as Defendant's failure to follow up on the source of the tips in this case in light of the circumstances in this case – can constitute "deliberate action" for purposes of a deliberate ignorance instruction.

Defendant is not entitled to a new trial on the basis of the deliberate ignorance instruction. The government provided a sufficient factual basis for the instruction and the instruction as given accurately stated the law.

C. The Court Correctly Instructed the Jury on the Personal Benefit Element

The Defendant argues that the Court erred in failing to instruct the jurors that they could only convict Defendant if he "knew inside information was disclosed in exchange for a personal benefit." Dkt. No. 262, at 12. Specifically, Defendant takes issue with the following instruction:

JURY INSTRUCTION NO. 37
KNOWLEDGE OF BREACH BY TIPPER

> As to the defendant's knowledge that the insider has breached the insider's duty of trust and confidentiality in return for some actual or anticipated benefit, it is not necessary that the defendant know the specific confidentiality rules of a given company or the specific benefit given or anticipated by the insider in return for disclosure of inside information; rather, it is sufficient that the defendant had a general understanding that the insider was improperly disclosing inside information for personal benefit.

Dkt. No. 245, at 42. This instruction is identical to that given by the Southern District of New York in the case *United States v. Whitman*, 904 F. Supp. 2d 363, 371 (S.D.N.Y. 2012).

This instruction is a correct statement of the law and is not confusing when read in its entirety and with the other instructions as a whole. First, the Court, contrary to Defendant's assertion, did unequivocally instruct the government had to prove,

beyond a reasonable doubt, that Defendant knew that Maher Kara personally benefitted in some way. Specifically, the Court instructed:

> In order to find that the government has established the first element of securities fraud . . . the government must prove each of the following beyond a reasonable doubt as to each Count:
>
> . . . .
>
> (6) That the defendant knew that Maher Kara personally benefitted in some way, directly or indirectly, from the disclosure of the allegedly inside information to Mounier ("Michael") Kara.

Dkt. 245, at 41. Second, Instruction 37 was not in conflict with this requirement and did not lower the government's burden of proof. Instruction 37 does not negate the requirement that the government prove that Maher Kara did, in fact, receive a personal benefit. Instead, Instruction 37 goes only to what Defendant knew in this regard; it stated that the government had to prove that Defendant "generally" understood that the insider improperly disclosed information for a personal benefit, but did *not* have to prove (1) that the defendant was aware of any *specific* company rule prohibiting disclosure, or (2) that the defendant was aware of the *specific* benefit given or anticipated. Defendant does not argue that the government must prove beyond a reasonable doubt that the tippee be aware of the precise benefit the tipper received by disclosing confidential insider information

and the Court has found none. *Cf. S.E.C. v. Warde*, 151 F.3d 42, 48 (2d Cir. 1998) ("[T]he Supreme Court has made plain that to prove a § 10(b) violation, the SEC need not show that the tipper expected or received a specific or tangible benefit in exchange for the tip." (citing *Dirks v. S.E.C.*, 463 U.S. 646, 664 (1983)).[3]

In light of the clear, unequivocal instruction that the government had to prove, beyond a reasonable doubt, that Defendant knew that Maher Kara personally benefitted from his disclosure, the Court finds there was no instructional error.

D. Sufficient Evidence Was Presented at Trial Regarding Defendant's Knowledge of Maher Kara's Breach of Fiduciary Duties and Benefit

Defendant argues that a new trial is necessary because there was no evidence adduced at trial that Defendant knew that Maher Kara breached his fiduciary duties or that Maher Kara obtained a personal benefit. Dkt. No 262, at 4. The Court disagrees. As the Ninth Circuit has recognized, "'direct proof' of

[3] Nor does the Court find any error with the use of the term "understanding" as opposed to "knowledge." *See* Black's Law Dictionary (8th ed. 2004) (defining the verb "understand" as "To apprehend the meaning of to know"); *see also Arthur Andersen LLP v. United States*, 544 U.S. 696, 705 (2005) ("'[K]nowledge' and 'knowingly' are normally associated with awareness, understanding, or consciousness.").

one's specific wrongful intent is 'rarely available.' But willfulness may be inferred from circumstantial evidence." *United States v. Dearing*, 504 F.3d 897, 901 (9th Cir. 2007); *see also United States v. Nungaray*, 697 F.3d 1114, 1117 (9th Cir. 2012) ("The government may demonstrate knowledge and intent through circumstantial evidence."). The Court finds that the government adduced sufficient circumstantial evidence at trial to show Defendant's knowledge regarding Maher Kara's personal benefit and breach of fiduciary duties.

Regarding Defendant's knowledge of Maher Kara's breach of his fiduciary duties, the government presented substantial circumstantial evidence, including the following:

- Defendant was aware that Maher Kara was an investment banker in the biotech industry. (Ex. 88, at 45).
- Mounir ("Michael") Kara told Defendant that his brother, Maher Kara, was the source of the trading tips Mounir gave Defendant. (Testimony of Michael Kara, p.55:11-21 ("Q: Did you inform any of those persons that your information was coming from your brother, Maher Kara? A: Yes.")).
- Mounir Kara testified that Defendant, upon learning that Maher Kara was the source of the information, told him that they had to "protect" Maher. (Testimony of Michael Kara, p. 131:3-19).
- The trades forming the basis of the indictment were made close in time to major corporate announcements that caused the price of the

purchased stocks to increase. (*See, e.g.*, Testimony of Special Agent Jeffrey Chisholm, p. 103:12-104:8).

