UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	**CIVIL ACTION NO. 12-CV-08676 (JSR)**
Plaintiffs,	**ECF CASE**
-against-	
THOMAS C. CONRADT, et al.,	
Defendants.	

MEMORANDUM OF LAW OF DEFENDANT THOMAS C. CONRADT IN OPPOSITION TO MOTION FOR FINAL JUDGMENT

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I. PRELIMINARY STATEMENT

More than seven years ago, Tom Conradt made a mistake. Since then, he has tried to mitigate his mistake by agreeing to cooperate with the FBI, the Office of the United States Attorney, and the United States Securities and Exchange Commission ("SEC").

As required by his Cooperation Agreement with the SEC, he spent dozens of hours meeting with government attorneys and traveled at least twice across the country to help with their investigation and litigation through interviews, depositions, and testifying at trial. By any objective standard Mr. Conradt has cooperated and lived up to his end of the bargain. In response to his valuable, but perhaps less than perfect performance on the witness stand, the SEC has unilaterally chosen to tear up the Cooperation Agreement and walk away from their obligation to act in good faith in assessing his cooperation. Instead of recommending a penalty to this Court consistent with the Cooperation Agreement and reflective of the limited $2,533 of personal financial gain Mr. Conradt received, the SEC seeks to have this Court impose a penalty of approximately $2,900,000—almost 1,200 times greater than his personal profit—on a man who they well know has little to no assets and a negative net worth. In fact, the SEC asks this Court to impose a penalty on Mr. Conradt greater than the combined penalty it seeks from the other participants including two who chose to litigate and did not cooperate with the SEC.

Such a result is unprecedented and unwarranted as Mr. Conradt has complied with his obligations under the Cooperation Agreement and testified truthfully in the related litigation against Daryl Payton and Benjamin Durant. There is also no basis in law for the severe sanction the SEC seeks as Mr. Conradt has no prior history of securities law violations and has already suffered immensely, both personally and professionally. A 1,200 percent penalty is not necessary to deter him from future misconduct.

Mr. Conradt's testimony was unquestionably critical to the SEC's case and instrumental to the verdict against Payton and Durant. While he may not have agreed to embrace the SEC's theories (something the SEC was aware of in advance of his testimony and chose to ignore) he testified truthfully regarding the source of the tip and how and what he tipped to Payton and Durant.[1] Any failures in his recollection were not "feigned" or designed to undermine the SEC's case, but were the product of the passage of seven years and the SEC's unexplained declination of repeated offers by counsel to meet with and prepare Mr. Conradt before trial. The SEC's penalty request stunningly attributes no value whatsoever to Mr. Conradt's cooperation despite repeated references during summation to the testimony he provided, the credibility of which was necessary for the jury to reach its verdict in their favor. Having reaped the rewards of Mr. Conradt's cooperation, the SEC cannot in good faith be allowed to tear up the agreement it signed and seek to impose such a severe sanction.

The exceedingly harsh nature of the SEC's request is further highlighted by the disparate treatment they have offered to Trent Martin against whom they only seek a one-time penalty based off his own profits despite the fact that he is a similarly situated cooperator, who traded on inside information, had trouble recalling events from six years prior at his deposition and did not testify at trial. The SEC's request would instead lump Mr. Conradt, a settling and cooperating witness, in with Payton and Durant, defendants who were found liable *after a trial on the merits* and who have contested their liability throughout the pendency of the SEC's action. It is also possible that Mr. Conradt's sanction would be more severe than Payton and Durant's *combined* penalty. *See SEC v. Payton, et al.*, No. 14-CV-4644 (JSR) (Mar. 7, 2016) Dkt. 144 at 4.

[1] While he may not have been the perfect witness, accepting the SEC's position creates the very real hazard that cooperating witnesses will feel compelled to testify consistent with the government's theory at the expense of the truth for fear that the government will unilaterally decide to tear up the cooperation agreement because it does not like what it hears.

Furthermore, the result proposed by the SEC is unfair, unjust, and inconsistent with prior civil penalties levied for insider trading violations.

For the reasons detailed below, we ask the Court to hold the SEC to the bargain they struck with Mr. Conradt, just as he held up his end of the bargain, and impose a penalty of $2,533.

II. MR. CONRADT COMPLIED WITH HIS COOPERATION AGREEMENT

The language of the Cooperation Agreement requires that Mr. Conradt "cooperate fully and truthfully in the Investigation and any other related enforcement litigation or proceedings to which the Commission is a party." Declaration of Jimmy Fokas, dated April 15, 2016 ("Fokas Decl."), Ex. 1 (Signed Cooperation Agreement between the United States Securities and Exchange Commission and Thomas C. Conradt, dated June 21, 2013) ¶ 2. Specifically, Mr. Conradt is required to "respond[] fully and truthfully to all inquiries, when requested to do so by the Division's staff" and to "testify[] at trial and other judicial proceedings, when requested to do so by the Division's staff." *Id.* ¶ 2(c)-(d). Mr. Conradt fully complied with these terms. Nothing in the Cooperation Agreement required Mr. Conradt to be the perfect trial witness or to have a perfectly clear recollection of all of the facts and all of the details of his previous statements, many of which were made many months or years before the trial. The SEC argues that during Payton and Durant's trial, Mr. Conradt "ceased complying with his Cooperation Agreement and attempted to undermine the Commission's case by not providing truthful testimony and failing to cooperate with the Commission." Pl. SEC's Mot. for Final Judgment Imposing a Civil Penalty Against Thomas C. Conradt, *SEC v. Conradt, et al.*, No. 12-CV-08676 (JSR) (Mar. 18, 2016) Dkt. 93 ("Br.") at 5. Even if Mr. Conradt's testimony at trial was not as perfect as the SEC would have preferred, he testified to facts critical to the SEC's case and materially consistent with his prior statements. Absolute perfection to the complete satisfaction

of the SEC cannot be the standard for determining whether Mr. Conradt complied with his agreement. Nor should a cooperating witness be forced to adopt or agree with facts or theory that do not comport with his recollection.

