No. 20-________

In the
Supreme Court of the United States

EDWARD J. KOSINSKI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

ALEXANDRA A.E. SHAPIRO
Counsel of Record
DANIEL J. O'NEILL
SHAPIRO ARATO BACH LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880
ashapiro@shapiroarato.com

Counsel for Petitioner

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QUESTIONS PRESENTED

1. Whether a simple agreement to keep information confidential by itself can establish the fiduciary or similar relationship of "trust and confidence" required to establish criminal insider-trading fraud.

2. Whether the Second Circuit's open-ended, case-by-case approach to the duty element of insider-trading fraud is unconstitutionally vague because it fails to give fair warning of when a relationship between two parties involves the "trust and confidence" necessary to proscribe trading.

3. Whether, if a jury was erroneously instructed on an element of a criminal offense, a reviewing court may affirm the conviction based upon a theory of guilt that the jury never considered or found proven beyond a reasonable doubt.

PARTIES TO THE PROCEEDING

Edward J. Kosinski is the petitioner here and was the defendant-appellant in the court of appeals. The United States of America is the respondent here and was the appellee in the court of appeals.

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

United States v. Kosinski, No. 16-cr-148 (VLB), United States District Court for the District of Connecticut. Judgment entered October 12, 2018.

United States v. Kosinski, No. 18-3065, United States Court of Appeals for the Second Circuit. Judgment entered September 22, 2020.

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INTRODUCTION

No federal criminal statute expressly proscribes "insider trading." Instead, such conduct is typically prosecuted under the anti-fraud provisions in Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b–5. But this Court established long ago that these provisions create no general duty to refrain from trading on material nonpublic information. Rather, to prove a violation the government must establish that the trades were *fraudulent*—and fraud requires a breach of a duty arising from a specific relationship between two parties. This Court has repeatedly held that only a fiduciary or similar relationship of "trust and confidence" creates such a duty.

These clear and firmly established principles have marked the line between lawful and unlawful trading since this Court's decision in *Chiarella v. United States*, 445 U.S. 222 (1980). For over four decades, investors and market professionals have relied on this established doctrine. But the Second Circuit defied this Court's rulings, and in three distinct ways. Unless this Court intervenes, the Second Circuit's decision threatens to upend and muddy insider-trading law and create uncertainty for investors, market professionals, and the securities markets.

First, the decision below would criminalize conduct that this Court has held is not fraudulent under §10(b). This Court has repeatedly and clearly defined the relationship required for criminal fraud: It must be a fiduciary or similar relationship of "*trust and* confidence." This Court has never suggested that an agreement between arm's-length counterparties to maintain information in confidence, without more, suffices. Yet the Second Circuit held that a mere

promise of "confidentiality" establishes the requisite duty, even without any other indicia of fiduciary status or trust. That ruling is irreconcilable with this Court's decisions, conflicts with the law of another circuit, and significantly expands the insider-trading crime.

Second, the Second Circuit failed to articulate any clear, definitive standard for determining when the requisite fiduciary or fiduciary-like relationship exists. The court instead served up a smorgasbord of competing formulations that "authorize and even encourage arbitrary and discriminatory enforcement" by inviting prosecutors to pick and choose whichever options best suit their case. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). This post hoc, case-by-case approach deprives investors of any fair notice as to when they can trade on information they have obtained. And some of the factors the court identified—like two parties' need to remain "independent"—actually suggest the *absence* of fiduciary-like duties. The result is an incoherent and indeterminate jumble in an area of the law that demands clarity and certainty to ensure the smooth operation of the securities markets.

Third, the government secured this conviction based on its theory that an agreement to keep information confidential necessarily makes trading on that information fraudulent. The district court instructed the jury to find the "duty of trust and confidence" element satisfied if there was proof of a confidentiality agreement, and to look no further. Yet the Second Circuit held that any error in this erroneous instruction was harmless because *the court of appeals* believed the facts supported a fiduciary-like

relationship under *other* theories that it hypothesized could apply. None of those other theories was ever submitted to, or considered by, the jury; the only finding the jury necessarily made under the erroneous instruction was that there was a fiduciary or similar duty because of a confidentiality agreement. The Second Circuit's holding therefore violates the defendant's Sixth Amendment right to a jury trial and conflicts with this Court's rulings on a basic principle of appellate review: A criminal conviction tainted by instructional error cannot be affirmed on a basis that the jury never considered or found proven beyond a reasonable doubt.

The questions presented are exceedingly important. The Second Circuit's malleable conception of the duty of trust and confidence provides no ascertainable standard. It invites enterprising prosecutors to rewrite myriad relationships that the parties never contemplated would impose any fiduciary or similar duties. Left unchecked, the decision below is likely to impair the efficient functioning of the securities markets, which require insider-trading rules to be clear and certain. Most insider-trading prosecutions are (or could be) filed in the Second Circuit, as nearly every securities transaction touches New York. Other circuits often defer to the Second Circuit because of its expertise in securities law. *See Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 260 (2010). Second Circuit rulings in this area thus tend to have nationwide influence, making this Court's intervention critical.

The petition for certiorari should be granted.

OPINIONS BELOW

The Second Circuit's opinion is reported at 976 F.3d 135 and reprinted at Pet.App.1a-40a. The district court's opinion denying Petitioner's motion to dismiss the indictment is not reported but is available at 2017 WL 3527694 and reprinted at Pet.App.41a-56a, and its opinion denying Petitioner's motions for a judgment of acquittal and for a new trial likewise is not reported but is available at 2018 WL 9988663 and reprinted at Pet.App.57a-72a.

JURISDICTION

The Second Circuit issued its opinion on September 22, 2020. On March 19, 2020, this Court issued an order extending the time to file petitions for certiorari to 150 days, making the deadline for this petition February 19, 2021. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reproduced at Pet.App.73a-75a.

STATEMENT OF THE CASE

A. Factual Background

Dr. Edward J. Kosinski was one of New England's leading cardiologists and treated patients in southern Connecticut for over 40 years. He was highly regarded for his clinical expertise and participated in several drug trials over the course of his career. This case relates to securities trades Kosinski placed in 2014 while working on a clinical trial for a cardiovascular drug that Regado Biosciences, Inc. ("Regado"), a

publicly-traded biopharmaceutical company, was developing.

Kosinski was not a Regado employee, nor did he have any direct interactions with Regado or its personnel. Instead, Kosinski served as a "principal investigator" in Regado's clinical trial without having to depart his daily cardiology practice. He administered Regado's drug to those of his patients who elected to participate in the study and dutifully recorded their responses to the medication. But his primary duty was to treat and care for his patients, not to serve Regado.

Kosinski's responsibilities during the clinical trial were defined in a contract he entered with the third party that administered the trial for Regado. The contract described Kosinski as an "independent contractor" and disclaimed any suggestion that he was acting as Regado's agent or fiduciary. It required Kosinski to keep information he learned through the study confidential—which he did—but did not impose any restraints on his use of the information, whether in treating his patients or otherwise.

1. The REG1 Anticoagulation System ("REG1") was Regado's experimental drug therapy to prevent blood clotting in patients undergoing heart procedures. Pet.App.4a-5a. In 2005, to obtain FDA approval for REG1, Regado launched a multi-phase clinical trial which it hoped would demonstrate the drug's safety and efficacy. However, at Phase II three patients experienced serious allergic reactions. C.A.App.91-92. Regado designed its Phase III trial to closely monitor allergic reactions and identify factors that might be contributing to their incidence. C.A.App.93-96.

To manage the Phase III trial, Regado formed a small team that included its own high-level personnel as well as individuals from the Cleveland Clinic Foundation, a research organization that Regado engaged to administer the trial on its behalf. Pet.App.8a n.1. Because of their central role in the trial, members of the trial management team had access to all patient data generated at each clinical site, including details of every adverse event, case reports for every patient, and all other data collected during the trial. C.A.App.109-10, 188-89. Given the obvious sensitivity of this information, Regado expressly prohibited management team members from owning or trading Regado's securities. C.A.App.194-95, 322, 337.

Kosinski was not part of the Phase III trial management team. He served as one of hundreds of principal investigators that interfaced directly with patients, and his involvement was limited to a single clinical site. Pet.App.3a, 5a. The function of an investigator in a clinical trial is to enroll patients in the study, administer the drug to them, and monitor their responses—positive or negative. Pet.App.58a-59a. Principal investigators are not privy to patient data from clinical sites other than their own and thus learn little about the overall trial until that information is made public. C.A.App.186-89. Although such investigators must report their findings to the drug company sponsoring the trial and adhere to the sponsor's protocol, the sponsor's chief interest is in obtaining FDA approval to sell its product. C.A.App.190-91. Investigators like Kosinski, by contrast, are charged with "protecting the rights, safety, and welfare of subjects under the[ir]...care." 21 C.F.R. §312.60. Accordingly, their duty remains "first

and foremost" to their patients, not the drug company. C.A.App.185-91.

2. In June 2013, the Cleveland Clinic Foundation approached Kosinski about serving as a principal investigator in Regado's Phase III trial. To facilitate these discussions, Kosinski was asked to and did sign a Confidential Disclosure Agreement ("CDA"). The CDA permitted him to receive the trial protocol and other confidential information "for the purpose of evaluating [his] interest in participating in [the] clinical trial." Pet.App.5a, 58a. The CDA required Kosinski to keep the information confidential and stated expressly that Kosinski was not to "*use, disclose or exploit* [the] Proprietary Information for [his] own benefit." Pet.App.58a (emphasis added). Kosinski complied with the CDA while it was in effect. As explained below, long before the trades that are at issue in this case, the CDA was superseded by a different agreement. The latter agreement, however, imposed no similar restrictions on Kosinski's use of any confidential information. Pet.App.59a.

In January 2014, Kosinski agreed to participate in the trial as the principal investigator at a hospital site in Bridgeport, Connecticut, and entered a new contract, a Clinical Study and Research Agreement ("CSRA"), with the Cleveland Clinic Foundation. Pet.App.6a, 58a. The CSRA expressly superseded the CDA. Pet.App.21a n.6. The CSRA emphasized Kosinski's independence. It specified that, in his role as a principal investigator, he was "an independent contractor and not an agent, joint venturer, or partner of [Regado]," and that he lacked any authority to legally bind Regado. C.A.App.232. Kosinski agreed to maintain in "strict confidence" all confidential

information that he received in the course of the study. Pet.App.6a. But in sharp contrast to the CDA (and restrictions Regado imposed on the high-level managers running the clinical study), the CSRA contained no restrictions on Kosinski's *use* of Regado's confidential information. It did not directly or indirectly bar him from using that information to trade Regado's securities. Pet.App.59a. The same lawyer drafted both the CSRA and the CDA on Regado's behalf. C.A.App.227, 245.

The CSRA also imposed additional obligations on Kosinski, which were designed to ensure his commitment to patient safety and independence from Regado. For example, principal investigators were required to complete Form FDA 1572, in which they affirmed that they would not administer REG1 to patients without informed consent and would do whatever necessary—even if it meant departing from the trial protocol—"to protect the safety, rights, or welfare of [test] subjects." C.A.App.230, 290. In addition, all principal investigators were required to disclose whether they had a financial interest in Regado that exceeded $50,000. Pet.App.6a, 60a; *see* 21 C.F.R. §§54.2(b), 54.4(a)(3)(iv). But nothing prohibited investigators from trading Regado securities during the trial; investigators were merely obliged to update their disclosure if, as a result of new acquisitions or otherwise, the value of their interest surpassed the specified threshold.

3. Kosinski maintained several brokerage accounts with assets totaling over $11 million. Pet.App.3a. In October 2013, he began purchasing Regado stock. Pet.App.7a. He eventually purchased

40,000 shares worth approximately $210,000. Pet.App.60a.

Kosinski sold his Regado shares on June 30, 2014. Pet.App.8a. The previous afternoon, all principal investigators had received an email from the REG1 trial management team instructing them not to enroll new patients due to recent allergic reactions that had been observed. *Id.* Three days later, Regado issued a press release announcing that its data safety management board ("DSMB") had "initiated an unplanned review of data" and that enrollment was paused. C.A.App.267.[1] Regado's share price dropped by 58%. Pet.App.8a.[2]

On July 31, Kosinski purchased fifty put options. Pet.App.9a. Two days earlier the trial management team had emailed the principal investigators "[i]n accordance with the Good Clinical Practice and scientific national regulatory requirements" to alert them to an anaphylactic reaction that resulted in a patient's death. C.A.App.253-56. The email indicated that the trial was on hold "pending a DSMB assessment." C.A.App.256. On August 25, 2014, Regado issued a press release announcing that the trial was permanently halted because of the "frequency and severity" of allergic reactions, and the next day Regado's share price dropped substantially.

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[1] The DSMB reviews adverse safety-related events and advises the sponsor whether to continue with the drug trial. C.A.App.349.

[2] The amount of losses Kosinski's trades avoided was hotly disputed at sentencing, but the district court adopted the government's figure of $160,000.

Pet.App.9a. Two days later, Kosinski exercised his put options, earning $3,300 in profit. *Id.*

Kosinski had accurately certified at the beginning of the trial that the value of his Regado equity interest was below $50,000. C.A.App.137-39, 298. Although he neglected to amend that statement upon buying additional shares, at the end of the study he received a reminder of that requirement and promptly submitted a new form to Regado, disclosing that his stock holdings had, in fact, exceeded $50,000. C.A.App.302-03.

B. The Indictment and Trial

The government charged Kosinski with two counts of securities fraud in violation of Securities Exchange Act §10(b) and SEC Rule 10b–5, one for the sale of Regado shares in June 2014, and the second for the put options Kosinski purchased and exercised later that summer. Throughout the case—from indictment through post-trial motions—the government acknowledged that it had to prove Kosinski owed Regado a "duty of trust and confidence" and breached that duty by trading. *E.g.*, C.A.App.17-18, 21, 44, 353-56. At each stage, the central disputed issue was whether, as the government asserted, the CSRA's confidentiality provision was in itself sufficient to establish that duty.

For example, the only allegation in the indictment supporting Kosinski's alleged duty was that the CDA and CSRA required Kosinski to "not disclose" but "maintain in strict confidence" all confidential information he received. C.A.App.16. Kosinski moved to dismiss on the ground that the indictment thus failed to allege a fiduciary or fiduciary-like

relationship that would have precluded him from trading Regado securities. The government opposed, contending that "an explicit confidentiality agreement, by its own terms, is sufficient to establish the requisite duty for…insider trading." C.A.App.28-29. The district court adopted the government's arguments and denied the motion. Pet.App.41a-56a.

Trial began on November 13, 2017 and lasted five days. After the government rested, Kosinski moved for a judgment of acquittal, and the district court reserved decision. C.A.App.166-67. Kosinski then called an expert witness who testified about the structure of clinical trials and that a clinical investigator generally has access to patient data only from his own site, which explains why investigator contracts are less restrictive than those binding trial managers. *E.g.*, C.A.App.185-89.

The government's closing arguments focused the jury intently on the CSRA. The prosecutors argued that the contract's use of "strict confidence" connotes something more than "just keep it confidential" and "also means that Dr. Kosinski had a duty of trust and confidence to Regado," and that the jury need not look any further than "a plain reading of just the words on the page of the CSRA" to resolve the duty question. C.A.Govt.App.991, 995, 1065.

The district court's jury instructions fully endorsed this prosecution argument that the confidentiality provision dispositively proved the duty element. In charging that the government had to prove Kosinski owed Regado "a duty of trust and confidence," the court—over Kosinski's objection, *e.g.*, C.A.App.208-10—instructed the jury that a confidentiality

agreement is, without more, sufficient to establish the requisite duty:

> The Government must establish beyond a reasonable doubt that Dr. Kosinski had a duty of trust and confidence to Regado. That means that he was reasonably expected to keep the material information at issue confidential or at least that the relationship between the defendant and Regado reasonably implied such a duty…. *[A] person has a requisite duty of trust and confidence whenever a person agrees to maintain information in confidence.*

Pet.App.78a-79a (emphasis added). Since the confidentiality clause in the CSRA was undisputed and indisputable, the inevitable consequence of this instruction was to direct a finding for the government on the duty of trust and confidence, a critical element of the offense.

The jury returned a guilty verdict on both counts. Pet.App.10a. The district court subsequently denied Kosinski's Rule 29 motion for acquittal and his post-trial motions. Pet.App.57a-72a. The court sentenced Kosinski principally to six months' imprisonment, but granted bail pending appeal. Pet.App.4a.[3]

C. The Second Circuit's Decision

Kosinski's primary contention on appeal was that the CSRA's confidentiality clause could not create the requisite duty of "trust and confidence." As a result, he argued, the evidence on the duty element was legally insufficient to sustain his convictions; the jury instruction was fatally flawed; and at a minimum, he

[3] Kosinski is currently due to surrender on March 31, 2021.

was entitled to a new trial because the flawed instruction told the jury that the government's burden of proving the duty element is satisfied based on a mere confidentiality agreement. The Second Circuit affirmed the conviction in an opinion authored by Judge Korman of the Eastern District of New York (sitting by designation). On the pivotal question in the appeal, the court ruled that a confidentiality agreement by itself can satisfy the duty element.

The Second Circuit concluded that there was sufficient evidence of a "fiduciary-like relationship with Regado" because "Kosinski expressly agreed to keep Regado's information confidential" in the CSRA. Pet.App.17a. The court explained that under two prior Second Circuit decisions—*United States v. Chestman*, 947 F.2d 551 (2d Cir. 1991) (en banc), and *United States v. Falcone*, 257 F.3d 226 (2d Cir. 2001)—such an agreement was all that was needed to establish the requisite duty. The court stated that the Second Circuit "has held that…an 'explicit acceptance of a duty of confidentiality' is itself sufficient to establish the necessary fiduciary duty of trust and confidence." Pet.App.19a (quoting *Falcone*, 257 F.3d at 234, and citing *Chestman*, 947 F.2d at 571); *see also* Pet.App.28a.

The court went on to introduce a compilation of additional theories, tests, and factors that had never been presented to or considered by the jury. Under this amalgam of theoretical bases for creating the requisite duty, the court purported to have *itself* found a fiduciary-like relationship. Additionally, in finding any error harmless, the court ignored that the jury's finding could not possibly have been based on any one of those theories, tests, or factors, because the jury had

been instructed to look no further than the confidentiality agreement to find proof of the duty element.

For instance, the court concluded that Kosinski qualified as a "temporary insider" of Regado, Pet.App.12a-17a, invoking a footnote in *Dirks v. SEC*, 463 U.S. 646, 655 n.14 (1983). But this Court has not developed the temporary-insider theory in any subsequent case, and, as the Second Circuit acknowledged, the theory relates to *classical* insider-trading fraud, not the misappropriation doctrine under which the government prosecuted this case. Pet.App.14a-15a.[4] That is undoubtedly why the government never argued—not to the jury, not to the district court, not to the court of appeals—that Kosinski qualified as a "temporary insider." The Second Circuit injected that theory entirely on its own.

The court also posited various other alternative grounds for finding Kosinski bound by "fiduciary-like" duties to Regado; none of these had been presented to the jury either. Pet.App.17a-30a. For example, the court found that Regado "entrusted" Kosinski to properly administer REG1 to patients and that Kosinski "serv[ed]…the interests" of Regado to the extent his "experience and skill" made FDA approval more likely. Pet.App.17a-18a.

