15-3457

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

v.

GEORGE H. HOLLEY; STEVEN V. DUDAS; PHAIROT IAMNAITA

GEORGE H. HOLLEY,
Defendant-Appellant.

On appeal from an opinion and order entered in the
United States District Court for the District of New Jersey, 3:11-cv-205,
Hon. Douglas E. Arpert, U.S.M.J.

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, APPELLEE

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PRELIMINARY STATEMENT

While serving as Chairman of the Board of a publicly traded company, Appellant George H. Holley learned that the company would soon be acquired in a tender offer. Instead of adhering to his duty to maintain the confidentiality of this material, nonpublic information, Holley arranged for persons close to him to profitably trade on it at the expense of the company's shareholders. Based on this conduct, Holley pleaded guilty to criminal insider trading and then consented to judgment in this civil law enforcement action brought by the Securities and Exchange Commission. Holley admitted that he committed insider trading, and the court found

it obvious that he engaged in wrongdoing. Holley paid disgorgement and penalties, and he agreed to be enjoined from again serving as an officer or director of a public company.

But soon after choosing to admit his wrongdoing, Holley abruptly reversed course. Seeking to resume serving on corporate boards, where he would again have access to confidential corporate information, Holley moved to vacate the consent judgment under Federal Rule of Civil Procedure 60(b) based on the defense that he received no personal benefit from providing others with inside information—a defense he had already unsuccessfully urged in his criminal case before choosing to plead guilty. Only this time, Holley sought to relitigate the defense in light of *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), a subsequent decision by the Second Circuit addressing the "personal benefit" defense which Holley claimed legalized his conduct. The court below acted within its discretion in finding Holley's Rule 60(b) motion meritless for several reasons, any one of which is an independently adequate basis for affirming the judgment below.

Holley's motion fails at the outset because it entirely depends on the false premise that a decision of the Second Circuit has changed the law of this Circuit. Neither the Supreme Court nor this Court has adopted the Second Circuit's decision. Holley is thus attempting to misuse Rule 60(b) to effect a change in the law of this Circuit, rather than to recognize a change in governing law that has already occurred.

But even if the Second Circuit's decision could somehow change this Circuit's law regarding "personal benefit," Holley's conduct was illegal regardless of whether he received any personal benefit. Holley admitted that he revealed highly sensitive information about a pending tender offer, which violates securities law provisions that specifically address tender offers and do not require receipt of a personal benefit. In addition, the question of whether Holley benefited from providing information to others is irrelevant here because, for a significant amount of the insider trading at issue, he personally funded and effectuated trades based on inside information.

In any event, even if the legality of Holley's conduct were to turn entirely on *Newman*'s personal benefit standard, Holley's misconduct would meet that standard. Unlike the corporate insiders in *Newman*, Holley disclosed inside information to his close companion and a family member with the intention that they would benefit by trading on it. Such conduct has long been illegal under Supreme Court precedent and remains so even under *Newman*.

Finally, Holley has also failed to carry his burden to demonstrate additional equitable factors that warrant setting aside the judgment. This is especially so because he seeks to void a judgment to which he voluntarily agreed. Given Holley's conduct, undoing that bargain and permitting him to resume serving on the boards of public companies would be inequitable and imprudent.

COUNTERSTATEMENT OF THE ISSUES

Whether the court below acted within its discretion in denying Holley's Rule 60(b) motion because:

1. Holley's motion was premised on a change in governing law, but the only basis for the purported change was the Second Circuit's decision in *United States v. Newman*—a single decision by a court of appeals in a different circuit that did not (and could not) change the law of this Circuit;

2. Regardless of *Newman*, Holley remains independently liable (a) for violating the separate prohibition on insider trading in connection with tender offers, and also (b) for trading on inside information—neither of which require him to receive any personal benefit;

3. *Newman* did not make legal Holley's disclosures of inside information to his close companion and his family member, with the intent to benefit them by encouraging them to trade on that information; or

4. No other equitable factors justified Rule 60(b) relief that would dissolve the final judgment resulting from Holley's voluntary settlement and permit him to return to boards of public companies.

COUNTERSTATEMENT OF THE CASE

A. Holley engaged in insider trading in connection with a tender offer.

From 1985 to 2010, Holley was the Chairman of the Board of Directors of Home Diagnostics, Inc., a publicly traded company. A28 at ¶10.[1] Beginning in late 2009, representatives of Nipro Corporation engaged in confidential negotiations to acquire Home Diagnostics through a tender offer. *Id.* at ¶8; A29 at ¶16. By the end of December, Nipro had formally offered to acquire Home Diagnostics for $11.50 per share, a substantial premium over its market value, and Holley and the rest of the Home Diagnostics board had authorized management to proceed with drafting a merger agreement. SA5-SA6 at ¶9; A29 at ¶17.

During the weeks that followed, while Holley continued to receive confidential updates about the merger's progress, he provided material, nonpublic information about the upcoming tender offer to five individuals: his first cousin, Robert Hahn-Baiyor; his close friend and companion, Phairot Iamnaita; two other friends; and one of his employees who had not otherwise been privy to this information. SA1 at ¶1, SA6-SA9 at ¶¶11-28. They all purchased shares in Home Diagnostics based on Holley's tips. *Id.* (In the parlance of insider trading, the disclosure of confidential

[1] "A__" refers to Holley's Appendix. "SA__" refers to the Commission's Supplemental Appendix filed with this brief. "Dkt. __" refers to the district court's docket in *SEC v. Holley, et al.*, No. 11-cv-205 (D.N.J.) (Arpert, U.S.M.J.). "Cr. Dkt. __" refers to the docket in Holley's criminal case, *United States v. Holley*, No. 11-cr-66 (D.N.J.) (Pisano, J.). "Br. __" refers to Holley's brief.

information is a "tip" or "tipping"; the corporate insider who discloses the information is the "tipper"; and the recipients are "tippees.")

With respect to Iamnaita, Holley went beyond merely tipping inside information about the confidential tender offer; he "effectuated" Iamnaita's purchases of Home Diagnostics shares based on that information. SA46:9-17. Iamnaita was a 28-year-old citizen and resident of Thailand who often stayed at Holley's home, traveled extensively with him in the United States and abroad, and was also Holley's business associate in several ventures. SA3 at ¶1h; A26 at ¶3, A28 at ¶¶12, 29. In January 2010, Holley asked a friend to help him open a brokerage account to purchase stock with Holley's funds in Iamnaita's name. SA6 at ¶11; A28 at ¶34. The friend told Holley that he could not do so because Iamnaita was not a U.S. citizen. SA6 at ¶12; A33 at ¶34.

So, instead, a joint brokerage account was opened in the names of Iamnaita and Steven Dudas, Holley's long-time personal accountant. SA6-SA7 at ¶13; A28 at ¶11, A33 at ¶35. To evade the restriction Holley encountered when opening an account the first time, the account opening documents falsely claimed that Iamnaita resided with the accountant. *Id.* Holley then wrote a $120,000 check to fund Iamnaita's account—the check was made out to his accountant, who then wired the money to the brokerage account. A33-4 at ¶36. On the same day that Holley's money was deposited in the account, all of it was used to purchase Home Diagnostics stock. SA7

at ¶15; A34 at ¶37. The account was not used to purchase any other stock. A33 at ¶35.

On February 3, 2010, the Home Diagnostics tender offer was publicly announced, causing the company's stock price nearly to double, from $6.50 to $11.45 per share. SA7 at ¶10. The five people Holley had tipped all sold their shares or tendered them in the merger, realizing profits of over $250,000. A26-27 at ¶3; A34-36 at ¶¶41, 43, 45, 49. Of that amount, Hahn-Baiyor realized over $66,000 in illicit profits (A35 at ¶44), and the shares purchased with Holley's funds in Iamnaita's name were tendered for a profit of over $90,000. A34 at ¶39.

B. The government brought a criminal action against Holley, in which Holley asserted the defense that he had not received a "personal benefit" from tipping.

Holley was indicted on three counts of insider trading in violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5, and one count of wire fraud. *See* SA1-SA12; *United States v. Holley*, 11-cr-66 (D.N.J.). He was also indicted on two counts of witness tampering and one count of obstruction of justice for impeding the government's investigation into his wrongdoing. SA13-SA16. The indictment alleged that Holley tampered with witnesses and obstructed the investigation after the tender offer was publicly announced by sending analyst and news reports about Home Diagnostics to two of the people he tipped, in an attempt to make it appear as though their trading had been prompted by those reports rather than by Holley's tips. SA13-

SA16. The indictment also alleged that Holley obstructed the investigation by sending those same analyst and news reports to the Commission. *Id.*

A centerpiece of Holley's defense was his claim that he received no "personal benefit" for tipping, and he unsuccessfully moved to dismiss the indictment on this ground. *See* Cr. Dkt. 83-1 at 4, 14, 43, 45; Cr. Dkt. 87 at 3, 16, 28-30, 34-35; Cr. Dkt. 100. Whether Holley received a "personal benefit" is relevant to his liability for tipping in violation of Section 10(b)'s and Rule 10b-5's prohibition against insider trading: A corporate insider, such as a board chairman, violates these antifraud provisions when he trades on the basis of confidential information because such trading deceptively breaches the duty of trust and confidence the insider owes to the uninformed shareholders of his company with whom he trades. *Chiarella v. United States*, 445 U.S. 222, 228 (1980). Tipping—where the insider discloses inside information to another person who trades—likewise violates these provisions. Just as an insider is forbidden from personally trading on confidential information, the insider also "may not give such information to an outsider for the same improper purpose." *Dirks v. SEC*, 463 U.S. 646, 659 (1983). It is unlawful for the insider to do "indirectly" through disclosing inside information to "any other person" what the insider cannot do directly by trading on that information. *Id.* (quoting Exchange Act Section 20(b), 15 U.S.C. 78t(b)).

