# 18-3065

*To Be Argued By:*
ALEXANDRA A.E. SHAPIRO

IN THE

# United States Court of Appeals

**FOR THE SECOND CIRCUIT**

UNITED STATES OF AMERICA,

*Appellee,*

—against—

EDWARD J. KOSINSKI,

*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

## BRIEF AND SPECIAL APPENDIX FOR DEFENDANT-APPELLANT

ALEXANDRA A.E. SHAPIRO
PHILIP W. YOUNG
SHAPIRO ARATO BACH LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880

*Attorneys for Defendant-Appellant*

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## INTRODUCTION

This appeal arises from an insider-trading prosecution under a theory that requires proof that the trader had a fiduciary or fiduciary-like duty to the source of the information, where the contract governing the parties' relationship indisputably disclaimed any such duty.

The defendant, Dr. Edward Kosinski, was one of New England's leading cardiologists. He was a "principal investigator" during the clinical trial of a cardiac drug that Regado Biosciences, Inc. developed. Doctors in this role treat, monitor, and collect data about their patients' responses to the tested drug. They must be independent from the drug company conducting the study because their duties run solely to their patients, whereas the company has commercial interests that may conflict with patient care. Consistent with that need for independence, Regado's contract with Kosinski expressly disclaimed any agency or fiduciary-like relationship. It required Kosinski to keep confidential information he learned from Regado during the study—which he did—but it did not bar him from using such information to trade Regado's securities. By contrast, when Regado entrusted study participants with discretionary authority to act on its behalf, it expressly prohibited them from trading on its confidential information.

Kosinski was prosecuted for allegedly trading on Regado's nonpublic information while working on the clinical trial. But those trades, which

supposedly helped him avoid losses to his investment portfolio, were not illegal. Under Section 10(b) of the Securities Exchange Act, the government had to prove that Kosinski's trades were "deceptive" because he had breached a "duty of trust *and* confidence" to Regado. But under the controlling Supreme Court and Second Circuit cases, he had no such duty. Indeed, any such duty was expressly disclaimed by his contract. His only duty to Regado was to keep its information confidential; he had no corresponding duty of trust barring him from trading. Accordingly, his conviction must be reversed.

Kosinski's conviction was tainted by additional errors. The evidence does not support the required finding that he acted willfully, *i.e.*, knowing that "'he was doing a wrongful act' under the securities laws," *United States v. Cassese*, 428 F.3d 92, 98 (2d Cir. 2005). This provides an independent basis for reversal. And at a minimum, a new trial is required due to other errors, each of which independently would require vacatur: the jury instructions on the elements of "duty of trust and confidence" and "willfulness" were both fatally flawed, and the district court erroneously precluded the defense from introducing critical evidence of Kosinski's good faith.

## JURISDICTIONAL STATEMENT

The district court had jurisdiction under 18 U.S.C. §3231. The judgment of conviction was entered on October 12, 2018. (SPA-33). Kosinski timely appealed. (A-391). This Court has jurisdiction under 28 U.S.C. §1291.

## ISSUES PRESENTED

1. Whether the conviction must be reversed or vacated because Kosinski owed no "duty of trust and confidence" that would have barred him from trading under *United States v. O'Hagan*, 521 U.S. 642 (1997).

2. Whether the conviction must be reversed or vacated because the government failed to prove the essential element of "willfulness."

3. Whether the conviction must be vacated because the district court erroneously excluded exculpatory statements by Kosinski that were admissible under the rule of completeness or as excited utterances.

## STATEMENT OF THE CASE

Kosinski appeals a judgment of conviction entered by the United States District Court for the District of Connecticut (Bryant, J.), following a jury trial. The relevant rulings are unreported.

### A. Background

Kosinski was one of the most prominent cardiologists in New England and treated patients in the Bridgeport, Connecticut area for over 40 years. He was highly regarded for his clinical expertise and worked on several drug trials during

his career. This case relates to securities trades he placed in 2014 while working on a clinical trial for a cardiovascular drug developed by Regado, a small public company.

1. Clinical Trial Participants' Roles.

Kosinski was a "clinical site principal investigator"[1] in the Regado trial. He enrolled a small group of patients, administered the drug, monitored their responses, and compiled data and observations. (A-84, A-104, A-127, A-185-86). Although such principal investigators follow the drug company sponsor's protocol, they must operate independently of the sponsor, whose chief (and potentially conflicting) interest is obtaining FDA approval to sell its product. (A-190-91). *See also Suthers v. Amgen, Inc.*, 441 F. Supp. 2d 478, 488 (S.D.N.Y. 2006) ("the investigator who recruits the subjects, determines their suitability, monitors their tolerance and reaction and reports the results" is independent from the sponsor). A principal investigator's role is to ensure "that the data is unbiased, it was generated objectively, and in fairness and according to the protocol." (A-191). And Kosinski's duty remained to his patients, not Regado. (A-190-91).

Principal investigators are not privy to patient data from clinical sites other than their own and thus learn little about the overall results of the trial until that

[1] Throughout this brief, we abbreviate this term, which refers to physicians responsible for just one clinical site, to "principal investigator."

information is made public. (A-186-87). A "trial management team" performs the high-level decision-making regarding trial structure and safety. (A-184-86). The team includes representatives of the sponsor, the Contract Research Organization ("CRO") that administers the trial for the sponsor, and a data safety monitoring board ("DSMB") responsible for advising the sponsor on patient safety-related issues like allergic reactions and other adverse events. (A-67-68, A-84-85, A-112-13, A-349).

Unlike principal investigators, trial management team members generally have access to all patient data generated at each clinical site. (A-109-10). This includes every adverse event, case reports for each patient, and other data collected during the trial. (A-188). Given the sensitivity of this information, trial management personnel are typically prohibited from owning and trading the sponsor's securities. (A-194).

By contrast, because of their circumscribed role and limited access to trial data, principal investigators are subject to fewer restrictions. (A-189). Principal investigators are typically not prohibited from buying, selling, or owning shares of the sponsor's stock during a clinical trial. (A-79-80, A-121, A-193). Instead, they are merely required to disclose any ownership interest that exceeds a certain dollar threshold. (A-81-82, A-292, A-298).

2. The REG1 Trial.

REG1 Anticoagulation System ("REG1") was Regado's two-part drug system to prevent blood clotting in patients undergoing heart procedures. (A-105-06). To obtain FDA approval for REG1, Regado began a multi-phase clinical trial in 2005 to establish the drug's safety and efficacy.