In addition, the court found Kosinski's *independence* from Regado indicative of a fiduciary

[4] The classical theory concerns the duty officers, directors, and other corporate "insiders" owe to the shareholders of the company that issued the securities. *United States v. O'Hagan*, 521 U.S. 642, 651-52 (1997). "Temporary insiders" are "attorneys, accountants, consultants, and others who temporarily become fiduciaries of a corporation." *Id.* at 652.

relationship. It noted that Kosinski's "independent assessment [was] required for FDA approval," that "Regado relied upon Kosinski's professional independence," and that Kosinski served Regado's interests by *not* being "aligned" with the company. Pet.App.18a-20a, 24a. At the same time, the court refused to afford any weight to the CSRA's clear statement that Kosinski was "an independent contractor and not an agent" of Regado. Doing so, the court claimed, "would permit unlawful insider trading"; it even suggested that the clause could be struck as against public policy. Pet.App.21a-22a & n.7.

The Second Circuit also endorsed multiple varying formulations of fiduciary duty, including two that were quoted in *Chestman*, four that describe New York State law, and yet another from a test the Second Circuit had previously applied in various fraud cases. Pet.App.23a-24a, 27a-29a. But the Second Circuit pointedly refused to articulate any "exclusive test of fiduciary status" or any characterization of "the proof necessary to sustain a conviction under the misappropriation theory." Pet.App.29a. Instead, the court announced that there are many "appropriate standard[s] from which the jury could find the requisite fiduciary relationship." Pet.App.24a-25a.

The Second Circuit also refused to directly address whether the jury instruction misstated the law. Instead, the court asserted that "any error in the instruction was harmless" because "the trial evidence overwhelmingly established that Kosinski had a fiduciary or fiduciary-like duty to Regado," referring back to its smorgasbord of alternative theories that the jury was never afforded any opportunity to

consider, much less find proven beyond a reasonable doubt. Pet.App.30a.

REASONS FOR GRANTING CERTIORARI

This Court has repeatedly held that §10(b) and Rule 10b–5 do not create any "general duty between all participants in market transactions to forgo actions based on material, nonpublic information," nor entitle all investors to equal information. *United States v. O'Hagan*, 521 U.S. 642, 661 (1997) (quoting *Chiarella*, 445 U.S. at 233). "Section 10(b) is aptly described as a catchall provision, but what it catches must be *fraud*." *Chiarella*, 445 U.S. at 234-35 (emphasis added). Under this Court's precedents, only trading that violates a fiduciary or similar duty of "trust and confidence" is "deceptive" behavior that contravenes §10(b). The breach of that duty is what divides lawful from unlawful trading.

The decision below transgresses these clear principles, which market participants have relied upon for four decades, in three significant ways that cry out for this Court's intervention.

I. Permitting a simple confidentiality obligation to substitute for the requisite duty of "trust and confidence" would vastly expand the scope of the insider-trading offense and ensnare conduct that is not fraudulent. This Court has repeatedly held that "trust" and "loyalty" are essential to creating the fiduciary or similar duty necessary to expose a person to criminal fraud liability for trading based on confidential information. The Second Circuit's ruling contravenes this Court's decisions by excising the concept of "trust" from the duty of "trust *and*

confidence," and is at odds with the Fifth Circuit on this important issue.

II. The Second Circuit's amorphous conception of the duty element fails to articulate any constitutionally "ascertainable standard of guilt." *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921). Due process and separation-of-powers require clear definitions for each element of an offense, and securities law particularly "demands certainty and predictability." *Pinter v. Dahl*, 486 U.S. 622, 654 n.29 (1988). Clear lines are needed in this area to avoid "unpredictable results" and "over-deterring activities related to lawful securities sales." *Id.* But the Second Circuit consciously refused to specify any "exclusive test" or "proof necessary" to establish fiduciary status. Its unwieldy assortment of theories, tests, and factors to be applied ad hoc, post hoc, and case-by-case makes it impossible for ordinary citizens to determine, ex ante, whether they can legally trade. This creates uncertainty and undermines the efficient operation of the nation's securities markets, particularly in light of the Second Circuit's national influence on the law in this area.

III. The Second Circuit's method of harmless-error review transgresses the Sixth Amendment and this Court's precedents. A reviewing court cannot ignore an instructional error on which the jury's verdict necessarily rests by interposing its own notions of how the case should have been prosecuted or the evidence presented. This Court has repeatedly held that appellate courts may not affirm a conviction on any theory that the jury did not get to consider for itself. *See*, *e.g.*, *McCormick v. United States*, 500 U.S. 257, 269-70 (1991). It should grant certiorari to enforce

that cardinal principle, which is constitutionally-based and of critical importance in numerous criminal appeals.

I. The Second Circuit's Ruling That A Confidentiality Agreement By Itself Establishes A Duty Of "Trust And Confidence" Warrants This Court's Review

1. Section 10(b) does not expressly address "insider trading." It prohibits "deceptive" conduct "in connection with the purchase or sale of any security." 15 U.S.C. §78j(b); *see* 17 C.F.R. §240.10b–5 (making it unlawful, *inter alia*, to employ a "scheme…to defraud...in connection with the purchase or sale of any security"). Accordingly, this Court has repeatedly held that §10(b) and Rule 10b–5 only prohibit *fraudulent* trading. The statute creates "no 'general duty'" to refrain from trading "'based on material, nonpublic information.'" *O'Hagan*, 521 U.S. at 661 (quoting *Chiarella*, 445 U.S. at 233).

In *Chiarella*, the Court explained that "not every instance of financial unfairness constitutes *fraudulent* activity under §10(b)." 445 U.S. at 232 (emphasis added). Fraud requires a misrepresentation or omission, but insider trading typically involves no misrepresentations, and silence cannot be fraudulent absent "a duty to speak." *Id.* at 235. In the context of securities trading that duty—the duty to disclose the information at issue, or else abstain from trading altogether—is "extraordinary." *Dirks*, 463 U.S. at 657. It arises only "from a specific relationship between two parties," not "the mere possession of nonpublic market information." *Chiarella*, 445 U.S. at 233, 235; *see also Dirks*, 463 U.S. at 654-59.

Moreover, for four decades this Court has insisted that this duty to disclose or refrain from trading only arises from a fiduciary or similar relationship of "trust and confidence." *Chiarella*, 445 U.S. at 230; *see also id.* at 232 (no duty without "trust and confidence"). In *Chiarella*, the Court held that corporate insiders violate §10(b) by trading on inside information without first publicly disclosing the information, because doing so breaches their "fiduciary or other similar relation of trust and confidence" to the corporation's shareholders (the "classical theory"). *Id.* at 228 (quotation marks omitted); *see also Dirks*, 463 U.S. at 654 (the duty arises from "trust and confidence" and "the existence of a fiduciary relationship"). *O'Hagan* extended this principle to corporate outsiders under the "misappropriation theory." That doctrine holds that an individual is prohibited from trading on material nonpublic information if it was entrusted to him by someone to whom he owes a fiduciary or similar "duty of loyalty and confidentiality." 521 U.S. at 652. The Court reaffirmed the "trust and confidence" requirement just five years ago in *Salman v. United States*, 137 S. Ct. 420 (2016). There, the Court reiterated that §10(b) and Rule 10b–5 "prohibit undisclosed trading on inside corporate information by individuals who are under a *duty of trust and confidence* that prohibits them from secretly using such information for their personal advantage." *Id.* at 423 (emphasis added).

Yet the Second Circuit held that a mere agreement to keep information confidential—even if the parties are at arm's length and have no relationship of "trust"—is sufficient to trigger a duty to refrain from trading on that information. That decision is irreconcilable with this Court's decisions. It squarely

conflicts with this Court's repeated insistence that the duty element requires proof of "trust *and* confidence" and effectively excises the words "trust" and "and" from the United States Reports.

2. The "trust" component of "trust and confidence" is integral to the misappropriation theory of insider-trading fraud on which this prosecution was premised. It is the duty of loyalty—and not that of confidentiality—which obliges a fiduciary to refrain from using his principal's information to trade for his own benefit. As this Court explained in *O'Hagan*, the very premise of the misappropriation doctrine is that "[a] *fiduciary* who 'pretends *loyalty* to the principal while secretly converting the principal's information for personal gain' 'dupes' or defrauds the principal." 521 U.S. at 653-54 (quoting U.S. Br. at 17; emphasis added). The fiduciary's duty of loyalty binds him to use information the principal has entrusted to him to benefit only the principal, not himself. The "deception" manifests in the fiduciary having "feign[ed] *fidelity* to the source of information"; accordingly, "there is no 'deceptive device' and thus no §10(b) violation" "if the fiduciary discloses to the source that he plans to trade." *Id.* at 655 (emphasis added). It follows that an individual who owes only a duty of confidentiality and faithfully keeps the information to himself—whether or not he uses it to trade—neither breaks any promise to the source nor has anything to disclose. Absent a duty of trust, undisclosed trading is not "deceptive" or "fraudulent" and thus cannot violate §10(b) and Rule 10b–5.

That is why the controlling cases use conjunctive, not disjunctive, language to describe the duty: It is one of "trust *and* confidence," not "trust *or* confidence."

Allowing "confidence" alone to establish a duty—as the Second Circuit did—would significantly broaden the reach of §10(b) to arm's-length relationships that neither Congress nor this Court has ever suggested create any duty to refrain from trading. Moreover, such an expansive reading raises a grave threat to individual liberty because "neither the legislative history nor the statute itself affords specific guidance" about when insider trading, which involves no misstatement, constitutes fraud. *Chiarella*, 445 U.S. at 226, 233; *accord Dirks*, 463 U.S. at 657-58 & n.16. *See also Dowling v. United States*, 473 U.S. 207, 227 (1985) (courts may not authorize a statute's "use in wide expanses of the law which Congress has evidenced no intention to enter by way of criminal sanction"). Accordingly, this Court has relied on principles of common-law fraud, in which a duty to disclose or refrain from trading only arises from one discrete type of relationship—namely, a relationship of "trust and confidence." *Chiarella*, 445 U.S. at 227-28. Yet the Second Circuit has expanded the category of relationships that qualify. Left undisturbed, its decision eviscerates the critical limitation this Court placed on when relationships create the duty necessary to trigger §10(b) liability for insider-trading fraud.

3. Under the Second Circuit's decision, parties in arm's-length relationships that do not involve fiduciary-like "trust and confidence" will now be subject to criminal §10(b) liability for the first time. "Trust" connotes a solemn duty, requiring obeyance of "the punctilio of an honor the most sensitive." *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928) (Cardozo, Ch. J.). This Court endorsed the misappropriation fraud theory in *O'Hagan* because

the defendant there, a partner at a law firm, indisputably owed a duty to his firm and its clients not to profit from confidential client information. 521 U.S. at 653. A similar duty clearly attaches to the relationship between a reporter and the newspaper that employs him with respect to the paper's confidential, potentially market-moving news before it is published. *See Carpenter v. United States*, 484 U.S. 19, 22-23 (1987); *see also Skilling v. United States*, 561 U.S. 358, 407 n.41 (2010) (identifying "public official-public," "employee-employer," and "union official-union members" as clear fiduciary relationships).

Treating any arrangement that includes an understanding of confidentiality as a fiduciary-like relationship of trust and confidence would have troubling consequences. Under the Second Circuit's holding, for example, a pedestrian who receives a stock tip from a benevolent passerby with the condition to keep it "under wraps" risks a criminal conviction and years in prison if he decides to trade—despite the passerby's clear intent and the total absence of any relationship between them. Or imagine a fledgling business is approached by a large corporation about a potential acquisition and required to enter a non-disclosure agreement. Has the smaller company unwittingly assumed uncontracted-for fiduciary-like responsibilities to its competitor even after the negotiations break down? Would a country-club caddy have to maintain a list of "no trade" stocks representing the corporations of every member who "just between us guys" let loose about work over a round of golf?

These hypotheticals demonstrate that excising the notion of "trust" from the duty of "trust and

confidence" vastly expands the category of relationships that traditionally created the duty to speak necessary to establish insider-trading fraud. The Second Circuit's decision thus verges on creating precisely the "parity-of-information" rule this Court has repeatedly rejected. *See Dirks*, 463 U.S. at 656-57; *Chiarella*, 445 U.S. at 233. Indeed, the court below transparently acknowledged that it sought to create such a rule. For instance, it opined that Kosinski was guilty because he "trad[ed] on nonpublic inside information that was not available to those upon whom he unloaded his shares." Pet.App.11a; *see also*, *e.g.*, Pet.App.22a-23a n.7. But that is precisely the theory this Court rejected in *Chiarella*, when it held: "No duty could arise from petitioner's relationship with" his trading counterparties, because "petitioner had no prior dealings with them. He was not their agent, he was not a fiduciary, he was not a person in whom [these trading counterparties] had placed their trust and confidence. He was, in fact, a complete stranger who dealt with [them] only through impersonal market transactions." 445 U.S. at 232-233. The same is true of Kosinski. Indeed, the government's theory was that he owed a duty under the misappropriation doctrine "to the source of information"—Regado—not counterparties to his securities transactions. *O'Hagan*, 521 U.S. at 655.

4. The CSRA specified that it "embodie[d] the entire understanding" between Kosinski and Regado and "superseded" "any prior or contemporaneous negotiations, either oral or written." Pet.App.21a n.6. Had Regado intended to prohibit Kosinski from trading its securities during the trial period, it very easily could have said so in the agreement, just as it did in the superseded CDA. But sophisticated parties

have the right to determine for themselves what terms to include, or not, in a business agreement. Where, as here, two parties stand at arm's length, and the only possible source of a duty is the contract between them, it defies logic to say that the contract created a duty to refrain from trading if trading would not breach the contract. Without such a restriction—or any provision suggesting a duty of trust and loyalty—Kosinski's only obligation under the CSRA was confidentiality, a duty with which he fully complied.

The Second Circuit insinuated into the CSRA's confidentiality clause a far more expansive duty than the one the parties had specified. Its decision reinforces and expands upon the Second Circuit's prior pronouncements that "explicit acceptance of a duty of confidentiality" is sufficient by itself to establish the requisite duty of trust and confidence. *Falcone*, 257 F.3d at 234; *see also United States v. Afriyie*, 929 F.3d 63, 68 (2d Cir. 2019) ("An express agreement of confidentiality may establish fiduciary status."); *Chestman*, 947 F.2d at 571.

What is more, the Second Circuit's decision to elevate confidentiality *simpliciter* to fiduciary or similar status is at odds with how the Fifth Circuit approaches the trust-and-confidence element in §10(b) cases. The issue arose in the Fifth Circuit in the well-publicized case against Mark Cuban. There, the SEC alleged that the CEO of a company in which Cuban invested obtained his commitment to keep certain information confidential and then disclosed a new development that would dilute the value of Cuban's holdings. Cuban sold all of his shares, and the SEC brought an enforcement action alleging violations of §10(b) and Rule 10b–5. The district court granted

Cuban's motion to dismiss. Relying on *O'Hagan* and *Chiarella*, it held that to create the requisite duty, an agreement "must consist of more than an express or implied promise merely to keep information confidential. It must also impose on the party who receives the information the legal duty to refrain from trading on or otherwise using the information for personal gain." *SEC v. Cuban*, 634 F. Supp. 2d 713, 725 (N.D. Tex. 2009). On appeal, the Fifth Circuit adopted the district court's legal analysis, but it reversed because it read the complaint to allege that additional duty. The Fifth Circuit concluded that the SEC had adequately alleged that the agreement between Cuban and the CEO "was more than a simple confidentiality agreement," but instead included the essential understanding that Cuban "was not to trade." 620 F.3d 551, 557 (5th Cir. 2010). *See also Jacked Up, L.L.C. v. Sara Lee Corp.*, 854 F.3d 797, 809 (5th Cir. 2017) (non-disclosure agreements and "other agreements requiring confidentiality" "generally do not create fiduciary relationships").

The CSRA was just "a simple confidentiality agreement." Kosinski was independent and had no fiduciary or similar duty to Regado. He could not have been prosecuted in the Fifth Circuit for his Regado trades. In light of the importance of the duty element in insider-trading fraud, the Second Circuit's defiance of this Court's precedents narrowing that element to traditional relationships of "trust and confidence," and the conflict between its decision and that of the Fifth Circuit, this Court's intervention is critical.

II. The Second Circuit's Standardless Approach To The Duty Element Is Unconstitutionally Vague And Injects Uncertainty Into The Securities Markets

1. The Fifth Amendment's Due Process Clause prevents the government from "tak[ing] away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983)). "The dividing line between unlawful…and lawful action cannot be left to conjecture." *M. Kraus & Bros. v. United States*, 327 U.S. 614, 621 (1946). This void-for-vagueness doctrine also enforces the constitutional separation of powers by ensuring that criminal laws do not "hand off the legislator's responsibility for defining criminal behavior to unelected prosecutors and judges." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019). It "require[s] that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not" in terms that are clear, certain, and objective. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018) (plurality opinion).

As discussed, the crime of insider trading poses particular challenges because §10(b) itself says nothing about insider trading, and for decades the offense has developed entirely in the courts. *See* John C. Coffee, Jr., *The 'Tip' of the Bunny's Nose: Sniffing Out Crime Where None Exists*, LEGAL TIMES, Sept. 25, 1989, at 34, 35 ("law of insider trading is developing through after-the-fact judicial decision-making," which "inevitably leads to the criminal law's

overexpansion" and violates separation of powers). While that ship might already have sailed, courts must nevertheless employ "restraint…[and] narrow interpretation," *Dowling*, 473 U.S. at 213 (quotation marks omitted), and any ambiguity concerning the scope of the offense must be "resolved in favor of lenity," *Cleveland v. United States*, 531 U.S. 12, 25 (2000) (quotation marks omitted); *see also*, *e.g.*, *Yates v. United States*, 574 U.S. 528, 547-48 (2015).

Consistent with those principles, this Court has rejected government efforts to expand the nature of the duty that defines the scope of insider-trading fraud. *See Salman*, 137 S. Ct. at 426-27 ("adher[ing] to *Dirks*" and its personal-benefit requirement, instead of the "noncorporate purpose" test proposed by the government); *Chiarella*, 445 U.S. at 233 (refusing to recognize a broader duty than "trust and confidence"). And the Court has deemed it "essential" that caselaw articulate clear and objective "guiding principle[s]" for market participants "whose daily activities must be limited and instructed" by the insider-trading rules. *Dirks*, 463 U.S. at 664.

2. The Second Circuit did the opposite. It proclaimed that there is no "exclusive test of fiduciary status" nor any particular "proof necessary to sustain a conviction." Pet.App.29a. The court instead endorsed a mélange of competing and often counterintuitive theories, tests, and factors and provided zero guidance as to how each should be weighed against the other. The decision thus hands prosecutors the flexibility post hoc to bend the law to the facts and makes it impossible for anyone seeking to invest in the securities markets to confidently

identify, ex ante, the line demarcating lawful from unlawful trading.