A. The SEC Refused Offers to Prepare Mr. Conradt for Trial

To the extent the SEC was unhappy with Mr. Conradt as a witness, the blame falls squarely on their shoulders as they continuously ignored repeated attempts by counsel to schedule time for Mr. Conradt's preparation prior to trial. *See* Declaration of Catherine Redlich, Esq. in Support of Opposition to Motion for Final Judgment ("Redlich Decl.") ¶¶ 5-10. What the SEC now characterizes as an attempt by Mr. Conradt to sabotage the trial, *see* Br. at 9-10, was instead a decision by the SEC to put him on the stand cold despite the importance of his testimony and without the benefit of having his recollection refreshed regarding events that took place almost seven years prior.

Nonetheless, Mr. Conradt appeared for trial despite not having reviewed any underlying documents (beyond his deposition transcript) or having any preparation whatsoever, ordinary and prudent steps the government usually takes before eliciting the testimony of its cooperating witnesses. While it may have been easy for Plaintiff's counsel to remember the minute details of multiple conversations involving various individuals from seven years prior, it was not unreasonable for Mr. Conradt to have forgotten some of this information due to the passage of time and lack of preparation. At times he did fail to recall certain details, but he was honest about his inability to remember and explained that many of his conversations with the Defendants were "really casual conversations, and over the course of seven years and multiple court documents that [he has] read," it has become very confusing for him "to peg down exactly what was said in each conversation to each person." Fokas Decl. Ex. 2 (Excerpts from the testimony of Thomas C. Conradt at the trial *SEC v. Daryl M. Payton and Benjamin Durant, III*,

No. 14-CV-4644 (JSR), dated February 16-17, 2016 ("Trial Tr.")) at 238:5-12; *see also id.* at 337:11-21. When properly refreshed both at trial[2] and during his pre-trial deposition[3] Mr. Conradt's memory predictably improved. The Court should not allow the SEC to be relieved of its contractual obligations under the Cooperation Agreement for an alleged breach based on the quality of the testimony when the SEC disregarded offers to meet and prepare before trial.

B. Mr. Conradt's Trial Testimony Was Critical to the SEC's Case and the Jury's Verdict Against Payton & Durant

Mr. Conradt's testimony was essential for the SEC to make their case against Payton and Durant. In fact, the SEC was not shy during its summation touting the helpful testimony Mr. Conradt provided, testimony necessary for the SEC to meet its burden.[4] The SEC needed to prove: "(1) that Martin owed a duty of trust and confidence to the source of the material non-public information about the SPSS transaction, namely, Dallas; (2) that Martin breached that duty by disclosing the confidential SPSS information to Conradt; (3) that Martin received a personal benefit from disclosing the information to Conradt; and (4) that Conradt's

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[2] Fokas Decl. Ex. 2 (Trial Tr.) at 272:14-274:11 (Mr. Conradt's recollection is refreshed that he told Payton and Durant not to tell anyone because Martin had given that instruction).

[3] Fokas Decl. Ex. 3 (Excerpts of the deposition of Thomas C. Conradt, dated July 17, 2015 ("Conradt Dep.")) at 79:22-82:3, 157:2-159:15, 197:5-22 (Mr. Conradt's recollection is refreshed regarding whether he wrote multiple letters to the landlord to get things fixed in the apartment with letters and e-mails; whether he traded after his third conversation with Martin; and whether he told Payton about Martin's Grand Central arrest).

[4] Fokas Decl. Ex. 4 (Excerpts of the summation by counsel for the SEC at the trial *SEC v. Daryl M. Payton and Benjamin Durant, III*, No. 14-CV-4644 (JSR), dated February 26, 29 2016 ("SEC Summation")) at 892:6-8 ("And you may recall when Thomas Conradt sat on the stand and he testified Trent Martin said, This is something that we can make money on."); *id.* at 904:13-17 ("You heard Conradt testify that in June 2009, Martin was the person that he was having the most interaction with. You heard that they hung out three to four times a week, drank beers, ordered food, watched TV, played Xbox, talked about their days."); *id.* at 912:25-913:2 ("Conradt testified that he tipped both Daryl Payton and Benjamin Durant specific information about IBM multiple times."); *id.* at 916:15-16 ("Conradt told Payton and Durant that this information came from his roommate . . . .").

tippees . . . understood both that the SPSS information was confidential and that Martin had disclosed this information to Conradt in exchange for a personal benefit." *See* Op., *SEC v. Payton, et al.*, No.14-CV-4644 (JSR) (S.D.N.Y. Dec. 28, 2015) Dkt. 76 at 5-6. As detailed below, Mr. Conradt's testimony was essential to proving the third and fourth elements and in compliance with his obligations under the Cooperation Agreement.