Kosinski only participated in the third phase of the trial, which involved a large, diverse population of patients.[2] (A-171-72). Regado's goal was to test whether REG1 would reduce the incidence of heart attacks, strokes, and deaths in patients undergoing angioplasty procedures to unblock clogged arteries. (A-103, A-107). Three patients had experienced substantial allergic reactions during the second phase of the trial, which required Regado to halt that phase earlier than expected. (A-91-92). All three were European women, and Regado believed that a shared genetic trait might be causing the allergic reactions. (A-93-94). Accordingly, it worked with the FDA to develop a unique protocol for phase three to further study these adverse events and mitigate the risk to patients. This

[2] Clinical trials typically include three phases. Phase one analyzes whether the drug is safe. (A-170-71). Phase two studies a larger patient population, examining both safety and efficacy. If these two phases succeed, 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 FDA approval to market the drug. (A-171-72).

protocol required investigators to collect allergy histories and blood samples from every trial patient and required DSMB review of each allergic reaction. (A-94-96).

Regado engaged C5 Research as the CRO for phase three. (A-76-77). C5 Research approached Kosinski about serving as a principal investigator in this phase. On June 12, 2013, Kosinski and C5 Research (on Regado's behalf) entered into a Confidential Disclosure Agreement ("CDA"), which permitted Kosinski to receive the protocol and other confidential information from Regado "for the purpose of evaluating [his] interest in participating in [the REG1] clinical trial." (A-225). The CDA expressly prohibited both the disclosure and use of such confidential information:

> Recipient shall hold in confidence, and *shall not disclose* to any person or entity, any Proprietary Information without the prior written consent of [Regado]. Recipient shall use such Proprietary Information only for the Business Purpose and *shall not use, disclose or exploit such Proprietary Information for its own benefit* or the benefit of any other person or entity.

(*Id.* at ¶ 2 (emphasis added)). Long before the alleged insider trading, however, the CDA was superseded by another contract (discussed below) which contained no restriction on Kosinski's use of confidential information. (A-78, A-234-35, A-243).

After signing the CDA, Kosinski received a non-public version of the protocol so that he could decide whether to participate in the trial. (A-69-71). The protocol outlined the structure of the trial, patient eligibility, how to administer the drug,

and what categories of data to collect. (A-70, A-108). During this initial recruiting period, Regado had a strong interest in maintaining the confidentiality of the protocol so that its competitors could not gain an unfair advantage by learning about the proprietary products Regado was developing. (A-70). Regado crafted the use and disclosure bars in the CDA with these competitive concerns in mind. (A-225). However, the information provided pursuant to the CDA—including the trial's particular focus on allergy histories and reactions—became public within 21 days of the first patient enrollment in phase three, once the protocol was posted on a government website. (A-176).

Kosinski agreed to serve as a principal investigator. On January 22, 2014, he and C5 Research (again acting on behalf of Regado) entered into a Clinical Study and Research Agreement ("CSRA") to formalize their working relationship. (A-228). The CSRA expressly superseded the CDA. (A-243). It provided that Kosinski would serve as the principal investigator in charge of the study site in Bridgeport, Connecticut at St. Vincent's Medical Center. (A-228). The CSRA stated that Kosinski was "an independent contractor and *not an agent*, joint venturer, or partner of [Regado]" and that he lacked the authority to legally bind Regado. (A-232 (emphasis added)). Kosinski agreed "to maintain in strict confidence all of the Confidential Information" and to disclose it only to certain enumerated parties. (A-234-35). The CSRA, in stark contrast to the CDA that it

superseded, contained *no* restrictions on Kosinski's *use* of Regado's confidential information, and nowhere prohibited him from using that information to trade Regado's securities. (*Id.*). The same lawyer at C5 Research drafted both the CSRA and the CDA. (A-227, A-245).

At no point during the clinical trial did anyone warn Kosinski that he could not trade Regado's securities. When Kosinski attended multi-day training sessions for principal investigators in early 2014, no one mentioned any such prohibition. (A-121). Other evidence reinforced that Regado permitted principal investigators to invest in the company and trade its securities. For example, principal investigators were required to disclose whether they had a financial interest in Regado that exceeded $50,000, and to update that disclosure if there was any "change" in that interest during the trial, implying that investigators could buy and sell securities during that time. (A-81-82, A-298).

Unlike principal investigators, members of the REG1 trial management team *were* barred from investing in Regado or trading its securities. For example, whereas principal investigators merely had to disclose holdings above $50,000, members of the DSMB could not "buy or sell" Regado securities. (A-322). Similarly, C5 Research had to agree "that it [would] not use [confidential information] for any other purpose other than to exercise its rights and responsibilities [related to the REG1 clinical trial]." (A-86-87, A-337).

3. Kosinski's Trades.

Kosinski maintained several Fidelity brokerage accounts with assets worth over $11.6 million. (A-128-29, A-131). In October 2013, he began purchasing Regado stock. (A-130). He eventually purchased 40,000 shares of Regado worth approximately $210,000. (A-132-33, A-272). This was less than 2% of the value of his entire Fidelity portfolio.

Kosinski sold all of his Regado shares at 9:21 a.m. on June 30, 2014. (A-141, A-145, A-147). The previous afternoon at 4:00 p.m., Kosinski received an email that the REG1 trial management team sent to all principal investigators informing them that patient enrollment was "being put on hold" from "today, Sunday June 29 until 12:00 noon (EST) on Wednesday, July 2." (A-250-52). The email explained that "[t]here have been several allergic reactions over the past few weeks, and the DSMB and trial leadership need time to review the recent events thoroughly." (A-251).

After Kosinski had already sold his Regado shares on June 30, 2014, the DSMB recommended continuing the trial. (A-124). Regado did not issue a press release about the enrollment pause or the DSMB's recommendation to continue the trial without modification.

Three days later, on July 2, 2014, the DSMB re-assessed two allergic reactions, identified them for the first time as "serious adverse events," and

recommended performing a full review of all patient data. (A-125-26, A-267). At 6:13 p.m. that day, Regado issued a press release announcing that the DSMB "has initiated an unplanned review of data" and that "[p]atient enrollment has been paused until the DSMB has completed its analysis and communicated its recommendations, which are anticipated within the next eight weeks." (A-267). Whereas the June 29, 2014 email to principal investigators referred only to "several allergic reactions," the press release disclosed that there were "serious adverse events related to allergic reactions." (*Id.*). The press release also announced a comprehensive eight-week DSMB data review—a far more significant event than the temporary three-day hold described in the June 29, 2014 email. (*Id.*). When markets opened the next day, Regado's share price dropped by 58%. (A-148, A-270).[3]

On July 29, 2014 at 4:37 p.m., the trial management team again emailed the principal investigators. This email informed them for the first time about a June 23, 2014 patient death that had helped trigger the initial DSMB review. (A-253-56). The email attached a letter stating that the "study is *on clinical hold* as of 09 July 2014 pending a DSMB assessment." (A-256 (emphasis added)). Two days later, Kosinski purchased fifty put options. (A-149-51).

[3] 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.

On August 25, 2014, Regado issued a press release announcing that the trial was *permanently halted* because of the "frequency and severity" of "serious allergic adverse events." (A-299, A-330-31). The next day, Regado's share price dropped substantially. (A-152-53, A-271). Two days later, Kosinski exercised his put options, earning $3,300 in profit. (A-154).