Certain factors that the Second Circuit emphasized also make no sense. *O'Hagan* approved the misappropriation doctrine for situations in which a defendant has sworn "fidelity to the source of the information" and stands bound by a "duty of loyalty." 521 U.S. at 655. The Second Circuit turned that reasoning on its head by holding that Kosinski had the requisite relationship because he was duty-bound to be "independent" of Regado and could *not* "align[]" his interests with the company's. Pet.App.18a-20a, 24a. But alignment of interests is the essence of what it means to be a fiduciary, since "it is elemental that a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect." *Birnbaum v. Birnbaum*, 73 N.Y.2d 461, 466 (1989).

Many of the other factors the Second Circuit discussed—and the way it applied them—could apply just as easily to numerous non-fiduciary relationships. For example, a CEO travelling crosstown to finalize a major deal with another company might select a car service based on its "reputation" and "experience and skill," exactly the reasons the court of appeals believed Regado selected Kosinski. Pet.App.17a-18a. Certainly, the CEO "entrust[s]" the driving to the driver and expects him to be discreet while she takes a conference call from the back seat. *Id.* After reading the Second Circuit's decision, the driver very well might wonder if that 10-minute car ride had transformed him into the CEO's fiduciary, with all the attendant duties and responsibilities that come with such a role. And, had the driver deduced that there

was a deal in the works and bought a few shares in the CEO's company, he would have every reason to fear criminal liability for having "defrauded" the CEO in breach of his newfound exalted status.

The Second Circuit's decision fails to articulate any clear lines defining this critical element of the offense, which can convert otherwise lawful securities trading into a federal crime. The Second Circuit's standardless "test" makes it impossible for a defendant to know the dispositive facts that "separat[e] legal innocence from wrongful conduct." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994); *see Staples v. United States*, 511 U.S. 600, 605 (1994) (scienter generally "require[s] that the defendant know the facts that make his conduct illegal"). Indeed, the decision exemplifies the vagueness problems that inhere when criminal liability turns on the presence or absence of fiduciary status, let alone when any "fiduciary-*like*" relationship will do.

This Court dealt with a similar issue eleven years ago in *Skilling* by insisting that "duty" should bear its traditional, narrow meaning when it comes to the federal "honest services fraud" statute. That statute, like the securities fraud provisions at issue here, requires the government to prove a breach of a fiduciary or similar duty of trust and confidence. Justice Scalia argued that the statute was unconstitutionally vague, in part because "[t]he indefiniteness" of the fiduciary duty element taints the offense with a "fundamental indeterminacy." *Skilling*, 561 U.S. at 419, 421 (concurring in judgment). He observed that lower courts were all over the map when it comes to fiduciary duties,

discerning such relationships in a plethora of circumstances that lack any clear unifying thread; the courts, he noted, were even divided over "the *source* of the fiduciary obligation—whether it must be positive state or federal law." *Id.* at 417. Tying criminal liability to fiduciary duty, he opined, "provides no 'ascertainable standard of guilt.'" *Id.* at 416 (quoting *L. Cohen Grocery Co.*, 255 U.S. at 89).

The *Skilling* majority adopted a narrow construction of the statute to avoid a due process problem. It responded to Justice Scalia's concerns by pointing out that it had cabined the offense to situations in which "[t]he existence of a fiduciary relationship, under any definition of that term, [is] usually beyond dispute." *Id.* at 407 n.41. The Court then provided, as examples, the quintessentially fiduciary relationships that exist between public officials and their constituents, employees and their employers, and union officials and their membership. *Id.*

If insider-trading fraud is likewise confined to cases in which the existence of a fiduciary or fiduciary-like duty is "beyond dispute," there would be no vagueness problem. But the Second Circuit *expanded* the duty (and the crime) to reach an indeterminate and boundless range of relationships. Its decision lays the groundwork for different cases to be judged according to different tests and cannot even identify a single body of law that should govern.

Given the patchwork of competing and occasionally contradictory theories, tests, and factors in the Second Circuit's decision, it now becomes impossible for anyone—or anyone's counsel—to reliably determine whether a given relationship does, or does not, expose

her to prison under §10(b). The Second Circuit's standardless approach creates confusion in an exceptionally important area that demands clarity and predictability. This Court's intervention is urgently needed, particularly because of the Second Circuit's nationwide influence on securities law.

III. The Harmless-Error Ruling Defies This Court's Constitutionally-Based Teachings On Appellate Review Of Criminal Convictions

A trial court's failure to properly instruct a jury on an element of the offense is a constitutional error that deprives the defendant of his Sixth Amendment right to have the jury find each element beyond a reasonable doubt. *See Neder v. United States*, 527 U.S. 1, 12 (1999). In assessing whether such an error can be overlooked as "harmless," a reviewing court must inquire "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). "That must be so," this Court explained, "because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee." *Id.*

In declaring any instructional error on the duty element harmless, the Second Circuit at once abdicated its responsibility and dramatically overstepped its proper role. The court found harmless error without conducting any harmless-error review at all. Instead, it simply repurposed its *sufficiency* findings under its own various alternative theories of

fiduciary duty. But the two analyses are fundamentally distinct. Sufficiency review asks whether the government adduced enough evidence from which a reasonable jury *could* find a defendant guilty beyond a reasonable doubt. *See Musacchio v. United States*, 136 S. Ct. 709, 715 (2016). Harmless-error review, by contrast, requires the government to prove "'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Neder*, 527 U.S. at 15 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). The Second Circuit's decision inexcusably conflates the two.

Had it conducted a proper inquiry, the court could not have concluded the instructional error was harmless. The jury was instructed on one theory and one theory only: that Kosinski owed Regado a duty of trust and confidence if, and only if, he had "agree[d] to maintain information in confidence." Pet.App.78a-79a. As charged, the jury was presented with no path to convict *except* by following the confidentiality instruction, and so the instruction necessarily "contribute[d] to the verdict obtained." *See Neder*, 527 U.S. at 15. If the instruction recited an incorrect statement of law, therefore, it was clearly "possible" that the jury "convicted [Kosinski] for conduct that is not unlawful," and the error was by definition *not* harmless. *McDonnell v. United States*, 136 S. Ct. 2355, 2375 (2016); s*ee Stromberg v. People of State of Cal.*, 283 U.S. 359, 369-70 (1931) (conviction that may have rested "exclusively" upon an invalid theory "must be set aside"); *see also Chiarella*, 445 US at 237 n.21 ("We may not uphold a criminal conviction if it is impossible to ascertain whether the defendant has been punished for noncriminal conduct."). Indeed, as long as "the defendant contested the [erroneously

charged] element and raised evidence sufficient to support a contrary finding"—as Kosinski did here—a reviewing court "cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error…[and] should not find the error harmless." *Neder*, 527 U.S. at 19.[5]

But the Second Circuit sidestepped the proper harmless-error analysis entirely. Rather than evaluating the jury's *actual* verdict, the court empaneled itself in a hypothetical jury box and sustained the convictions using *its own* factual findings relating to theories of fiduciary duty that Kosinski's jury never had the opportunity to consider.

That ruling squarely conflicts with this Court's decisions. This Court has long held that an appellate court "cannot affirm a criminal conviction on the basis of a theory not presented to the jury." *Chiarella*, 445 U.S. at 236; *see McNally v. United States*, 483 U.S. 350, 361 (1987) (court cannot affirm on a basis for which "there was nothing in the jury charge that required such a finding"). "[E]ven assuming the Court of Appeals was correct on the law, the conviction should not have been affirmed on that basis" because it was "never submitted to the jury." *McCormick*, 500 U.S. at 269-70. Other circuits have faithfully applied this basic proposition, which serves to protect a defendant's Sixth Amendment rights. *See*, *e.g.*, *United States v. Munguia*, 704 F.3d 596, 604-05 (9th Cir. 2012); *United States v. Serawop*, 410 F.3d 656, 669-70 (10th Cir. 2005). *See also United States v. Annamalai*,

[5] Among other things, the CSRA specified that Kosinski was an independent contractor, disclaimed any agency relationship, and, unlike the CDA that it expressly superseded, imposed no restriction on Kosinski's use of Regado's confidential information.

939 F.3d 1216, 1231 (11th Cir. 2019) (sufficiency review); *United States v. Dann*, 652 F.3d 1160, 1174 (9th Cir. 2011) (same); *United States v. Mendez*, 528 F.3d 811, 816 n.1 (11th Cir. 2008) (same); *United States v. Winfield*, 997 F.2d 1076, 1081 (4th Cir. 1993) (same).

Chiarella, in fact, involved the same issue posed here—whether an insider-trading conviction can be affirmed under a new theory of duty that emerged only after the trial. The defendant in that case purchased stock of the target of an imminent acquisition. The jury was instructed that the defendant owed a duty to the counterparties of his trades; the Court held that this misstated the law and required reversing his conviction. The government argued that the conviction should be sustained regardless of the erroneous instruction, because the defendant owed a duty to the acquiring company, the source of his information. This Court refused to consider the argument, saying: "The jury was not instructed on the nature or elements of a duty owed by petitioner to anyone other than the sellers,...[and] we will not speculate upon whether such a duty exists, whether it has been breached, or whether such a breach constitutes a violation of §10(b)." 445 U.S. at 236-37.

"Courts are essentially passive instruments of government. They do not, or should not, sally forth each day looking for wrongs to right." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (quotation marks and citation omitted). Accordingly, "appellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial." *Dunn v. United States*, 442 U.S. 100, 107 (1979). When "[a]

reviewing court…engage[s] in pure speculation—its view of what a reasonable jury would have done…the wrong entity judges the defendant guilty." *Sullivan*, 508 U.S. at 281 (quotation marks omitted).

Just as the Court could not affirm the conviction in *Chiarella* based on a theory not presented to the jury, here the Second Circuit should not have relied on alternative theories of fiduciary duty never considered by Kosinski's jury to deem any instructional error was harmless. By doing so the court substituted its judgment for the jury's and defied this Court's precedents. It is imperative that courts of appeals confronted with unconstitutional jury instructions uniformly conduct harmless-error review in a manner that respects the defendant's Sixth Amendment right to jury trial. This Court should grant review to ensure that the Second Circuit conforms its harmlessness review to the law. That is especially important because here, the result was to affirm a conviction based on reasoning that deprives market participants of fair notice as to when a relationship gives rise to the duty of "trust and confidence" that triggers insider-trading liability.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

ALEXANDRA A.E. SHAPIRO
Counsel of Record
DANIEL J. O'NEILL
SHAPIRO ARATO BACH LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880
ashapiro@shapiroarato.com

Counsel for Petitioner

February 19, 2021

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

———

AUGUST TERM 2019
No. 18-3065

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UNITED STATES OF AMERICA,

Appellee,

v.

EDWARD J. KOSINSKI,

Appellant.

———

On Appeal from the United States District Court
for the District of Connecticut
Vanessa L. Bryant, *Judge*.

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ARGUED: OCTOBER 30, 2019
DECIDED: SEPTEMBER 22, 2020

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Before: CABRANES and RAGGI, *Circuit Judges*,
and KORMAN, *District Judge*.[*]

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[*] Judge Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

Dr. Edward Kosinski served as a principal investigator for a clinical trial of a cardiac drug designed to prevent blood clotting. After he learned that patients suffered adverse effects during the trial, Kosinski traded on that nonpublic inside information to avoid a loss and earn a profit in the shares of the pharmaceutical company for which he was principal investigator. He was convicted of two counts of insider trading in violation of Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b–5 promulgated thereunder, in the United States District Court for the District of Connecticut (Bryant, *J.*) and was sentenced principally to six months' incarceration. On appeal, Kosinski argues primarily that he was under no duty to refrain from trading based on nonpublic inside information, and that there was insufficient evidence that he committed a willful violation of the law. We conclude that Kosinski did have a duty to refrain from trading on nonpublic inside information and that the evidence was sufficient to convict Kosinski. We further conclude that the trial judge's jury instructions and evidentiary rulings contained no reversible error.

AFFIRMED.

ALEXANDRA A.E. SHAPIRO (Philip W. Young, *on the brief*), Shapiro Arato Bach LLP, New York, New York, *for Defendant-Appellant*.

HEATHER L. CHERRY, Assistant United States Attorney (Jonathan N. Francis and Sandra S. Glover, *on the brief*) *for* John H. Durham, United States Attorney for the District of Connecticut, New Haven, Connecticut, *Appellee.*

KORMAN, *District Judge*:

Dr. Edward Kosinski was a principal investigator in a clinical trial (the "Study") for a heart-related drug developed by Regado Biosciences, Inc. ("Regado"), a publicly traded biopharmaceutical company whose stock was traded on NASDAQ. Regado's pharmaceutical product was designed to prevent blood clotting in patients undergoing heart procedures. As a principal investigator in the Study, Kosinski was responsible for recruiting the subjects, determining their suitability, monitoring their tolerance and reaction and reporting the results. To that end, he persuaded twenty patients who were part of his practice to participate in the Study, for which Regado paid Kosinski a fee of $80,000. Further, Kosinski was responsible for "making sure that the patients understand the risks and the reason why they're being enrolled, and getting informed consent and then making sure that they're getting the best level of care and following . . . good clinical practice." Gov't App'x at 547.

During the course of the Study, Kosinski, who was also a sophisticated stock trader with a portfolio exceeding $11 million, secretly accumulated approximately $250,000 of Regado stock in breach of his agreement to disclose if his holdings exceeded $50,000. Then, after being advised by Regado of information likely to affect the trial adversely, Kosinski traded based on that nonpublic inside information.

First, Kosinski sold Regado stock when he was informed the Study would be suspended due to safety concerns, avoiding a loss of $160,000 at the expense of purchasers who did not have access to the same nonpublic inside information. Then, when informed that a patient had died and that the Study would be suspended indefinitely, Kosinski bet against Regado's

stock by purchasing put options from which he realized a net profit of $3,300 when Regado publicly announced that it had permanently terminated the clinical trial. Kosinski later admitted to the FBI that these trades were based on "greed and stupidity" and that "he didn't feel good about making those trades when he had made them." His indictment, trial, and conviction for violating Section 10(b) of the Securities Exchange Act of 1934 resulted, and he was sentenced principally to six months' imprisonment and a $500,000 fine. Kosinski is free on bail pending this appeal.

On appeal, Kosinski challenges the sufficiency of the evidence presented at trial, as well as certain of the district court's jury instructions and evidentiary rulings. Because Kosinski raises a sufficiency challenge, we "view the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and deferring to the jury's assessment of witness credibility and its assessment of the weight of the evidence." *United States v. Martoma*, 894 F.3d 64, 72 (2d Cir. 2017); *see also Jackson v. Virginia*, 443 U.S. 307, 319 (1979) ("upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution"). Moreover, to the extent he challenges the district court's legal conclusions, our review is *de novo*. *United States v. Castello*, 611 F.3d 116, 119 (2d Cir. 2010).

BACKGROUND

In 2005, Regado commenced a clinical trial of its cardiac drug, known as REG1 Anticoagulation System ("REG1"), to test whether it could safely and effectively reduce the incidence of heart attacks, strokes, and deaths in patients undergoing angioplasty proce-

dures to unblock clogged arteries. Clinical drug trials involve multiple phases. Before human trials begin, researchers ordinarily test the drug in animals. Then, phase one analyzes whether the drug is safe in humans. Phase two studies a larger patient population, examining both safety and efficacy. If these two phases succeed, the drug company, which is the "sponsor," conducts phase three, a comprehensive study of thousands of patients at hundreds of study sites. If phase three is successful, the sponsor can seek final Food and Drug Administration ("FDA") approval to market the drug. Kosinski only participated in the third phase of the REG1 trial at a single site, although the Study involved a large, heterogenous population of patients at multiple sites.

For phase three, Regado hired the Cleveland Clinic Foundation, which supports research into cardiovascular drugs**,** to help write the Study protocol and administer the Study by choosing sites and principal investigators as well as by handling communication, site contract negotiation and execution, and payment for services.

On June 12, 2013, the Cleveland Clinic Foundation, on behalf of Regado, and the Connecticut Clinical Research, LLC (the "LLC"), of which Kosinski was president and through which he conducted multiple clinical trials for various drugs, entered into a Confidential Disclosure Agreement (the "CDA") to determine whether Kosinski would serve as a principal investigator for the Study. Kosinski signed the CDA on behalf of the LLC. The CDA allowed employees of the LLC to receive confidential information from Regado—such as the Study's protocol—which provided information subject to a restriction on disclosure and use.

On January 22, 2014, the Cleveland Clinic Foundation, on behalf of Regado, and the LLC, with Kosinski signing as president, entered into a superseding contract called a Clinical Study and Research Agreement ("CSRA"), pursuant to which Kosinski became a principal investigator for one of the many sites of phase three of the Study. Kosinski again signed the CSRA as the LLC's president. He also acknowledged and agreed to the CSRA in his personal capacity as the principal investigator.

The CSRA included two key interrelated provisions that are particularly relevant to this appeal: Kosinski was required (1) to maintain in "strict confidence" all the information with which he was provided to enable him to perform as principal investigator; and (2) to complete a financial disclosure form called a Form FDA 1572, which in turn required that he "promptly" disclose to Regado if the value of his Regado stock exceeded $50,000. The form stated that such disclosure would be "of concern to [the] FDA."

This disclosure form was intended to safeguard against potential conflict of interest by those involved in clinical trials. Federal regulations state that a "potential source of bias . . . is a financial interest of the clinical investigator in the outcome of the study," which includes "an equity interest in the sponsor of the covered study." 21 C.F.R. § 54.1(b). The required stockholding disclosure would thus allow sponsors such as Regado to identify if principal investigators had a conflict, which could not only endanger patient safety but also possibly delay or interfere with the FDA's approval process.

Sponsors, such as Regado, are motivated to obtain FDA approval for their product, along with the attendant financial rewards. That financial interest is

the motivation for the sponsor vesting responsibility for a clinical trial in principal investigators, with whom the sponsor does not have direct contact but with whom the sponsor works through intermediaries like the Cleveland Clinic Foundation. Likewise, it is the reason for requiring the sponsor to disclose to the FDA any financial entanglements between itself and the principal investigator, along with any steps it had taken to minimize the risk of bias. *See* 21 C.F.R. § 54.4(a). As a Cleveland Clinic Foundation executive testified at trial, these conflict-avoiding practices and the related FDA regulations principally address the concern that "[i]f there's a safety issue, [conflicted study participants] may not report it if [they] think it's going to negatively impact the trial. That would be a very big concern actually for patient safety. Or, you know, anything else that [persons] may– [persons] may sway the trial to go the way [they] want it to go if [they] have a financial interest." Gov't App'x at 72–73; *see* 45 C.F.R. § 46.101 et seq.

I. Kosinski's Trading And Related Representations

Kosinski began purchasing Regado shares on October 8, 2013, four months after entering into the CDA in June 2013, acquiring 2,000 Regado shares that day, and 2,000 more the next day. On October 16, 2013, he executed an application to St. Vincent's Medical Center in Bridgeport, Connecticut, for permission to administer Regado's drug to patients there for purpose of the Study. In that application, he falsely represented that he did not own any Regado shares.

