13-1837-cr(L)
13-1917-cr(con)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

TODD NEWMAN, ANTHONY CHIASSON,

Defendants-Appellants,

JON HORVATH, DANNY KUO, HYUNG G. LIM, MICHAEL STEINBERG,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLANT TODD NEWMAN IN OPPOSITION TO THE UNITED STATES OF AMERICA'S PETITION FOR REHEARING AND REHEARING *EN BANC*

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PRELIMINARY STATEMENT

The government's rehearing Petition makes a critical concession. After insisting throughout trial and appeal of this matter that a tippee need not know of the personal benefit obtained by a tipper, the government now reverses course and declines to challenge the Panel's decision on this key legal issue. Pet. 2.[1] This is a remarkable development because the government previously insisted that its position was compelled by Supreme Court and Second Circuit precedent, and was essential to the effective enforcement of the securities laws. Notwithstanding the urgency of its prior position, the government now, in effect, says "never mind."

The government's concession is decisive to the outcome of this case. The legal requirement that a tippee know of the benefit to the tipper is now undisputed. The Panel's factual determination that the evidence was insufficient to establish such knowledge is inappropriate for rehearing *en banc* because there is no disputed legal issue that can form the basis of a Circuit conflict, nor is a fact-specific sufficiency determination an issue of exceptional importance. This ruling is also inappropriate for reconsideration by the Panel because the Panel's determination was fully supported by the evidentiary record, a position the government barely

[1] References to the Joint Appendix on appeal are cited as "A-__." References to the Supplemental Appendix are cited as "SA-__." References to the trial transcript are cited as "Tr. __." References to the Panel decision are cited as "Opinion __." References to the government's petition for rehearing are cited as "Pet. __."

contests. Since there is no basis for either *en banc* or Panel review of the knowledge of benefit holding, the outcome of this case must stand.

What the government is really complaining about here is the Panel's discussion of the nature of the personal benefit required to establish the tipper's fraud. But the Panel's analysis of this issue creates no new law, and only highlights the fact-specific nature of the inquiry. More importantly, any modification of the Panel's formulation of the benefit standard (which we show below is unnecessary) would have no effect on the outcome of the case because, as the Panel found, whether or not there was a personal benefit, Mr. Newman did not *know* about the benefit. Opinion 24. Rehearing to address a factual issue with no effect on the ultimate result of the case is not appropriate. The Petition should therefore be denied.

I. THERE IS NO BASIS FOR EITHER *EN BANC* OR PANEL REHEARING OF THE KNOWLEDGE OF BENEFIT ISSUE

The Panel rendered two alternative holdings in this case. First, the Panel determined that the evidence of a personal benefit to the tippers was insufficient. Opinion 23. Second, the Panel held that even if there was a personal benefit, the evidence was insufficient to show that Mr. Newman knew of the benefit. *Id.* at 24. The second holding is itself enough to sustain the Panel's decision reversing Mr. Newman's conviction and dismissing the Indictment. There is no basis to rehear that determination; accordingly the Panel's disposition of this case must stand.

A. The Government Has Not Satisfied the Rule 35 Requirements for *En Banc* Review

The government's *en banc* Petition does not cite Rule 35 of the Rules of Appellate Procedure, which governs *en banc* practice. The reason is obvious: Rule 35 strictly limits *en banc* review and imposes requirements that the government cannot meet. Rule 35 states that rehearing *en banc* "is not favored and ordinarily will not be ordered" unless such review "is necessary to secure or maintain uniformity of the court's decisions" or the proceeding "involves a question of exceptional importance." Neither requirement is satisfied here.

First, regarding conflicts within the Circuit, the government argued on appeal that the Supreme Court's decision in *Dirks v. SEC*, 463 U.S. 646 (1983), and Second Circuit precedent required a tippee to know only that there was a breach of fiduciary duty, not that the tipper received a benefit. The Panel rejected that contention, explaining that its holding followed naturally from *Dirks* and did not conflict with Circuit precedent. Opinion 14-15. The government does not challenge the Panel decision in this regard. Accordingly, the Panel's determination that there is no Circuit conflict must be accepted and there is no basis for a rehearing to "maintain uniformity of the court's decisions."

The Panel's knowledge of benefit holding is also not an issue of "exceptional importance." The government concedes that the legal ruling was

correct (or at least that it is not now disputed).[2] Pet. 2. What remains is the Panel's conclusion that the evidence was insufficient, an analysis that is fact-specific and rooted in the unique circumstances of this case. We are aware of no case – and the government cites none – in which this Court granted *en banc* review to address a sufficiency determination under a legal standard that neither party contests.