On the issue of personal benefit, while neither Mr. Conradt (nor Martin) ever believed a personal benefit was provided in exchange for the tip, he nonetheless testified to all of the facts necessary to establish this element. Mr. Conradt testified truthfully to the following facts:

- Conradt allowed use of his bedroom for Martin's guests in the apartment. Fokas Decl. Ex. 2 (Trial Tr.) at 112:6-114:6.
- Conradt did not take money from Martin for Conradt's stolen bike. *Id.* at 114:12-116:20.
- Conradt performed tasks and repairs around the apartment and wrote letters to the management company. *Id.* at 116:22-124:9.
    - Conradt handled a situation with a truck outside of the apartment building. *Id.* at 124:10-21.
    - Conradt hired a cleaning lady for the apartment. *Id.* at 124:22-127:20, 130:2-131:1.
    - Conradt handled the collection of money to split shared bills in the apartment. *Id.* at 127:22-130:1.
    - Conradt negotiated to reduce the cable bill. *Id.* at 131:2-132:8.
    - Conradt negotiated to reduce the rent. *Id.* at 133:1-134:21.
- Conradt provided assistance to Martin after his arrest relating to the Grand Central Station incident. *Id.* at 155:22-162:4.
    - After the buyout became public, Martin and Conradt had an additional conversation in their apartment during which Martin told Conradt that he was glad Conradt had made some money and thanked him for his help with the Grand Central Station incident. *Id.* at 284:6-25, 286:12-25.

It is obvious from the verdict that the jury relied on his testimony to conclude there was a personal benefit.

On the issue of what the tippees understood about the source of the tip, Mr. Conradt testified that he had an implied understanding from his conversations with Martin that he should not tell anyone and that when he did tell people about the tip, he told them to keep it to themselves. *Id.* at 248:7-19. Further, Mr. Conradt confirmed his deposition testimony that he told Payton and Durant not to tell anyone about the tip because Martin had given that instruction. *Id.* at 272:18-274:11. In fact, the SEC during summation argued to the jury that Payton and Durant were on notice of the confidential nature of the information because of what Mr. Conradt relayed to them. Fokas Decl. Ex. 4 (SEC Summation) at 918:14-919:4.

The SEC would now have the Court believe that everything Mr. Conradt testified to was inconsistent or untruthful in order to justify the maximum penalty. The trial transcript and the jury's verdict tell a different story and the SEC should not be allowed to reap the benefits of his truthful testimony and then claim they are no longer bound by the Cooperation Agreement they signed. Nor should the SEC be allowed to seek a penalty equivalent to almost 1,200 times the amount of his personal gain.

C. Mr. Conradt's Testimony Was Truthful and Consistent

A careful examination of the record reveals that Mr. Conradt's testimony was largely consistent with his prior statements, contrary to the SEC's claims that they were not. Any differences were minor, resulted from the SEC's failure to prepare him, the passage of time and a recollection that evolved as he was presented and refreshed with contemporaneous documents

and communications through two lengthy government investigations.[5] It was not the result of deliberate actions intended to undermine the SEC's case.

The SEC principally takes issue with Mr. Conradt's testimony in the following areas—what Durant knew about Martin; whether Mr. Conradt told Payton and Durant additional details regarding the SPSS deal and that Martin told him to keep the information confidential; and whether Martin's tip was in return for Mr. Conradt's help after his arrest. A review of his testimony reveals that Mr. Conradt testified to the best of his ability on these areas and complied with his cooperation obligations.

1. Mr. Conradt Was Consistent on the Key Facts

The instances where Mr. Conradt's recollection of specific facts faltered did not impede the SEC's case. He was still able to testify that he shared material information he learned from Martin with Payton and Durant, that Payton and Durant knew the information came from Martin, and that they were to keep the information confidential. Mr. Conradt recalled the critical fact that he told Payton and Durant about the stock tip, but was unsure of whether he used the term "buyout." Br. at 6 (citing Fokas Decl. Ex. 2 (Trial Tr.) at 242:23-244:8). Whether he used the word "buyout" or not is irrelevant, as Mr. Conradt's testimony makes clear that the information he was relaying was material. Mr. Conradt also remembered telling increasingly specific information to Matt Lehrer, David Weishaus, and Durant, but was only unsure as to whether or not this information was relayed to Payton. Fokas Decl. Ex. 2 (Trial Tr.) at 364:14-365:10 (Mr. Conradt recalls telling Durant that IBM was acquiring SPSS but not Payton). Finally, Mr.

[5] The SEC tries to imply that Mr. Conradt's testimony is crystal clear when it is in favor of the defendants as evidence of his evasiveness. Br. at 7 n.4. This argument ignores that Mr. Conradt's testimony on cross-examination was after a full day of direct testimony during which his recollection was refreshed. Even then, Mr. Conradt had to be shown documents to fully jog his memory. Fokas Decl. Ex. 2 (Trial Tr.) at 294:4-17.

Conradt also recalled telling both Payton and Durant to keep the information he relayed confidential, and once refreshed, agreed that he shared with Payton and Durant that Martin had asked him not to say anything about the tip. *Id.* at 272:18-274:11.

These examples of Mr. Conradt's memory faltering are no different than instances where he needed to have his memory refreshed during his deposition.[6] The SEC knew that Mr. Conradt had difficulty remembering specifics of certain conversations during his deposition but took no precautions prior to trial to remedy this through preparation. As demonstrated above, the instances cited by the SEC as evidence of minimization and evasiveness can more reasonably been seen as examples of where Mr. Conradt legitimately could not recall who said what to whom and when, seven years later with the precision the SEC would have liked. The SEC now claims that despite a failure to prepare him, Mr. Conradt did not cooperate at trial all in an effort to frustrate their case. Br. at 9. The record however, reflects that Mr. Conradt was simply being honest about the conversations he could remember, and the conversations he could not remember. Indeed, the SEC warned jurors that such varying memories was a matter of course to be expected:

> Different witnesses are going to tell slightly different versions of what happened. This is natural. It's natural because sometimes people remember things slightly differently. But the main point that's going to come across is going to be uniform: That Tom Conradt got a hot stock tip from his roommate and passed it along to the EuroPac stockbrokers who all made a lot of money.