In February 2014, shortly after the LLC had entered into the CSRA, Kosinski bought another 2,000 Regado shares, and by the end of that month, he owned well over $50,000 of Regado stock, triggering his obligation

to "promptly" disclose that fact to Regado, which he failed to do. In April and May of 2014, Kosinski bought an additional 31,000 Regado shares, bringing the total value of his holdings to around $250,000. During these months, Kosinski failed to make the required disclosure to Regado. As far as Regado knew, the value of Kosinski's interest never exceeded $50,000.

On Sunday, June 29, 2014, while the Study was underway, Kosinski received an email from the Study's management team.[1] The email alerted all principal investigators that the enrollment of new patients was being put on hold until Wednesday, July 2, 2014 because there had been "several allergic reactions over the past few weeks, and the [data safety monitoring board] and trial leadership need time to review the recent events thoroughly." On Monday, June 30, 2014, the morning after he received the email and before the information contained therein was made public, Kosinski sold all of his Regado shares. Thereafter, on Wednesday, July 2, 2014, Regado issued a press release announcing that it was suspending the Study due to "serious adverse events related to allergic reactions," and Regado's stock price fell approximately 58% the next day. If Kosinski had not sold all of his shares beforehand, their value would have been diminished by around $160,000.

On Tuesday, July 29, 2014, Kosinski received another email from the trial management team to all of the principal investigators. This email revealed that

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[1] The management team performs the high-level decision-making regarding trial structure and safety and includes representatives from Regado as the sponsor and from the Cleveland Clinic Foundation as the trial administrator, as well as a data safety monitoring board, which is responsible for advising the sponsor on patient safety-related issues.

a patient at another Study site had died from an allergic reaction to the drug, and that the Study was on hold pending an assessment by the Study's data safety management board. Two days later, before the patient's death was made public, Kosinski placed a bet that Regado's share price would fall: He bought 50 put options that collectively would entitle him to sell up to 5,000 Regado shares for $2.50 each by October 18, 2014. On August 25, 2014, Regado issued a press release announcing that the trial was being permanently halted due to the frequency and severity of allergic reactions. That same day, Regado's share value dropped from around $2.80 to around $1.10. On August 28, 2014, Kosinski bought 5,000 Regado shares for around $1.10 each and then used his put options to sell the same number of shares for $2.50 each. Kosinski's net profits from these transactions was around $3,300.[2]

On September 29, 2014, a month after the Study was terminated, the Cleveland Clinic Foundation sent Kosinski a letter that, among other things, offered a "reminder" that "[i]f any investigator has any relevant financial interest changes related to Regado Biosciences for 1 year following termination of the study, please send updated Financial Disclosure Forms to Regado." In response to this letter, on October 1, 2014, after the Study terminated and when he no longer held any stock in Regado, Kosinski executed a Form FDA 1572, as he was required to do under the CSRA. That was the first FDA Form 1572 that Kosinski had filed since the initial one he filed in December 2013 when

[2] Kosinski's net profit was less than the difference between the value of the 5,000 shares he purchased on August 28, 2014, and the price for which he sold them because Kosinski paid a $0.70 premium for each share the put options entitled him to sell.

he executed the CSRA on behalf of the LLC, notwithstanding his obligation to "promptly" update the form when the value of his Regado shares rose above $50,000, which occurred in February 2014.

II. Kosinski's Statements To The FBI

James McGoey, an FBI agent, interviewed Kosinski in person for nearly an hour and a half in June 2016. Agent McGoey also called Kosinski on the telephone in August 2016. During that call, which lasted about five minutes, McGoey told Kosinski that he had been indicted for securities fraud. McGoey testified that Kosinski told him that it was a "stupid thing that he did and he didn't feel good about making those trades when he had made them," and that Kosinski used the words "greed and stupidity" to describe what caused him to make those trades.[3]

ANALYSIS

Kosinski was tried and convicted of two counts of violating § 10b of the Securities Exchange Act and Rule 10b–5. One count was based on the sale of all his shares shortly after receiving the June 2014 email announcing the Study's suspension, and the other count was based on his purchase of 50 put options shortly after learning the Study would be canceled.

Kosinski challenges these convictions, arguing principally that the evidence was legally insufficient to prove that he breached a duty owed to Regado and that the district court's jury instruction was erroneous. He maintains that he agreed only to keep the information he received in the course of the Study in strict

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[3] As discussed *infra* at 52, Kosinski also told McGoey that he "can't believe this is happening" and that he had not retained counsel. Gov't App'x at 668.

confidence, which he claims he did, and that secretly trading on the basis of information was not a breach of his agreement. Whatever merit Kosinski's argument might have had Regado brought a civil action for breach of contract, it fails in the context of a criminal prosecution for trading on nonpublic inside information that was not available to those upon whom he unloaded his shares without making the requisite disclosure.

Kosinski further challenges his conviction by arguing that the district court gave the jury an improper instruction on willfulness and that, when assessed under the proper standard, the evidence presented at trial was legally insufficient to prove that he acted willfully. Finally, Kosinski challenges several evidentiary rulings.

We address each argument in turn.

I. Kosinski Had A Duty To Regado Not To Trade In Regado's Stock Absent Disclosure

Section 10(b) of the Securities Exchange Act of 1934 prohibits the use of "any manipulative or deceptive device or contrivance" in connection with the purchase or sale of securities. 15 U.S.C. § 78j(b). Similarly, Rule 10b–5 makes it unlawful to "employ any device, scheme, or artifice to defraud, [or] . . . to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b–5. "In an inside-trading case this fraud derives from the inherent unfairness involved where one takes advantage of information intended to be available only for a corporate purpose and not for the personal benefit of anyone." *Dirks v. SEC*, 463 U.S. 646, 654 (1983) (internal quotation omitted). We con-

clude that Kosinski owed a duty to Regado not to trade in Regado's stock based on confidential, nonpublic information, absent disclosure to Regado.

A. Kosinski Owed A Duty to Regado As A "Temporary Insider"

In *United States v. O'Hagan*, Justice Ginsburg succinctly set forth the two theories under which a defendant may be found guilty of insider trading: the classical and misappropriation theories.

> Under the "traditional" or "classical theory" of insider trading liability, § 10(b) and Rule 10b–5 are violated when a corporate insider trades in the securities of his corporation on the basis of material, nonpublic information. Trading on such information qualifies as a "deceptive device" under § 10(b), we have affirmed, because "a relationship of trust and confidence [exists] between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation." *Chiarella v. United States*, 445 U.S. 222, 228 (1980). That relationship, we recognized, "gives rise to a duty to disclose [or to abstain from trading] because of the 'necessity of preventing a corporate insider from . . . tak[ing] unfair advantage of . . . uninformed . . . stockholders.'" *Id.*, at 228–229 (citation omitted). The classical theory applies not only to officers, directors, and other permanent insiders of a corporation, but also to attorneys, accountants, consultants, and others who temporarily become fiduciaries of a corporation. *See Dirks v. SEC*, 463 U.S. 646, 655, n. 14 (1983).

> The "misappropriation theory" holds that a person commits fraud "in connection with" a securities transaction, and thereby violates § 10(b) and Rule 10b–5, when he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information. Under this theory, a fiduciary's undisclosed, self-serving use of a principal's information to purchase or sell securities, in breach of a duty of loyalty and confidentiality, defrauds the principal of the exclusive use of that information. In lieu of premising liability on a fiduciary relationship between company insider and purchaser or seller of the company's stock, the misappropriation theory premises liability on a fiduciary-turned-trader's deception of those who entrusted him with access to confidential information.

521 U.S. 642, 651–52 (1997).

Both theories advance the "animating purpose of the Exchange Act: to insure honest securities markets and thereby promote investor confidence." *Id.* at 658. They are based on the assumption that "investors likely would hesitate to venture their capital in a market where trading based on misappropriated nonpublic information is unchecked by law." *Id*. Both theories seek to avoid the unfairness that "[a]n investor's informational disadvantage vis-à-vis the misappropriator with material, nonpublic information stems from contrivance, not luck; it is a disadvantage that cannot be overcome with research or skill." *Id.* at 658–59. These theories are consistent with the common law principle that "a person who acquires special knowledge or information by virtue of a confidential

or fiduciary relationship with another is not free to exploit that knowledge or information for his own personal benefit[.]" *Diamond v. Oreamuno*, 24 N.Y.2d 494, 497 (1969).

This case was prosecuted under the misappropriation theory. Specifically, as we have held, "a person violates Rule 10b–5 when he misappropriates material nonpublic information in breach of a fiduciary duty or similar relationship of trust and confidence and uses that information in a securities transaction." *United States v. Falcone*, 257 F.3d 226, 230 (2d Cir. 2001) (Sotomayor, *J.*) (internal citation omitted). We have explained that

> a fiduciary relationship, or its functional equivalent, exists only where there is explicit acceptance of a duty of confidentiality or where such acceptance may be implied from a similar relationship of trust and confidence between the parties. Qualifying relationships are marked by the fact that the party in whom confidence is reposed has entered into a relationship in which he or she acts to serve the interests of the party entrusting him or her with such information.

Id. at 234–35.

Significantly, a qualifying relationship does not require one to be a traditional corporate insider. The Supreme Court has explained that,

> [u]nder certain circumstances, such as where corporate information is revealed legitimately to an underwriter, accountant, lawyer, or consultant working for the corporation, these outsiders may become fiduciaries of the shareholders. The basis for recognizing this

> fiduciary duty is not simply that such persons acquired nonpublic corporate information, but rather that they have entered into a special confidential relationship in the conduct of the business of the enterprise and are given access to information solely for corporate purposes.

Dirks, 463 U.S. at 655 n.14. We have described such individuals as "temporary insiders." *United States v. Chestman*, 947 F.2d 551, 567 (2d Cir. 1991) (en banc).

While the language in *Dirks* was in the context of the traditional classical theory of insider trading, it likewise encompasses those who have entered into a "special confidential relationship," *Dirks*, 463 U.S. at 655 n.14, that has enabled them to misappropriate information that was "intended to be available only for a corporate purpose and not for the personal benefit of anyone," *id.* at 654 (internal quotation omitted). This court has recognized that the classical and misappropriation theories are "overlapping," sometimes proscribing the same or similar conduct. *United States v. Newman*, 773 F.3d 438, 445 (2d Cir. 2014), *abrogated on other grounds by Salman v. United States*, 137 S. Ct. 420 (2016). Thus, we have treated the theories as intertwined branches of the same tree, explaining that in both cases, it is the "breach of a fiduciary duty or other duty of loyalty and confidentiality that is a necessary predicate to insider trading liability." *Martoma*, 894 F.3d at 73.[4]

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[4] In *Martoma*, we also observed that "[a]lthough many of the cases refer to 'insiders' and 'fiduciary' duties because those cases involve the 'classical theory' of insider trading, the *Dirks* articulation of tipper and tippee liability also applies under the misappropriation theory, where the misappropriator violates

Temporary insiders are therefore forbidden from trading under both the classical and misappropriation theories without the requisite disclosure. Indeed, the only meaningful difference between the two theories is the victim of the fraud. Where, as here, a trader owes a duty to both the shareholders with whom he trades and the source of the confidential information on which he trades, he must make disclosure to both. *See O'Hagan*, 521 U.S. at 655 n.7 (where "a person trading on the basis of material, nonpublic information owes a duty of loyalty and confidentiality to two entities or persons . . . but makes disclosure to only one, the trader may still be liable").

Turning to this case, we view Kosinski's role as a principal investigator to fit squarely within *Dirks*'s recognition of "temporary insiders" who play fiduciary-like roles, such that he could have been successfully prosecuted under the classical theory (because he failed to disclose to his trading counterparty that he was trading on inside information) and under the misappropriation theory (because he failed to disclose to Regado that he was trading on inside information that he had been given in confidence). *Chestman*, 947 F.2d at 565 (citing *Dirks*, 463 U.S. at 655 n.14). Kosinski was entrusted with Regado's information solely because of his duty to ensure the integrity and accuracy of the phase three clinical trial, as well as the health of his patients. Regado provided Kosinski the information he traded upon because that information was integrally related to the safety of the Study, ultimately necessitating its termination. Indeed, Kosinski would not have been provided this information absent his "explicit acceptance of a duty of

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some duty owed to the source of the information." *Martoma*, 894 F.3d at 73 n.5.

confidentiality." *Falcone*, 257 F.3d at 234. Moreover, Kosinski further agreed to disclose if his holding of Regado stock exceeded $50,000, which presumably would have triggered Regado's closer oversight of Kosinski (or even his termination) given its significance to the FDA, and which he failed to do. Under these circumstances, Kosinski qualified as a temporary insider of Regado.

Since it is uncontested that Kosinski traded on Regado's nonpublic inside information without disclosure to Regado, he therefore "misappropriate[d] confidential information for securities trading purposes, in breach of a duty owed to the source of the information." *O'Hagan*, 521 U.S. at 652. That failure to disclose satisfied the element of deceit required by § 10(b) and Rule 10b–5. *Id.*

B. Kosinski Had A Fiduciary-Like Relationship With Regado

Separate and apart from whether Kosinski qualified as a "temporary insider" of Regado, we conclude that Kosinski's relationship with Regado was fiduciary in nature because it was a relationship based upon trust and confidence. Kosinski expressly agreed to keep Regado's information confidential. Moreover, Regado entrusted Kosinski with the administration of a newly-created drug to human beings. It was presumably Regado's faith and confidence in Kosinski's reputation as a prominent New England cardiologist, his experience as a principal investigator, and his willingness to provide access to his patients, that caused Regado to secure Kosinski's services. By selecting Kosinski, Regado chose a distinguished physician, knowing that the Study could become a matter of life and death—as indeed it did at another site—because "you're asking patients to put their lives at stake when

they participate." Gov't App'x at 310. Kosinski's experience and skill were important to Regado avoiding such an outcome and ultimately to Regado receiving FDA approval for REG1 and the financial reward that would accompany it. Regado accordingly entered into a relationship with Kosinski that was "marked by" his service of "the interests of the party entrusting him [] with such information." *Falcone*, 257 F.3d at 234–35 (internal citation omitted). Thus, Kosinski regularly received information from Regado regarding the drug trial, including the confidential information that he ultimately misappropriated and upon which he traded.

Such trading vitiates the principal investigator's critical function, by fixing his attention on his own monetary gain and depriving the company of the independent assessment required for FDA approval. Principal investigators are charged with caring for the well-being of their patients, not the ultimate success of the drug. But by appropriating the sponsor's nonpublic inside information to trade in its stock, a principal investigator's financial interest becomes aligned with the outcome of the study—he has an incentive to lie about or conceal patients' results in order to influence the study's outcome, and ultimately his wallet. When a sponsor such as Regado files an application for the approval of a particular drug, however, it makes representations to the FDA, which in turn the FDA necessarily relies on, about the integrity of the study performed by principal investigators. Allowing principal investigators to trade on the nonpublic inside information entrusted to them in the course of a study would thus undermine that study's integrity, the very reason why principal investigators are vested with independence from the drug's corporate sponsor.

Indeed, as indicated above, the contract creating the relationship between Kosinski and Regado—the CSRA—contained two significant provisions. First, his contract required that the Study information conveyed to Kosinski be held in "strict confidence," which provided Regado with the "trust and confidence" it required to disclose to him critical inside information. *Falcone*, 257 F.3d at 234. Regado would not have provided this information had Kosinski not agreed to keep the information confidential. This court has held that such an "explicit acceptance of a duty of confidentiality" is itself sufficient to establish the necessary fiduciary duty of trust and confidence. *Id.*; *see also Chestman*, 947 F.2d at 571. Second, the contract required Kosinski to inform Regado if the value of his shares in that company exceeded $50,000. This served to ensure that Kosinski's assessment of the drug's safety and efficacy was independent of the company's interest in obtaining FDA approval. Had Kosinski not agreed to make this disclosure, he could not have been hired.

In sum, we conclude that there was sufficient evidence that Kosinski's role as a principal investigator clothed him with fiduciary status such that he could not trade on Regado's nonpublic inside information absent disclosure. *Chestman*, 947 F.2d at 565. That conclusion is only reinforced by Kosinski's agreement to disclose to Regado when the value of his shares exceeded $50,000, which he failed to do. The evidence established that Kosinki's unrevealed investment in Regado created a conflict between his financial interest and his duty to objectively gather and report information about REG1's safety and effectiveness. In these circumstances, his secret trading in Regado stock based on the nonpublic inside information that was disclosed to him because of his

relationship of trust and confidence constituted a fraud on Regado.[5]

C. Kosinski's Arguments To The Contrary Are Without Merit

In urging otherwise, Kosinski first argues that he did not violate federal securities law because he was simply bound by the provisions of his agreement with Regado not to disclose any confidential information that he acquired as a result of his involvement as an investigator in the Study, and he did not divulge any such information in breach of the CSRA. But as we have demonstrated, the agreement was significantly broader than Kosinski asserts. The CSRA expressly required that Kosinski complete a financial disclosure form and promptly disclose if the value of his shares of Regado stock exceeded $50,000. Kosinski breached this duty to disclose, which was clearly designed to inform Regado if Kosinski was no longer the independent assessor for whose services Regado contracted. Kosinski's breach of this condition constituted a breach of the confidentiality agreement of which it was an integral part.

Nor does it help Kosinski's cause that the operative CSRA contained a clause providing that Kosinski would "maintain in strict confidence" Regado's confidential information, while the preceding CDA contained a comparable prohibition on disclosure as well as use of confidential information. The Supreme Court

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[5] Because we hold that the evidence was otherwise sufficient to convict Kosinski, we do not address the application of Rule 10b5–2, upon which the U.S. Attorney relies and which provides that a "duty of trust or confidence" exists "[w]henever a person agrees to maintain information in confidence." 17 C.F.R. § 240.10b5–2(b)(1).

has held that a temporary insider's duty not to trade on insider information can arise from an expectation that "the outsider [will] keep the disclosed nonpublic information confidential" and that his relationship with the corporation at a minimum "must imply such a duty." *Dirks*, 463 U.S. at 655 n.14. It follows that the absence of an express prohibition on trading is not fatal here. In any event, we decline to infer Regado's intent to permit Kosinski to trade on nonpublic Study information based on the CSRA's omission of a clause contained in the prior CDA, a conclusion only reinforced by the CSRA's merger clause, which stated expressly that the CSRA embodied the entire understanding of the parties and thus rendered the CDA irrelevant.[6] The same is true of other agreements that Regado may have had with third parties. *See Applied Energetics, Inc. v. NewOak Capital Mkts., LLC*, 645 F.3d 522, 525–26 (2d Cir. 2011).

Similarly, we reject the notion that Kosinski could not have been a fiduciary of Regado because the CSRA labeled him an independent contractor. The Supreme Court has held that independent contractors such as outside attorneys, accountants, underwriters, and consultants can serve as fiduciaries sufficient to establish their insider trading liability. *See Dirks*, 463 U.S. at 655 n.14.