B. The Panel's Sufficiency Determination Was Correct

The government argues that the Panel's sufficiency determination on the knowledge of benefit issue was factually incorrect. Pet. 21. Since a disagreement with a Panel's assessment of the facts under an undisputed legal standard is not a basis for *en banc* review, we understand the government to be offering this argument in support of its request for Panel rehearing. In fact, the Panel's ruling is fully supported by the record and there is no reason to change it.

To begin with, the government's challenge to the Panel's sufficiency ruling is half-hearted at best. The government devotes a scant three paragraphs out of an oversize 25-page Petition to its contention that Newman knew that the Dell insider received a personal benefit. Pet. 19-22. As cursory as is its argument on Dell, the government does not even attempt to argue that Newman knew of the benefit to the Nvidia insider. The government's lack of conviction is understandable as its arguments are contrary to the trial record.

[2] The SEC, the primary regulator of the securities markets, submitted a 15-page amicus brief and did not even mention the knowledge of benefit issue.

First, the government argues that an inference of knowledge can be drawn from testimony that the Dell source (Rob Ray), an employee in the Investor Relations ("IR") department, sometimes spoke to Sandy Goyal "outside of work" hours. Pet. 19. But, according to Ray's boss, Dell IR personnel were expected to be available at all hours and "there was nothing wrong" with calls on nights and weekends. Tr. 2894-96; *see id.* at 1646 (Goyal also testified that Ray and other Dell IR staff took calls outside office).[3] If the executive responsible for the unit where the tipper worked testified that there was "nothing wrong" with calls on nights and weekends, surely the Panel cannot be faulted for rejecting an inference of guilty knowledge from those same circumstances.

Second, the government argues that Newman knew that the Dell insider was giving Mr. Goyal "highly accurate earnings figures, quarter after quarter, at multiple points during each roll-up period . . . ." Pet. 19-20. The government misstates the record. As Newman demonstrated in his briefs on appeal, Goyal's information on Dell was frequently imprecise and often wrong.[4] *E.g.*, Newman

[3] The boss, Rob Williams, testified that "[w]e operated in an industry where information flows relatively quickly" and that Dell IR "encouraged a flexible work schedule for sure." Tr. 2894. Ray was therefore authorized to speak to analysts on nights and weekends; indeed, Williams agreed "there was nothing wrong with talking to analysts at nights and weekends." *Id.* at 2896.

[4] Goyal said that Ray typically gave him "a range" rather than specific numbers, or expressed his views relative to analysts' expectations (*i.e.*, higher/lower than market consensus). Tr. 1417-18. This was consistent with conversations Goyal

Br. 12-14; Newman Reply Br. 4-8. More importantly, the Panel determined that the trial evidence undermined any inference of knowledge because the government's own witnesses testified that Dell insiders routinely leaked highly precise and accurate earnings numbers – and did so in multiple quarters – *without any personal benefit*. Opinion 26-27. The evidence of these leaks was extensive and, indeed, overwhelming. Newman Opening Br. 17-20; Newman Reply Br. 10-13.[5] The Panel's conclusion that the receipt of earnings information was equally consistent with authorized leaks as with illegal tips was therefore well supported.

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had with IR departments at other companies in which insiders would tell him whether his financial assumptions were "too high or too low" or in the "ball park." *Id.* at 1511; *see* A-2012 (instant message in which Tortora, Newman's analyst, said he spoke to Goyal and that his "guess" was that Dell's gross margin "could get closer [to market expectations], maybe 18, but who knows"). Goyal's information was also often wrong. For example, in the May 2008 quarter, Ray told Goyal that gross margin would be higher than the market expected; in fact gross margin came in lower than expectations. Superseding Indictment ¶ 15; Tr. 828-30. In the August 2008 quarter, Ray was almost $400 million off the revenue estimate he gave Goyal, causing Tortora to tell Newman he "freaked" when he saw the actual result. Tr. 882; A-2019; *see also* A-1999-2000 (wrong about gross margin); A-2377-78 (wrong about Dell unit sales data); A-2021 (information from Ray did not indicate problems less than three days before Dell pre-announced negative results); A-2396 (Tortora telling another analyst he was "dead wrong" on Dell last quarter).