Fokas Decl. Ex. 5 (Excerpt of the opening statement by counsel for the SEC at the trial *SEC v. Daryl M. Payton and Benjamin Durant, III*, No. 14-CV-4644 (JSR), dated February 16, 2016) at 51:1-7. Again, none of this testimony is indicative of a deliberate intent to deceive or not

[6] *See supra* note 2 (listing examples where Mr. Conradt's memory had to be refreshed during his deposition).

cooperate. Neither is it an example of "egregious" or "outrageous" conduct mischaracterized by the SEC to support a treble penalty request. Br. at 10.

2. Mr. Conradt Testified Consistently with Respect to the Facts Surrounding Personal Benefit

Mr. Conradt's testimony on personal benefit is similarly consistent with his prior statements. He has never testified on the record that Martin directly stated in any conversation that he provided the SPSS tip to Mr. Conradt because of his help with the Grand Central arrest. Rather, during both his deposition and trial testimony, Mr. Conradt testified that this was an afterthought or offhand comment by Martin and it was his belief that this was not Martin's motivation for providing the tip. Fokas Decl. Ex. 3 (Conradt Dep.) at 24:4-25:17, 213:6-214:15; Fokas Decl. Ex. 2 (Trial Tr.) at 286:12-25. This statement was corroborated by Martin's testimony where he categorically denied tipping Conradt in return for his help with his Grand Central arrest or the apartment related tasks. Fokas Decl. Ex. 6 (Excerpts of the deposition of Trent Martin, dated June 26, 2015 ("Martin Dep.")) at 22:15-23:14, 39:20-40:16, 41:2-9. What the SEC now characterizes as inconsistent is really a reflection of the fact that, like any witness, his memory evolved over time as he was refreshed with contemporaneous documents and communications.

The SEC relies on a statement contained within a 302 prepared by the FBI as supposed damning evidence of his inconsistent and evasive statements at trial regarding personal benefit. The 302 was prepared shortly after Mr. Conradt's arrest at a time when he had not yet had the opportunity to refresh his recollection with communications and documents that were critical to filling in the complete narrative. This narrative expanded over time as his recollection was refreshed, something that is consistent with his attempts to recall the minutiae of conversations that occurred years prior. Putting aside the fact that the 302 is not a verbatim transcript of Mr.

Conradt's statements to the government, by the time of his deposition two and a half years later, Mr. Conradt was unequivocal in confirming that at most, Martin's appreciation for Conradt's assistance after Martin's arrest was merely "an offhand comment." Fokas Decl. Ex. 3 (Conradt Dep.) at 24:4-25:17. He confirmed this at trial. Fokas Decl. Ex. 2 (Trial Tr.) at 286:12-25. Martin's testimony corroborated that he did not provide Mr. Conradt with the tip in exchange for Mr. Conradt's assistance with apartment related tasks or the Grand Central arrest. Fokas Decl. Ex. 6 (Martin Dep.) at 22:15-23:14, 39:20-40:16, 41:2-9. Furthermore, the SEC was informed over a year before trial that Mr. Conradt would not testify to their theory of personal benefit. Redlich Decl. ¶ 4. While Mr. Conradt testified truthfully to performing certain tasks around the apartment and his assistance after Martin's arrest, he has consistently maintained that he did not believe this was a primary reason for the SPSS tip.

None of Mr. Conradt's testimony on this topic represents any sort of deliberate evasiveness or a feigned inability to recall as the SEC would have the Court believe. Nor was this testimony part of some nefarious plot to undermine. It certainly provides no basis for concluding that Mr. Conradt violated his Cooperation Agreement or that his conduct merits a treble penalty particularly where his testimony was a crucial part of the SEC's case.

D. Mr. Conradt Did Not Have a Joint Defense with Payton and Durant

Mr. Conradt did not secretly meet with counsel for Payton and Durant or enter into a joint defense with them. Any conversations with their counsel prior to trial did not undermine or otherwise affect Mr. Conradt's mandated cooperation. The SEC completely mischaracterizes the conversation with counsel for Mr. Conradt in a further attempt to bolster the specious argument that he breached his Cooperation Agreement by not disclosing this information to them. To the extent Plaintiff's counsel sought to learn whether Mr. Conradt provided information to counsel for Payton and Durant, it would have behooved him to take the time and prepare his witness in

advance (as offered) when he could have asked questions and learned the information rather than attempt to intimidate his counsel in the gallery during the trial. The Court also had an opportunity to question counsel on the record, at which time counsel for Mr. Conradt clarified that there was no joint defense with either Payton or Durant. Fokas Decl. Ex. 7 (Excerpt from the record of the trial *SEC v. Daryl M. Payton and Benjamin Durant, III*, No. 14-CV-4644 (JSR), dated February 17, 2016) at 208:15-214:8. Accordingly, the Court should not consider this episode in determining whether Mr. Conradt complied with his Cooperation Agreement or in determining the appropriate penalty.[7]

III. A TREBLE PENALTY IS EXCESSIVE, UNWARRANTED, & UNNECESSARY

The Court should impose a penalty of $2,533 that was agreed to in the Cooperation Agreement as there has not been a breach of the Agreement. Even if the Court determines there was a breach, a treble penalty is not supported by the law or the facts. A review of Mr. Conradt's conduct does not merit such a severe sanction which is usually reserved for the most egregious violations and certainly not for an individual who yielded a meager personal profit of $2,533.