**B. The Investigation**

FBI agent James McGoey interviewed Kosinski twice. The first interview occurred almost two years after his Regado trades, on June 14, 2016, when McGoey arrived at Kosinski's office without prior warning. (A-162). Kosinski agreed to answer questions about the trades, and the interview lasted about an hour and twenty minutes. (A-163). The government did not introduce any statements from that interview at trial.

Then, on August 3, 2016, McGoey called Kosinski and told him that he had been indicted for insider trading. (A-163-64). The conversation lasted just five minutes. (A-160). Kosinski expressed shock about the indictment, stating, "I can't believe this is happening." (A-117-18). When McGoey asked whether Kosinski had "gotten an attorney since we met in June," Kosinski said "no, I haven't." (A-119-20). The district court barred Kosinski from eliciting these statements on cross-examination of McGoey, even though it permitted the government to elicit McGoey's claim that during the same five-minute conversation Kosinski had said

that "he didn't feel good about making those trades when he had made them" (A-164), and that "greed and stupidity" caused him to make the trades. (A-165).

### C. Pretrial Proceedings, Trial, and Sentencing

The indictment 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 on June 30, 2014, and the second for the puts purchased on July 31, 2014 and exercised on August 28, 2014.

Kosinski moved to dismiss the indictment. He argued that it did not allege any criminal insider trading because he did not have a fiduciary or fiduciary-like relationship that would have precluded him from trading Regado securities. (Dkt. 26). On August 16, 2017, the district court denied the motion. (SPA-1).

Trial began on November 13, 2017. Before voir dire, the district court circulated a questionnaire to potential jurors. Question 18 included the following statement: "The law does not permit a person to buy or sell stock or other securities based on information unknown to the general public ('insider trading')." (A-54-55). Kosinski objected. He pointed out that the Court's assertion in the questionnaire erroneously characterized *all* trading on inside information as illegal and requested that the court add the words "under certain circumstances" to the statement. (A-57). The government had no objection to this proposed change. (*Id.*). Nevertheless, the district court refused to revise the question and,

contradicting settled Supreme Court precedents discussed *infra*, thereby instructed the jurors that trading on inside information is *never* permitted. (A-62-63).

Trial lasted five days. In addition to introducing various documents, the government called five witnesses: two employees involved in the operation and management of the REG1 clinical trial, Regado's Chief Medical Officer, a FINRA employee involved in the investigation, and FBI agent McGoey. With the exception of the agent, none of the government's witnesses had ever met Kosinski. After the government rested, Kosinski moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29. (Dkt. 68). The district court reserved decision. (A-167). Kosinski then called Dr. Edward J. Buthusiem, a former GlaxoSmithKline employee who spent much of his career working on clinical trials, as an expert witness. (A-168). He testified about the structure of clinical trials, the role of various trial participants, and whether principal investigators were permitted to trade in the sponsor's securities.

On November 28, 2017, the jury returned a guilty verdict on both counts. (A-350). Shortly thereafter, Kosinski renewed his motion for judgment of acquittal and in the alternative moved for a new trial pursuant to Rule 33. (Dkt. 85). On May 11, 2018, the district court denied the post-trial motions. (SPA-17).

On September 25, 2018, the court imposed a sentence of six months' imprisonment and a $500,000 fine. (SPA-33-34). On October 23, 2018, the

district court ruled that the appeal "raises a substantial question" and granted bail pending appeal. (Dkt. 124).

## SUMMARY OF ARGUMENT

No federal statute generally prohibits trading on "inside" information. The government instead usually prosecutes insider trading under §10(b) of the Securities Exchange Act, which prohibits "manipulative" and "deceptive" conduct in connection with the purchase or sale of securities.[4] But the Supreme Court has repeatedly held that §10(b) does not create any general duty to refrain from trading on material nonpublic information, nor entitle all investors to equal information. Insider trading is not necessarily "deceptive," because it typically does not involve false statements, and silence is not fraudulent absent a duty to speak. Accordingly, only trading that violates a fiduciary or similar duty of "trust and confidence" is "deceptive" behavior that contravenes §10(b). This limitation is critical, because "only Congress, and not the courts…can make conduct criminal," *Bousley v. United States*, 523 U.S. 614, 620-21 (1998).

The government's theory of criminality was that Kosinski's trades violated §10(b) because the CSRA required him to keep Regado's information confidential. But the contract expressly disclaimed a fiduciary-like relationship and did not

[4] "Manipulation" is a term of art irrelevant here. *See Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 476 (1977).

preclude Kosinski from trading on the confidential information. The conviction must be reversed.

*First*, under the controlling authorities, Kosinski's trading would only be "deceptive," and thus violate §10(b), if he owed Regado a duty of "trust *and* confidence." No such duty can be inferred from Kosinski's function as a principal investigator on Regado's clinical trial—an arms-length independent contractor role. Instead, in contrast to fiduciary-like arrangements Regado made with other trial participants, Kosinski's contract disclaimed any fiduciary relationship and contained no restriction on Kosinski's use of confidential information.

Well-settled caselaw precludes liability under these circumstances. To the extent that Rule 10b5-2 purports to broaden the duty of "trust and confidence" by permitting liability based solely upon a confidentiality provision in a business contract, it would cover non-deceptive conduct and thus exceeds the scope of the SEC's delegated authority under §10(b). In any event, the SEC only intended Rule 10b5-2 to apply to family and personal relationships. The jury was thus erroneously instructed that "a person has a requisite duty of trust and confidence whenever a person agrees to maintain information in confidence"—effectively directing a verdict in favor of the government.

*Second*, there was insufficient evidence of "willfulness," an essential element that requires proof the defendant knew he was doing something unlawful.

Because "insider trading does not necessarily involve deception," "an insider trader who receives a tip" but "is unaware that his conduct was illegal" has not acted willfully. *United States v. Kaiser*, 609 F.3d 556, 569 (2d Cir. 2010). Here, no reasonable juror could find willfulness beyond a reasonable doubt because: The CSRA disclaimed a fiduciary relationship and, unlike the prior CDA, conspicuously omitted a use prohibition; and the form requiring disclosure of holdings exceeding $50,000 indicated that principal investigators were permitted to own and trade Regado's securities while working on the trial. Furthermore, the circumstantial evidence the government cited either cuts against willfulness, or "at best," gave "'equal or nearly equal'" support to either guilt or innocence, requiring reversal. *Cassese*, 428 F.3d at 103. At a minimum, the willfulness instruction watered down the standard so much that, coupled with the district court's erroneous voir dire statement, it likely confused the jury into thinking it could find willfulness even if Kosinski did not believe his trading violated the law.