To distinguish between proper and improper dissemination of confidential corporate information in tipping cases under Section 10(b) and Rule 10b-5, courts

have required evidence that a tipper breached a duty of trust and confidence by obtaining a "direct or indirect personal benefit" from tipping. *Id.* at 659-64. An inference that an insider received a personal benefit from the breach is "justif[ied]" where there is "a relationship between the insider and the recipient that suggests a *quid pro quo*," such as the tippee's payment to the insider for the information which yields the insider a direct "pecuniary gain." *Id.* An inference of breach and personal benefit is also justified where the insider manifests "an intention to benefit the particular recipient" of information. *Id.* And the requisite breach and personal benefit "also exist" where the insider "makes a gift of confidential information to a trading relative or friend" because "[t]he tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient." *Id.* (applying Exchange Act Section 20(b)).

On the first day of the trial in the summer of 2012, Holley's counsel reiterated his "personal benefit" defense. He claimed that "the law requires" that Holley "benefited himself," and he argued that the government could not satisfy this requirement because Holley received no pecuniary gain in exchange for his tipping. SA21:2-4. Holley made his purported lack of personal benefit a theme throughout trial. *See* SA24:20-25, SA25:13-22, SA28:12-21, SA31:12-SA32:21. And he proposed a jury instruction that incorporated his strict view of the "personal benefit" requirement that, for example, would have required Holley to "share in the profits from the tippee's trades" or tip "in exchange for something else of value." *See* A69-71; Br. 5-6.

The district court rejected Holley's "personal benefit" arguments, concluding that a pecuniary *quid pro quo* was not the only way to establish the requisite personal benefit. The court instead proposed instructing the jury that the "personal benefit" element could also be "satisfied if you find that the information was conveyed as a gift of confidential information to a trading relative or friend." A73; *see also* SA36:6-9 (court concluding that "the benefit element of Section 10(b) is satisfied when the tipper intends to benefit or makes a gift of confidential information to a trading relative or friend").

C. Holley chose to plead guilty, rather than further litigate his "personal benefit" defense.

On August 8, 2012, Holley decided not to pursue his defense any further. After the close of the government's case, Holley's counsel announced that Holley had agreed to plead guilty. A76:14-19. Upon Holley's announcement, the court noted that it had "struggled" with the personal benefit issue in Holley's case, but it observed that Holley's guilty plea would make the matter an "academic exercise." A77:12-A78:1. Holley nevertheless proceeded with his plea. Holley confirmed that he had discussed his options with counsel and that his decision to plead guilty was informed and voluntary. A79:11-A88:17. The court emphasized that Holley was "entitled to continue in the trial," that the jury is "in the courthouse ready to go forward today . . . [s]o you have the right to change your mind and say, no, I want to go forward with my trial." A87:2-9. Holley declined this invitation and confirmed that he would

"waive [his] right to continue the trial." A88:4-6. He also waived his right to appeal his conviction. A101:11-14.

Holley pleaded guilty to two counts of insider trading—one count covering the tip to his cousin Hahn-Baiyor, and the other covering the trading in the account he funded for Iamnaita. A99:5-A100:16 (allocution). In exchange, the government agreed to dismiss the remaining counts against Holley, including the charges for witness tampering and obstruction of justice. A88:19-A89:3. Holley confirmed that he considered this to be a "reasonable" deal, and the court accepted his plea. *Id.*

During sentencing proceedings in December 2012, the court concluded that Holley's misconduct was not merely a "mistake of judgment" because "it was so obvious that it was wrong." A123:4-7. The court noted that, while Holley "didn't get any benefit himself" in that Holley personally "didn't make any money" from the securities transactions (A124:11-19, A112:8-9), Holley had "a position of chairman of the company, clearly knew what his obligations were, he knew what the legal standards were because he wrote the Insider Trading Policy that was entered into evidence, and, nevertheless, called five of his friends and suggested that they buy this stock." A122:18-23; *see also* A124:11-12 (court concluding that Holley tipped "in order to help people who Mr. Holley knew or was related to"). The court added that "[i]t's a little more serious with Mr. Iamnaita because [Holley] actually participated in the transaction by funding it." A122:24-25. At his sentencing, Holley himself admitted: "I . . . encourag[ed] my friends and my cousin to buy the stock when I

knew the company was about to be sold," and "g[a]ve information I knew shouldn't be given" to them. A117:13-25.

The court sentenced Holley to a three-year term of probation and imposed a criminal fine of $260,000. A127. The court had applied upward adjustments in the sentencing guideline range based on the total amount of the gain to all of the tippees that resulted from Holley's offense, and based on Holley's abuse of a position of trust. A108:17-A110:5 (applying USSG §§ 2B1.1 & 3B1.3). But the court concluded that it did not "need to impose the punishment of incarceration on Mr. Holley at his age" of 72, and it noted, regarding additional remedies, that there was a parallel "civil case" against Holley brought by the Commission. A121, A125-A126, A128.

D. The Commission brought a civil action against Holley.

The Commission had brought a civil law enforcement action against Holley, which was stayed pending Holley's criminal trial. A17. Like the criminal indictment, the Commission's complaint alleged that Holley's conduct violated Section 10(b) and Rule 10b-5. A29-38. But unlike the indictment, the complaint included an additional claim that Holley violated Exchange Act Section 14(e), 15 U.S.C. 78n(e), and Rule 14e-3 thereunder, 17 C.F.R. 240.14e-3, by communicating inside information specifically regarding a tender offer, where it was foreseeable that such communication would likely result in the purchase of Home Diagnostics shares. A38-

A39.[2] When the civil action resumed after Holley's guilty plea in 2013, the parties commenced a lengthy series of settlement negotiations that took place over the following two years. *See* A17-A21.

Meanwhile, news broke regarding *United States v. Newman*, an insider trading case on appeal to the Second Circuit. News outlets reported widely on the April 2014 oral argument, observing that the Second Circuit panel had "seized on" the personal benefit issue and appeared likely to rule against the government. Ben Protess & Matthew Goldstein, *Appeal Judges Hint at Doubts in Insider Case*, N.Y. Times (Apr. 22, 2014); *see also* Dkt. 56 at 6 n.6 (citing this article and collecting others published in April 2014 about *Newman*).

E. Holley chose to consent to a civil judgment.

On November 21, 2014, months after the *Newman* argument, Holley decided to sign a consent agreement to settle the Commission's action against him. A67. He was represented at the time by the same counsel who represented him throughout his criminal trial. *Id.*

In his written agreement (A62-A67), Holley consented to the entry of a final judgment that enjoined him from acting as an officer or director of a public company. A63. Holley also consented to an injunction against further violations of both Section 10(b) and Section 14(e) of the Exchange Act. *Id.* Holley also agreed to pay

[2] The Commission alleged that Iamnaita and Dudas also violated these provisions. A37-A39. Both Iamnaita and Dudas agreed to consent judgments (A19-A20), but unlike Holley, neither has sought to disturb those judgments.

$66,000 in disgorgement, $7,653 in prejudgment interest, and $312,440 in civil penalties. *Id.* He further agreed to waive his right to a trial and appeal. A64. And he agreed "not to take any action . . . denying, directly or indirectly, any allegation in the complaint." A66.

The court entered final judgment consistent with Holley's consent on December 8, 2014. A51-55.

F. Holley moved under Rule 60(b) to vacate the consent judgment based on his "personal benefit" defense and the Second Circuit's opinion in *Newman*.

Only two months after signing the settlement agreement, Holley sought to vacate the judgment to which he had consented. On February 2, 2015, he moved to set aside the judgment pursuant to Federal Rule of Civil Procedure 60(b)(5) and (6). A56. Holley renewed his defense that he "did not receive . . . 'any benefit' when sharing information about [the] upcoming merger." Dkt. 55-1 at 1. As support for his "personal benefit" defense, Holley cited the Second Circuit's December 10, 2014, decision in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014).[3]

[3] The Supreme Court denied the government's petition for writ of *certiorari* in *Newman*. *See United States v. Newman*, 136 S. Ct. 242 (2015). However, the Supreme Court has recently granted *certiorari* in a different case, *United States v. Salman*, 792 F.3d 1087 (9th Cir. 2015), to consider a question concerning the personal benefit standard articulated in *Newman*. *See Salman v. United States*, 136 S. Ct. 899 (Jan. 19, 2016) (No. 15-628); http://www.supremecourt.gov/qp/15-00628qp.pdf (question presented in *Salman*).