A. Mr. Conradt Did Not Breach the Cooperation Agreement

As set forth in Section II above, Mr. Conradt has testified consistently and provided valuable and meaningful assistance to the SEC during their investigation and at trial. He has complied with the obligations of his Cooperation Agreement and he should receive the benefit of that cooperation. Instead, the SEC has not lived up to their end of the Cooperation Agreement by improperly deeming Mr. Conradt to be in breach of that agreement.

[7] If the Court is inclined to consider this in its decision, then Mr. Axelrod should be required to submit the alleged contents of the conversation in the form of a declaration, and be subject to cross-examination regarding the same since the SEC cites this as a basis for rescinding his Cooperation Agreement.

The SEC cites to *United States v. Davis*, 393 F.3d 540, 546-47 (5th Cir. 2004), as the standard for a material breach: "[a] material breach is one that deprives the non-breaching party of the benefit of its bargain." *Davis* is distinguishable on its facts, as it involved a defendant who *lied* about material information and failed to disclose other information material to the government's investigation, in contrast to Mr. Conradt who testified truthfully to the material information and assisted the SEC both prior to and during his trial testimony.

The court in *Davis* went on to say that "[a]s a corollary, if a party's nonperformance . . . is innocent, does not thwart the purpose of the bargain, and is wholly dwarfed by that party's performance, the breaching party has substantially performed under the contract, and the non-breaching party is not entitled to rescission." *Id.* at 547 (internal quotation marks omitted). Even accepting as true the SEC's complaints about Mr. Conradt's testimony, his lapses in memory were legitimate, did not impede the SEC's victory at trial, and were minimal when compared with the wealth of information he provided. As demonstrated above, Mr. Conradt's lack of recollection of events seven years prior was a natural occurrence made worse by the SEC's failure to prepare him to testify, not a malicious attempt to "frustrate the Commission's efforts." Br. at 9. Even though Mr. Conradt required his memory to be refreshed, the SEC won at trial based in significant part on his testimony.[8]

Finally, Mr. Conradt sat for numerous interviews with the Department of Justice and the SEC,[9] an additional interview solely with the SEC, a deposition, and testified against his former

[8] In his summation, Mr. Axelrod referenced Mr. Conradt's testimony on several occasions to bolster the SEC's case against Payton and Durant. Fokas Decl. Ex. 4 (SEC Summation) at 892:6-8, 904:13-17, 906:4-24, 909:17-910:3, 912:25-913:17, 916:15-25, 1035:15-18, 1049:23-1050:2.

[9] Mr. Conradt sat for at least five interviews with the Department of Justice and the SEC had the benefit of participating in at least three of these interviews.

co-workers at trial. It is entirely unfair for the SEC to now take the position that Mr. Conradt did not cooperate or to imply that his cooperation was not critical to the jury verdict in their favor. That he did not perform mental gymnastics to recreate memories he no longer had in no way constitutes a breach of the agreement. While the SEC has some discretion to determine whether Mr. Conradt failed to cooperate, such a determination must be made in good faith and not simply because the SEC did not like everything they heard at trial. *See United States v. Khan*, 920 F.2d 1100, 1105 (2d Cir. 1990); *United States v. Rexach*, 896 F.2d 710, 713-14 (2d Cir. 1990). Indeed, the government's latitude in evaluating a defendant's cooperation "does not permit it to ignore a defendant's efforts at cooperation simply 'because the defendant is supplying information that the government does not want to hear.'" *United States v. Knights*, 968 F.2d 1483, 1488 (2d Cir. 1992) (quoting *Khan*, 920 F.2d at 1105). It is not at all uncommon for a court to find that defendants have cooperated even when their testimony is not perfect. *See United States v. Aleman*, 286 F.3d 86, 90 (2d Cir. 2002) (finding defendant not in breach of immunity agreement if his testimony was what he recalled, even if his recollection was not the truth). Mr. Conradt cooperated and has fulfilled his obligations.

B. <u>As a Cooperating Witness a Maximum Penalty Is Not Warranted</u>

Courts typically do not impose significant penalties when the defendant cooperates with the government and often choose not to impose civil penalties at all. *See SEC v. Simone*, No. 07-cv-3928 (JG), 2013 WL 4495664, at *3 (E.D.N.Y. Aug. 19, 2013) (deciding not to impose civil penalties because the defendants "demonstrated a meaningful contrition by their prompt cooperation in the criminal investigation, providing full disclosure"); *SEC v. Opulentica, LLC*, 479 F. Supp. 2d 319, 332 (S.D.N.Y. 2007) (deciding to impose a minimal civil penalty of $5,000 for one of the defendants because he "was a much smaller beneficiary of the fraudulent scheme" and he "demonstrated meaningful contrition by his prompt and significant cooperation in the

criminal investigation"); *SEC v. Inorganic Recycling Corp.*, No. 99 Civ. 10159 (GEL), 2002 WL 1968341, at *5 (S.D.N.Y. Aug. 23, 2002) (determining that a civil penalty of zero was appropriate for one of the defendants because he was "a much smaller beneficiary of the fraudulent scheme" and he "demonstrated substantial and meaningful contrition by his prompt and significant cooperation in the criminal investigation").