*Third*, by excluding Kosinski's statements to Agent McGoey about his lack of concern about the agent's previous visit and his surprise at being indicted, the court further hamstrung Kosinski's ability to contest scienter. The statements were plainly admissible, under both the rule of completeness and as excited utterances, and could easily have tipped the balance in Kosinski's favor given the weakness in the government's willfulness case. At a minimum, this requires a new trial.

## STANDARDS OF REVIEW

This Court reviews statutory interpretation questions, sufficiency of the evidence challenges, and jury instruction challenges *de novo*. *United States v. Gayle*, 342 F.3d 89, 91 (2d Cir. 2003); *Cassese*, 428 F.3d at 97; *United States v. Silver*, 864 F.3d 102, 117 (2d Cir. 2017). Evidentiary rulings are reviewed for abuse of discretion, *United States v. Litvak*, 808 F.3d 160, 179 (2d Cir. 2015); "an error of law" is "by definition" an abuse of discretion. *Koon v. United States*, 518 U.S. 81, 100 (1996).

## ARGUMENT

### I. THE CONVICTION SHOULD BE REVERSED BECAUSE THE GOVERNMENT FAILED TO PROVE THAT KOSINSKI OWED A DUTY OF TRUST AND CONFIDENCE TO REGADO

It is well-settled that there is "no 'general duty'" to refrain from trading "'based on material, nonpublic information.'" *United States v. O'Hagan*, 521 U.S. 642, 661 (1997) (quoting *Chiarella v. United States*, 445 U.S. 222, 233 (1980)); *see also Dirks v. SEC*, 463 U.S. 646, 654-59 (1983). Such a limitless restraint would "depart[] radically from the established doctrine that duty arises from a specific relationship between two parties." *Chiarella*, 445 U.S. at 233.

As relevant here, §10(b) only prohibits "deceptive" conduct "in connection with the purchase or sale of any security." 15 U.S.C. §78j(b). In *Chiarella*, the Supreme Court stressed that "not every instance of financial unfairness constitutes

fraudulent activity under §10(b)." 445 U.S. at 232. Fraud requires a misrepresentation or omission, and it is black-letter law that "[w]hen an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak." *Id*. at 235. "[S]ilence in connection with the purchase or sale of securities may operate as a fraud actionable under §10(b)," but only if there is "a duty to disclose arising from a relationship of trust and confidence between parties to a transaction." *Id*. at 230; *see also id*. at 235 ("a duty to disclose under §10(b) does not arise from the mere possession of nonpublic market information.").

Following *Chiarella*, the Supreme Court has repeatedly reaffirmed that trading on material nonpublic information is "deceptive" only if done in breach of a fiduciary or similar duty of trust and confidence. *Chiarella* defined the "classical theory" of insider trading, holding that corporate insiders violate §10(b) by trading on inside information without first publicly disclosing, in breach of the "'fiduciary or other similar relation of trust and confidence between them'" and shareholders. *See* 445 U.S. at 228. *O'Hagan* extended this principle to corporate outsiders and endorsed the "misappropriation theory." Under that theory, an individual is prohibited from trading on material nonpublic information only if it was entrusted to him by someone to whom he owes a fiduciary or similar "duty of loyalty and confidentiality." *See* 521 U.S. at 652. This fiduciary or fiduciary-like relationship is essential under the misappropriation theory, which posits that "[a] fiduciary who

pretends loyalty to the principal while secretly converting the principal's information for personal gain, dupes or defrauds the principal." *Id.* at 653-54 (quotation marks, citation, and alterations omitted).

Here, the government relied exclusively on the "misappropriation" theory, which was thus the sole basis for the jury's verdict. (A-21, A-27, A-44, A-220, A-353-55). The government argued that a confidentiality agreement alone can create the requisite fiduciary-like duty and that the CSRA's confidentiality provision itself precluded Kosinski from trading. The district court agreed, and so instructed the jury. But under the controlling precedents, Kosinski's duty of confidence—which he indisputably did not violate—did not create a corresponding duty of trust that would have barred him from trading. In fact, his contract with Regado expressly disclaimed any such duty. This forecloses §10(b) liability as a matter of law. To the extent Rule 10b5-2(b)(1) purports to trump the contract's specific disclaimer, it exceeds the scope of the SEC's statutory authority and is invalid as applied here.

### A. Kosinski Did Not Owe A Duty Of Trust And Confidence To Regado

Kosinski had no duty to refrain from trading for several reasons.

#### 1. The Controlling Authorities Require More Than A Mere Confidentiality Agreement To Establish The Requisite Duty.

The government's argument that the CSRA's confidentiality provisions themselves create the necessary duty fails under well-settled precedents. Trading

without disclosure is only deceptive under §10(b) if there is a fiduciary or fiduciary-like duty. *Chiarella*, 445 U.S. at 228. To be fiduciary-like, the relationship must "share the essential characteristics of a fiduciary association"; it must be "the functional equivalent of a fiduciary relationship." *United States v. Chestman*, 947 F.2d 551, 568 (2d Cir. 1991) (en banc). This means there must be an obligation of not only confidence, but also trust. Indeed, it is the duty of loyalty, not that of confidentiality, which obligates the fiduciary to refrain from using the principal's information for his own benefit by trading. As the Supreme Court explained in *O'Hagan*, the fiduciary's duty of loyalty binds him to use the property the principal has entrusted to him—*i.e.*, the confidential information—to benefit only the principal, not himself. 521 U.S. at 652. Thus, under the misappropriation theory, "the fiduciary's undisclosed, self-serving use of a principal's information to purchase or sell securities" is "in breach of a duty of *loyalty and confidentiality*" that "defrauds the principal of the exclusive use of that information." *Id.* (emphasis added).

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" (or merely "confidence"). For instance, as explained, *O'Hagan* held that "'a relationship of trust *and* confidence'" is necessary to trigger insider trading liability. 521 U.S. at 652 (emphasis added). Likewise, in *Chiarella*, the Court held

that the duty to disclose or abstain arises from a "'fiduciary or other similar relation of trust *and* confidence.'" 445 U.S. at 228 (emphasis added). And the Supreme Court's most recent insider trading decision reaffirms that §10(b) only bars "individuals who are under a duty of trust *and* confidence" from trading material non-public information. *Salman v. United States*, 137 S. Ct. 420, 423 (2016) (emphasis added). This Court has similarly held that the misappropriation theory requires a fiduciary or "similar relationship of trust *and* confidence." *Chestman*, 947 F.2d at 568 (emphasis added).

*Chestman*, the seminal authority on the types of relationships that impose duties of trust and confidence,[5] illustrates the importance of the "trust" component of the duty. In *Chestman*, this Court held that merely giving a person confidential information does not create a fiduciary-like relationship. 947 F.2d at 567. The Court identified the "essential characteristics" of such relationships as "discretionary authority and dependency," in which the beneficiary relies on the fiduciary "to serve his interests." *Id.* at 568-69; *see also id.* at 568 ("reliance" by beneficiary is "'[a]t the heart'" of fiduciary relationship). The relationship must be characterized by "'reliance, and de facto control and dominance.'" *Id.* (citation omitted); *see also id.* (requiring that "'confidence is reposed on one side and there is resulting superiority and influence on the other'"). In other words, mere

[5] *See O'Hagan*, 521 U.S. at 650 n.3 (citing *Chestman* test).

confidence is insufficient; in a relationship of "trust and confidence," trust is also critical and, if anything, even more important.