- Despite Defendant having his own trading account at Charles Schwab (Ex. 144), the trades at issue were executed through a Comerica Securities account held in the name of his brother-in-law, Karrim Bayyouk (Ex. 171), from which Defendant benefitted.

As to Defendant's knowledge that Maher Kara received a personal benefit from his disclosure of material, non-public information, the government adduced evidence at trial that Michael Kara and Mounir Kara were brothers with a very close relationship. (*See, e.g.*, Testimony of Michael Kara, p.14:2-15). It is also clear that the Defendant was close to the family, having married the sister of Maher and Mounir Kara. "Personal benefit to the tipper is broadly defined: it includes not only 'pecuniary gain,' such as a cut of the take or a gratuity from the tippee, but also a 'reputational benefit' or the benefit one would obtain from simply 'mak[ing] a gift of confidential information to a trading relative or friend." *S.E.C. v. Obus*, 693 F.3d 276, 285 (2d Cir. 2012) (quoting *Dirks*, 463 U.S. at 663-64). In light of the evidence suggesting that defendant was aware that Michael Kara and Mounir Kara were brothers, knew the family, and was aware that Maher Kara was the source of the material, non-public information given to his brother, the Court concludes there was sufficient circumstantial evidence showing

Defendant knew that Maher Kara received a benefit from his disclosures.

Accordingly, the evidence at admitted at trial does not preponderate against the verdict, and Defendant is not entitled to a new trial. *See Kellington*, 217 F.3d at 1087.

IV. CONCLUSION

For the foregoing reasons, Defendant's motion for a new trial pursuant to Fed. R. Crim. P. 33 is **DENIED**.

This order disposes of Docket No. 262.

IT IS SO ORDERED.

Dated: December 17, 2013

/s/ Edward Chen
EDWARD M. CHEN
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BASSAM YACOUB SALMAN, a/k/a Bessam Jacob Salman, Defendant-Appellant.	No. 14-10204 D.C. No. 3:11-CR-00625-EMC-1 ORDER (Filed Aug. 13, 2015)

Before: CHRISTEN and WATFORD, Circuit Judges, and RAKOFF, Senior District Judge.*

Judge Watford and Judge Christen have voted to deny the petition for rehearing en banc, and Judge Rakoff has recommended denying Appellant's en banc petition. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's petition for rehearing en banc is DENIED.

* The Honorable Jed S. Rakoff, Senior District Judge for the U.S. strict Court for the Southern District of New York, sitting by designation.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. BASSAM YACOUB SALMAN, a/k/a Bassam Jacob Salman Defendant. /	Case No. CR-11-0625 EMC **FINAL JURY INSTRUCTIONS** (Filed Sep. 27, 2013)

FINAL JURY INSTRUCTIONS

* * *

JURY INSTRUCTION NO. 35

COUNTS TWO THROUGH FIVE

SECURITIES FRAUD – ELEMENTS

(15 U.S.C. §§ 78j(b), 78ff; 17 C.F.R. § 240.10b-5)

The defendant is charged in Counts Two through Five of the indictment with securities fraud in violation of federal securities law.

1. Count Two charges the defendant with securities fraud concerning the purchase of 58 securities of United Surgical Partners International, Inc. on or about November 7, 2006.

2. Count Three charges the defendant with securities fraud concerning the purchase of 6,200 securities of United Surgical Partners

International, Inc. on or about December 15, 2006.

3. Count Four charges the defendant with securities fraud concerning the purchase of 37 securities of Biosite Incorporated on or about March 23, 2007.

4. Count Five charges the defendant with securities fraud concerning the purchase of 22 securities of Biosite Incorporated on or about March 23, 2007.

As to each count you are considering, in order for Mr. Salman to be found guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt.

First, the defendant willfully used a device or scheme to defraud someone or engaged in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person;

Second, the defendant's acts were undertaken in connection with the purchase of securities, specifically:

1. For Count Two, that the defendant's acts were undertaken in connection with the purchase of 58 securities of United Surgical Partners International, Inc. on or about November 7, 2006.

2. For Count Three, that the defendant's acts were undertaken in connection with the purchase of 6,200 securities of United Surgical

Partners International, Inc. on or about December 15, 2006.

3. For Count Four, that the defendant's acts were undertaken in connection with the purchase of 37 securities of Biosite Incorporated on or about March 23, 2007.

4. For Count Five, that the defendant's acts were undertaken in connection with the purchase of 22 securities of Biosite Incorporated on or about March 23, 2007.

Third, the defendant directly or indirectly used an instrumentality of interstate commerce or any facility of any national securities exchange in connection with these acts; and Fourth, the defendant acted knowingly.

"Willfully" means intentionally undertaking an act for the wrongful purpose of defrauding or deceiving someone. Acting willfully does not require that the defendant know that the conduct was unlawful. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted willfully.