Cases in which courts have imposed treble penalties involve conduct far more egregious than Mr. Conradt's. Typically they involve millions of dollars of losses and frauds that spanned long periods of time[10] or cases where defendants tried to avoid prosecution for their crimes.[11] Mr. Conradt's conduct is clearly distinguishable from the conduct of the defendants in these cases. He did not participate in a long-term or pervasive fraudulent scheme and did not avoid prosecution for his crimes. In fact, in connection with the dismissed criminal case, Mr. Conradt admitted his misconduct and has cooperated with the government helping the SEC to build its case against the other participants. Imposing the maximum penalty on Mr. Conradt would be unjust, unwarranted and set a terrible precedent for cooperating witnesses in light of the circumstances of this case and the modest level of his personal financial gain.

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[10] *See SEC v. Gupta*, No. 11 Civ. 7566 (JSR), 2013 WL 3784138, at *2 (S.D.N.Y. July 17, 2013), *aff'd*, 569 F. App'x 45 (2d Cir. 2014) (imposing maximum penalties in part because "conduct was knowing, willful, purposeful, and recurrent, and resulted, in effect, in millions of dollars of losses"); *SEC v. Rajaratnam*, 822 F. Supp. 2d 432, 434 (S.D.N.Y. 2011) (imposing maximum penalties because defendant's insider trading scheme "netted tens of millions of dollars and continued for years").

[11] *See SEC v. Anticevic*, No. 05 CV 6991 (KMW), 2010 WL 2077196, at *8 (S.D.N.Y. May 14, 2010) (imposing the maximum civil penalty where defendant "exhibited a flagrant disregard for the law by violating the terms of his supervised release and disappearing"); *SEC v. Haligiannis*, 470 F. Supp. 2d 373, 386 (S.D.N.Y. 2007) (imposing maximum penalty where the defendant became a fugitive, fleeing "with substantial profits from his fraudulent conduct"); *SEC v. Sekhri*, No. 98 Civ. 2320 (RPP), 2002 WL 31100823, at *19 (S.D.N.Y. July 22, 2002) (imposing the maximum civil penalty because the defendants acted to amass as much illegal profits as they could and left the United States to avoid prosecution and removed their assets from the jurisdiction of the court).

C. The SEC Is Inappropriately Singling Out Mr. Conradt

The similarity between Martin's testimony and Mr. Conradt's testimony, and the dissimilarity in the penalties the SEC seeks against the two cooperators suggests that the motive behind the purported breach is not grounded in good faith.[12] The SEC was informed shortly after the filing of the Amended Complaint in *SEC v. Payton, et al*., No. 14-CV-4644 (JSR) Dkt. 32 (Mar. 2, 2015), that Mr. Conradt (and Martin) would not testify to the personal benefit theory as outlined in the complaint. *See* Redlich Decl. ¶ 4. Indeed, Mr. Conradt testified at his deposition that the apartment related tasks and other acts he performed with regard to Martin were the "mundane minutia of the day-to-day life of being a roommate and [he] had zero recollection of it whatsoever until . . . it was asked of [him] in February." Fokas Decl. Ex. 3 (Conradt Dep.) at 228:4-10.

Martin's deposition testimony was strikingly similar to Mr. Conradt's, yet the SEC has not alleged a breach of his cooperation agreement or asked the Court to impose treble penalties based on the gains of his downstream tippees. Notice of Mot., *SEC v. Conradt, et al.*, No. 12-CV-08676 (JSR) (Mar. 18, 2016) Dkt. 88; Pl. SEC's Memo. of Law in Support of its Mot. for the Imposition of a Civil Penalty Against Def. Trent Martin, *SEC v. Conradt, et al.*, No. 12-CV-08676 (JSR) (Mar. 18, 2016) Dkt. 90 ("Martin Br."). The SEC characterizes Mr. Conradt's failures of recollection during his trial testimony as untruthfulness or evasiveness. *See* Br. at 5-8. Yet the SEC does not come to the same conclusion regarding Martin's deposition testimony, during which he also needed to have his recollection refreshed on several key points including

[12] Courts also recognize that occasionally a prosecution's claim that a defendant has breached his cooperation agreement is not made in good faith. *United States v. Harris*, 188 F. Supp. 2d 294, 301 (W.D.N.Y. 2001) (finding that the government ignored the defendant's cooperation and "had no real interest in [his] cooperation").

personal benefit and the specific information tipped to Mr. Conradt.[13] Martin's deposition testimony also differed from previous statements he had made to the government regarding whether he believed Mike Dallas tipped him with the expectation that he would trade on the information.[14] Additionally, at trial, counsel for the SEC commented that Martin "doesn't seem like a guy who wants to accept responsibility." Fokas Decl. Ex. 4 (SEC Summation) at 1040:22-23. Yet the SEC now says Martin (who was not present at trial) has "[taken] responsibility for his wrongful actions" in arguing to this Court that he should receive a one-time penalty equal to his personal gain of $7,625. Martin Br. at 3. In strikingly similar circumstances, the SEC seeks to make an example out of Mr. Conradt while honoring its deal with Martin.