For similar reasons, two other district courts have rejected the exact argument the government made here, holding that a confidentiality agreement is not sufficient by itself to create a "duty of trust and confidence" to refrain from "insider trading" under §10(b). In *SEC v. Cuban*, after an exhaustive and well-reasoned analysis of the key Supreme Court cases, the court 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." 634 F. Supp. 2d 713, 725 (N.D. Tex. 2009). The Fifth Circuit did not disagree with the district court's legal analysis but reinstated the SEC's complaint because it concluded that the "allegations…provide more than a plausible basis" that the understanding between Cuban and the CEO who gave him the information "was that [Cuban] was not to trade, that it was more than a simple confidentiality agreement." 620 F.3d 551, 557 (5th Cir. 2010). Similarly, in *United States v. Kim*, the court applied *Chestman* to hold that an express promise by members of a young CEOs' club to keep information confidential did not create a duty to refrain from trading, because their relationship lacked the characteristics of "'reliance, and de facto control and dominance'" in

which "'confidence is reposed on one side and there is resulting superiority and influence on the other.'" 184 F. Supp. 2d 1006, 1011-12, 1015 (N.D. Cal. 2002) (quoting *Chestman*, 947 F.2d at 568).

These decisions are further supported by the well-established rule that mere confidentiality agreements do not create duties of trust and confidence under the common law. *See, e.g.*, *Boccardi Capital Sys., Inc. v. D.E. Shaw Laminar Portfolios, L.L.C.*, 355 F. App'x 516, 519 (2d Cir. 2009) (no fiduciary relationship despite confidentiality agreement because parties dealt "'at arm[']s length in a commercial transaction'" and "[t]here is no allegation that [defendant] agreed to 'act for or to give advice for the benefit of' [plaintiff]"); *Albany Molecular Research, Inc. v. Schloemer*, No. 1:10-CV-210 (LEK/DRH), 2010 WL 5168890, at *4-5 (N.D.N.Y. Dec. 14, 2010) (no fiduciary relationship despite confidentiality agreement because "[n]o fiduciary obligation is expressly stated" and because the agreement does 'not "'give [defendant] the function of an agent, partner or coventurer'"); *Nolan Bros. of Texas, Inc. v. Whiteraven, L.L.C.*, No. 99 Civ. 10256 (TPG), 2004 WL 376265, at *1 (S.D.N.Y. Feb. 27, 2004) ("signing of a confidentiality agreement" does not "necessarily create a fiduciary relationship"); *City Solutions, Inc. v. Clear Channel Commc'ns, Inc.*, 201 F. Supp. 2d 1048, 1049 (N.D. Cal. 2002) ("existence of a detailed confidentiality agreement suggests arm's-length dealings between co-equals" rather than a fiduciary relationship).

Indeed, the Supreme Court has delineated the contours of §10(b)'s duty of trust and confidence by reference to state common-law principles, *see*, *e.g.*, *Dirks*, 463 U.S. at 653-54; *O'Hagan*, 521 U.S. at 654-55, even though the §10(b) duty appears to be "imposed and defined by federal law."[6]

Kosinski and Regado's execution of a confidentiality agreement "does not change the nature of their relationship," because the agreement did not "establish[] a greater degree of trust between them." *Villa Marin Chevrolet, Inc. v. Gen. Motors Corp.*, No. 98-CV-6167(JG), 1999 WL 1052494, at *7 (E.D.N.Y. Nov. 18, 1999). It simply prohibited Kosinski from disclosing information about the clinical trial, which he never did. There is no reason to create a different and inconsistent fiduciary rule peculiar to §10(b).

2. The Contract Governing The Relationship Forecloses Any Fiduciary-like Duty And Should Be Enforced.

The CSRA conclusively demonstrates that Kosinski's relationship with Regado shares *none* of *Chestman*'s "essential characteristics" of a fiduciary one. The CSRA does not remotely hint at the "'reliance, and de facto control and dominance'" that lies "'[a]t the heart'" of a fiduciary or similar relationship. *Chestman*, 947 F.2d at 568. It did not confer on Kosinski any "discretionary authority" to act on Regado's behalf or to bind or control it in any way; nor did his

[6] *United States v. Whitman*, 904 F. Supp. 2d 363, 369 (S.D.N.Y. 2012).

confidentiality obligation confer him with "superiority" or "influence" over Regado. *Id.* at 568-69. Entering into contracts is precisely the sort of activity someone entrusted with fiduciary-esque responsibilities performs on behalf of the principal. *See id.* at 569 (a beneficiary "rel[ies] on a fiduciary to act for his benefit"). But the CSRA expressly barred Kosinski from "enter[ing] into any contract or agreement…that purports to obligate or bind [Regado]" (A-232), further demonstrating that no fiduciary-like relationship was intended or established. And the relationship the CSRA created resembles none of *Chestman*'s examples of "inherently fiduciary" "associations"—relations "between attorney and client, executor and heir, guardian and ward, principal and agent, trustee and trust beneficiary, and senior corporate official and shareholder." 947 F.2d at 568.

On the contrary, the CSRA expressly disclaimed any fiduciary "or similar" relationship. It said Kosinski was "an independent contractor and not an agent, joint venturer, or partner of [Regado]." (A-232). Independent contractors are not fiduciaries; their relationships with their counterparties are governed purely by contract, and they have no free-standing obligation to serve their counterparties' interests. *See Williams Trading LLC v. Wells Fargo Sec., LLC*, 553 F. App'x 33, 35-36 (2d Cir. 2014); *Chestman*, 947 F.2d at 568-69 (no "reliance" where counterparty does not "depend[] on…the fiduciary…to serve his interests"). Unlike independent contractors, agents are quintessential fiduciaries. A principal

grants authority to its agent to act on its behalf; the agent promises to act in good faith, protect the principal's property, and serve the principal's interests. *See Chestman*, 947 F.2d at 569 (principal-agent relationship is the "paradigmatic fiduciary relationship"). But the CSRA specified that Kosinski was *not* Regado's agent.

Where, as here, "the parties to the relevant agreements…have expressly disclaimed any sort of…fiduciary relationship…there is no factual issue," and that is the end of the matter. *Wachovia Bank, Nat'l Ass'n v. VCG Special Opportunities Master Fund, Ltd.*, 661 F.3d 164, 174 (2d Cir. 2011); *accord JA Apparel Corp. v. Abboud*, 568 F.3d 390, 404 (2d Cir. 2009) (Sack, J., concurring) ("[w]hen an agreement is 'clear' and 'complete,'" its meaning "is determined by reference only to the contract's terms"); *Hunt Ltd. v. Lifschultz Fast Freight, Inc.*, 889 F.2d 1274, 1277-78 (2d Cir. 1989) (same).