In *Newman*, the Second Circuit recognized that "[p]ersonal benefit is broadly defined to include not only pecuniary gain, but also . . . the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend," because "a personal benefit may be inferred from a personal relationship between the tipper and tippee, where the tippee's trades resemble trading by the insider himself followed by a gift of the profits to the recipient." 773 F.3d at 452 (quotations omitted). But the Second Circuit added:

> [S]uch an inference is impermissible in the absence of proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature. In other words . . . this requires evidence of a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the latter.

Id. (quotations omitted).

Holley's Rule 60(b) motion argued that *Newman* required the government to show in every tipping case that the insider received a pecuniary or similarly valuable personal benefit. Dkt. 55-1, Dkt. 57. Holley claimed that the Second Circuit's decision in *Newman* amounted to a significant change in the law governing his case in this Circuit, which, along with various equitable factors, merited vacating his consent judgment. *Id.*[4]

[4] Holley has never moved to vacate his criminal conviction by filing a petition for a writ of *habeas corpus*, nor has he moved to challenge the non-custodial components of his sentence or criminal penalties by filing a petition for a writ of *coram nobis* (*see United States v. Denedo*, 556 U.S. 904, 911-12 (2009)).

G. The court below denied Holley's Rule 60(b) motion.

Magistrate Judge Douglas Arpert—to whom this matter had been referred with the consent of the parties (A21; 28 U.S.C. 636(c))—denied Holley's motion, concluding that Holley "failed to demonstrate any grounds for relief under Rule 60(b)." A9. The court found that Holley "failed to establish that the Second Circuit's decision in *Newman* constitutes a significant change in the law." A9. The court also found that *Newman* did not "make[ ] legal the conduct for which [Holley] accepted liability." A9. Although Holley may not have "receive[d] a tangible benefit in return" for his inside information, the court found that he "repeatedly acknowledged that the information was disclosed for the purpose of benefitting [two] individuals, one of whom is related to [Holley] and one with whom [Holley] shares a close personal relationship." A7-8. The court explained that Holley's "intent to benefit and help people close to him is precisely the type of personal benefit the Second Circuit referred to in *Newman*" as sufficient for liability. A8. Finally, the court concluded that "Holley has failed to demonstrate any extraordinary circumstances or other equitable factors qualifying for relief under Rule 60(b)." A7.

STANDARD OF REVIEW

In reviewing the denial of a motion to alter or amend a judgment under Federal Rule of Civil Procedure 60(b), the "scope of review . . . is narrow" and "confined to a determination whether the district court abused its discretion." *Wilson v. Fenton*, 684 F.2d 249, 251 (3d Cir. 1982). No abuse of discretion will be found unless the denial is "arbitrary, fanciful, or clearly unreasonable." *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 673 F.3d 192, 203 (3d Cir. 2012). This Court reviews a final judgment of a magistrate judge under the same standard as it reviews a judgment of a district court. 28 U.S.C. 636(c)(3); *Goodman v. Pennsylvania Turnpike Comm'n*, 293 F.3d 655, 676-77 (3d Cir. 2002).

SUMMARY OF ARGUMENT

The court below acted within its discretion in denying Holley's Rule 60(b) motion for four reasons, any one of which is independently sufficient to affirm the judgment below:

1. The court below acted within its discretion in denying Holley's Rule 60(b) motion because there has been no change in the law of this Circuit. Because the Second Circuit's *Newman* decision is not a decision of the Supreme Court or of this Court, it did not change the law applicable to Holley, and he cannot use Rule 60(b) to create such a change.

2. Even if *Newman* could somehow change the law of this Circuit, the court below acted within its discretion in denying Holley's Rule 60(b) motion because Holley's conduct was illegal for separate reasons having nothing to do with *Newman*'s personal benefit ruling. Holley violated specific prohibitions on tipping sensitive information about tender offers, for which Holley is liable regardless of whether he received a personal benefit. Holley is also liable for arranging, funding, and effectuating trades based on inside information, regardless of any personal benefit he received merely by tipping.

3. Even if Holley's liability were to turn solely on *Newman*, the court below acted within its discretion in denying Holley's Rule 60(b) motion because Holley's conduct was unlawful even under *Newman*'s personal benefit standard. Unlike the insiders in *Newman*, Holley disclosed inside information to his close companion and his family member, while encouraging them to benefit from that information by trading. That is illegal under longstanding Supreme Court precedent, and it remains so under *Newman*.

4. Even if Holley were able to show that *Newman* constitutes a change in governing law, the court below acted within its discretion in denying Holley's Rule 60(b) motion because he failed to identify equitable factors justifying 60(b) relief. Equity does not entitle Holley to relitigate a defense he voluntarily abandoned in exchange for settlement, nor does equity favor permitting Holley to return to the boardrooms of public companies.

ARGUMENT

Under Rule 60(b), Holley first "bears the burden of establishing" that a "significant change in circumstances," such as a "significant change in law," warrants vacating the judgment. *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 673 F.3d 192, 202 (3d Cir. 2012); *see also Coltec Indus., Inc. v. Hobgood*, 280 F.3d 262, 273 (3d Cir. 2002) (Rule 60(b)6) requires "exceptional circumstances"). As explained below in Arguments I, II, and III, Holley cannot make this threshold showing for several independent reasons. But even if Holley makes that showing, he bears another burden of establishing that "additional [equitable] factors" justify setting aside the judgment. *Democratic Nat'l Comm.*, 673 F.3d at 202; *see also United States v. Doe*, 810 F.3d 132, 152 (3d Cir. 2015) ("[A] change in decisional law, without more, is not enough to warrant Rule 60 relief."). As explained below in Argument IV, Holley cannot make this showing either.

I. The court below acted within its discretion in denying Holley's Rule 60(b) motion because *Newman* is an out-of-circuit decision that cannot change this Circuit's law.

Holley's argument that the decision of the Second Circuit in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), amounted to a "significant change in law" that "legalized" his conduct (Br. 18) fails for a simple reason: *Newman* is neither a Supreme Court nor a Third Circuit decision, and accordingly, there has been no change in the law of this Circuit. Whatever *Newman*'s impact in the Second Circuit, a decision of another circuit is of course "not binding on" this Court. *Newmark v.*

Principi, 283 F.3d 172, 174 (3d Cir. 2002); *see also United States v. Farley*, 202 F.3d 198, 202 (3d Cir. 2000) ("[W]e are obviously not bound by Second Circuit precedent."). And in no case after *Newman* has this Court, or any court in this circuit, adopted *Newman*'s holding or its reasoning as its own.

While Rule 60(b) may be used to *recognize* a change in the law, Holley improperly attempts to use it as a vehicle for *effecting* a change in the law of this circuit. *See* Charles A. Wright *et al.*, 11 Fed. Prac. & Proc. Civ. § 2863 (3d ed. 2015). Holley cites no decision of this Court, and the Commission is aware of none, that has granted Rule 60(b) relief based on a change in the law of a *different* circuit. Holley relies (Br. 18) on one case in which this Court stated that a "decision of the Supreme Court . . . or *a Court of Appeals* may provide the extraordinary circumstances for granting a Rule 60(b)(6) motion." *Wilson*, 684 F.2d at 251 (emphasis added). But that case involved a decision of the Supreme Court, not any court of appeals—much less a court in a different circuit. And this Court has subsequently cited *Wilson* in explaining that a "change in controlling precedent" is required. *Cox v. Horn*, 757 F.3d 113, 121 (3d Cir. 2014).