[5] *See, e.g.*, A-2387 (Dell IR told an analyst "offline" that Dell would miss quarterly estimates "by a country mile"); A-2388 (during roll up period before earnings release, head of Dell IR told an analyst that gross margin would be stable even if revenue missed expectations); A-2389 (during roll up period, Dell IR told an analyst that the company would report earnings of at least 30 cents per share); A-2394 (head of Dell IR told Tortora that "low 12%" operating margin was "reasonable"); A-2397 (head of Dell IR suggested to a group of analysts that Dell's normalized gross margin would be 18%). The Dell IR manager called as a

The Panel also correctly concluded that an inference of knowledge was undermined by the evidence that analysts, including Goyal, were able to accurately model Dell's financial results without any inside information, and Newman could have just as easily believed the information he received was derived in this way. Opinion 25-26.[6] The government's only retort is that references to "rolled-up" numbers in the alleged tips were inconsistent with modeling. Pet. 22. The government is wrong again. The record clearly showed that Goyal, and analysts more generally, used the term "roll up" to refer to any aggregation of results, including in the context of modeling and other legitimate activities. *See, e.g.*, Tr. 1555-56 (Goyal testifying to doing a "roll up" of financial results while constructing a model); SA-38 (Tortora asking consultant to include a weighted average for "qtrly roll up purposes"); Tr. at 1780 (Level Global analyst testifying that he "rolled" up public margin and revenue data in Dell model).

Finally, the government repeats the argument made to and rejected by the Panel that an inference of knowledge should flow from Diamondback's consulting

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government witness admitted that his staff discussed quarterly financial results with analysts in an effort to help them with their financial models. Tr. 2926-28.

[6] For example, Newman's analyst, Jesse Tortora testified that an email he sent to Newman contained inside information from Goyal, who received it from Ray. Tr. 328-29. But the entire text of the email was "Ran model, if rev 15.150, om 6.1%, eps would 36c vs street 31-32c" and it said nothing about information originating with Goyal or Ray. SA-2. On cross examination, Tortora agreed that the email "looks like someone is doing modeling." Tr. 927.

payments to Goyal. Pet. 6, 20. The Panel was correct in rejecting this argument.[7] It was undisputed at trial that Goyal performed legitimate consulting work for Diamondback, including financial modeling, analysis of stocks, and discussions with legitimate Dell contacts. Tr. 961, 1384-85, 1523-31. The consulting was agreed to and started before Goyal received any information from the alleged tipper, Rob Ray. *Id.* at 1523. The undisputed evidence showed that the consulting payments were made to Goyal's wife rather than directly to Goyal only because Goyal's visa status prohibited him from working for more than one employer. *Id.* at 384-85, 1425-26. Most importantly, Goyal testified that he passed none of his consulting income, or any other funds, to Ray. *Id.* at 1612. Thus, the inference the government wishes to draw would not only be illogical in light of the legitimate consulting work performed by Goyal, but it would be affirmatively false.[8] *See United States v. Cassese*, 428 F.3d 92, 99 (2d Cir. 2005) (if evidence "gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, then a reasonable jury must necessarily entertain a reasonable doubt").[9]

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[7] The Panel inquired about the consulting payments at oral argument, making clear that they were familiar with the issue and carefully considered it.

[8] Not even the government suggests the absurd inference that Newman could have figured out that Goyal was talking to Ray about "career advice," the alleged benefit that Ray received. There was zero evidence that Newman, or for that matter Tortora, were aware of this.

[9] The government's suggestion that the leaks at Dell violated SEC Regulation FD, Pet. 21, is irrelevant because that regulation neither applies to company outsiders

C. There Is No Basis to Reconsider the Panel's Dismissal of the Indictment

It is well settled that when a conviction is reversed for insufficiency of the evidence, double jeopardy prohibits a retrial. *Burks v. United States*, 437 U.S. 1, 18 (1978). Here, the government says it should be afforded a second chance to try Newman in light of the Panel's "newly announced knowledge requirement" (which the government does not contest). Pet. 2. The government's position is incorrect.

There is nothing "new" about the Panel's knowledge of benefit holding; it is a straightforward application of the Supreme Court's decision in *Dirks*. Indeed, the Panel said that its conclusion "follows naturally" from *Dirks*. Opinion 14. Moreover, as the Panel observed, every district court to have addressed the issue (other than Judge Sullivan below) has ruled that knowledge of the personal benefit is required, including several decisions prior to the trial in this case. Opinion 17. The fact is that if the Panel's holding on knowledge of benefit was really new and unprecedented, the government would not now have conceded the issue.

In any case, the government was clearly on notice that it could be required to prove knowledge of the personal benefit at trial. Defendants raised the issue in their proposed requests to charge before trial, A-200-01, and Judge Sullivan did not decide the issue until after the close of the government's case, Tr. 3604-05.

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like Newman nor does it, according to the SEC's own authorizing release, purport to define criminal insider trading liability. Selective Disclosure and Insider Trading, 65 Fed. Reg. 51716 (Aug. 24, 2000).

