Securities Regulation Daily Wrap Up, FRAUD AND MANIPULATION—D.N.J.: Apple attorney unable to worm out of insider trading charges, (Aug. 14, 2020)

Securities Regulation Daily Wrap Up

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By Rodney F. Tonkovic, J.D.

An attorney argued that no statute explicitly criminalized insider trading, but the court said that his conduct fit squarely within the prohibitions of the Exchange Act and SEC regulations.

A district court has denied a motion to dismiss an indictment charging a former top attorney at Apple with insider trading and wire fraud. Charged with using his high-ranking status and access to nonpublic information to inside trade Apple stock, the attorney raised a number of arguments in support of dismissing the indictment, including that no statute explicitly criminalizes insider trading and that insider trading law is unconstitutional. The court disagreed, finding that the attorney's conduct constituted a "classical" insider trading violation and that the SEC had used its given authority to promulgate rules directly applicable in this case. Since the wire fraud charges were derivative of the securities fraud charges, the court declined to dismiss them for the same reasons (*U.S. v. Levoff*, August 14, 2020, Martini, W.).

According to the complaint, Gene Levoff was an attorney at Apple, Inc., and between 2008 and 2013, served as director, and later senior director, of Corporate Law. Levoff was also Apple's Corporate Secretary and was a member and co-chair of the Disclosure Committee. As a member of the Disclosure Committee, the complaint says, Levoff had access to Apple's draft SEC filings.

The government alleges that between 2011 and 2016, Levoff used non-public information to trade Apple's securities before its financial results became public. The trades allowed Levoff to realize profits of approximately $227,000 and to avoid losses of approximately $377,000.

The Department of Justice charged Levoff with one count of securities fraud in February 2019. In October 2019, a federal jury returned a 12-count indictment, charging him with securities and wire fraud. Levoff later moved to dismiss all of the counts, arguing that criminal insider trading laws are unconstitutional. The court disagreed.

Insider trading laws are constitutional. The court first concluded that Levoff's conduct constituted "classical" insider trading. Under the classical theory, Levoff's conduct fits squarely within the definition of "manipulative and deceptive devices" set out by the SEC in Rule 10b5-1. That is, he had a duty to not misuse his access to material, nonpublic information but traded on that information.

Levoff maintained that insider trading law was a "federal common-law" crime and thus unconstitutional. This characterization is incorrect, the court said, explaining that Congress passed the Exchange Act, which established the SEC, and the Commission then used its authority to promulgate rules directly applicable to Levoff's conduct. In addition, Congress has also ratified interpretations of Section 10(b) to include Supreme Court precedent on insider trading and codified penalties for violations. There is nothing unusual about the fact that judicial precedents have helped define the contours of insider trading, the court said.

Non-delegation and *Chevron*. Levoff next argued that the SEC's promulgation of rules outlawing insider trading is outside of Congress's delegation of power to the Commission. Congress delegated power to the SEC to enact regulations to "insure the maintenance of fair and honest markets," and the Commission promulgated regulations outlining the exact illegal behavior in which Levoff participated, the court said. Levoff argued further that the Supreme Court recently rejected *Chevron* deference for criminal statutes, but this was of no help to him here since Section 10(b) specifically empowers the Commission to enact regulations prohibiting the alleged conduct.

The rule of lenity also was inapplicable here, the court concluded, because there was no "grievous ambiguity or uncertainty" in Levoff's "classical" insider trading.

SEC action. The SEC has also charged Levoff with insider trading based on the same conduct in a parallel civil action announced on the same day as the criminal charges. The SEC's complaint, also filed in New Jersey, claims that Levoff engaged in insider trading on three occasions. The Commission alleges violations of the antifraud provisions of the securities laws and requests a permanent injunction and an officer and director bar, along with disgorgement of ill-gotten gains, prejudgment interest, and civil monetary penalties.

The case is No. 19-cr-780.

Attorneys: Courtney A. Howard, Office of the U.S. Attorney, for the United States. John A. Boyle (Marino, Tortorella & Boyle, P.C.) for Gene Levoff.

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