Perhaps the only distinguishing factor is that Mr. Conradt filed a Motion to Vacate Judgment based on an intervening change in the law. Notice of Mot., *SEC v. Conradt, et al.*, No. 12-CV-08676 (JSR) (May 29, 2015) Dkt. 72; Mem. of Law of Def. Thomas C. Conradt in Support of Mot. to Vacate Judgment, *SEC v. Conradt, et al.*, No. 12-CV-08676 (JSR) (May 29,

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[13] *See* Fokas Decl. Ex. 6 (Martin Dep.) at 27:5-28:18 (using an e-mail chain to refresh Martin's recollection regarding the proposed allocation of the rent reduction initially suggested by Mr. Conradt); *id.* at 29:19-31:12 (using an e-mail chain to refresh Martin's recollection regarding whether he was agreeable to the allocation of the rent reduction initially suggested by Mr. Conradt); *id.* at 38:23-39:18, 80:19-84:2 (using a Facebook message and an FBI Form 302 to refresh Martin's recollection that his arrest in connection with the Grand Central Station incident took place after the conversation he had with Mr. Conradt in which Martin disclosed the details of the SPSS transaction); *id.* at 48:14-49:17 (using an FBI Form 302 of an interview with Martin on July 26, 2013 to refresh Martin's recollection about the expected price per share of the SPSS buyout); *id.* at 70:11-72:18 (using an FBI Form 302 of an interview with Martin on August 9, 2013 to refresh Martin's recollection regarding the details Dallas shared with him about a transaction involving United Airlines).

[14] *See* Fokas Decl. Ex. 6 (Martin Dep.) at 56:14-57:17, 108:6-110:11 (using an FBI 302 to demonstrate that Martin had previously stated that Dallas would not have wanted Martin to trade on the SPSS information which differed from Martin's deposition testimony during which he stated that Dallas wanted Martin to trade on the information); *id.* at 148:16-151:18 (using Martin's declaration to demonstrate that Martin had previously stated that he apologized to Dallas for trading on the SPSS information which differed from Martin's deposition testimony during which he stated that he apologized to Dallas specifically for trading in options).

2015) Dkt. 73. Indeed, counsel for the SEC became so angered when Mr. Conradt first alerted them that he was considering filing the Motion to Vacate Judgment that Mr. Conradt felt threatened. Fokas Decl. Ex. 3 (Conradt Dep.) at 219:4-15. Mr. Conradt should not be punished for exercising his right to attempt to vacate his judgment based on his good faith belief that the *Newman* opinion changed the law underlying the SEC's charges against him. The Court should not allow the SEC to breach their obligations under the Cooperation Agreement, and should impose a one-time penalty based solely on Mr. Conradt's gains.

D. Even Absent Cooperation a Treble Penalty Is Not Appropriate

Not only has there been no breach of the Cooperation Agreement, even if there was, a treble penalty is not appropriate in light of the legal standards for determining civil penalties pursuant to 15 U.S.C. § 78u-1(a)(2). The SEC attempts to portray Mr. Conradt as the mastermind behind a "calculated, organized, conspiracy," *see* Br. at 12, who will only be deterred from future violations by a maximum penalty. This colorful rhetoric ignores and greatly overstates Mr. Conradt's conduct, its isolated nature and the likelihood that it will ever recur in order to justify an extreme sanction. The SEC is well aware that Mr. Conradt has been brought to the edge of financial ruin as a result of his role in these events and that his fledgling career and reputation will likely never recover. Yet they seem to want to squeeze the proverbial blood from a stone by levying a penalty almost twelve hundred times greater than the profit he earned from his trade. This unjust position is not supported by the law or the facts.

1. Mr. Conradt's Conduct Does Not Support a Maximum Sanction

Courts consider the following factors when determining an appropriate penalty "(1) the egregiousness of the defendant's conduct; (2) the degree of the defendant's scienter; (3) whether the defendant's conduct created substantial losses or the risk of substantial losses to other persons; (4) whether the defendant's conduct was isolated or recurrent; and (5) whether the

penalty should be reduced due to the defendant's demonstrated current and future financial condition." *Gupta*, 2013 WL 3784138, at *1.

A review of these elements demonstrates that a treble penalty is excessive. First, while Mr. Conradt's conduct was wrong, he has admitted his misconduct, a factor that strongly weighs against levying the most severe penalty available. *See SEC v. Colonial Inv. Mgmt. LLC*, 659 F. Supp. 2d 467, 503 (S.D.N.Y. 2009) (listing "whether the defendant has admitted wrongdoing" as a factor to be considered in a determination of whether a civil penalty is appropriate); *Opulentica, LLC*, 479 F. Supp. 2d at 332 (noting that the defendant fully acknowledged his accountability for the fraud in determining the appropriate civil penalty). The egregiousness of his conduct and the degree of his scienter should also be mitigated by his assistance throughout the SEC's investigation and trial. *SEC v. Svoboda*, 409 F. Supp. 2d 331, 348 (S.D.N.Y. 2006) (finding that one defendant deserved a lesser penalty than another because although they engaged in equally culpable conduct, one defendant pleaded guilty to the criminal charges against him and then provided substantial assistance to the government at the criminal trial of the other defendant).

As for the nature of his conduct, it could not have been more isolated. Mr. Conradt made three small purchases of stock for one company, based on a single tip. In fact, as the SEC well knows, the only time Conradt has *ever* traded stock for himself was when he made the ill-fated decision to purchase the 170 shares of SPSS. Unlike the cases cited by the SEC, this is not a case in which the defendant made millions by engaging in numerous small trades designed to evade detection. *See SEC v. Contorinis*, No. 09 Civ. 1043 (RJS), 2012 WL 512626, at *4 (S.D.N.Y. Feb. 3, 2012), *aff'd*, 743 F.3d 296 (2d Cir. 2014), *cert. denied*, 136 S. Ct. 531 (2015). Mr. Conradt could have made a significant amount of money by buying more stock but instead

only made a small profit of $2,533. The SEC's attempt to contort this trade into an argument that Mr. Conradt is likely to repeat his conduct is completely misplaced. In addition, Mr. Conradt has no prior history of securities law violations, and is barred from working in the securities industry and appearing or practicing before the SEC as an attorney, making it extremely unlikely that he will ever engage in misconduct again. Any claim that Mr. Conradt is likely to be a recidivist is simply unsupported by the record and the result of overzealous advocacy.