Moreover, we do not afford the contractual term "independent contractor" controlling effect where such a term, even in a private contract, implicates

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[6] The CSRA's merger clause provided that: "This Agreement, including Exhibits A and B, embodies the entire understanding between [the LLC], [St. Vincent's Medical Center], [Kosinski] and [Regado] for [] the subject matter herein, and any prior or contemporaneous negotiations, either oral or written, are hereby superseded." App'x at 243.

significant public policies. *See Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988) (stating that a "self-serving label of [employees] as independent contractors is not controlling"). Here, in light of the significant public policy considerations "animating" the Exchange Act, *O'Hagan*, 521 U.S. at 658, we would decline to deem controlling language used by private parties that would permit unlawful insider trading. Nor do we find controlling cases between private parties based on a cause of action for breach of fiduciary duty, *see, e.g.*, *Spinelli v. Nat'l Football League*, 903 F.3d 185, 207–08 (2d Cir. 2018). Those cases simply do not implicate any considerations of federal public policy, much less considerations as strong as those underlying the prohibition against insider trading in the Exchange Act, as articulated by Justice Ginsburg in *O'Hagan*.[7]

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[7] We have made a similar point in the context of the Securities Act of 1933. In *Kaiser-Frazer Corp. v. Otis & Co.*, 195 F.2d 838 (2d Cir. 1952), we declined to enforce a contract for sale of securities by Kaiser-Frazer to one of its underwriters, Otis & Co., which claimed that Kaiser-Frazer misleadingly inflated its profits in December 1947. *Id.* at 843–44. The record indicated, however, that representatives of Otis were informed of the actual December earnings and took part in the preparation of the registration statement and prospectus. *Id.* at 843.

We nevertheless declined to apply the ordinary "rules of estoppel or waiver," because whatever those rules "may be in the case of an ordinary contract of sale, nevertheless it is clear that a contract which violates the laws of the United States and contravenes the public policy as expressed in those laws is unenforceable." *Id*. Writing for the panel, Judge Augustus Hand explained that "regardless of the equities as between the parties, [] the very meaning of public policy is the interest of other than the parties and that interest is not to be at the mercy of the [parties] alone." *Id.* at 844 (internal quotation omitted). "While it may be argued that the enforcement of the underwriting contract

We likewise reject the argument that Kosinski could not have been a fiduciary because he dealt with Regado at "arm's-length," a term that is often used but rarely defined. We have held that while "[an arm's length] relationship is not by itself a fiduciary relationship," the "addition of a relationship of confidence [or] trust," as was present here, "may indicate that such a relationship exists." *In re Mid-Island Hosp., Inc*., 276 F.3d 123, 130 (2d Cir. 2002) (internal quotation omitted); *see also, e.g*., *Muller-Paisner v. TIAA*, 289 F. App'x 461, 466 (2d Cir. 2008) (summary order) (relying on *In re Mid-Island Hosp*. to explain that "a fiduciary duty may arise in the context of [such] a commercial transaction upon a requisite showing of trust and confidence," as was present here).

We come now to Kosinski's argument that the evidence was insufficient to conclude that he was a fiduciary of Regado on the basis of language in *Chestman* highlighting three particular factors: that "[a]t the heart of the fiduciary relationship lies reliance, and de facto control and dominance." 947 F.2d at 568. "Stated differently, a fiduciary relation exists when confidence is reposed on one side and there is resulting superiority and influence on the other." *AG Cap. Funding Partners v. State St. Bank & Tr. Co.*, 11 N.Y.3d 146, 158 (2008) (quoting *Ne. Gen.*

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according to its terms would result only in the sale of the stock to Otis and that such a sale would not violate the [Securities Act of 1933], we are satisfied that the contract was so closely related to the performance of acts forbidden by law as to be itself illegal." *Id.* Similarly here, Kosinski's actions substantially undermined the policies underlying the Exchange Act relating to insider trading. Accordingly, whether or not the language of the contract would have provided a defense to a private breach of contract action by Regado, Kosinski's designation as an independent contractor cannot control the legality of his trades.

Corp. v. Wellington Adv., 82 N.Y.2d 158, 173 (1993) (Hancock, *J.*, dissenting)); *see also Fisher v. Bishop*, 108 N.Y. 25, 28 (1888) (fiduciary relationship exists when "there has been a confidence reposed which invests the person trusted with an advantage in treating with the person so confiding").

The evidence was sufficient here to find that Kosinski's relationship with Regado satisfied this standard. As we observed earlier, Regado entrusted Kosinski with the administration of a newly-created drug to human beings because of his experience as a principal investigator who could give Regado access to his patients. His patients' continued participation in the Study presumably was dependent on Kosinski's relationship with them. Thus, while control of REG1 was Regado's at the outset, it ceded that control, at least for purposes of conducting the Study, to principal investigators, such as Kosinski, relying on their superior medical skill and expertise, and affording them dominance in assessing how the drug actually performed for patients. Regado relied upon Kosinski's professional independence and integrity to accurately report back his results about REG1 from the Study, without which information Regado's clinical trial could not be completed. Kosinski's relationship with Regado was therefore "characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise," *SEC v. DiBella*, 587 F.3d 553, 564 (2d Cir. 2009).

We have assumed for purpose of addressing Kosinski's argument that these three factors described in *Chestman* reflect the only appropriate standard from which the jury could find the requisite fiduciary

relationship.[8] They do not. We provide the following detailed analysis of *Chestman*—more than would otherwise be necessary—because of the extensive reliance on these factors in Kosinski's briefing.

Chestman's reference to "reliance, and de facto control and dominance" was a direct quotation from *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982), which concerned the federal mail fraud statute and relied on New York law. It is helpful to place that language in the context of the analysis prompting its adoption. As framed by Judge Kaufman, writing for the majority, *Margiotta* raised "the novel issue whether an individual who occupies no official public office but nonetheless participates substantially in the operation of government owes a fiduciary duty to the general citizenry not to deprive it of certain intangible political rights that may lay the basis for a mail fraud prosecution." 688 F.2d at 121.

Judge Kaufman observed that "[t]he drawing of standards in this area is a most difficult enterprise," because "[o]n the one hand, it is essential to avoid the Scylla of a rule which permits a finding of fiduciary duty on the basis of mere influence or minimum participation in the processes of government." *Id.* at 122.[9] Such a rule would "threaten to criminalize a wide

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[8] We frame the issue in terms of the sufficiency of the evidence because Kosinski never sought a jury instruction defining a fiduciary relationship to require reliance, de facto control and dominance. Nor does he raise on appeal the adequacy of the charge in this respect, which did not include discussion of these factors. Thus, he is forced to argue that the evidence was insufficient as a matter of law.

[9] Some years after *Margiotta* upheld an honest-services theory of mail fraud, the Supreme Court construed the federal mail fraud statute, 18 U.S.C. § 1341, to reach only schemes to deprive

range of conduct, from lobbying to political party activities, as to which the public has no right to disinterested service." *Id.* On the other hand, "the harm to the public arising from the sale of public office and other fraudulent schemes leads us to steer a course away from the Charybdis of a rule which bars on all occasions, as a matter of law, a holding that one who does not hold public office owes a fiduciary duty to the general citizenry even if he in fact is conducting the business of government." *Id.*

The *Margiotta* Court observed that while "there is no precise litmus paper test," it found two measures of fiduciary status helpful in that context: (1) a reliance test, under which one may be a fiduciary when others rely upon him because of a special relationship in the government, and (2) a de facto control test, under which a person who in fact makes governmental decisions may be held to be a governmental fiduciary. *Id.*

> These tests recognize the important distinction between party business and government affairs, permitting a party official to act in accordance with partisan preferences or even whim, up to the point at which he dominates government. Accordingly, the reliance and de facto control tests carve out a safe harbor for the party leader who merely exercises a veto power over decisions affecting his constituency.

Id.

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victims of money or property. *See United States v. McNally*, 483 U.S. 350 (1987). Following *McNally*, Congress enacted 18 U.S.C. § 1346 to include "the intangible right of honest services" within the ambit of the federal fraud statutes.

In turn, although *Chestman* adopted *Margiotta*'s measure of a fiduciary duty for a political leader, such a measure is not necessarily appropriate for other cases in other contexts. Significantly, as Judge Robert Ward—who was sitting by designation on the *Margiotta* panel and who cast the deciding vote in this aspect of the case—later wrote, "the analysis in *Margiotta* was directed at the precise parameters of the facts involved in that case." *United States v. Reed*, 601 F. Supp. 685, 708 n.35 (S.D.N.Y. 1985). Judge Ward did "not read *Margiotta* or any other decision of the Second Circuit as establishing a controlling definition of the confidential relationship concept to be applied in a variety of contexts, and particularly in the instant case [before him]." *Id*. We agree.

Consistent with Judge Ward's analysis, and without reference to the *Margiotta* factors, this court subsequently held that under New York law, a fiduciary relationship arises "when one [person] is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." *Flickinger v. Harold C. Brown & Co.*, 947 F.2d 595, 599 (2d Cir. 1991) (internal quotation omitted).[10] And

[10] Indeed, three decades later, the New York Court of Appeals defined a fiduciary relationship as "a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." *Oddo Asset Mgmt. v. Barclays Bank PLC*, 19 N.Y.3d 584, 592–93 (2012). Likewise, two years ago, this court again restated the definition of a fiduciary set out in *Flickinger* and quoted the following summation of such a duty under New York law: "Broadly stated, a fiduciary relationship is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another. It is said that the relationship exists in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed." *Galvstar Holdings, LLC v. Harvard Steel Sales, LLC*, 722 F. App'x 12, 15 (2d Cir. 2018) (quoting *Penato v. George*, 52 A.D.2d 939, 942 (2d Dep't

Chestman itself set out two other tests, immediately after quoting from *Margiotta*, one of which is the traditional test that one acts as a fiduciary when

> the business which he transacts, or the money or property which he handles, is not his own or for his own benefit, but for the benefit of another person, as to whom he stands in a relation implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part.

947 F.2d at 568–69 (quoting Black's Law Dictionary (5th ed. 1979)). This traditional test aptly describes the relationship between Kosinski and Regado.

Moreover, *Chestman* indicated that the result in that case, which involved the transmittal of inside information in the context of a family relationship, might have been different had the transmittal been in breach of an "express agreement of confidentiality." *Id.* at 571. Significantly, the *Chestman* court in 1991 expressed approval for Judge Ward's 1985 opinion in *Reed* that "the repeated disclosure of business secrets between family members may *substitute* for a factual finding of dependence and influence and thereby sustain a finding of the functional equivalent of a fiduciary relationship." *Id.* at 569 (emphasis added).

Perhaps most significant is then-Judge Sotomayor's opinion in *Falcone*, which holds that a fiduciary relationship can arise so long as "the party in whom confidence is reposed has entered into a relationship in which he or she acts to serve the interests of the

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1976)). None of these cases described the *Margiotta* factors as a prerequisite to fiduciary or fiduciary-like status, although that standard is occasionally cited in other cases. *See, e.g.*, *AG Cap. Funding Partners*, 11 N.Y.3d at 158.

party entrusting him or her with such information," 257 F.3d at 234–35, without referencing a showing of "de facto control and dominance," *Chestman*, 947 F.2d at 568. Indeed, and perhaps for these reasons, Kosinski concedes that he "has never maintained" that only contracts bearing what he calls "'the hallmarks of a traditional fiduciary relationship' can create the necessary duty" sufficient to sustain insider trading liability. Reply Br. at 7 n.2.

In sum, *Chestman*'s three-factor standard of "reliance, and de facto control and dominance" does not state the exclusive test of fiduciary status, nor the proof necessary to sustain a conviction under the misappropriation theory. The cases cited by Kosinski that employ the standard of "reliance, and de facto control and dominance,"[11] Reply Br. at 4, did so (in the words of the Supreme Court) in the context of "other federal fraud statutes" and do not advance his cause here, in the context of insider trading. *Salman*, 137 S. Ct. at 428. Indeed, in *Salman* in 2016, the Supreme Court merely "assum[ed]" that such "cases are relevant to our construction of §10(b) (a proposition the Government forcefully disputes)[.]" *Id.* In light of our discussion of the limitations of the history and application of *Chestman*'s three-factor standard, we see no reason to extend it here merely because it has been repeated in other contexts. Thus, while the evidence here was indeed sufficient to find that Kosinski owed Regado a fiduciary duty based on reliance, control, and dominance, that conclusion does

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[11] *See United States v. Halloran*, 821 F.3d 321, 338–39 (2d Cir. 2016); *United States v. Skelly*, 442 F.3d 94, 99 (2d Cir. 2006); *United States v. Szur*, 289 F.3d 200, 210 (2d Cir. 2002); *United States v. Brennan*, 183 F.3d 139, 150 (2d Cir. 1999). Of these cases, only *Halloran* turned on the application of this standard.

not signal that only such factors can establish a fiduciary duty for purposes of determining insider-trading liability.

D. The Jury Instruction On Breach Of Duty

Kosinski contends that the district court erred in instructing the jury that "a person has a requisite duty of trust and confidence whenever a person agrees to maintain information in confidence." Gov't App'x at 1151. He maintains that this instruction "effectively directed a verdict in favor of the government" because it was undisputed at trial that Kosinski had agreed, per the CSRA, to keep Regado's information confidential. *See* Appellant Br. at 40.

"We consider a jury instruction erroneous 'if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law.'" *United States v. Silver*, 864 F.3d 102, 118 (2d Cir. 2017) (quoting *United States v. Finazzo*, 850 F.3d 94, 105 (2d Cir. 2017)). Even where an instruction is erroneous, we will affirm if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *United States v. Sheehan*, 838 F.3d 109, 121 (2d Cir. 2016) (internal quotation marks and citation omitted).

We need not decide here whether the district court's instruction to the jury that "a person has a requisite duty of trust and confidence whenever a person agrees to maintain information in confidence" was erroneous. Assuming *arguendo* that it was, any error in the instruction was harmless. As discussed *supra*, the trial evidence overwhelmingly established that Kosinski had a fiduciary or fiduciary-like duty to Regado, and we are convinced "that a rational jury would have found [Kosinski] guilty absent the error."

Sheehan, 838 F.3d at 121 (internal quotation marks omitted).

II. Willfulness

Kosinski argues that the district court gave an improper jury instruction on the willfulness element of his alleged breach of his fiduciary duty, and that the evidence was insufficient to prove willfulness under the proper standard.

Section 32(a) of the Securities Exchange Act provides that:

> Any person who willfully violates any provision of this chapter . . . , or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter . . . shall upon conviction be fined not more than $5,000,000 or imprisoned not more than 20 years, or both . . . ; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

15 U.S.C. § 78ff(a) (emphasis added). Thus, Kosinski must have "willfully violate[d]" § 10b and Rule 10b–5 to be held criminally liable for such violations.

A. The Jury Instructions

The trial judge gave the jury the following relevant instruction on what the judge called "the second element [of the offense]: knowledge, intent, and willfulness":

> The second element that the Government must prove beyond a reasonable doubt is that

> the defendant participated in the scheme to defraud knowingly, willingly, and with the intent to defraud. To act knowingly means to act voluntarily and deliberately rather than mistakenly or inadvertently. To act willfully means to act knowingly and purposefully with the intent to do something that the law forbids, that is, with bad purpose either to disobey or to disregard the law. . . . It is not required that the Government show that Dr. Kosinski, in addition to knowing what he was doing and deliberately doing it, also knew that he was violating some particular statute. But the defendant must have acted with knowledge and intent to carry out the insider trading scheme.

GA 1154–55.

Kosinski argues that the above instruction failed to adequately convey that Kosinski's guilt required that he knew that his conduct was unlawful under the securities laws. The government responds that the instruction accurately explained the willfulness requirement, which does not require any knowledge that the defendant knew he was violating the securities laws.

At the outset, we observe that Kosinski did not request an instruction that he must have known he was violating the *securities laws*, an omission that would normally limit our review to plain error. *See* Fed. R. Crim. P. 52(b). Here, however, Kosinski's conduct may have amounted to waiver, and not merely

forfeiture, which would preclude even plain error review.[12]

Contrary to Kosinski's argument on appeal, he appears to have endorsed the substance of the given charge. We have explained that "if a party invited the charge . . . she has waived any right to appellate review of the charge." *United States v. Giovanelli*, 464 F.3d 346, 351 (2d Cir. 2006). Kosinski's own request to charge defined "willful conduct" as a "voluntary, intentional violation of a known legal duty and is synonymous with conduct that is done with bad purpose or evil motive either to disobey or to disregard the law." Gov't App'x at 1276. In this respect, it was identical to the district court's charge. And the defense repeated this position at the charge conference: "Your Honor, our position really just is that the instruction needs to be clear that the willfulness requires a showing that the defendant had knowledge that his conduct was unlawful." *Id.* at 1226. "Such endorsement might well be deemed a true waiver, negating even plain error review." *United States v. Hertular*, 562 F.3d 433, 444 (2d Cir. 2009).

Even assuming *arguendo* that Kosinski's conduct at trial constituted correctable forfeiture, however,

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[12] It is well established that waiver is different from forfeiture. *See United States v. Olano*, 507 U.S. 725, 733 (1993) ("Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right."). We have explained that "[i]f a party's failure to take an evidentiary exception is simply a matter of oversight, then such oversight qualifies as a correctable 'forfeiture' for the purposes of plain error analysis." *United States v. Yu-Leung*, 51 F.3d 1116, 1122 (2d Cir. 1995). "If, however, the party consciously refrains from objecting as a tactical matter, then that action constitutes a true 'waiver,' which will negate even plain error review." *Id*.

Kosinski still cannot demonstrate error, and certainly not plain error. The Supreme Court has held that, "[a]s a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.' In other words, in order to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.'" *Bryan v. United* States, 524 U.S. 184, 191–92 (1998) (quoting *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994)). Moreover, in *Bryan*, the Court approved a willfulness charge instructing that so long as a defendant "act[s] with the intent to do something that the law forbids," he need not be aware "of the specific law or rule that his conduct may be violating." *Id.* at 190 (quoting jury instructions).

While *Bryan* made these pronouncements in the context of a federal firearms conviction, this court has recognized that its definition of willfulness is generally applicable. As a general matter, "a person who acts willfully need not be aware of the specific law that his conduct may be violating. Rather, 'knowledge that the conduct is unlawful is all that is required.'" *United States v. Henry*, 888 F.3d 589, 599 (2d Cir. 2018) (quoting *Bryan*, 524 U.S. at 196). When a statute limits criminal liability to "willful" violations, it does not necessarily "carve out an exception to the traditional rule that ignorance of the law is no excuse." *Bryan*, 524 U.S. at 195–96.

A heightened standard of willfulness, demanding "[k]nowledge of the specific law that one is violating[,] has been required only where a 'highly technical statute[]'—such as a provision of the Internal Revenue Code—prohibits 'apparently innocent conduct.'" *Henry*,

888 F.3d at 599 (quoting *Bryan*, 524 U.S. at 196).[13] The insider trading activities that Section 10(b) and Rule 10b–5 prohibit, by contrast, cannot be described as "apparently innocent." *Henry*, 888 F.3d at 599; *see United States v. O'Hagan*, 139 F.3d 641, 647 (8th Cir. 1998) (recognizing that § 10(b) violations "necessarily involve[] fraudulent conduct and breaches of duty by the defendant," and "do not involve conduct that is often innocently undertaken").