An act is done knowingly if the defendant is aware of the act and did not act through ignorance, mistake or accident. The government is not required to prove that the defendant knew that his acts were unlawful. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

It is not necessary that the defendant made a profit or that anyone actually suffered a loss.

JURY INSTRUCTION NO. 36

COUNTS TWO THROUGH FIVE

DEVICE OR SCHEME TO DEFRAUD DEFINED

A "device or scheme to defraud" is merely a plan for the accomplishment of any fraudulent objective.

"Fraud" is a general term that embraces all efforts and means that individuals devise to take advantage of others.

The specific "device or scheme to defraud" or "act, practice, or course of business" that the government alleges the defendant employed in connection with Counts Two through Five of the indictment is known as "insider trading."

An "insider" is one who comes into possession of material, confidential, nonpublic information about a security by virtue of a relationship that involves trust and confidence. If a person has such "inside information" and his position of trust or confidence prevents him from disclosing that information, the law forbids him from buying or selling the securities in question or giving that information to others so that they can trade in such securities on the basis of that information.

The law also prohibits a person who is not actually an insider from trading in securities based on material nonpublic information, if the person knows that the material, nonpublic information was intended to be kept confidential and knows that the information was disclosed in breach of a duty of trust or confidence and knows that the insider personally benefitted in some way, directly or indirectly, from the disclosure of the allegedly inside information.

Counts Two through Five allege that the defendant engaged in insider trading as a "tippee," that is, based on the allegations that the defendant received material, nonpublic information and wrongfully used it for his own benefit when he knew that the information had been disclosed in violation of a duty of trust and confidence. A person who receives material, nonpublic information engages in an act of fraud or deceit under the federal securities laws if he buys or sells securities based on material, nonpublic information that he knows was disclosed by another person in breach of a duty of trust and confidence and knows that the insider personally benefitted in some way, directly or indirectly, from the disclosure of the allegedly inside information. I caution you, however, that trading on information that does not originate from an insider is not illegal.

In order to find that the government has established the first element of securities fraud – namely that the defendant used a device or scheme to defraud or engaged in any act, practice, or course of business that operates or would operate as a fraud or

deceit upon any person – the government must prove each of the following beyond a reasonable doubt as to each Count:

(1) That Maher Kara, who the indictment alleges was the "insider" or the "tipper", had a fiduciary duty or other relationship of trust and confidence with Citigroup or Citigroup's clients;

(2) That Maher Kara intentionally breached that duty of trust and confidence by disclosing confidential, material, nonpublic information to Mounir ("Michael") Kara, which information was subsequently disclosed to the defendant;

(3) That Maher Kara personally benefitted in some way, directly or indirectly, from the disclosure of the confidential, material, nonpublic information to Mounir ("Michael") Kara;

(4) That the defendant knew that the information he obtained had been disclosed in breach of a duty;

(5) That the defendant used the material, nonpublic information he received to purchase or sell a security or tip for his own benefit; and

(6) That the defendant knew that Maher Kara personally benefitted in some way, directly or indirectly, from the disclosure of the allegedly inside information to Mounir ("Michael") Kara.

JURY INSTRUCTION NO 37

KNOWLEDGE OF BREACH BY TIPPER

As to the defendant's knowledge that the insider has breached the insider's duty of trust and confidentiality in return for some actual or anticipated benefit, it is not necessary that the defendant know the specific confidentiality rules of a given company or the specific benefit given or anticipated by the insider in return for disclosure of inside information; rather, it is sufficient that the defendant had a general understanding that the insider was improperly disclosing inside information for personal benefit.

JURY INSTRUCTION NO. 38

COUNTS TWO THROUGH FIVE – DELIBERATE IGNORANCE

You may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant:

1. was aware of a high probability that he obtained information that had been disclosed in violation of a duty of trust and confidence, and

2. deliberately avoided learning the truth.

You may not find such knowledge, however, if you find that the defendant actually believed that the information he obtained was not disclosed in violation of a duty of trust and confidence, or if you find that the defendant was simply careless or reckless.

JURY INSTRUCTION NO 39

COUNTS TWO THROUGH FIVE – MATERIAL NONPUBLIC INFORMATION DEFINED

Information is material if there is a substantial likelihood that a reasonable investor would consider it important in making the decision to purchase or sell securities.

Nonpublic information is information which is not generally available to the public through such sources as press releases, trade publications, analyst's reports, newspapers, magazines, television, radio, websites, internet chat rooms, online message boards, or other publicly available sources.

Information is considered nonpublic for purposes of insider trading until such information has been effectively disseminated in a manner sufficient to insure its availability to the investing public.

JURY INSTRUCTION NO. 40

COUNTS TWO THROUGH FIVE – BENEFIT DEFINED

Personal benefit includes not only monetary gain, such as a cut of the take or a gratuity from the tippee, but also a reputational benefit or the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend. The benefit does not need to be financial or tangible in nature; it could include, for example, maintaining a useful networking contact, improving the tipper's

reputation, obtaining future financial benefits, or making a gift of confidential information to a trading relative or friend.

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