3. Even If The Terms Of The Contract Were Not Dispositive, Other Evidence Confirms The Absence Of Any Fiduciary-like Relationship Prohibiting Kosinski's Trading.

As explained *supra*, the CSRA restricted disclosure of confidential information but *not* its *use*. That was in the provision entitled "Restrictions on Use and Disclosure"—where any use restriction would have appeared. (A-234-35). Regado obviously knew how to draft an obligation to refrain from using its information to trade—the lawyer who drafted the CSRA for Regado also drafted

the CDA, which *did* bar such trading. The omission of any use restriction in the CSRA thus must have been deliberate, as any reasonable counterparty likely would have concluded. *Cf.* Restatement (Second) of Contracts § 202(5) ("Wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with…any relevant…course of dealing").

Furthermore, Regado's contracts with those working on the clinical trial who did owe it a fiduciary duty stand in stark contrast to Kosinski's principal investigator contract. Those parties, unlike Kosinski, were *not* independent. They had explicit principal-agent relationships with Regado, and Regado specifically barred them from trading its securities. For example, Regado entrusted C5 Research with managing the clinical trial on its behalf, and expressly directed it "to act as its agent" to enter the CSRA and "carry out certain [of Regado's] obligations" for the trial. (A-67-69, A-76, A-227-28; *see also* A-73-74 (C5 Research employee who signed the CDA and CSRA "was acting on Regado's behalf as an agent")). The Regado/C5 Research principal-agent relationship is plainly a fiduciary-like relationship of trust and confidence. *See Chestman*, 947 F.2d at 568 ("One acts in a 'fiduciary capacity' when 'the business which he transacts...is not his own or for his own benefit, but for the benefit of another person'"). Accordingly, unlike Kosinski, C5 Research personnel were *not* permitted to trade Regado securities during the trial. (A-337 (providing that C5

could not "use" "Confidential Information" "for any other purpose other than to exercise its rights and responsibilities" to Regado).

Regado placed similar restrictions on DSMB personnel, who had access to the most sensitive information about patients' reactions to the drug and who were charged with making key decisions about the trial. Regado prohibited these individuals from having *any* financial interest in Regado during the course of the trial and expressly barred them from "buy[ing] or sell[ing] stock or stock options in Regado BioSciences or its subsidiaries" before the results were publicly announced. (A-322). Regado's decision to expressly prohibit C5 Research and the DSMB—but not principal investigators—from using its confidential information for trading demonstrates that Kosinski had no duty of trust and confidence and was free to trade.

And there were other indications that Kosinski—unlike others who had fiduciary responsibilities to Regado—could trade Regado's securities. For instance, he and other principal investigators were required to disclose any financial interest in Regado exceeding $50,000, as well as any "change" in such interests that might occur during the study—implying that such a change was permitted. (A-298). By contrast, the higher-ups on the trial management team and C5 personnel were barred from trading. (A-322, A-337).

Finally, Kosinski's expert witness testified without contradiction that under industry best practices, principal investigators must be independent of the sponsor and trial management team to ensure the accuracy, trustworthiness, and objectivity of data generated during the trial. (A-191). This is why principal investigators in the REG1 trial were prohibited from acting on behalf of Regado. (*Id.*). In other words, it was critical to the integrity of Regado's clinical trial that Kosinski *not* be its fiduciary. Of course, Regado could have inserted a non-use provision and contractually barred Kosinski from using its confidential information to trade. *See Cuban*, 634 F Supp. 2d at 725. But it opted not to do so, and accordingly, Kosinski was permitted to trade.

4. The District Court Misplaced Its Reliance On *Chestman* And *Falcone*.

The district court cited *dicta* in *Chestman* and *United States v. Falcone*, 257 F.3d 226 (2d Cir. 2001), suggesting that confidentiality agreements can sometimes impose fiduciary obligations. (*See* SPA-7, SPA-11-12). But neither case involved a confidentiality agreement or the issue here—whether a nondisclosure provision in a contract between arms-length counterparties that expressly disclaims a fiduciary or similar duty can *in and of itself* trigger a duty to refrain from trading under §10(b). In *Chestman*, the Court merely suggested that a husband/wife relationship could "establish fiduciary status" if the spouses were *also* parties to an express confidentiality agreement. 947 F.2d at 571. *Falcone* involved an

employment relationship, in which the tipper owed a classic fiduciary duty to his employer, which—like the *O'Hagan* defendant's law firm—had obtained the confidential information from a client. 257 F.3d at 227-28, 234-35. And the *Falcone* Court expressly confirmed that: "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. Neither case stands for the proposition that a confidentiality agreement by itself—with no pre-existing fiduciary-like relationship or use prohibition—would be sufficient to create a duty of trust and confidence.

### B. Rule 10b5-2 Cannot Create A Duty Of Trust And Confidence Foreclosed By The Contract Governing A Business Relationship And Applies Only To Non-Business Relationships

In holding that a confidentiality agreement suffices to establish the requisite duty of "trust and confidence" under §10(b), the district court relied heavily on Rule 10b5-2, which provides, *inter alia*, that "for purposes of the 'misappropriation' theory of insider trading," "a 'duty of trust *or* confidence' exists" "[w]henever a person agrees to maintain information in confidence." 17 CFR §240.10b5-2(b)(1) (emphasis added); s*ee* SPA-11-13. But Rule 10b5-2 cannot negate controlling authority, which requires a duty of "trust *and* confidence" for criminal liability under §10(b). Nor can it trump the express terms

of a contract that explicitly disclaim any duty of trust. If so interpreted, the Rule would exceed the SEC's limited authority under §10(b). Furthermore, the regulatory history demonstrates that the SEC intended its Rule to cover only family and other non-business relationships, not commercial relationships between arms-length counterparties.