United States v. Cassese, 428 F.3d 92 (2d Cir. 2005), relied on by Kosinski, is not to the contrary. While the panel majority there defined willfulness as "'a realization on the defendant's part that he was doing a wrongful act' *under the securities laws*," *see id.* at 98 (emphasis added) (quoting *United States v. Peltz*, 433 F.3d 48, 55 (2d Cir. 1970)), this court has since clarified that the highlighted language did not depart from precedent to require a securities defendant's awareness of more than the general unlawfulness of his conduct. *United States v. Kaiser*, 609 F.3d 556, 569 (2d Cir. 2010).[14]

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[13] *See, e.g.*, *Cheek v. United State*s, 498 U.S. 192, 205 (1991) (stating that, in some tax cases, willfulness requires defendant's knowledge of specific legal duty violated because "uncertainty" about "our complex tax system . . . often arises even among taxpayers who earnestly wish to follow the law"); *see also Ratzlaf v. United States*, 510 U.S. 135, 136, 144 (1994) (stating same as to statutory prohibition against structuring of cash transactions to avoid triggering financial institutions' legal reporting requirement, conduct that "is not inevitably nefarious").

[14] As *Kaiser* observed, the *Cassese* majority "did not reach the question of whether willfulness required only awareness of general unlawfulness or whether it required that the defendant knowingly commit the specific violation charged," finding the evidence insufficient as a matter of law under either standard. 609 F.3d at 569; *see Cassese*, 428 F.3d at 95. Only Judge Raggi,

All in all, Kosinski's challenge fails because he cannot demonstrate that the purported error is plain, much less that he sustained any prejudice or that the fairness, integrity, or public reputation of his judicial proceedings was called into question. *See Olano*, 507 U.S. at 732–37.

B. Legal Sufficiency

Although we review a defendant's challenge to the sufficiency of the evidence de novo, "we will uphold the judgment[] of conviction if '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,'" *Martoma*, 894 F.3d at 72 (quoting *Jackson*, 443 U.S. at 319). "In evaluating a sufficiency challenge, we must view the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and . . . uphold[ing] the judgment of conviction if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (internal quotation marks, brackets, and emphasis omitted).

Viewed in the light most favorable to the government, the trial evidence was sufficient to allow a rational jury to conclude that Kosinski's insider trading was willful under the instruction given by the

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in dissent, analyzed the appropriate standard, and concluded—correctly—that the "only proof of knowledge required to establish a willful violation of the Exchange Act is the defendant's awareness of the general unlawfulness of his conduct." *Cassese*, 428 F.3d at 109. Thus, *Cassese* does not clearly establish the willfulness standard urged by Kosinski, as necessary for the first two prongs of plain error. But the point warrants no further discussion because *Kaiser* makes plain that Kosinski cannot show *any* charging error.

district judge, which was consistent with Kosinski's own request and the law. The jury heard evidence that Kosinski was a "sophisticated investor," particularly "in the pharmaceutical sector" who regularly dealt in options. Gov't App'x at 565, 1007**.** Indeed, while working as principal investigator for Regado, he not only traded to avoid a loss of $160,000, but also, after learning that a patient had died, he traded to profit from that inside information by purchasing put options. The government presented evidence that Kosinski knew that he was trading on nonpublic inside information, based on his receipt of the information at issue pursuant to a confidentiality agreement as well as his subsequent admissions that he did not feel good about the trades at the time he made them (that they were the product of "greed and stupidity"). Indeed, the admissions by themselves might suffice to show he knew his conduct violated the law.

There is more evidence indicating willfulness. Kosinski was only able to engage in the charged conduct because of lies and deceit. First, in breach of his contract with Regado, he failed to advise Regado that he had accumulated far more than the minimal stock holdings in that company that he was permitted to own without disclosure. And he failed to do so even though he had been told that such disclosure was crucial to the FDA. Nor did he disclose his use of Regado's inside information to trade in the manner in which he did. Moreover, he lied to St. Vincent's Hospital, which was also a party to the CSRA with Regado when, in seeking its permission to conduct the Study there, he falsely stated that he did not own any Regado shares in response to a specific inquiry.

Taken together, this evidence of Kosinski's deceptive activity was sufficient for the jury to find that

Kosinski knew his actions were unlawful under the charge given by the district court.

III. The District Court's Evidentiary Rulings Did Not Abuse Its Discretion

Kosinski sought to elicit testimony from FBI agent McGoey on cross examination that in the same August 2016 five-minute telephone conversation in which Kosinski stated that he "didn't feel good about making those trades when he had made them" and described his conduct as motivated by "greed and stupidity," *see supra* at 14, he also made two other statements: (i) before McGoey informed Kosinski that he had been indicted, Kosinski told him that he had not yet retained counsel, and (ii) after McGoey informed Kosinski that he had been indicted, Kosinski said "I can't believe this is happening." Over Kosinski's objections, the district court excluded those statements as inadmissible hearsay. Kosinski now challenges those rulings, arguing that both statements were admissible under the rule of completeness and as excited utterances.

"We review a district court's evidentiary rulings under a deferential abuse of discretion standard, and we will disturb an evidentiary ruling only where the decision to admit or exclude evidence was 'manifestly erroneous.'" *United States v. Litvak*, 889 F.3d 56, 67 (2d Cir. 2018) (quoting *United States v. McGinn*, 787 F.3d 116, 127 (2d Cir. 2015)).

A. Kosinski's Statement That He Had Not Retained Counsel

We reject Kosinski's argument that his statement that he had not retained counsel was an excited utterance. First, Kosinski concedes he made that statement

before Agent McGoey informed him of the indictment. Second, Kosinski's resort to the argument that "the phone call from the FBI was itself a startling event" under Federal Rule of Evidence 803(2) is without merit, particularly since he had already spoken with the FBI approximately two months earlier. Nor did the district court abuse its discretion by declining to admit this statement under the rule of completeness. *See United States v. Johnson*, 507 F.3d 793, 796 & n.2 (2d Cir. 2007) (no error where court could reasonably conclude that the statement was not "relevant to the admitted passages"); *see* FED. R. EVID. 106.

B. Kosinski's Statement That He "Can't Believe This Is Happening"

We likewise conclude that the district court did not abuse its discretion by excluding Kosinski's second statement to Agent McGoey—that "I can't believe this is happening"—when McGoey told him he had been indicted. While learning that one has been indicted could perhaps under certain circumstances be a startling event, those circumstances are not present here. Kosinski had spoken with Agent McGoey for close to an hour and a half about two months prior about "Dr. Kosinski's trading in Regado," which Kosinski knew was based on nonpublic, inside information. Gov't App'x at 421–22. The parties, however, stipulated not to elicit any testimony from that first conversation in order to avoid a "hearsay fight" over the admissibility of certain of Kosinski's statements. *Id.* at 423.

Because of that stipulation, the district court did not have sufficient information—and neither do we—to determine whether Kosinski's indictment was startling despite what he could have gleaned from the earlier conversation: namely, that he was possibly a

subject or target of the FBI's investigation for insider trading. Under these circumstances, we cannot say that the district court's decision to exclude this statement was "manifestly erroneous." *Litvak*, 889 F.3d at 67. Nor was the statement necessary under the rule of completeness to place into context Kosinski's comments introduced by the government, which did not relate to this statement by Kosinski.

CONCLUSION

The judgment of conviction is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Criminal Case No. 3:16-CR-00148 (VLB)

UNITED STATES OF AMERICA

v.

EDWARD KOSINSKI

August 16, 2017

Memorandum of Decision Denying Defendant's Motion to Dismiss the Indictment

Before the Court is Defendant's Motion to Dismiss the Indictment for failure to state an offense under Federal Rule of Criminal Procedure 12(b)(3). For the reasons that follow, the Defendant's Motion is DENIED.

I. Background

On August 3, 2016, a federal grand jury sitting in New Haven, Connecticut returned an indictment against Defendant Edward Kosinski charging him with two counts of Insider Trading in violation of 17 C.F.R. Section 240.10b-5 and 15 U.S.C. Sections 78j(b) and 78ff. [Dkt. 1 (Indictment).] The Indictment alleges as follows.

Throughout the relevant time period, Defendant was a resident of Weston, Connecticut and the presi-

dent of President of Connecticut Clinical Research, LLC ("CCR"), located in Bridgeport, Connecticut. Indictment at ¶ 1. Regado Biosciences, Inc. ("Regado") is a publicly traded biopharmaceutical company incorporated in Delaware and principally located in New Jersey. *Id*. at ¶ 2. From approximately September 2013 through June 2014, Regado enrolled patients in a clinical trial to study the efficacy of a clinical drug candidate (the "Trial"). *Id*. at ¶ 3. Regado hired the Cleveland Clinical Coordinating Center for Clinical Research ("C5 Research") to coordinate and manage the Trial. *Id*.

On or about June 12, 2013, Defendant, on behalf of CCR, entered into a Confidential Disclosure Agreement (the "Disclosure Agreement") with Regado. The Disclosure Agreement granted CCR the right to receive confidential, proprietary information to "evaluate CCR's interest in participating in the Trial," and required CCR to "treat the information received confidentially and not disclose such information" without Regado's prior written consent. *Id*. at ¶ 4.

On or about January 29, 2014, Defendant entered into a Clinical Study and Research Agreement (the "Research Agreement") with C5 Research, an authorized agent of Regado. *Id*. at ¶ 5. Defendant executed the Research Agreement both individually, as a principal investigator, and on behalf of CCR. *Id*. The Research Agreement required CCR and Defendant to "maintain in strict confidence all confidential information . . . provided by C5 Research or Regado during the course of the Trial." *Id*.

Between approximately October 2013 and May 2014, Defendant purchased 40,000 shares of Regado common stock. *Id*. at ¶ 6. On or about June 29, 2014, C5 Research informed Trial investigators and coordi-

nators, including Defendant, that several Trial participants had allergic reactions to the clinical drug candidate. *Id*. at ¶ 8. As a result, C5 Research indicated it would accept no new Trial participants until July 2, 2014 and the Data and Safety Monitoring Board would assess the Trial. *Id*. This information was confidential, non-public and material. *Id*.

On or about the following day, June 30, 2014, Defendant sold his $40,000 shares of Regado common stock for between $6.59 and $7.00 per share, for a total of approximately $272,561. *Id*. at ¶ 9. He did so knowingly, willfully, with intent to defraud, and in violation of a duty of trust and confidence owed to Regado and C5 Research. *Id*.

On July 2, 2014, the closing price of Regado common stock was $6.76. *Id*. at ¶ 10. After the stock market closed that day, Regado publicly announced that participant enrollment in the Trial was paused pending the Data and Safety Monitoring Board's assessment. *Id*. at ¶ 10. On July 3, 2014, the closing price of Regado common stock was $2.81. *Id*. at ¶ 11. By selling his stock before July 2, 2014, Defendant avoided a loss of approximately $160,000. *Id*.

On July 29, 2014, C5 Research informed Defendant and other investigators and study coordinators that a Trial participant had died and the Trial was on hold pending the Data and Safety Monitoring Board's assessment. *Id*. at ¶ 14. The information was confidential, non-public, and material. *Id*.

Approximately two days later, on or about July 31, 2014, Defendant purchased 50 Regado put-option contracts with a strike price of $2.50 and an expiration date of October 18, 2014. *Id*. at ¶ 15. This gave Defendant the right to sell 5,000 shares of Regado

common stock on or before October 18, 2014 for $2.50 per share. *Id*. He did so knowingly, willfully, with intent to defraud, and in violation of a duty of trust and confidence owed to Regado and C5 Research. *Id*. The closing price of Regado common stock that day was $2.98. *Id*. at ¶ 16.

On or about August 25, 2014, Regado publicly announced that it had permanently halted the Trial. *Id*. at ¶ 17. Over the course of that day, Regado common stock prices fell to $1.13 per share. *Id*. Approximately three days later, on or about August 28, 2014, Defendant purchased 5,000 shares of Regado common stock for approximately $1.13 per share. *Id*. at ¶ 18. Defendant then exercised his put option, selling his 5,000 shares for $2.50 per share and netting a profit of over $3,000. *Id*.

Defendant self-surrendered and was arraigned on August 4, 2016. [Dkt. 4.] Defendant entered a $500,000.00 non-surety bond and agreed to conditional pre-trial release. [Dkts. 5, 6.]

II. Standard For Dismissal Of An Indictment

"An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits." *Costello v. United States*, 350 U.S. 359, 363 (1956). An indictment is valid if it "first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *United States v. Alfonso,* 143 F.3d 772, 776 (2d Cir. 1998) (quoting *Hamling v. United States,* 418 U.S. 87, 117 (1974)).

When identifying the elements of a crime of indictment, courts look to "the language employed by Congress" in the applicable statute and assume "the ordinary meaning of the language accurately expresses the legislative purpose." *United States v. Aleynikov*, 676 F.3d 71, 76 (2d Cir. 2012). While an indictment must allege all of the elements of the crime of indictment, it has "never been thought that an indictment, in order to be sufficient, need anticipate affirmative defenses." *United States v. Sisson*, 399 U.S. 267, 288 (1970).

When determining whether an indictment asserts facts to fulfill each element of the crime alleged, courts accept as true the allegations in the charging document. *Alfonso,* 143 F.3d at 776-77. An indictment must "contain some amount of factual particularity to ensure that the prosecution will not fill in elements of its case with facts other than those considered by the grand jury." *United States v. Walsh*, 194 F.3d 37, 44 (2d Cir. 1999). However, courts have "consistently upheld indictments that do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime." *Id*. at 44. "[T]he sufficiency of the evidence is not appropriately addressed on a pretrial motion to dismiss an indictment" unless "the government has made what can fairly be described as a full proffer of the evidence it intends to present at trial." *Alfonso*, 143 F.3d at 776-77; *see also Costello,* 350 U.S. at 363 ("If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great.").

III. Analysis

Defendant moves to dismiss the Indictment for failure to state an offense under Federal Rule of Criminal Procedure 12(b)(3). Specifically, Defendant asserts the Indictment fails to allege a duty of trust and confidence prohibiting Defendant from trading securities based on confidential information concerning the Trial. The Government opposes Defendant's Motion.

a. The Duty of Trust and Confidence

The Indictment alleges Defendant violated the Securities Exchange Act of 1934 as codified at 15 U.S.C. Sections 78j(b) and 78ff,[1] and SEC Rule 10b-5, codified at 17 C.F.R. 240.10b-5. 15 U.S.C. Section 78j(b), which codifies Section 10(b) of the Securities Exchange Act of 1934,[2] prohibits the use "in connection with the purchase or sale of any security . . . [of] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." Pursuant to this section,

[1] 15 U.S.C. Section 78ff states anyone who willfully violates the Securities Exchange Act of 1934 "shall upon conviction be fined not more than $5,000,000, or imprisoned not more than 20 years, or both."

[2] 15 U.S.C. Section 78j codifies Section 10(b) of the Securities Exchange Act of 1934, which prohibits the "use or employ[ment], in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." Courts often reference violations of 15 U.S.C. Section 78j(b) as Section 10(b) violations; the Court will so reference them here.

the SEC promulgated Rule 10b-5 which provides in pertinent part:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, [or] . . . (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

17 CFR § 240.10b-5 (1979); *see also Chiarella v. United States*, 445 U.S. 222, 225-26 (1980) (explaining the relation between 15 U.S.C. Section 78j(b) and Rule 10b-5).

A person who uses non-public information for his own benefit in securities trading commits a "fraud" in two instances. First, under the "classical" theory, a fiduciary[3] of a corporation commits a fraud by violating a duty to disclose or abstain from trading on confidential information obtained because of the fiduciary's position with the corporation. *United States v. O'Hagan*, 521 U.S. 642, 652 (1997). The duty arises out of the "relationship of trust and confidence" which exists between a corporation's shareholders and fiduciaries. *Id*.

Second, under the "misappropriation" theory, an individual commits a fraud by violating a duty to

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[3] A fiduciary of a corporation is a "corporate insider, such as an officer of the corporation," who has "obtained confidential information by reason of [his] position with that corporation." *United States v. Falcone*, 257 F.3d 226, 229 (2d Cir. 2001).

disclose or abstain from trading on confidential information obtained from a source with whom the individual has a relationship of trust and confidence. *O'Hagan*, 521 U.S. at 652. The relationship of trust and confidence is not created "unilaterally, by entrusting a person with confidential information" but rather when "there is explicit acceptance of a duty of confidentiality or where such acceptance may be implied from a similar relationship of trust and confidence between the parties." *United States v. Falcone*, 257 F.3d 226, 234 (2d Cir. 2001) (citing *United States v. Chestman*, 947 F.2d 551, 567 (2d Cir. 1991)). A "similar relationship of trust and confidence" exists where the parties have the "functional equivalent of a fiduciary relationship," namely, when the beneficiary of the relationship "rel[ies] on a fiduciary to act for his benefit" and in doing so "entrust[s] the fiduciary with custody over property of one sort or another." *Chestman*, 947 F.2d at 569.

b. The Confidentiality Agreements Create a Duty of Trust and Confidence

Both parties agree the Indictment relies on the misappropriation theory. [Dkt. 26 (Motion to Dismiss); Dkt. 31 (Opposition).] However, the parties disagree as to whether the Research Agreement and Disclosure Agreement (together, the "Confidentiality Agreements") created a relationship of trust and confidence which prohibited Defendant from trading on confidential information concerning the Trial. The disagreement concerns 17 C.F.R. Section 240.10b5-2(a) (hereafter "Rule 10b5-2"), which "provides a non-exclusive definition of circumstances in which a person has a duty of trust or confidence for the purposes of the 'misappropriation' theory of insider trading under Section 10(b) of the Act and Rule 10b-5." Rule 10b5-2

Preliminary Note. One of the circumstances creating a "duty of trust or confidence" is "[w]henever a person agrees to maintain information in confidence." Rule 10b5-2(b).

The Government asserts Defendant owed Regado and C5 Research a duty of trust and confidence under Rule 10b5-2. Defendant argues Rule 10b5-2 establishes no such duty for three reasons: (i) Rule 10b5-2 is not cited in the Indictment; (ii) the wording of Rule 10b5-2 does not track exactly the language in the Supreme Court's definition of misappropriation liability; and (iii) affording Rule 10b5-2 its plain meaning would impermissibly extend the reach of Section 10(b). The Court addresses each argument in turn.

First, Defendant asserts that Rule 10b5-2 does not apply because it is not cited in the Indictment. Rule 10b5-2 applies to "any violation of Section 10(b) of the Act (15 U.S.C. 78j(b)) and § 240.10b-5 thereunder that is based on the purchase or sale of securities on the basis of, or the communication of, material nonpublic information misappropriated in breach of a duty of trust or confidence." Rule 10b5-2(a). The rules of statutory construction direct courts to assign a statute meaning according to the plain language of terms. *See Aleynikov*, 676 F.3d at 76. Accordingly, the Court construes Rule 10b5-2 as applying to "any" violation of the type described therein even where, as here, the indictment does not cite Rule 10b5-2. This interpretation is consistent with other courts within the Second Circuit. *See, e.g., U.S. v. Corbin*, 729 F. Supp. 2d 607, 615 (S.D.N.Y. 2010) (finding an indictment under Section 10(b) and Rule 10b-5 which asserted the defendant agreed to maintain information in confidence sufficiently alleged "a duty of trust or confidence

for the purposes of maintaining a prosecution based on misappropriation theory under Rule 10b5-2(b)(1)").