Finally, the Court should also consider the deterrent effect given the defendant's net worth and the ability to pay a civil penalty. *Sekhri*, 2002 WL 31100823, at *18; *see SEC v. Yun*, 148 F. Supp. 2d 1287, 1295, 1297-98 (M.D. Fla. 2001) (imposing civil penalty of $100,000 despite SEC request for $807,000 penalty and defendant's "significant levels of misconduct" because defendant's net worth was only $264,282); *SEC v. Pardue*, 367 F. Supp. 2d 773, 777-78 (E.D. Pa. 2005) (imposing civil penalty of $25,000 despite SEC's request for $139,697 fine and defendant's "very serious" securities law violations due to defendant's negative net worth). The SEC gives short shrift to this factor because it is obvious that Mr. Conradt's financial situation is dire. The SEC focuses on Mr. Conradt's age and potential future earnings to conclude that he would not be prevented from earning sufficient funds in the future to pay the exorbitant penalty. Br. at 13. Of course the law focuses on more than just a defendant's future ability to pay when considering the size of a penalty. *Sekhri*, 2002 WL 31100823, at *18. Cases where a maximum penalty was levied, such as *Gupta* and *Rajaratnam*, did so only after finding in part, that the financial condition of the defendant did not weigh against the maximum penalty. *Gupta*, 2013 WL 3784138, at *2 (factoring in defendant's financial condition in awarding maximum penalty); *Rajaratnam*, 822 F. Supp. 2d at 434 (noting that the civil penalty should be designed to deprive

the defendant "of a material part of his fortune"). *Gupta* and *Rajaratnam* are also distinguishable in that they did not involve cooperating witnesses who testified to key elements that ultimately led to a government verdict.

The SEC is well aware from a prior sworn financial disclosure that Mr. Conradt does not have the means to pay even a modest one-time penalty, let alone the $2,940,687 the SEC seeks. Mr. Conradt has a ***negative*** net worth of several hundred thousand dollars. His future prospects for earning income are equally dim. Mr. Conradt is currently unemployed while he attempts to start his own business and has had difficulty retaining employment. Mr. Conradt is not a multi-millionaire, and despite his age, there is little chance absent an unexpected and highly unlikely windfall that he will ever earn sufficient money to satisfy such a judgment. There is little deterrent effect from a judgment that will never be collected. Instead, Mr. Conradt will be dogged for years for something he admitted to and took responsibility for. The damage to his reputation, the loss of his career, the near financial ruin—is sufficient to deter any young broker from making the same mistake Mr. Conradt has made.

2. The Cases Cited by the SEC Do Not Support a Treble Penalty

The SEC cites a handful of cases to support its contention that Mr. Conradt's "untruthful testimony and feigned lack of recollection supports a maximum penalty." Br. at 12. A review of the facts of these cases demonstrates precisely why a maximum penalty is not appropriate in this situation. In *SEC v. Drucker*, 528 F. Supp. 2d 450, 452-54 (S.D.N.Y. 2007), the court declined to impose the maximum penalty despite the defendant's *perjury* at trial. Mr. Conradt testified truthfully and should not face a steeper penalty than a defendant who committed perjury.[15]

[15] While the Court may have expressed some skepticism during Mr. Conradt's trial testimony, it did not rise to the level of what concerned the Court in connection with Payton's testimony. Op. and Order, *SEC v. Payton, et al.*, No.14-CV-4644 (JSR) (S.D.N.Y. Apr. 4, 2016) Dkt. 164 at 15-16 (noting the contradiction between Payton's criminal allocution and trial testimony).

In *SEC v. Anticevic*, the SEC was seeking a default judgment as the defendant had absconded with the profits of his insider trading while on supervised release and had not responded to any of the pending motions. 2010 WL 2077196, at *8. While Mr. Conradt's conduct is not above reproach, none of those aggravating factors are present here. Mr. Conradt did not solicit the information on which he traded and the profits from his trade were small. *But see id.* Instead of fleeing, Mr. Conradt pleaded guilty and accepted responsibility in the dismissed criminal case. He has consistently made himself available for interviews, depositions and trial, all of which greatly assisted the SEC in obtaining a verdict against Payton and Durant. *See Haligiannis*, 470 F. Supp. 2d at 386 (imposing maximum penalty on defendant in part due to fact that defendant was a fugitive who "fled with substantial profits from his fraudulent conduct.").

Finally, in *SEC v. Contorinis*, the court declined the SEC's request for a maximum penalty of $21,781,812, imposing instead a more modest penalty of $1 million despite the defendant's "substantial[]" profits and "willingness to repeatedly exploit misappropriated information," noting that the much reduced penalty amount was still "sufficiently substantial to promote the general and specific deterrence contemplated in the Exchange Act." 2012 WL 512626, at *6. There is similarly no need for an exorbitant penalty to deter Mr. Conradt who has already suffered for his actions.

IV. CONCLUSION

For the reasons herein, the SEC's Motion for Final Judgment in the amount of $2,940,687 should be denied, and the Court should impose a one-time penalty of $2,533, an amount equal to the personal profits Mr. Conradt made and consistent with the Cooperation Agreement he signed with the SEC.

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New York, New York

Respectfully submitted,

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