1. The SEC Has No Authority To Enact A Rule That Would Exceed The Judicially-Interpreted Scope Of §10(b).

Section 10(b) authorizes the SEC to "'adopt regulations to carry into effect the will of the Congress as expressed by the statute,'" but does not confer "the power to make law." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976). The SEC's rulemaking power under §10(b) "does not extend beyond conduct encompassed by §10(b)'s prohibition." *O'Hagan*, 521 U.S. at 651; *accord Chiarella*, 445 U.S. at 234-35; *United States v. Vilar*, 729 F.3d 62, 76 (2d Cir. 2013); *United States v. Gansman*, 657 F.3d 85, 90 n.5 (2d Cir. 2011). And, as explained, §10(b) prohibits trading on inside information only when such trading breaches a fiduciary or fiduciary-like duty of "trust *and* confidence"—a duty the Supreme Court and this Court have described with particular emphasis on the "trust" or "loyalty" component. The SEC has no power to dispense with that "trust" requirement by rewriting a conjunctive test in the disjunctive, or by premising

§10(b) liability for insider trading entirely on breach of a mere duty of "confidence[]" in violation of the controlling judicial decisions.[7]

*O'Hagan* held that under §10(b), the misappropriator's deception is his "feigning fidelity to the source of information" by promising not to use it to trade, but then trading anyway. 521 U.S. at 655. A promise to keep information confidential, without a pre-existing fiduciary or similar duty of trust, merely prohibits the promisor from disclosing the information to third parties. It does not create some additional, unexpressed obligation to refrain from using the information for personal benefit. That is why the *Cuban* court held Rule 10b5-2 invalid. That court opined that a "duty sufficient to support liability under the misappropriation theory can arise by agreement absent a preexisting fiduciary or fiduciary-like relationship," but any such agreement "must consist of more than an

[7] The Supreme Court's many decisions sharply circumscribing the private §10(b) action also dictate a narrow construction here. In those cases, the Court has repeatedly emphasized that, because the private action was judicially-created, §10(b) must be narrowly construed with its scope limited to conduct prohibited by "the text of the statute," to avoid a separation-of-powers problem. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173-74 (1994); *see also*, *e.g.*, *Janus Capital Grp. v. First Derivative Traders*, 564 U.S. 135, 142, 144 (2011); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 736-37 (1975). The ban on insider trading, like the private action, is a judicial invention, *e.g.*, *Cuban*, 634 F. Supp. 2d at 720, and these interpretive principles have even more force in a criminal application of §10(b). *See*, *e.g.*, *United States v. Wiltberger*, 18 U.S. 76, 95 (1820) ("penal laws are to be construed strictly" because "the legislature, not the Court…is to define a crime, and ordain its punishment").

express or implied promise merely to keep information confidential." 634 F. Supp. 2d at 725. Because "nondisclosure" and "non-use" of confidential information are "distinct," an agreement "must also impose on the party who receives the information the legal duty to refrain from trading on or otherwise use the information for personal gain." *Id.* Thus, the SEC cannot "predicate liability on an agreement that lacks the necessary component of an obligation not to trade on or otherwise use confidential information for personal benefit." *Id.* at 729. The CSRA imposed no such obligation, even though Regado obviously knew how to insist on one and did so in the CDA and contracts with other participants in the clinical trial. Rule 10b5-2 cannot supply a term absent from the contract by equating "confidence" with "trust," any more than the SEC could issue a rule declaring all nonpublic information material. Trust and confidence are separate and distinct requirements, and the courts have insisted that both be present to trigger criminal liability under §10(b).

The contrast between the rulemaking power Congress delegated to the SEC in §10(b) and the far broader authority it conferred in another securities fraud statute further illustrates the point. Section 14(e) of the Securities Exchange Act prohibits false statements and material omissions with respect to tender offers. In that context, Congress authorized the SEC to "*define*, and prescribe *means reasonably designed to prevent*, such acts and practices as are fraudulent,

deceptive, or manipulative." 15 U.S.C. §78n(e) (emphasis added). In other words, §14(e) authorizes the SEC both to "define" what is fraudulent *and* to promulgate "prophylactic" rules that prohibit conduct that may not itself be fraudulent. *See O'Hagan*, 521 U.S. at 672-73 ("under §14(e), the [SEC] may prohibit acts not themselves fraudulent under the common law or §10(b)"). By contrast, Congress did not delegate to the SEC authority to either "define" what is fraudulent under §10(b) or to promulgate rules to prevent such fraud. As this Court has explained, §14(e) "provides a more compelling legislative delegation to the SEC to prescribe rules than does section 10(b)." *Chestman*, 947 F.2d at 561 (noting distinction between §10(b)'s authorization for SEC to "prescribe as necessary or appropriate" and §14(e)'s command to prescribe rules that will "define" and "prevent" fraud).

The district court disagreed with *Cuban* and invoked *Chevron* deference to apply Rule 10b5-2 here. (SPA-11-13). But *Chevron* is irrelevant for two reasons. First, there is no ambiguity. Securities trading involves no false statement; it is only "deceptive" if the trader's silence breached some duty to disclose—*i.e.*, a duty of "trust *and* confidence" to the shareholders or the source of the information. *Chiarella*, 445 U.S. at 230; *O'Hagan*, 521 U.S. at 652. The SEC cannot flout the Supreme Court's authoritative interpretation and substitute "or" for "and," or redefine "trust" as "confidence," to drastically expand the scope of "deception" under §10(b), a statute that the Court has cautioned must be narrowly limited even

in its civil applications. *See supra* n.7. Because there is no ambiguity, the definitive "prior judicial construction of [the] statute trumps" any contrary SEC interpretation that might "otherwise [be] entitled to *Chevron* deference." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

Second, any statutory ambiguity would have to be "'resolved in favor of lenity,'" *Cleveland v. United States*, 531 U.S. 12, 25 (2000); *accord*, *e.g.*, *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015), not by deferring to the SEC. It is well-settled that *Chevron* deference does not apply to crimes. *See*, *e.g.*, *Abramski v. United States*, 573 U.S. 169, 191 (2014) (agency interpretations irrelevant because "criminal laws are for courts, not for the Government, to construe"); *United States v. Apel*, 571 U.S. 359, 369 (2014) ("we have never held that the Government's reading of a criminal statute is entitled to any deference"); *Sash v. Zenk*, 428 F.3d 132, 135 (2d Cir. 2005) ("'courts owe no deference to an agency's interpretations of…federal criminal laws'").

It makes no difference that §10(b) carries civil and criminal penalties. When an ambiguous statute has both civil and criminal applications, courts "must" apply the rule of lenity to construe the statute narrowly and "interpret the statute consistently, whether [they] encounter its application in a criminal or noncriminal context." *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004). As Justice Scalia explained, *Chevron* deference to the SEC's interpretation of a rule promulgated

under §10(b) "'would turn [the Court's] normal construction…upside-down, replacing the doctrine of lenity with a doctrine of severity.'" *Whitman v. United States*, 135 S. Ct. 352, 353 (2014) (concurring in denial of petition for certiorari, joined by Thomas, J.). Such deference would "'complete[ly] undermin[e]…the Constitution's separation of powers,'" whereas "the rule of lenity 'preserves' them by maintaining the legislature as the creator of crimes," "ensur[ing] fair notice of criminal consequences," and "preclud[ing] the same agency from altering criminal laws back and forth over time," thus avoiding a due process problem. *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1030 (6th Cir. 2016) (Sutton, J., concurring) (quoting majority opinion), *rev'd on other grounds*, 137 S. Ct. 1562 (2017); *see also Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1155-56 (10th Cir. 2016) (Gorsuch, J., concurring) (approving *Esquivel-Quintana* concurrence).[8]

[8] *United States v. Royer*, 549 F.3d 886 (2d Cir. 2008), is not to the contrary. That decision merely reaffirmed *United States v. Teicher*, 987 F.2d 112, 119-21 (2d Cir. 1993), which held that "knowing possession" can establish "use" of material nonpublic information in trading. The Court observed in passing that "[n]othing that has developed since persuades us of any different resolution," and that Rule 10b5-1 adopted the *Teicher* approach and was entitled to *Chevron* deference. *Royer*, 549 F.3d at 899. This point was unnecessary to the holding, which reaffirmed a prior *judicial* construction, and in any event pre-dated *Abramski* and *Apel*.