Second, Defendant asserts that Rule 10b5-2 could not inform the application of Section 10(b) because Rule 10b5-2 states a "duty of trust *or* confidence exists . . . [w]henever a person agrees to maintain information in confidence," while the misappropriation theory requires a "duty of trust *and* confidence." *See* Rule 10b5-2(a) (emphasis added); *O'Hagan*, 521 U.S. at 652 (emphasis added). The rules of statutory construction dispose of this argument as well. The Court must consider the statute as a whole and consult its relevant legislative history to determine its meaning. *Interstate Commerce Comm'n v. J.T. Transport Co.*, 368 U.S. 81, 107 (1961). Rule 10b5-2 repeatedly states it is intended to apply to Section 10(b) and the misappropriation theory. *See* Rule 10b5-2 Preliminary Note, subsection (a). In addition, the SEC's Executive Summary of Rule 10b5-2 states Rule 10b5-2 is intended to resolve disagreements among the courts regarding the application of Section 10(b) and Rule 10b-5. *See* Final Rule: Selective Disclosure and Insider Trading, Exchange Act Release Nos. 33-7881, 34-43154 (Oct. 23, 2000) at Section III (hereafter "Final Rule"). Despite the statute's wording and the SEC's intent in enacting Rule 10b5-2, Defendant asserts the phrase "trust *or* confidence" renders it inapplicable to Section 10(b). The Court shall not read Rule 10b5-2 to include such an internal contradiction. *See United States v. Ron Pair Enters.*, 489 U.S. 235, 240 (1989) (holding a statute should be upheld according to its plain meaning if it is "coherent and consistent").

Finally, Defendant asserts Rule 10b5-2 extends beyond the scope of Section 10(b) by creating liability where there is a confidentiality agreement but no

agreement not to trade upon the confidential information. In support of this argument, Defendant cites *SEC v. Cuban*, 634 F. Supp. 2d 713 (N.D. Tex. 2009) (vacated on other grounds). The *Cuban* Court determined that an agreement which only expressly prohibits disclosing confidential information does not also create a duty not to trade securities based on that information. *Id*. at 728. Because trading on the information would not violate the strict terms of the confidentiality agreement, the *Cuban* Court reasoned such trading would not constitute "deception." *Id*. As Section 10(b) gave the SEC authority to proscribe conduct that is "manipulative or deceptive," the *Cuban* Court concluded Section 10(b) does not contemplate prohibiting securities trading where only a confidentiality agreement exists. *Id*. (citing Section 10(b)). The *Cuban* Court accordingly concluded Rule 10b5-2 exceeds the scope of Section 10(b). *Id*.

The Court declines to find that affording Rule 10b5-2 its plain meaning would impermissibly extend beyond Section 10(b). "When a court reviews an agency's construction of the statute which it administers," the court must consider "whether Congress has directly spoken to the precise question at issue." *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984). Where the statute does not speak directly to the precise question, but rather leaves "ambiguity in [the] statute meant for implementation by an agency," the court must uphold the agency's interpretation if it "is based on a permissible construction of the statute." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005) (discussing *Chevron*, 467 U.S. at 843). An interpretation is "permissible" if it is "a reasonable policy choice for the agency to make." *Id.* at 986.

Section 10(b) does not state what duties, if breached through "manipulation or deception," create misappropriation theory liability. *See supra* note 2 (text of Section 10(b)). Accordingly, if the SEC's interpretation of those duties as including the duty to maintain information in confidence is "a reasonable policy choice," the Court shall uphold it.

The Court finds the SEC's interpretation reasonable. The SEC's interpretation is consistent with this Circuit's precedent which, both before and after Rule 10b5-2's enactment, recognized that a confidentiality agreement creates a duty of trust and confidence under the misappropriation theory. In 1991, the Second Circuit recognized two avenues for establishing a duty of trust and confidence under the misappropriation theory: an "express agreement of confidentiality" or a "pre-existing fiduciary relation . . . or its functional equivalent." *Chestman*, 947 F.2d at 571. Six years later, the Supreme Court affirmed that an individual violates Section 10(b) "when he misappropriates confidential information for securities trading purposes." *O'Hagan*, 521 U.S. 642, 643 (1997). When the SEC enacted Rule 10b5-2, it considered "the fundamental unfairness of insider trading" and Congress's "strong support for [the SEC's] insider trading enforcement program," and found the misappropriation theory as described in *O'Hagan* was "consistent with the animating purpose of the federal securities laws." Final Rule at Section III. The SEC also cited *Chestman* in its Executive Summary of Rule 10b5-2 as part of the regime of case law upon which the Rule was based. *Id.* at Section III(b)(1). After Rule 10b5-2's enactment, courts within the Second Circuit have continued to recognize that confidentiality agreements create a duty under the misappropriation

theory.[4] *See, e.g.*, *U.S. v. Falcone*, 257 F.3d 226, 233 (2d Cir. 2001).

Further, the SEC promulgated Rule 10b5-2 in 2002. Despite *Cuban* and its contrary application of the Rule, Congress has not enacted clarifying legislation limiting the reach of Rule 10b5-2. Rather, Congress has allowed the SEC to continue to apply Rule 10b5-2 as it is written. This indicates a congressional affirmance of the Rule as appropriate in scope.

The Court finds the SEC's interpretation of Section 10(b) in Rule 10b5-2 a "reasonable policy choice" and rejects Defendant's final argument against applying the Rule here. *See also United States v. Corbin*, 729 F. Supp. 2d 607, 617-19 (finding Rule 10b5-2 did not exceed the SEC's rulemaking authority under *Chevron* analysis). Defendant's Motion to Dismiss for failure to allege a duty of trust and confidence through the Confidentiality Agreements is DENIED.

a. Whether a Fiduciary-Like Relationship Creates a Duty of Trust and Confidence

The parties also disagree as to whether the Indictment alleges a fiduciary-like relationship between

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[4] The cases within the Second Circuit which Defendant cites do not hold otherwise. *See Nolan Bros. of Texas, Inc. v. Whiterhaven, LLC*, 2004 WL 376265 at *1 (S.D.N.Y. 2004) (stating a confidentiality agreement does not necessarily create a fiduciary relationship between the parties to a civil contract); *Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb Inc.*, 767 F. Supp. 1220 (S.D.N.Y. 1991) (holding the receipt of confidential information without a confidentiality agreement does not create a duty not to trade on the information); *United States v. Cassesse*, 273 F. Supp. 2d 481 (S.D.N.Y. 2003) (finding an unsigned confidentiality agreement does not create a duty of trust and confidence under the misappropriation theory).

Defendant and Regado and C5 Research. As stated above, a person has a duty of trust and confidence under the misappropriation theory if he or she and the source of the information have an "express agreement of confidentiality" or a "pre-existing fiduciary relation . . . or its functional equivalent." *Chestman*, 947 F.2d at 571. The Government asserts even if Defendant's confidentiality agreement did not create a duty not to trade on shared non-public information under Rule 10b5-2, the Defendant and C5 Research had a fiduciary-like relationship creating liability under the misappropriation theory. The Government points to Defendant's role as an investigator in C5 Research's clinical trials as the basis for the fiduciary-like relationship. Defendant responds that an investigator is independent from the entity sponsoring a clinical trial, and has a fiduciary relationship not with the entity sponsoring the trial (C5 Research) but with an independent institutional review board.

The indictment provides limited information about Defendant's relationship with C5 Research, stating only that CCR entered into the Disclosure Agreement "to evaluate CCR's interest in participating in the Trial," and that C5 Research provided information regarding the Trial to "Investigators and Study Coordinators, including Kosinski." Indictment ¶¶4, 8. Defendant asks the Court to determine whether Defendant and CCR were independent of C5 Research, or whether Defendant "obtain[ed] access to [information regarding the Trial] to serve the ends of the fiduciary relationship, [and] . . . bec[ame] duty-bound not to appropriate the property for his own use." *Chestman*, 947 F.2d at 569.

The sole authority Defendant cites to assert his legal independence from C5 Research is a case stating "the

investigator who recruits the subjects, determines their suitability, monitors their tolerance and reaction and reports the results" is independent from the sponsoring enterprise and answers only to his or her "institutional review board." *Suthers v. Amgen Inc.*, 441 F. Supp. 2d 478, 488 (S.D.N.Y. 2006). The indictment does not allege that Defendant had such a role on C5 Research's drug trial.

Even if Defendant did have the investigatory role contemplated in *Suthers*, Defendant obscures the fact that the Indictment alleges he entered into two independent confidentiality agreements. In the Disclosure Agreement, Defendant, on behalf of CCR, contracted with Regado to receive information about the Trial to "evaluate CCR's interest in participating in the Trial," and agreed to "treat the information received confidentially." Indictment at ¶ 4. In the Research Agreement, Defendant, both individually and on behalf of CCR, contracted with C5 Research as agent of Regado. *Id*. at ¶ 5. The Indictment does not state the terms of the Research Agreement other than that it required Defendant and CCR to "maintain in strict confidence all confidential information . . . provided by C5 Research or Regado during the course of the Trial." *Id*.

Defendant conflates the interests of Regado and C5 Research and his distinct duty to each under each agreement. While the evidence may show that Defendant was responsible for "recruit[ing] the subjects, determin[ing] their suitability, monitor[ing] their tolerance and reaction and report[ing] the results" of the Trial (*Suthers*, 411 F. Supp. 2d at 488), such evidence would not nullify his duty under each agreement to maintain Trial-related information in confidence. In addition, such evidence may not nullify other fiduciary-like duties under the Disclosure Agreement

or Research Agreement which are yet to be discovered, as the parties have not produced either agreement to the Court.

Defendant asks the Court to "look beyond the face of the indictment and dr[aw] inferences as to the proof that would be introduced by the government at trial" to establish the duty of trust and confidence. *Alfonso*, 143 F.3d at 776.

"[S]uch an inquiry into the sufficiency of the evidence" on a motion to dismiss would be "premature . . . [u]nless the government ha[d] made what can fairly be described as a full proffer of the evidence it intends to present at trial" to establish the duty of trust and confidence, which it has not done here. *Id*. The Court may not weigh the sufficiency of potential evidence at this juncture; Defendant's Motion to Dismiss on the ground that he did not have a fiduciary-like relationship with C5 Research is DENIED.

IV. Conclusion

For the foregoing reasons, Defendant's Motion to Dismiss the Indictment is DENIED.

It is so ordered this 16th day of August 2017, at Hartford, Connecticut.

/s/
Vanessa L. Bryant, U.S.D.J.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Criminal No. 3:16-CR-00148 (VLB)

UNITED STATES OF AMERICA

v.

EDWARD KOSINISKI

May 11, 2018

Memorandum of Decision Denying Defendant's Motion for Judgment of Acquittal and for New Trial

Before the Court is Defendant's Motion for Judgment of Acquittal and for a New Trial. For the reasons set forth below, Defendant's Motion is DENIED.

I. Background

On August 3, 2016, a federal grand jury sitting in New Haven, Connecticut returned an indictment against Defendant Edward Kosinski charging him with two counts of Insider Trading in violation of 17 C.F.R. Section 240.10b-5 and 15 U.S.C. Sections 78j(b) and 78ff. [Dkt. 1 (Indictment).] Defendant entered a plea of not guilty on both counts. [Dkt. 4.] Defendant moved to dismiss the indictment for failure to state an offense under Federal Rule of Criminal Procedure 12(b)(3), and the Court denied that motion in its entirety. [Dkts. 26 (Motion to Dismiss); 35 (Order

Denying Motion to Dismiss).] Jury selection was held on November 7, 2017, and trial took place over five days, on November 13, 14, 16, 17, and 27. [Dkts. 62, 64-66, 69, 72, 73.] The jury deliberated on the afternoon of November 27 and rendered a verdict of guilty on November 28. [Dkts. 73, 75, 77.]

At trial, evidence was elicited that Regado Biosciences, Inc. ("Regado"), a publicly traded company, engaged in a pharmaceutical clinical trial to test a new drug to treat patients undergoing procedures for heart attacks (the "Trial"). [Dkt. 87 at 136-38 (testimony of Dr. Steven Zelenkofske).] The success of Regado depended on the drug's viability. *Id*. at 138.

On June 12, 2013, Defendant, on behalf of Connecticut Clinical Research, LLC ("CCR"), entered into a Confidential Disclosure Agreement (the "CDA") with Regado. [Gov't Ex. 1B.] The CDA granted CCR the right to receive confidential, proprietary information to "evaluate [CCR's] interest in participating in the [Trial]," and required CCR to "hold in confidence and . . . not disclose to any person or entity any Proprietary Information without the prior written consent of [Regado]. *Id*. at 1. The CDA also required Defendant to "use such Proprietary Information only for the Business purpose and shall not use, disclose or exploit such Proprietary Information for its own benefit." *Id*.

On January 29, 2014, Defendant entered into a Clinical Study and Research Agreement (the "CSRA") with C5 Research, an authorized agent of Regado. [Gov't Ex. 4.] Defendant executed the CSRA both individually, as a principal investigator for the Trial, and on behalf of CCR. *Id*. As a principal investigator, Defendant administered the experimental drug to his patients and reported their reactions to the drug to

Regado through C5 Research. *Id*. at 3-4; [Dkt. 86 (Testimony of Terri Zito) at 86-87.] Defendant also agreed to "supervise the conduct of the [Trial]" at one of multiple locations where the Trial was conducted. [Gov't Ex. 4 at 3; Zito Testimony at 87.] The CSRA "embodie[d] the entire understanding between [Defendant, Regado, and CCR]" and "superseded . . . any prior or contemporaneous negotiations, either oral or written." *Id*. at 16. In a section titled "Restrictions on Use and Disclosure," the CSRA required CCR and Defendant to "maintain in strict confidence all . . . confidential information" provided by C5 Research or Regado during the course of the Trial. [Gov't Ex. 4 at 7.]

The CSRA did not include explicit language prohibiting use of confidential information for personal financial gain; nor did it include a "carve out" explicitly allowing principal investigators to trade on confidential information, bet against Regado stock, or bet against the Trial drug. [*Id*.; Zito Testimony at 129-130.] Dr. Zelenofske, Regado's chief medical officer, testified that Regado "anticipated [that principal investigators] wouldn't use the confidential information [received about the Trial] for anything," and that Regado "never really thought about [principal investigators] trading in stock" because Regado "assumed nobody would do that." [Zelenkofski Testimony at 158-59.] When asked why Regado did not contemplate principal investigators using confidential information for securities trades, Dr. Zelenkofske explained: "[W]hen you participate as an investigator in a trial, it's a research agreement, and you're asking patients to put their lives at stake when they participate, and it does not really make sense for somebody to be using that information to do anything other than take care of their patients and conduct the study appropriately." *Id*. at 159.

As a principal investigator, Defendant was allowed to own, but was required to disclose his ownership of, stock in Regado. [Def. Ex. 20.] Specifically, Defendant was required to complete a Trial Financial Disclosure form reporting any "significant equity interest" in Regado held during the course of the Trial and for one year following completion of the trial," which "would include, for example, . . . any equity interest . . . exceeding $50,000." *Id*. Defendant was required to "promptly" update his Financial Disclosure Form to report any change in his financial interests and arrangements during the course of the Trial or within one year after the close of the Trial. *Id*. The financial disclosure was required to ensure that principal investigators had no "conflict of interest . . . that [might have] influence[d] the way [the principal investigator] conduct[ed] the trial." [Zito Testimony at 72.]

From October 2013 through May 2014, Defendant purchased 40,000 shares of Regado stock. [Dkt. 88 (Testimony of Alexander Scoufis) at 152-53]. On October 16, 2013, in an Application for Administrative Approval to Conduct Research connected with the Trial, Defendant reported that he held no shares of Regado stock. [Gov't Ex. 69 at 3, 9.] As of that date, Defendant owned 4,000 shares of Regado stock. [Scoufis Testimony at 156.]

On December 4, 2013, in a Trial Financial Disclosure Form, Defendant reported that he had no significant equity interest in Regado. [Def. Ex. 20.] Defendant's ownership of Regado stock surpassed $50,000 – with a total value of $64,530 – in February 2014. [Scoufis Tetsimony at 159.] Defendant did not submit an updated Trial Financial Disclosure Form reporting that he owned Regado stock in excess of $50,000 until October 1, 2014. [Def. Ex. 58.]

On June 29, 2014, C5 Research sent an email to Defendant and other Trial investigators and study coordinators which announced that multiple Trial participants experienced allergic reaction and as a result the Trial was being put on hold. [Gov't Ex. 10.] Regado's trial of the prior generation of the study drug had been terminated because patients experienced allergic reactions. [Dkt. 87 (Testimony of Mary Ann Sellers) at 9-10.] On June 30, 2014, Defendant sold all of his 40,000 shares of Regado stock for approximately $273,000. [Scoufis Testimony at 162-63, 68.] On July 2, 2014, Regado issued a press release publicly announcing for the first time that the Trial was paused pending review of Trial participants' allergic reactions. [Gov't Ex. 51.] The day after the announcement, Regado stock prices dropped approximately 58 percent. [Scoufis Testimony at 171, 174.] Defendant avoided a loss of approximately $160,000 by selling his shares on June 30, 2014, prior to the press release informing the public of the adverse information. [Scoufis Testimony at 174.]

On July 29, 2014, C5 Research sent an email to Defendant and other Trial investigators and study coordinators which stated the Trial was put on hold after a participant died. [Gov't Ex. 14A-B.] On July 30, 2014, Defendant purchased 50 Regado put-option contracts with a strike price of $2.50 and an expiration date of October 18, 2014. [Scoufis Testimony at 184-85.] On August 25, 2014, Regado issued a press release announcing the Trial was permanently halted. [Def. Ex. 55.] The following day, Regado's price dropped 61 percent, to $1.15 per share. [Scoufis Testimony at 187-89.] On August 28, 2014, Defendant purchased 5,000 shares of Regado stock at $1.13 per share and exercised his put-option to sell them at $2.50, making a profit of $5,600. *Id*. at 191-93.

On June 14, 2016, Special Agent James McGoey and another agent met with Defendant at his office and discussed his securities transactions in June and August of 2014. [Dkt. 89 (Testimony of James McGoey) at 104.] In a second conversation, on August 3, 2016, Agent McGoey called Defendant and told him a grand jury indicted him on two counts of securities fraud. *Id*. at 104-05. Defendant spontaneously reacted, stating he had done a "stupid thing" and that he "didn't feel good about making those trades when he made them." *Id*. at 105. Defendant stated he was motivated to conduct the securities transactions by "greed and stupidity." *Id*. at 105-06.