The government therefore knew throughout the trial that: (i) the defense requested a knowledge of benefit instruction; (ii) the three prior district court decisions to have addressed the issue required knowledge of benefit, including Judge Rakoff in a case just three months earlier involving the same unit within the United States Attorney's Office that tried this case, *United States v. Whitman*, 904 F. Supp. 2d 363, 371 (S.D.N.Y. 2012); and (iii) Judge Sullivan had reserved decision on the issue. The government therefore had every incentive to put on all the evidence available and is not entitled to a "do over" now that it has lost its argument about the legal standard on appeal.

II. THERE IS NO BASIS TO REHEAR THE PANEL'S DECISION REGARDING THE NATURE OF THE PERSONAL BENEFIT

The government insists that the Panel's discussion of what qualifies as a personal benefit conflicts with Supreme Court and Second Circuit precedent. *E.g.*, Pet. 1, 2, 11. But the Panel cited, quoted, and agreed with the very precedents that the government claims were disregarded. *Compare* Pet. 11-12 (citing *Dirks*, 463 U.S. at 662-64 and *United States v. Jiau*, 734 F.3d 147, 153 (2d Cir. 2013) as leading precedents on personal benefit definition), *with* Opinion 21-22 (adopting same precedents and quoting same language as Petition). In particular, the Panel adopted the standard set forth in *Dirks* and *Jiau* that a tip to a friend who trades can satisfy the personal benefit requirement if there is evidence of "a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter,

or an intention to benefit the [latter]." Opinion 22 (quoting *Jiau*, 734 F.3d at 153); *see Dirks*, 463 U.S. at 664. And the Panel cited with approval cases from the First and Eleventh Circuits in which tips to trading friends were deemed sufficient. Opinion 22-23. Accordingly, and contrary to the views of the SEC (SEC Br. 8, 11), nothing in the Opinion undermines the well-settled principle that a gift of confidential inside information with the intention of benefitting a trading friend can satisfy the personal benefit requirement.

The government acknowledges the Panel's citation of controlling precedent, Pet. 9, 12, but argues that the Panel went beyond that precedent when it said that an inference of personal benefit "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." Opinion 22. This is not, as the government suggests, a new legal standard. This is guidance as to how to apply an existing legal standard. And that guidance – that a *quid pro quo* or intention to benefit the tippee may not be inferred from the mere acquaintance of the two individuals – is consistent with the analysis courts regularly undertake in this area, including in the cases cited by the government.[10] To the extent that the government and SEC complain that the

[10] *See United States v. Jiau*, 734 F.3d 147, 153 (2d Cir. 2013) (parties were members of investment club where they traded stock tips, and one tipper also got gifts); *SEC v. Warde*, 151 F.3d 42, 48-49 (2d Cir. 1998) *and SEC v. Downe*, 969 F.

Panel's decision robs them of the ability to satisfy the benefit requirement through an allegation of "mere" friendship, Pet. 13, SEC Br. 11, they overstate the law as it has existed since *Dirks*; the case law (*see* note 10 *supra*) shows that courts have always considered the particular circumstances of the parties' relationship and have not based their decisions solely on the status of friendship.

Moreover, the government misreads the sentence at issue, asserting that insiders will be able to generate millions of dollars in profits for their close friends and family as long as the insider himself expected no cash in return. Pet. 23 n.5. That is not a fair characterization. The key concept in the Panel's formulation is "an exchange" that is valuable, monetarily or otherwise.[11] Opinion 22. The word "exchange" indicates value going in two directions. If a corporate insider tips a close friend or family member under circumstances suggesting either a *quid pro quo* or an intention to direct trading profits to the tippee, the pecuniary aspect of the exchange would be satisfied by the tippee's profits from the sale of stock.

Supp. 149, 152 (S.D.N.Y. 1997) (parties had a "close friendship" because they socialized several times a year and "often discussed their business and investing interests"); *United States v. Evans*, 486 F.3d 315, 319 (7th Cir. 2007) (friends who talked daily and saw each other frequently); *SEC v. Rocklage*, 470 F.3d 1, 3 (1st Cir. 2006) (brother and sister who had made an agreement that sister would tip brother so brother could trade); *SEC v. Maio*, 51 F.3d 623, 627 (7th Cir. 1995) ("close friends" with significant history of financial dealings and favors).

[11] The Panel did not limit *quid pro quo* exchanges to money. The Panel's reference to "similarly valuable nature" could encompass a variety of non-financial benefits, *e.g.*, appointing someone to a leadership position in a charity or getting someone admitted to a private club.