As the Sixth Circuit explained in similar circumstances, a change in the law meriting Rule 60(b) relief requires "a subsequent published decision of the Sixth Circuit or a decision from the United States Supreme Court." *United States v. Tennessee*, 615 F.3d 646, 653 (6th Cir. 2010). Although "cases from other circuits could potentially be persuasive if this case were before [the court] in another context, they

cannot . . . satisfy the [movant's] initial burden" to show a change in the law under Rule 60(b). *Id.* at 655. Accordingly, even if this Court should desire to adopt the Second Circuit's holding in *Newman* (or Holley's reading of it), this appeal arising under Rule 60(b) is not the appropriate case in which to do so.[5]

Several courts outside of the Second Circuit have joined the court below in reaching the conclusion that *Newman* did not change the governing law. In *SEC v. Somers*, a Kentucky district court declined to vacate a settlement agreement because *Newman* was not "binding on this Court." 91 F. Supp. 3d 876, 878 (W.D. Ky. 2015). In *Salman*, the Ninth Circuit affirmed the district court's determination that *Newman* did not warrant a new trial, noting that "[o]f course, *Newman* is not binding on us." 792 F.3d at 1092. In *SEC v. Megalli*, a Georgia district court held that a defendant's pre-*Newman* guilty plea precluded him from contesting his civil insider trading liability after *Newman*, concluding that "*Newman* is a Second Circuit case, and thus is not controlling on the Court," so "[e]ven if governing authority in the Second Circuit may have changed, there is no indication at this juncture that it has in the Eleventh Circuit

[5] Should the Supreme Court reach a decision in *Salman* (*see supra* at 14 n.3) that arguably represents a change in governing law, or should this Court do so in another case, Holley would still fail to qualify for Rule 60(b) relief. As explained below in Arguments II and IV, Holley's Rule 60(b) motion fails for additional reasons that do not depend on any of the "personal benefit" issues that *Newman* or *Salman* present. Thus, if a decision of this Court or the Supreme Court arguably changes the law, the decision below should be affirmed on one of those alternative grounds. Alternatively, the present appeal based on *Newman* could be dismissed as moot, and Holley could file a new Rule 60(b) motion in the court below based on that new Third Circuit or Supreme Court decision.

too." – F. Supp. 3d –, 2015 WL 9703789, at *6-*7 (N.D. Ga. 2015); *see also United States v. Melvin*, – F. Supp. 3d –, 2015 WL 7077258, at *15 (N.D. Ga. 2015) ("*Newman* is not binding authority"). The same is true here, and it is fatal to Holley's attempt to vacate his judgment under Rule 60(b).

Nor, in any event, has any other circuit endorsed the Second Circuit's decision, much less Holley's reading of it, which assumes that in every tipping case the government must prove that the insider received a "pecuniary or similarly valuable benefit in exchange for" tipping. Br. 20-21. Holley recognizes that, other than the Second Circuit, "circuit courts around the country" have "uniformly" held that depending on the surrounding facts tipping can be illegal "*regardless* of whether the insider received a pecuniary or similarly valuable benefit." Br. 20-21 (collecting cases, original emphasis).[6] And as Holley admits (Br. 28), the Ninth Circuit has expressly rejected his reading of *Newman*. *See Salman*, 792 F.3d at 1093-94 ("To the extent *Newman* can be read to go so far" as to require a pecuniary benefit, "we decline to follow it").

[6] *See also SEC v. Rocklage*, 470 F.3d 1, 7 n.4 (1st Cir. 2006) ("[T]he mere giving of a gift to a relative or friend is a sufficient personal benefit."); *SEC v. Cuban*, 620 F.3d 551, 557 n.38 (5th Cir. 2010) ("[A] gift to a trading friend or relative" could "suffice to show the tipper personally benefitted."); *SEC v. Maio*, 51 F.3d 623, 632-633 (7th Cir. 1995) (concluding that insider was liable for making "an improper gift of confidential corporate information" to a friend); *SEC v. Clark*, 915 F.2d 439, 454 (9th Cir. 1990) (tipper cannot "eva[de] Rule 10b-5 liability" by "enriching a friend or relative"); *SEC v. Yun*, 327 F.3d 1263, 1275 (11th Cir. 2003) ("The gain does not always have to be pecuniary . . . [A] gift to a trading friend or relative [can] suffice to show that the tipper personally benefitted.").

Grasping for some proof that *Newman* is a sea change in the law outside of the Second Circuit, Holley points to an Administrative Law Judge's initial decision in *In re Bolan & Ruggieri*, Release No. 877, 2015 WL 5316569 (Sept. 14, 2015), which dismissed an administrative action based in part on *Newman*. Br. 23, 29. But because the Commission granted its Division of Enforcement's petition for review of the ALJ's initial decision (*see In re Ruggieri*, Release No. 34-76614, 2015 WL 8519533 (Dec. 10, 2015)), that decision does not "have any force or effect." *In re Fundamental Portfolio Advisors, Inc.*, Release No. 34-48177, 2003 WL 21658248, at *14 n.44 (July 15, 2003); *see also* 17 C.F.R. 201.411(f). The ALJ's decision in *Ruggieri* is "not a binding Commission decision," and will be subject to the Commission's *de novo* review. *Rapoport v. SEC*, 682 F.3d 98, 105 (D.C. Cir. 2012).

Holley also seeks support from the government's petition for certiorari in *Newman* (Br. 24), but that petition recognized that no other court of appeals had adopted the Second Circuit's "novel" holding. Petition for Writ of Certiorari, *United States v. Newman*, No. 15-137, 2015 WL 4572753, at *22-*25, *32-*34 (July 30, 2015), 136 S.Ct. 242 (2015) (denying cert.). The Commission's *amicus* brief in support of

rehearing in *Newman* likewise cautioned against reading that opinion to displace longstanding circuit consensus. *See* A202-A203, A210-A212, A214.[7]

In short, what Holley describes as a "revolution" that upended "thirty years of decisional law throughout the land" (Br. 21-22) is in fact only a deviation by one out-of-circuit panel from the otherwise prevailing consensus.

II. Holley's conduct remains unlawful for independent reasons that do not turn on the law of "personal benefit."

Even if the Second Circuit's decision in *Newman* could somehow change the law of this Circuit regarding the "personal benefit" standard, Holley would still fail, for two independent reasons, to establish the central premise of his argument for vacating his consent judgment—that his conduct has been "legalized." Br. 18. First, Holley violated Exchange Act Section 14(e) and Rule 14e-3, which make it unlawful to communicate material, nonpublic information about a tender offer and do not require *any* personal benefit. Second, any "personal benefit" requirement for liability regarding *tipping* would not apply to the unlawful *trading* that Holley effectuated for Iamnaita. Because Holley's conduct remains illegal for both of those reasons, irrespective of whether he received a "personal benefit," no relief is available under

[7] The Commission's longstanding position, in accord with consensus of the courts of appeals, is that it is not necessary for the insider to obtain an "economic benefit from the tip." *In re Lohmann*, Release No. 34-48092, 2003 WL 21468604, at *4 (June 26, 2003). The Commission has reiterated this position since *Newman* was decided. *See In re Melvin*, Release No. 34-75844, 2015 WL 5172974, at *5 & n.38 (Sept. 4, 2015); A198-A216 (SEC Amicus Brief in Support of Rehearing in *Newman*).

Rule 60(b). And this Court may affirm the denial of Holley's Rule 60(b) motion on either of those two alternative legal grounds. *See, e.g.*, *Munroe v. Central Bucks School Dist.*, 805 F.3d 454, 469 (3d Cir. 2015) ("Of course, this Court may affirm on any ground supported by the record.").[8]

A. Holley tipped information about a tender offer, which violated Exchange Act Section 14(e) and Rule 14e-3 regardless of whether he received any "personal benefit."

Section 14(e) prohibits "any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer," and it authorizes the Commission to prescribe rules "designed to prevent" such fraud. Pursuant to that express authorization, the Commission adopted a rule that specifically prohibits insiders from tipping information about tender offers. Rule 14e-3 makes it unlawful for an officer or director of an issuer who is the target of a tender offer to "communicate material, nonpublic information relating to [that] tender offer to any other person" where it is "reasonably foreseeable that such communication is likely to result in" the purchase or sale of the issuer's securities before the information is publicly disclosed. 17

[8] The Court can dispose of this appeal on either of these grounds irrespective of the outcome of the Supreme Court's consideration of *United States v. Salman*. *Salman* does not involve a violation of Section 14(e) or Rule 14e-3, and addresses tipping by an insider, not trading by an insider. *See Salman*, 792 F.3d at 1088-1089; http://www.supremecourt.gov/qp/15-00628qp.pdf.

C.F.R. 240.14e-3(d). In other words, the rule prohibits insiders from disclosing information about impending tender offers to people who are likely to trade on it.[9]

The Commission's complaint alleged that Holley violated Section 14(e) and Rule 14e-3 because, after Nipro and Home Diagnostics began to finalize the tender offer, Holley provided material, nonpublic information about it to Iamnaita and Hahn-Baiyor and foresaw that they would trade on that information. A38-A39 at ¶¶57-61; A29-A31 at ¶¶15-23; A33 at ¶31; A35 at ¶44; A38 at ¶58. Holley admitted those allegations and consented to the entry of a judgment enjoining him from violating Section 14(e) and Rule 14e-3. A63 (consent); A52-A53 (judgment). Holley has never disclaimed his liability for this violation.[10]

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[9] This rule is a "means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices within the meaning of Section 14(e)." 17 C.F.R. 240.14e-3(d); *see also Tender Offers*, Release No. 34-17120, 45 Fed. Reg. 60410, 1980 WL 20869, at *11-*13 (Sept. 4, 1980). "Because Congress has authorized the Commission, in § 14(e), to prescribe legislative rules, we owe the Commission's judgment more than mere deference or weight . . . we must accord the Commission's assessment controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *United States v. O'Hagan*, 521 U.S. 642, 673 (1997) (applying *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 844 (1984), and upholding the validity of Rule 14e-3).