II. Standard Of Law

Federal Rule of Criminal Procedure 29 provides that "[i]f the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal." Fed. R. Crim. P. 29(c)(2). "A Rule 29 motion should be granted only if the district court concludes there is 'no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt.'" *U.S. v. Irving,* 452 F.3d 110, 117 (2d Cir.2006) (citation omitted); *U.S. v. Cossette,* 3:12-CR-232 (JBA), 2013 WL 5274349 (D. Conn. Sept. 18, 2013) (same). "A defendant challenging the sufficiency of the evidence that was the basis of his conviction at trial 'bears a heavy burden,'" *U.S. v. Hawkins,* 547 F.3d 66, 70 (2d Cir.2008), as he "must show that when viewing the evidence in its totality, in a light most favorable to the government, and drawing all inferences in favor of the prosecution, no rational trier of fact could have found him guilty." *Irving,* 452 F.3d at 117. Further, "it is well settled that Rule 29(c) does not provide the trial court with an opportunity to substitute its own determination of . . . the weight of the evidence and the reason-

able inferences to be drawn for that of the jury." *U.S. v. Cote,* 544 F.3d 88, 99 (2d Cir.2008) (internal quotation marks and citation omitted). "The Court must give full play to the right of the jury to determine credibility." *Id.*

Federal Rule of Criminal Procedure 33 provides that, upon a defendant's motion, a district court "may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). "In exercising the discretion so conferred, the court is entitled to weigh the evidence and in so doing evaluate for itself the credibility of the witnesses." *U.S. v. Sanchez,* 969 F.2d 1409, 1413 (2d Cir. 1992) (internal quotation marks and citation omitted); *U.S. v. Padilla,* 511 F. App'x 8, 10 (2d Cir. 2013) *cert. denied,* 133 S. Ct. 2815 (2013) (same). However, only where exceptional circumstances exist may the trial judge "intrude upon the jury function of credibility assessment." *Sanchez,* 969 F.2d at 1414; *U.S. v. Castelin,* 3:11–CR–183 JCH, 2013 WL 3540052 (D. Conn. July 10, 2013) (same). "Even in cases involving a witness's perjured testimony, however, a new trial is warranted only if 'the jury probably would have acquitted in the absence of the false testimony.'" *U.S. v. Truman,* 688 F.3d 129, 141 (2d Cir. 2012) (quoting *Sanchez,* 969 F.2d at 1413–14). "The test is whether it would be a manifest injustice to let the guilty verdict stand." *Sanchez,* 969 F.2d at 1414 (internal quotation marks and citation omitted). In other words, for a court to grant a motion for a new trial after examination of the entire case, "[t]here must be a real concern that an innocent person may have been convicted." *Id.* (internal quotation marks and citation omitted).

III. Analysis

In support of his Motion for Judgment of Acquittal under Federal Rule of Criminal Procedure 29, Defendant asserts (1) a confidentiality agreement is insufficient to create a duty of trust and confidence prohibiting Defendant from trading securities based on confidential information; (2) Rule 10b5-2 should not be applied in this case because it concerns only familial and non-business relationships; (3) in addition to a confidentiality agreement, the law requires Defendant to have a "fiduciary-like" relationship of trust and confidence with Regado, which he did not have; and (4) the Government failed to introduce evidence that Defendant willfully violated the prohibition against insider trading. Defendant also asserts that, if the Court declines to enter judgment of acquittal, the Court should grant Defendant a new trial under Federal Rule of Criminal Procedure 33.

The majority of Defendant's Motion reasserts arguments raised and rejected by the Court in his Motion to Dismiss the Indictment. [Dkts. 26 (Motion to Dismiss); 35 (Order Denying Motion to Dismiss).] Defendant reargues questions of law already decided by this Court, including the scope of the duty of trust and confidence under the misappropriation theory of liability and the application of SEC Rule 10b5-2. In addition, Defendant raises a new argument that Rule 10b5-2 should not apply to this case because it only applies to familial or non-business relationships, but indicates no reason he could not have raised that argument in his Motion to Dismiss, and the Court discerns none.

Defendant appears to be using this Motion as an avenue to seek reconsideration of the Court's ruling on the Motion to Dismiss. Such a motion would be

untimely at this juncture, eight months after the Court's ruling on the Motion to Dismiss, after a full trial on the merits and a jury verdict. *See* Local R. Crim. P. 7(c) (stating motions for reconsideration shall be filed within seven days of filing of the decision from which relief is sought). In addition, such a motion would not be meritorious, as Defendant cites no newly discovered evidence, intervening change in law, or manifest injustice which would result from the Court's failure to reconsider its prior ruling, and fails to meet the strict standard for reconsideration. *Shrader v. CSX Transp. Inc.*, 70 F.3d 255, 257 (2d Cir. 1995) ("The standard for granting a motion for reconsideration is strict."); *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992) (stating three primary grounds for reconsideration). A "motion for reconsideration is not a means to reargue those issues already considered when a party does not like the way the original motion was resolved." *Doe v. Winchester Bd. of Ed.*, No. 10 cv-1179, 2017 WL 662898, at *2 (D. Conn. Feb. 17, 2017); *Roman v. Leibert*, No. 3:16-cv-1988, 2017 WL 4286302, at *1 (D. Conn. Sept. 27, 2017) (same).

Defendant's legal arguments do not discuss whether sufficient evidence was presented at trial for a reasonable mind to find the Defendant guilty beyond a reasonable doubt, nor do they contemplate whether the weight of the evidence elicited at trial renders the guilty verdict a manifest injustice. *See Irving*, 452 F.3d at 117 (discussing standard for a motion for judgment of acquittal); *Sanchez*, 969 F.2d at 1413 (discussing standard for a motion for new trial). Rather, Defendant seeks to raise repetitive arguments on matters of law inappropriate at this juncture. The Court will not now reiterate its previous ruling on Defendant's arguments on matters of law previously raised and

already decided. The Court will consider Defendant's challenge to the sufficiency of the evidence at trial: specifically that acquittal is appropriate because the Government failed to introduce evidence from which a reasonable jury could find the Defendant willfully violated the prohibition against insider trading.

A. Defendant Acted Willfully

Defendant relies on the language of the CDRA to assert he did not willfully violate the insider trading laws. Defendant asserts that, because the Clinical Study and Research Agreement ("CSRA") did not expressly prohibit Defendant's use of confidential information, Defendant did not willfully defraud Regado by using that confidential information in his securities transactions. [*See* CSRA at 7 ("Facility and Principal Investigator will maintain in strict confidence all of the Confidential Information and will disclose the Confidential Information only" to an enumerated subset of parties).] Defendant also emphasizes that he was permitted to own stock in Regado. [Defense Ex. 20 (Financial Disclosure Form).]

The Government does not dispute that the CSRA governed Defendant's relationship with Regado or that Defendant was allowed to own stock in Regado. However, the Government asserts neither of these facts establishes that Defendant did not willfully violate the insider trading laws.

The Second Circuit has articulated the willfulness requirement for insider trading as "a realization on the defendant's part that he was doing a wrongful act

under the securities laws . . . in a situation where the knowingly wrongful act involved a significant risk of effecting the violation that has occurred." *United States v. Cassese*, 428 F.3d 92, 98 (2d Cir. 2005)

(quoting *United States v. Peltz*, 433 F.2d 48, 55 (2d Cir. 1970). The willfulness requirement is met if the government establishes general awareness of wrongful conduct, "which may exist even if a defendant believes his chicanery is in technical compliance with the law." *United States v. Chiarella*, 588 F.2d 1358, 1371 (2d Cir. 1979). The Court finds that sufficient evidence was elicited at trial for a reasonable jury to find that Defendant acted willfully.

The jury heard evidence that Defendant is highly educated, that he read and understood documents which required him to disclose and periodically update his stock ownership, and that he signed multiple forms failing to disclose his stock ownership. In particular, the jury heard evidence that Defendant submitted an inaccurate Application for Administrative Approval to Conduct Research in October 2013, stating he held no Regado stock when in actuality he held 4,000 shares. [Gov't Ex. 69; Scoufis Testimony at 152-53.] In addition, the jury heard evidence that Defendant did not update his Trial Financial Disclosure Form until eight months after his Regado stock ownership surpassed $50,000. [Def. Ex. 58; Scoufis Testimony at 159.] Defendant notes that he updated his disclosure two days after receiving a letter from C5 Research stating "[a]s a reminder: . . . [i]f any investigator has any relevant financial interest changes related to Regado Biosciences for 1 year following termination of the study, please send updated Financial Disclosure Forms to Regado." [Def. Ex. 57.]

Defendant argues his disclosure two days after receiving that reminder disproves willful violation of the insider trading laws. However, the reminder did not offer an additional explanation of Defendant's continuing duty to promptly disclose any financial

interest in Regado. Defendant's eventual disclosure of his securities holdings establishes that he did understand his ongoing duty to disclose, and does not explain away his failure to do so in the preceding eight months.

In addition to evidence regarding his failure to timely disclose his securities holdings, the jury heard evidence of the short timeframe between when Defendant received confidential information about the Trial and when he made his securities transactions. The jury heard evidence that Defendant received confidential information that several Trial participants experienced allergic reactions, and one day later sold $40,000 shares of Regado stock, avoiding a loss of approximately $160,000. [Scoufis Testimony at 162-74.] The jury also heard evidence that Defendant received confidential information that a Trial participant died, two days later purchased 50 Regado put-option contracts, and then exercised those put-options three days after the Trial information was made public, profiting over $5,600. [Scoufis Testimony at 184-89.] The jury also heard evidence that principle investigators are expected not to trade on confidential information. [Selenkofske Testimony at 158-59.]

Finally, the jury heard testimony from Special Agent McGoey that when he confronted Defendant about his securities transactions, Defendant stated he was motivated to conduct the securities transactions by "greed and stupidity." [McGoey Testimony at 105-06.]

After the jury heard the above evidence, the Court instructed the jury as to willfulness:

> [To] act willfully means to act knowingly and purposefully with the intent to do something the law forbids, that is, with bad purpose

> either to disobey or disregard the law . . . It is not required that the Government show that Dr. Kosinski, in addition to knowing what he was doing and deliberately doing it, also knew that he was violating some particular statute.

[Dkt. 91 at 171-72.] That definition of willfulness articulates the Second Circuit's definition of the scienter requirement for insider trading as stated above. *See United States v. Cassese*, 428 F.3d at 98.

As discussed *supra*, to succeed on a motion for judgment of acquittal, the defendant must show that "when viewing the evidence in its totality, in a light most favorable to the government, and drawing all inferences in favor of the prosecution, no rational trier of fact could have found him guilty." *Irving,* 452 F.3d at 117. In light of the evidence elicited at trial, the Court cannot say there was "no evidence upon which a reasonable mind might fairly conclude" that Defendant acted willfully. *Id.* at 117. Defendant's Motion for Judgment of Acquittal is accordingly DENIED.

B. A New Trial is Not Warranted

Defendant spends the final two paragraphs of his Motion arguing that, if the Court denies his motion for judgment of acquittal, the Court should order a new trial. In support, Defendant states the record does not contain sufficient evidence to support the jury's verdict, and that Defendant's conviction is a manifest injustice. [Motion at 34-35 (citing *United States v. Ferguson*, 246 F.3d 129, 133 (2d Cir. 2001) (discussing standard for a new trial under Fed. R. Crim. P. 33); *United States v. Lopac*, 411 F. Supp. 2d 350, 359 (S.D.N.Y. 2006) (same)).] The Government responds that a new trial is only granted in extraordinary circumstances, and that in evaluating such a motion

the Court should not usurp the role of the jury. [Opp. at 16-17.]

Defendant has not explained his basis for asserting that his conviction is manifestly unjust, and has not identified any exceptional circumstance requiring a new trial here. *See Sanchez*, 969 F.2d at 141 (stating a new trial is only appropriate where exceptional circumstances exist); *Castelin*, 2013 WL 3540052 (same). Neither case Defendant cites in support of his Rule 33 motion is analogous. In *Ferguson*, the first case Defendant cites, the Second Circuit found no abuse of discretion where the District Court held there was "no credible evidence" that the defendant acted with the expectation of gaining gang membership, as was required under the statute of indictment, where the Government "abandoned" its motive theory at trial and sought to establish the expectation of gang membership through evidence that the defendant attempted to murder someone of strategic importance to a gang. *Id*. at 135.

In *Lopac*, the second case Defendant cites, the Southern District of New York ordered a new trial concerning the defendant's participation in a criminal conspiracy to distribute marijuana. 411 F. Supp. 2d at 361-62. There was no evidence that the defendant expressed an intent to join the conspiracy, no evidence that the defendant received any financial compensation for participation in the conspiracy, and no evidence that the defendant knew the Federal Express packages she received on behalf of a conspiracy member contained marijuana. *Id*. at 366-67.

Unlike *Sanchez* and *Lopac*, this is not a case where no credible evidence was put before the jury which supported Defendant's guilt. This is not a case in which testimony supporting the conviction was

"patently incredible or defie[d] physical realities," *Ferguson*, 246 F.3d at 134 (explaining what might constitute exceptional circumstances warranting a new trial), or in which the verdict hinged on perjured testimony. *See, e.g.*, U.S. v. Truman, 688 F.3d 129, 141 (2d Cir. 2012) ("Even in cases involving a witness's perjured testimony, however, a new trial is warranted only if 'the jury probably would have acquitted in the absence of the false testimony.'"). Rather, as stated above, evidence supporting a reasonable jury's finding of guilt included: the timing of Defendant's transactions in relation to when he received confidential information, his intelligence and sophistication, his knowledge that he was required to disclose his holdings, his failure to timely disclose his holdings, and his admission to Agent McGoey that he traded out of greed and stupidity. The Court is not "convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice." *United States v. Triumph Cap. Grp., Inc.*, 544 F.3d 149, 159 (2d Cir. 2008) (stating Rule 33 standard). On the contrary, the Court is persuaded that the jury had ample evidence from which to have found Defendant guilty, including the timing of his trades, his failure to timely report his Regado stock ownership, and his admissions when advised that he had been indicted. Defendant's motion for a new trial is DENIED.[1]

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[1] Defendant moved for a judgment of acquittal at the close of the Government's case-in-chief and simultaneously moved for leave to file an *amicus curiae* brief authored by Mark Cuban. [Dkts. 67-68.] On December 22, 2017, Defendant filed a renewed Motion for Judgment of Acquittal and for New Trial, explaining that he was supplementing his prior arguments with evidence elicited at trial. [Dkt. 85.] The Court finds Defendant's initial motions as moot, as Defendant incorporated his prior briefing into his second Motion for Judgment of Acquittal and for New

IV. Conclusion

For the foregoing reasons, Defendant's Motion for Judgment of Acquittal and for New Trial is DENIED.

It is so ordered this 11th day of May 11, 2018, at Hartford, Connecticut.

/s/
Vanessa L. Bryant, U.S.D.J.

Trial and the prior motions raise no arguments not contemplated herein.

APPENDIX D

15 U.S.C. § 78j provides:

Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--

(a)(1) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security other than a government security, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Paragraph (1) of this subsection shall not apply to security futures products.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(c)(1) To effect, accept, or facilitate a transaction involving the loan or borrowing of securities in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Nothing in paragraph (1) may be construed to limit the authority of the appropriate Federal banking

agency (as defined in section 1813(q) of Title 12), the National Credit Union Administration, or any other Federal department or agency having a responsibility under Federal law to prescribe rules or regulations restricting transactions involving the loan or borrowing of securities in order to protect the safety and soundness of a financial institution or to protect the financial system from systemic risk.

Rules promulgated under subsection (b) that prohibit fraud, manipulation, or insider trading (but not rules imposing or specifying reporting or recordkeeping requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading), and judicial precedents decided under subsection (b) and rules promulgated thereunder that prohibit fraud, manipulation, or insider trading, shall apply to security-based swap agreements to the same extent as they apply to securities. Judicial precedents decided under section 77q(a) of this title and sections 78i, 78o, 78p, 78t, and 78u-1 of this title, and judicial precedents decided under applicable rules promulgated under such sections, shall apply to security-based swap agreements to the same extent as they apply to securities.

* * *

17 C.F.R. § 240.10b–5 provides:

Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

* * *

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Case No.: 3:16-CR-00148 (VLB)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDWARD J. KOSINSKI,

Defendant.

November 27, 2017

TRIAL – DAY 5

THE HON. VANESSA L. BRYANT
United States District Judge

THE COURT:

* * *

I'm now going to instruct you on the elements of the offense.

In order to meet its burden of proof, the Government must establish beyond a reasonable doubt the following elements of the crime of securities fraud:

First, that, in connection with the purchase or sale of the security, the defendant employed a device,

scheme, or artifice to defraud or engaged in an act, practice, or course of dealing that operated or would operate as a fraud or deceit upon a purchaser or seller of the specific security.

The second element is that the defendant acted willfully, knowingly, and with the intent to defraud.

The third element is that the defendant used or caused to be used any means or instrument of transportation or communication in interstate commerce or the mails or any facility of a national securities exchange in furtherance of the fraudulent conduct.

[166] I will now instruct you on each of these elements in detail.

The first element that the Government must prove beyond a reasonable doubt is that, in connection with the purchase and sale of a specific security, Dr. Kosinski deployed a scheme or artifice or engaged in an act, practice, or course of business that operated or would operate as a fraud or deceit on a purchaser or seller of the specific security.

A device, scheme, or artifice is merely a plan for the accomplishment of any fraudulent objective. The device, scheme, or artifice that the indictment alleges the defendant employed in this case is known as "insider trading."

Insider trading occurs when a person misappropriates material nonpublic information and then trades in securities in breach of the duty of trust and confidence which he or she owes to the source of that information. When a person has material nonpublic information and his duty of trust and confidence to the source of the information prevents him from disclosing

that [167] information, the law forbids him from buying or selling the securities in question.

In order to find that the Government has established the first element that Dr. Kosinski engaged in an inside trading scheme, the Government must prove the following beyond a reasonable doubt:

First, that Dr. Kosinski had a duty of trust and confidence to Regado Bioscience, Inc., which I will refer to herein as "Regado."

And, second, that Dr. Kosinski violated his duty of trust and confidence in connection with trading in Regado stock or options by using material nonpublic information that he obtained by virtue of his agreement with Regado through its authorized agent Cleveland Clinic Foundation.

I will now define for you several of the relevant terms I just used.

The Government must establish beyond a reasonable doubt that Dr. Kosinski had a duty of trust and confidence to Regado. That means that he was reasonably expected to keep the material information at issue [168] confidential or at least that the relationship between the defendant and Regado reasonably implied such a duty. Whether such a duty of trust and confidence existed between the defendant and Regado is a question of fact for you to determine.

The duties and obligations between the defendant and Regado may have been expressed explicitly in writing or may be inferred from the nature and circumstances of their relationship including through any agreement with Regado through its authorized agent Cleveland Clinic Foundation.

Dr. Kosinski and Regado must each recognize the existence of a duty of trust and confidence, although the understanding or mutual recognition may be either express or implied. A mere working relationship is not sufficient to satisfy this element; however, a person has a requisite duty of trust and confidence whenever a person agrees to maintain information in confidence.

If you find that Dr. Kosinski had a duty of trust and confidence to Regado, then you must next consider whether the Government has [169] proved beyond a reasonable doubt that Dr. Kosinski breached the duty of trust and confidence by using material nonpublic information he received directly or indirectly from Regado in connection with trading in Regado stock or options.

I will now define for you the terms "material" and "nonpublic."

* * *