Properly read, the language the government objects to stands for the unremarkable proposition that a personal benefit cannot be inferred when a relationship is so casual or arm's length that neither party would understand a communication of corporate information to constitute a mutual "exchange" of value.[12]

The correct, and entirely reasonable, scope of the Panel's ruling is best illustrated by the facts of this case. After all, the Panel was not offering abstract thoughts, but was instead making a sufficiency determination that necessarily related to the specific facts proved at trial. Here, that proof showed that the Dell insider, Ray, and the tippee, Goyal, were not friends at all.[13] While it is true that

[12] Federal prosecutors outside of New York understand the limited reach of the Panel's decision. In *United States v. Musante*, the government recently filed a brief observing that *Newman* makes "no new rule of law applicable to Defendant," that the Panel did not overrule Second Circuit precedent on the definition of personal benefit, and that the Panel "merely quibbled with whether the tippee's scienter had to include knowledge of the personal benefit, and *whether that knowledge could be inferred from a friendship alone*." Government's Opposition to Defendant's Motion to Withdraw Guilty Plea at 14, 16, *United States v. Musante*, 12 Cr. 386 (W.D.N.C. Feb. 6, 2015) (Dkt. No. 200) (emphasis added).

[13] Goyal testified that his relationship with Ray was "not very close or personal." Tr. 1411. When the government tried to get Goyal to say that Ray was a friend, Goyal answered "[h]e was not that close." *Id.* And at his own plea allocution, Goyal said that the two were "acquaintances," never using the word "friend." Transcript at 17, 19, *United States v. Goyal*, 11 Cr. 935 (S.D.N.Y. Nov. 3, 2011). The government's suggestion that Ray and Goyal had a social relationship is misleading because, to the extent they did so, this only happened *after* Ray left Dell and moved to New York for another job. Tr. 1512. In fact, Goyal and Ray never socialized while the alleged tipping was going on. *Id.* at 1469, 1512. It is also incorrect for the government to suggest that Ray and Goyal were close because they attended business school and worked together. Goyal testified that he

Ray wanted to find a job with a financial firm, there was no evidence that Goyal helped Ray to accomplish that goal or that there was any understanding of a *quid pro quo*. Indeed, the evidence affirmatively contradicted an inference of an exchange as the alleged career advice began years before Ray started providing information, Goyal testified that he would have provided career advice regardless of whether he received information, and Ray never connected the career advice to any assistance he was providing to Goyal. Tr. 1513-15. Similarly, with respect to Nvidia, the insider and the person he tipped were only the most casual of acquaintances from church, the tippee candidly admitted he gave nothing of value to the insider, and the tippee did not even trade Nvidia stock during the relevant period of the alleged tips.[14] Tr. 3032-33; 3067-69, 3078.

Against this factual backdrop, the Panel's discussion of a "meaningfully close personal relationship" and an "exchange" that is objective, consequential and valuable is quite clear.[15] Attending school, work, or church together does not, in

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met Ray while at business school, but that they were not in the same year. *Id.* at 1390. And while they overlapped at Dell, they only spoke a few times. *Id.*

[14] The government neglects to explain how its insistence that the insiders personally benefitted from passing non-public information squares with its decision not to charge either one of them with securities fraud. *See* Opinion 6. Since any liability on Newman's part is wholly derived from the insider's fraud, *Dirks* 463 U.S. at 662, the fact that the government has not charged the insiders is particularly significant.

[15] While the government asserts that the Panel's formulation is confusing, that is not a view shared by others. *See, e.g.*, Order Vacating Guilty Pleas, *United States*

itself, raise an inference of personal benefit because it is over inclusive; everyone has acquaintances of this sort who they are *not* particularly close to and where an inference of an intent to benefit or a *quid pro quo* exchange would be untrue. In the same vein, common social or professional courtesies – such as career advice, making introductions, accepting a friend request on Facebook, following someone on Twitter, or connecting on LinkedIn – are what casual acquaintances do every day. If these interactions, standing alone, were the bases for an inference that communication of corporate information was fraudulent, the *Dirks* self-dealing requirement would be eviscerated, and only the rude, uncivilized and affirmatively hostile would be exempt. That is not the law as the Panel appropriately held.

CONCLUSION

The government's request for Panel rehearing and rehearing *en banc* should be denied.

Dated: February 9, 2015

Respectfully submitted,

SHEARMAN & STERLING LLP

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v. Conradt, 12 Cr. 887 (S.D.N.Y. Jan. 22, 2015) (Dkt. No. 166) (noting "meticulous and conscientious effort by the Second Circuit to clarify the state of insider-trading law in this Circuit").

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