[10] Holley was charged civilly but not criminally with violating Section 14(e) and Rule 14e-3. When he entered his consent in the Commission's action, his counsel stated that he was "admitting . . . only that conduct which was the subject of his guilty plea" in the criminal case. A132:15-16. Holley's counsel explained that this meant he was "not admitting the charges in the SEC's complaint of conspiracy, witness tampering, obstruction of justice"; and that he was "not admitting the allegations of insider trading with respect to any tippees, or alleged tippees, other than Mr. Hahn-Baiyor and Mr. Iamnaita." A132:19-24. Holley's counsel never similarly disclaimed

(footnote continued on the next page) . . .

Nor could Holley do so based on *Newman*. The Second Circuit's decision concerned only Section 10(b) and Rule 10b-5, which do not specifically define what constitutes insider trading, and thus leave the elements of the violation to be elaborated by courts. *See* Br. 19. But Rule 14e-3 is different. It specifically defines the elements of a violation in the language of the rule itself. And nowhere in the language of that rule is a personal benefit requirement. *See* 17 C.F.R. 240.14e-3(d).

Courts have confirmed this conclusion. *Newman* explains that the personal benefit requirement under Section 10(b) and Rule 10b-5 derives from the need to establish that an insider breached his fiduciary duty, as the receipt of a personal benefit in exchange for a tip "*is* the fiduciary breach that triggers liability for securities fraud under Rule 10b-5." 773 F.3d at 447-49 (original emphasis). But the Supreme Court has held that Rule 14e-3 "does not require specific proof of a breach of fiduciary duty." *O'Hagan*, 521 U.S. at 676. Rather, because of the "highly sensitive nature of tender offer information" and "its susceptibility to misuse," *United States v. Chestman*, 947 F.2d 551, 559-60 (2d Cir. 1991) (*en banc*), Rule 14e-3 is a "prophylactic" that "'dispens[es] with the subtle problems of proof associated with demonstrating fiduciary breach in the problematic area of tender offer insider trading.'" *O'Hagan*,

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. . . *(footnote continued from the previous page)*

liability for violating Section 14(e) and Rule 14e-3. That is consistent with the written terms of the consent (A62-A63)—in which Holley admits to liability with regard only to Hahn-Baiyor and Iamnaita, as well as the judgment (A52-A53)—which specifically enjoins Holley from violating Section 14(e) and Rule 14e-3.

521 U.S. at 676 (quoting *Chestman*, 947 F.2d at 560); *see also SEC v. Warde*, 151 F.3d 42, 47 (2d Cir. 1998) (Under Section 14(e), "there is no requirement to show that a [defendant] breached a fiduciary duty."); *Tender Offers*, 1980 WL 20869, at *5-*13.

Accordingly, because Section 14(e) and Rule 14e-3 do not require a fiduciary breach, they do not require a personal benefit. *See Melvin*, No. 34-75844, 2015 WL 5172974, at *5 & n. 38 (finding *Newman* inapplicable because "a breach of fiduciary duty for personal benefit is not an element of liability under Exchange Act Section 14(e) and Rule 14e-3"); 4 Bromberg & Lowenfels on Securities Fraud § 6:549 (2d ed. 2015) ("14e-3 is violated without personal benefit to the tipper."); *id.* at § 6:520 (Rule 14e-3 "is not dependent on personal benefit to the tipper").[11]

B. Any "personal benefit" limitation on liability for *tipping* would not apply to the *trading* that Holley effectuated.

Holley's conduct remains unlawful for a second reason that has nothing to do with the "personal benefit" requirement: Holley was more than just a "tipper"; he also orchestrated trading on inside information himself. *See supra* at 6-7. Under the

[11] The Commission raised this argument at the hearing on Holley's Rule 60(b) motion after the magistrate judge invited counsel to provide "anything additional they'd like the Court to consider." SA41:23-24; SA100:7-SA101:1, SA102:12-SA103:7. Although this argument had not been in the Commission's written brief, the magistrate judge nevertheless considered it at the hearing and Holley chose not to address it in a post-hearing brief. SA101:18-19; SA102:3-15. *See, e.g.*, *United States v. Tupone*, 442 F.3d 145, 157 (3d Cir. 2006) (legal issue raised during hearing is "obviously preserved"); *United States v. Huntington Nat'l Bank*, 574 F.3d 329, 332 (6th Cir. 2009) ("[L]itigants may preserve an argument in the district court by 'rais[ing]' it for the first time at a hearing, even when they neglected to make the argument in a pre-hearing filing.") (collecting authorities). In any event, this Court may affirm on any legal ground supported by the record. *Munroe*, 805 F.3d at 469.

"classical" or "traditional" theory of insider trading, a "corporate insider"—such as a "director" like Holley—commits fraud when he "trades in the securities of his corporation on the basis of material, nonpublic information." *O'Hagan*, 521 U.S. at 651-52 (discussing *Chiarella*, 445 U.S. at 228-29); *accord United States v. McGee*, 763 F.3d 304, 310-11 (3d Cir. 2014). Such conduct is "deceptive" because it violates the "relationship of trust and confidence between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation," and results in a corporate insider "tak[ing] unfair advantage" of uninformed shareholders. *Chiarella*, 445 U.S. at 228.

Where the insider himself trades, there is no personal benefit requirement. As *Newman* explains, that requirement arises only in the context of "tipping liability"—an "expan[sion] [of] insider trading liability to reach situations where the insider . . . in possession of material nonpublic information (the 'tipper') *does not himself trade* but discloses the information to an outsider (a 'tippee') who then trades." 773 F.3d at 446 (emphasis added) (citing *Dirks*, 463 U.S. at 659); *see generally*, *SEC v. Obus*, 693 F.3d 276, 284-85 (2d Cir. 2012) (distinguishing between a classical insider trading case and a tipping case). It is axiomatic that an insider is liable where there is "trading by the insider followed by a gift of the profits to the recipient." *Dirks*, 463 U.S. at 664.

Holley did just that by personally orchestrating the purchase of stock with his funds on the basis of inside information. As Holley's attorney conceded at the Rule 60(b) hearing, Holley "effectuated" the trade for Iamnaita "based on material

nonpublic information." SA46:9-17 (emphasis added). Holley directed the opening of a brokerage account for the sole purpose of purchasing Home Diagnostics stock, and Holley funded that account with $120,000 of his own money. *Supra* at 6-7. Although that account was nominally in Iamnaita's name, Holley arranged for the trading in that account to occur. *Id.* As the court recognized at sentencing, Holley's conduct was "more serious with Mr. Iamnaita because [Holley] *actually participated in the transaction* by funding it." A122:24-25 (emphasis added).

The fact that Holley "trade[d] on behalf of another person" and "produce[d] illegal profits that he d[id] not personally realize" does not make Holley's conduct any less "illegal and fraudulent." *SEC v. Contorinis*, 743 F.3d 296, 299 (2d Cir. 2014) (holding the defendant responsible for insider trading in third-party account); *accord Clark*, 915 F.2d at 453-54. "[T]he insider trader who trades for another's account has engaged in a fraud" and then "allocated that gain, for reasons of his own, to beneficiaries that he chose." *Contorinis*, 743 F.3d at 302-03, 307. Imposing liability in this situation prevents insider traders like Holley "from evading liability by operating through or on behalf of third parties" like Iamnaita. *Id.* at 304.

III. Holley's conduct remains unlawful even under *Newman*.

Even if *Newman* were to apply in this Circuit and Holley's liability were to turn solely on *Newman*'s personal benefit holding, Holley is wrong to claim that *Newman* "legalized the precise conduct in which [he] engaged." Br. 18. As the court below correctly concluded, *Newman* did not "make[] legal the conduct for which [Holley] accepted liability" (A9) because this case does not have the particular facts that led the *Newman* court to conclude that the government had failed to establish the personal benefit required for tipper liability. *See Dirks*, 463 U.S. at 664 (personal benefit is a "question of fact"). Unlike here, the insiders in *Newman* (1) tipped only casual acquaintances, not close friends or family members, and (2) did not intend to benefit the people they tipped. On those facts, the *Newman* court held that, to establish the necessary personal benefit, the government was required to prove that the tippers received a pecuniary or similarly valuable benefit in exchange for tipping. Ignoring that factual context, Holley reads *Newman* to hold that a "pecuniary or similarly valuable benefit" is required in *all* tipping cases under Section 10(b). Br. 20-21. But that view cannot be reconciled with either *Newman* or *Dirks*, under which Holley's conduct remains illegal.

A. Unlike the insiders in *Newman*, Holley unlawfully tipped a close personal friend as well as a member of his family, which remains a basis for inferring a personal benefit under *Newman*.

Newman accepted the proposition that a personal benefit "include[s] not only pecuniary gain, but *also* . . . the benefit one would obtain from simply making a gift of

confidential information to a trading relative or friend." *Newman*, 773 F.3d at 452 (emphasis added). But *Newman* refused to find that the tippers in that case had made a "gift" to their tippees, where the only evidence of a gift was "the mere fact" that they had a relationship "of a casual or social nature." *Id.* One insider and the person he tipped had previously attended the same school, but they "were not 'close' friends." *Id.* at 451-52. The other insider tipped a "merely casual acquaintance[ ]" whom he "had met through church" and with whom he "occasionally socialized." *Id.* at 452-53. *Newman* considered these relationships "scant evidence" from which to infer that the tippers had intended to make a "gift" to a "friend" because they were not "meaningfully close personal relationship[s]." *Id.*

Unlike the insiders in *Newman*, Holley does not dispute that he had a "meaningfully close personal relationship" with the people he tipped. By Holley's own admission, he had a "close relationship" with Iamnaita (SA53:16), who was his "friend and companion with whom he regularly socialized and vacationed" (Br. 5).[12] Holley and Iamnaita were also "business associates," and they "jointly invested" in "several business ventures." A26 at ¶3a; SA2 at ¶1b. Holley's attorney also admitted that Holley had a "close, indeed, familial relationship" with Hahn-Baiyor. SA53:16-

[12] *See also* A28 at ¶12; A31-A32 at ¶¶24, 29 (Holley and Iamnaita were "close personal friends having regular contact," and "Iamnaita often stayed at Holley's home"); SA2 at ¶ 1b (Iamnaita was Holley's "companion" with whom he "regularly socialized and vacationed").

18; *see also* Br. 5; SA65:22-SA66:19 (Holley's counsel admitting that both Iamnaita and Hahn-Baiyor were "close to him").

Although Holley now asserts that the magistrate judge "made no findings" about the "nature" of the relationship between Holley and his tippees (Br. 12), Holley never disputed the closeness of those relationships below. And, in consenting to judgment, he expressly "waive[d] the entry of findings of fact." A64. In any event, the judge did make findings, explaining that in considering whether there is a "meaningfully close relationship, . . . it's noteworthy here that the tippees here were a relative and a companion." SA52 at 15:1-24. The court specifically found that Iamnaita was Holley's "close personal friend," "long-time confidant," and "companion." A2, A7, A8. And the judge found that Hahn-Baiyor was Holley's "first cousin." A8.[13]

Courts have agreed that *Newman*'s determination that the government was required to show that the tippers in that case received a pecuniary (or similar) benefit does not apply where, as here, there is a "meaningfully close personal relationship." For example, in *Salman*, where the tipper and tippee were brothers, the Ninth Circuit

[13] First cousins have sufficient consanguinity to be meaningfully close as a matter of law. For example, anti-bias, anti-nepotism, and conflict of interest standards routinely apply to first cousins. *See*, *e.g.*, *Application of Shapiro*, 392 F.2d 397, 399 (3d Cir. 1968) (draft boards); 5 U.S.C. 3110(a)(3) (federal employment); 28 U.S.C. 458(a)(1) (judicial appointments). *See also United States v. Windsor*, 133 S.Ct. 2675, 2691-92 (2013) (state laws prohibiting first cousins from marrying); *Curry v. Dempsey*, 701 F.2d 580, 583 (6th Cir. 1983) (welfare benefits available to a family member, including a first cousin); 26 U.S.C. 529(e)(2)(D) (same).

found it sufficient, even under *Newman*, that there was a close "friendship or familial relationship between tipper and tippee." *Salman*, 792 F.3d at 1093-94. Like Holley, the defendant in *Salman* urged the Ninth Circuit to read *Newman* to require proof in all tipping cases that the insider received a "gain of a pecuniary or similarly valuable nature" in exchange for tipping. *Id.* at 1093. The Ninth Circuit rejected that argument, observing that such a reading of *Newman* would be inconsistent with the Supreme Court's decision in *Dirks* and would result in a legal framework under which "a corporate insider" would "be free to disclose" confidential information to her friends and relatives, and "they would be free to trade on it, provided only that she asked for no tangible compensation in return." *Id.* at 1093-94.

Several district courts outside of the Second Circuit have likewise determined that *Newman* can be satisfied where the tipper and tippee have a close relationship.[14] Even in the Second Circuit, district courts have concluded that a "close, longstanding

[14] *See SEC v. Andrade*, – F. Supp. 3d –, 2016 WL 199423, at *3-*4 (D. R.I. Jan. 15, 2016) (denying motion to dismiss, concluding that *Newman* does not require a pecuniary or similar exchange where the tipper and tippee have a "meaningfully close personal relationship"); *United States v. Melvin*, 2015 WL 7077258, at *1, *15 (denying motion to dismiss indictment where the tipper had a "close personal friendship" with his tippees); *Megalli*, 2015 WL 9703789, at *8 (denying defendant's motion for summary judgment based on *Newman* where the insider passed along inside information for a variety of reasons, "including their friendship"). *Ruggieri*—a nonprecedential ALJ decision on which Holley relies (*supra* at 23)—dismissed an administrative action based on *Newman* where the ALJ found that, unlike here, the tipper and tippee had a "working relationship" that failed to establish a "meaningfully close personal relationship." 2015 WL 5316569, at *34-*35, *42-*45.

friendship" between the insider and tippee is sufficient under *Newman*.[15] Holley cites the Second Circuit's unpublished decision in *United States v. Riley* (Br. 28), which affirmed a criminal conviction where the defendant tipped for "an immediate pecuniary benefit." *Riley*, No. 15-1541, 2016 WL 158464, at *3-*4 (2d Cir. Jan. 14, 2016). But the court expressly did not reach the question of whether it was also sufficient under *Newman* that the defendant tipped to "maintain[] or further[] a friendship"—nor did the Second Circuit there address whether tipping a *close* friend or a *relative* is sufficient. *Id.* at nn. 3, 4.

B. Unlike the insiders in *Newman*, Holley unlawfully intended for his tippees to benefit by trading on the inside information he provided.

Newman suggested that a personal benefit may also be shown by evidence that the insider had an "intention to benefit" the tippee. 773 F.3d at 452. An insider's "intention to benefit" a tippee may be shown, for example, by evidence that the insider intended the tippee to trade on the information. *Salman*, 792 F.3d at 1092. Where the tipper intends the tippee to trade on confidential information, the tipper's use of that information is indisputably "improper." *Newman*, 773 F.3d at 446 (quoting *Dirks*, 463 U.S. at 559).

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[15] *SEC v. McGinnis*, 2015 WL 5643186, at *18-*19 (D. Vt. Sept. 23, 2015) (denying defendant's motion for summary judgment); *see also SEC v. Payton*, – F. Supp. 3d –, 2015 WL 9463182, at *2-*3 (S.D.N.Y. Dec. 28, 2015) (denying defendant's motion for summary judgment based in part on the "closeness of the relationship" between a tipper and tippee who were "more than mere roommates"); *United States v. Gupta*, 111 F. Supp. 3d 557, 559-61 (S.D.N.Y. 2015) (denying defendant's habeas petition), *appeal pending*, No. 15-2707 (2d Cir.).

Evidence of the *Newman* insiders' "intention to benefit" was lacking because neither of the insiders there admitted that he intended to benefit his tippee, and one testified that he "did not know" that his tippee was even trading on the information. 773 F.3d at 452-53. Furthermore, the insiders in *Newman* did not tip highly sensitive information about an impending tender offer, but instead communicated to financial analysts the kind of quarterly financial information "routinely" used by such investment professionals, such as "revenue, gross margin, operating margin, and earnings per share." *Id.* at 454-55. Such information was of a "nature regularly and accurately predicted by analyst modeling" and was "routinely 'leaked'" to analysts by the corporations at issue. *Id.*

In contrast to *Newman*, the court below found that Holley made "repeated admission[s] that he shared the confidential information regarding the merger with his 'companion' and his first cousin with the intent to confer a benefit on them." A8. Specifically, Holley repeatedly admitted that he intended to benefit his tippees by encouraging them to profitably trade on exceptionally sensitive information about a soon-to-be disclosed tender offer. *See* A117:16-18 (Holley allocuted: "I . . . encourage[ed] my friends and my cousin to buy the stock when I knew the company was about to be sold."); A63 at ¶2 (admitting that he tipped "with the understanding that his cousin and his friend would use that information to purchase HDI stock"). The district court in the criminal proceeding found that Holley received a tangible, economic benefit when his intention to benefit his tippees was satisfied: Holley had

committed himself to "help[ing] his cousin and Mr. Iamnaita," and did so by disclosing valuable information at no monetary cost to himself in lieu of "writing [them] a check" for money that otherwise would have come out of his pocket. A123:8-16.

Courts have recognized that the personal benefit required by *Newman* can be established by evidence that the tipper intended to benefit the tippee.[16] In particular, like Holley, the tipper in *Salman* admitted that he disclosed inside information to his tippee "in order to 'benefit him,'" which the court of appeals determined was a sufficient personal benefit to sustain a conviction for insider trading. 792 F.3d at 1089. And as here, there was evidence that the tipper "intended to 'benefit'" the tippee by "knowing that he intended to trade on" the information, which *Salman* contrasted with *Newman*, where the tippers did not know or intend that the tippees would trade. *Id.* at 1089, 1093.

C. Holley's reading of *Newman* to require that to be liable as a tipper the insider must always receive a pecuniary personal benefit in exchange for tipping contradicts the Supreme Court's decision in *Dirks*.

Reading *Newman*, as Holley does, to hold that the only way to establish the personal benefit required for tipper liability under Section 10(b) and Rule 10b-5 is

[16] *See McGinnis*, 2015 WL 5643186, at *20; *Andrade*, 2016 WL 199423, at *4; *Payton*, 2015 WL 9463182, at *3; *Gupta*, 111 F. Supp. 3d at 560. Holley's reliance on *Ruggieri*, an ALJ decision that has no force or effect (*supra* at 23), is misplaced for the additional reason that the ALJ concluded that, unlike here, the Division of Enforcement had "not argue[d]" that the insider there tipped with the "intent to benefit" the tipper. 2015 WL 5316569, at *45-*46.

through proof that the insider received a pecuniary benefit "depart[s] from the clear holding of *Dirks*." *Salman*, 792 F.3d at 1093. *Dirks* held that a pecuniary *quid pro quo* is sufficient, not necessary: To infer the requisite personal benefit, it is also sufficient if the insider "makes a gift of confidential information" to a "relative or friend," or if the insider "intend[s] to benefit" the tippee. 463 U.S. at 663-64. Holley's reading also cannot be reconciled with *Dirks*'s conclusion that the tipper can benefit "directly *or indirectly*" by application of Exchange Act Section 20(b). *Id.* at 659, 662 (emphasis added); *see supra* at 8-9. And it cannot be squared with *Dirks*'s application of its holding to determine that the insiders there had not received a personal benefit because they "received no monetary or personal benefit . . . *nor* was their purpose to make a gift of valuable information." *Id.* at 666-67. *Cf. McGinnis*, 2015 WL 5643186, at *18 ("*Newman* did not 'overrule' the Supreme Court's decision in *Dirks*" regarding a personal benefit from tipping information to a "trading relative or friend" or "intend[ing] to benefit" the tippee); *Payton*, 2015 WL 9463182, at *2-*3 (noting that *Newman* "obviously" could not "overrule *Dirks*").[17]

[17] Contrary to Holley's assertions regarding the government's cert petition in *Newman* (Br. 27-28), the entire thrust of that petition was that requiring a pecuniary personal benefit, as Holley urges, is inconsistent with *Dirks*.

IV. Equity weighs strongly against vacating Holley's consent judgment.

Even if Holley were able to show that *Newman* constitutes a significant "change in decisional law," that is "not enough to warrant Rule 60 relief." *Doe*, 810 F.3d at 152. There must also be "additional factors" that justify the court's exercise of its equitable discretion to set aside the judgment. *Democratic Nat'l Comm.*, 673 F.3d at 202. Those equitable factors weigh decisively against Rule 60(b) relief here: Holley chose to receive the benefits of settling the claims against him; he did so while aware of his arguable "personal benefit" defense; and permitting him to void his settlement would discourage settlements generally. Furthermore, his conduct demonstrates that he should not be placed in a position of trust with a publicly held company. Accordingly, after considering both the Commission's and Holley's arguments regarding the relative equities (Br. 32), the court below acted within its discretion when it concluded that "Holley has failed to demonstrate any extraordinary circumstances or other equitable factors qualifying for relief under Rule 60(b)." A7.

A. Holley should not be released from a settlement to which he voluntarily agreed.

The overwhelming equitable consideration in this case is that Holley made a knowing and voluntary choice to settle rather than to litigate his "personal benefit" defense. Having done so—and having received the benefits of his bargain—it would not be equitable to permit Holley to revive his defense in a collateral attack on his settlement.

"[A] motion made under Rule 60(b)(5) or (6) may not generally substitute for an appeal." *Marshall v. Bd. of Ed., Bergenfield, N.J.*, 575 F.2d 417, 424 (3d Cir. 1978). Thus, when one person chooses not to appeal an issue, while another appeals that issue and wins, the one who does not appeal has no right to the benefit of the other's choice. *Ackermann v. United States*, 340 U.S. 193, 198 (1950). Such "free, calculated, deliberate choices are not to be relieved from" simply because "hindsight seems to indicate . . . that [one's] decision not to appeal was probably wrong." *Id.*

That principle applies with even greater force where one chooses not only to forgo an appeal, but to settle and accept a consent judgment. As this Court has recognized, it "is not unfair" to "enforc[e] [a party's] bargain," regardless of a subsequent change in the law. *Coltec*, 280 F.3d at 275. In *Coltec*, a party sought to escape a settlement after the Supreme Court held unconstitutional the statute on which the settled action had been based. The party had settled "because it believed" its constitutional claims "were unlikely to be successful in light of then-existing case law." *Id.* at 274. But this Court concluded that the settling party "must bear the consequences of its informed, counseled and voluntary decision," even though the change in the law made the settlement "improvident in hindsight." *Id.* at 275; *see also, e.g.*, *W.L. Gore & Assoc., Inc. v. C.R. Bard, Inc.*, 977 F.2d 558 (Fed. Cir. 1992) (applying Third Circuit law, refusing to modify injunction in light of post-settlement change in law).

The same is true here. Holley admits that he was fully aware of his "personal benefit" defense during his criminal trial (Br. 5-6), but he made a deliberate choice to abandon it. Rather than litigating that defense and taking an appeal on its merits—as the defendants in *Newman* did—Holley chose to plead guilty instead. *Supra* at 10-12. And then, while *Newman* was pending in the Second Circuit, and after oral argument had occurred there, Holley made the same choice again, and consented to judgment in the Commission's civil action. *Supra* at 13-14. In both instances, Holley obtained significant advantages by giving up his "personal benefit" defense: He saved the burden and expense of further litigation, avoided liability for tipping three other individuals, escaped obstruction and witness tampering charges in the criminal case, and avoided hundreds of thousands of dollars of additional penalties and disgorgement in the civil case. *Compare* Exchange Act Section 21A, 15 U.S.C. 78u-1 (authorizing civil penalties against the tipper for "three times the profit gained or loss avoided as a result of" the "communication" of inside information) *with* A34-A36 (alleging total tippee gains of $261,280); *see also supra* at 30. Just like the party who did not appeal in *Ackermann* and the party who settled in *Coltec*, it is fair to hold Holley to his choices. Having freely relinquished two opportunities to litigate his "personal benefit" defense, he has no equitable claim to a third.

Indeed, it would frustrate the purpose of the Commission's settlements if those agreements must perpetually be renegotiated—or relitigated—every time the law allegedly evolves. As courts have recognized, "significant governmental interests

would be impaired if courts too readily lifted injunctive sanctions." *SEC v. Clifton*, 700 F.2d 744, 748 (D.C. Cir. 1983). Consent judgments "conserve [the Commission's] own . . . resources," as well as "judicial resources"; and in exchange for consenting, defendants obtain various benefits for themselves. *Id.*; *accord SEC v. Citigroup Glob. Markets, Inc.*, 752 F.3d 285, 295 (2d Cir. 2014). Courts are "reluctant to upset this balance of advantages and disadvantages." *Clifton*, 700 F.2d at 748.; *see also, e.g.*, *Coltec*, 280 F.3d at 276; *W.L. Gore*, 977 F.2d at 563. And for good reason: Settlements "would be illusory" if a party that "bargained away" its "claims that later turned out to have merit could renege on its agreement." *Coltec*, 280 F.3d at 276.

Holley points (Br. 31-32) to *Cox v. Horn*, 757 F.3d 113 (3d Cir. 2014), but the defendant there did not seek to vacate a settlement. Furthermore, the district court in *Cox* found that a Supreme Court decision had materially changed the law, but denied Rule 60(b)(6) relief based on its erroneous conclusion that a change in the law can "*never* be the basis" for such relief. *Id.* at 120 (emphasis added). This Court reversed, explaining that a change in the law could be a basis for Rule 60(b)(6) relief—albeit "rarely." *Id.* at 121. Here, the magistrate judge correctly applied *Cox* when it recognized that "[a] change in the law *can* qualify for relief under Rule 60(b)(6)," but found that Holley had failed to establish that *Newman* constituted such a change in the law. A9 (emphasis added); *see also* A5 (discussing *Cox*).

B. Holley should not be permitted to resume serving as an officer or director of a public company.

Beyond the strong interest in maintaining the finality of consent judgments, "other equitable factors" also support leaving Holley's judgment in place. A7. When Holley was enjoined from serving as an officer or director of a public company, and from further violating the securities laws, those injunctions were amply justified by the five factors courts consider in imposing such injunctive relief. *See SEC v. Bonastia*, 614 F.2d 908, 912 (3d Cir. 1980).[18] All of those factors support the injunctions against Holley as strongly today as they did when the injunctions were first entered.[19]

The first factor is "the degree of scienter involved" in Holley's violations. *Id.* at 912. Holley pleaded guilty to a criminal violation of Exchange Act Section 10(b) and Rule 10b-5, which requires scienter that "embrac[es] intent to deceive, manipulate or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976); *SEC v. Infinity Grp., Co.*, 212 F.3d 180, 192 (3d Cir. 2000) (same); Exchange Act Section 32(a), 15 U.S.C. 78ff(a) (requiring criminal violation to be "willful"). In his consent Holley

[18] The presence of these factors also justifies the civil penalty against Holley, which Holley does not specifically contest. *See SEC v. Lazare Indus., Inc.*, 294 Fed.Appx. 711, 715 (3d Cir. 2008). In any event, a monetary judgment (including both penalties and disgorgement) may be vacated only under Rule 60(b)(6), which requires "extraordinary circumstances" involving "extreme and unexpected hardship." *Cox*, 757 F.3d at 120 (quotation omitted). Under that exceptionally high standard, "intervening changes in the law *rarely* justify relief from final judgments." *Id.* at 121 (original emphasis).

[19] These factors, which are specific to injunctions in securities cases, substantially overlap the more general factors courts consider before modifying a decree under Rule 60(b)(5). *See Democratic Nat'l Comm.*, 673 F.3d at 202.

admitted to acting "knowingly, willfully, and intentionally." A63. The indictment and the Commission's complaint alleged that Holley acted "knowingly" and with the "understanding" that he was violating the law (*see*, *e.g.*, A33 at ¶31, SA4 at ¶4), and the court below found that Holley had such "understanding" (A3).

Indeed, as an insider who tipped his company's confidential information, Holley is "most directly culpable" because the illegal trading by Hahn-Baiyor and Iamnaita "would not [have] occur[ed]" absent Holley's tips. *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 312-13 & n.23 (1985). Thus, not only was Holley "guilty of fraud against individual shareholders," but he also directly "breache[d] fiduciary duties toward the issuer itself." *Id.* at 312-14. *See*, *e.g.*, *SEC v. Gupta*, 569 Fed.Appx. 45 (2d Cir. 2014) (affirming officer and director bar and treble civil penalty on board member for tipping). Nor was Holley an ordinary tipper, as he not only tipped, but arranged for $120,000 of illegal trading to occur. *Supra* at 28-30.

Second, Holley's conduct was "recurrent" (*Bonastia*, 614 F.2d at 912), as he pleaded guilty to committing insider trading not once, but twice. *See*, *e.g.*, *SEC v. Ginsburg*, 362 F.3d 1292, 1304-05 (11th Cir. 2004) (Tipping material nonpublic information once "is a bad thing, and doing it twice in a year is doubly so.") (affirming injunctive relief). As the sentencing judge found, it would be "an understatement to call [this] a mistake of judgment" because this was not some momentary lapse; it was a weeks-long frenzy of insider trading by someone who "called five of his friends and suggested that they buy this stock." A122:22-23, A123:4-5.

Third, Holley has not "recogni[zed] the wrongful nature of his conduct. *Bonastia*, 614 F.2d at 912. Shortly after pleading guilty and settling with the Commission, Holley abruptly reversed course and began denying that anything he did was wrong. Holley now contends that his insider trading "involved an esoteric area of the law." Br. 30. But there is nothing "esoteric" about Holley's duty, as chairman of Home Diagnostics, to keep its information confidential because, as Holley notes, insider trading and tipping have been illegal for at least "thirty years." Br. 19-20. And as the sentencing judge found, Holley "clearly knew what his obligations were, he knew what the legal standards were because he wrote the Insider Trading Policy" for Home Diagnostics, and yet he engaged in insider trading anyway. A122:18-23. Even Holley admitted during sentencing that he "g[a]ve information [he] knew shouldn't be given." A117:14-25.

Holley's claim that he had a "beneficent rather than sinister motive" also demonstrates that Holley does not appreciate the wrongfulness of his conduct and the harm he caused investors. Br. 30. It is hardly "beneficent" to give a gift to a friend by stealing from a stranger, yet that is essentially what Holley did. By sharing news of Nipro's tender offer with his friends and relative before the news became public, Holley encouraged his friends and relative to "tak[e] unfair advantage of the uninformed . . . stockholders" on the other side of the trades, who sold their stock without that knowledge. *Chiarella*, 445 U.S. at 228-29. The gains of Holley's friends and relative were the losses of other shareholders, regardless of whether Holley

personally profited from those gains. The law thus holds Holley responsible for all of those gains. *See supra* at 30; A108:17-20 (sentencing court applying an upward adjustment under USSG § 2B1.1 based on the gains from all of Holley's tippees); Exchange Act Section 21A(a) (authorizing civil penalty against a tipper equal to three times the amount of tippees' profits). Holley also undermined the integrity of the negotiating process for the tender offer, creating the risk of substantial losses to both Home Diagnostics and Nipro. *See Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb Inc.*, 967 F.2d 742, 747-51 (2d Cir. 1992) (finding that insider trading in advance of a tender offer can artificially inflate the price the acquirer must pay for the acquisition); *SEC v. Gaspar*, 1985 WL 521, at *15-*17 (S.D.N.Y. Apr. 16, 1985) (escalation in share price due to insider trading contributed to collapse of tender offer).

Finally, the fourth and fifth factors courts consider are "the sincerity of [the defendant's] assurances against future violations" and the "likelihood . . . that future violations might occur." *Bonastia*, 614 F.2d at 912. Holley claims that there is "no prospect that [his] conduct would re-occur." Br. 30. But enjoining him from serving as an officer or director of a public company is a reasonable way of ensuring that he will not be in a position to engage in the same misconduct. If the injunction were dissolved, he would be free to resume serving on company boards again, a position that would give him constant access to material, nonpublic information—which is exactly what he says he intends to do. Holley laments that the consent judgment "preclud[es] or limit[s] his service on corporate boards." Br. 11. As his counsel has

explained, Holley "does travel in the sort of circles where" people say that Holley is "someone who we'd like to have sit on our board"; "those opportunities have come up," and Holley admits "he'd want to do that." SA93:4-14; SA70:8-11. But as Congress has recognized, "persons who have demonstrated a blatant disregard for the requirements of the Federal securities laws should not be placed in a position of trust with a publicly held corporation." S. Rep. 101-337 at *21 (1990); *see also* A108:21-23 (sentencing court applying upward adjustment under USSG § 3B1.3 for Holley's abuse of a position of trust).

Holley's reliance on *SEC v. Warren*, 583 F.2d 115 (3d Cir. 1978), is misplaced for several reasons. First, Warren sought to dissolve a consent decree ten *years* after it was entered, not, as here, two *months* after the bargain was struck and where the relevant factors show that there is a "further necessity" for the injunction. *Id.* at 122; *see also Democratic Nat'l Comm.*, 673 F.3d at 202 (describing "length of time since entry of the injunction" as an equitable factor). Second, Warren was found liable for a "single isolated offense" amounting to "a technical violation of the margin requirements" for extending credit secured by stock under Regulation U, 12 C.F.R. 221.1, and Warren's violation "came more from inadvertence" than "intent." *Warren*, 583 F.2d at 120-21 & n.2. In contrast, Holley twice engaged in fraudulent insider trading that the sentencing court concluded was "obvious[ly]" unlawful (A123:4-7), and Holley admitted that his violations were made "knowingly, willfully, and intentionally" (A63 at ¶2). Finally, *Warren* reinforces the deference given to the

court's decision below; this Court deferred to the "sound discretion of the district court" that granted Rule 60(b) in light of the circumstances of that case, and warned that injunctions "are not to be lightly vacated" in other cases. *Id.* at 121-22. As subsequent decisions have recognized, *Warren* does not help a litigant who "contends the district court *abused* its discretion" by declining to vacate an injunction, "a far greater appellate burden than that borne by the appellee in *Warren*." *SEC v. Coldicutt*, 258 F.3d 939, 942 (9th Cir. 2001) (affirming denial of motion to vacate injunction); *see also Clifton*, 700 F.2d at 747-48 (same).

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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CERTIFICATIONS

I certify that:

1. I am an attorney representing a federal government agency and not required to become admitted to this Court's bar in order to appear before the Court. *See* 3d Cir. L.A.R. 28.3(d); http://www.ca3.uscourts.gov/attyadmiss_faq

2. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 12,459 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

3. This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Garamond font.

4. The electronic version of this brief is identical to the paper copies filed separately with the Clerk of Court. *See* 3d Cir. L.A.R. 31.1(c).

5. Using McAfee VirusScan Enterprise and AntiSpyware Enterprise, version 8.8.0.1445, DAT Version 8140.0000, updated April 19, 2016, the electronic version of this brief was scanned for viruses and found to contain none. *See* 3d Cir. L.A.R. 31.1(c).

6. In addition to the electronic submission of this brief and accompanying Supplemental Appendix, 10 paper copies of this brief, and 4 paper copies of the

Supplemental Appendix, have been delivered to the Clerk of Court. A single paper copy of each has been mailed to counsel of record:

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See 3d Cir. L.A.R. 31.1(a).

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