2. Rule 10b5-2 Does Not Apply To Business Relationships Defined By Contracts Between Arms-length Counterparties.

Even if the SEC had the power to define §10(b) (it does not), Rule 10b5-2 would not apply. The proposing and adopting releases show that the SEC intended to tether liability to a mere confidentiality agreement only where the parties to that agreement had a family or personal relationship—not a business relationship.

In its release proposing Rule 10b5-2, the SEC described its purpose as broadening liability in the context of "close family and personal relationships." Selective Disclosure and Insider Trading, 64 Fed. Reg. 72590, 72602 (Dec. 28, 1999). The SEC's view was that *Chestman*'s "approach does not fully recognize the degree to which parties to *close family and personal relationships* have reasonable and legitimate expectations of confidentiality in their communications." *Id.* (emphasis added). Accordingly, the SEC proposed a "broader approach…for determining when *family or personal relationships* create 'duties of trust or confidence.'" *Id*. at 72603 (emphasis added). The release was peppered with additional comments confirming that Rule 10b5-2's purpose was to regulate insider trading in non-business settings only. *See*, *e.g.*, *id.* at 72591 ("Rule 10b5-2 addresses...what types of family *or other non-business relationships* can give rise to liability under the misappropriation theory") (emphasis added); *id.* at 72608 ("Rule 10b5-2 would define when a *non-business relationship*, such as a family or personal relationship, may provide the duty of trust and confidence required under

the misappropriation theory") (emphasis added). The release announcing the final rule included similar language. *See*, *e.g.*, Selective Disclosure and Insider Trading, 65 Fed. Reg. 51716, 51716 (Aug. 24, 2000) (purpose of Rule 10b5-2 is "to address…when the breach of a family or other non-business relationship may give rise to liability under the misappropriation theory of insider trading"); *id.* at 51729 (describing Rule 10b5-2 as a "broader approach…for determining when family or personal relationships create 'duties of trust or confidence' under the misappropriation theory").

Although this Court has never addressed this precise issue, most courts to consider it have held that Rule 10b5-2 does *not* cover business relationships. *See SEC v. De La Maza*, No. 09-21977-CIV-JORDAN, 2011 WL 13174213, at *7 (S.D. Fla. Feb. 16, 2011) ("Rule 10b5-2...codifies three circumstances giving rise to a 'duty of trust and confidence' in the context of non-business relationships"); *SEC v. Talbot*, 430 F. Supp. 2d 1029, 1061 n.91 (C.D. Cal. 2006) ("Rule 10b5-2 was not intended to apply to business relationships"), *rev'd on other grounds*, 530 F.3d 1085 (9th Cir. 2008); *Kim*, 184 F. Supp. 2d at 1015 (the "language of the [SEC] release makes clear [Rule 10b5-2] applies to family 'or other non-business relationships'"). The SEC promulgated Rule 10b5-2 to address the scope of misappropriation liability for those who trade on information provided in confidence by a family member or close friend. Congress did not grant the SEC

authority in §10(b) to add additional terms to contracts that arms-length counterparties willingly enter. Rule 10b5-2 should be interpreted narrowly to avoid a result that would enable it to do so.

### C. At A Minimum, Kosinski Is Entitled To A New Trial With A Proper Instruction On The Duty Of Trust And Confidence

If this Court agrees that a confidentiality agreement is insufficient to establish the requisite duty of trust and confidence but still finds the evidence somehow sufficient, a new trial is required because the jury instructions were fatally defective.

Over Kosinski's objection (A-208-10), the district court instructed the jury that "a person has a requisite duty of trust and confidence whenever a person agrees to maintain information in confidence." (A-222). Because the CSRA barred Kosinski from disclosing Regado's confidential information, this erroneous instruction effectively directed a verdict in favor of the government. It invited the jury to ignore all of the evidence about the Kosinski/Regado relationship other than the CSRA's confidentiality provision, and ensured conviction based on a legally invalid theory. Accordingly, if this Court does not reverse for insufficient evidence, it should grant a new trial. *See*, *e.g.*, *Silver*, 864 F.3d at 123-24 (vacating conviction and remanding for new trial where defective instruction permitted conviction on invalid theory).

## II. THE CONVICTION SHOULD BE REVERSED BECAUSE THERE WAS INSUFFICIENT EVIDENCE OF WILLFULNESS

### A. The Evidence Was At Worst, Equally Consistent With Innocence As Any Inference Of Guilt

Establishing criminal violations of the securities laws requires proof beyond a reasonable doubt that the defendant acted "willfully." 15 U.S.C. §78ff(a). 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)); *see also Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 58 n.9 (2007) ("a defendant cannot harbor [willful] criminal intent unless he 'acted with knowledge that his conduct was unlawful'"). In the insider trading context, willfulness requires that the defendant knew "he was doing a wrongful act under the securities laws." *Cassese*, 428 F.3d at 98; *accord*, *e.g.*, *United States v. Newman*, 773 F.3d 438, 447 (2d Cir. 2014), *abrogated on other grounds by Salman v. United States*, 137 S. Ct. 420 (2016). This means that the government must establish that the defendant knew his trading was illegal. *See Kaiser*, 609 F.3d at 569.

Where the evidence of willfulness "at best, gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence…a reasonable jury must necessarily entertain a reasonable doubt." *Cassese*, 428 F.3d at 103

(internal quotation marks omitted); *accord*, *e.g.*, *United States v. Coplan*, 703 F.3d 46, 70-71 (2d Cir. 2012) (finding evidence of tax-related conspiracy to defraud insufficient on this basis); *United States v. Valle*, 807 F.3d 508, 522-23 (2d Cir. 2015) (affirming post-judgment acquittal despite "some incriminating evidence"); *United States v. Glenn*, 312 F.3d 58, 70 (2d Cir. 2002) (reversing conviction where evidence "gave 'nearly equal circumstantial support' to guilt or innocence).

In *Cassese*, the government asserted that five pieces of evidence proved the defendant acted willfully when he purchased shares in advance of the public announcement of an acquisition. 428 F.3d at 99. After carefully reviewing each one, this Court held that "viewed singly, each of the areas of proof by the Government was characterized by modest evidentiary showings, equivocal or attenuated evidence of guilt or a combination of the three." *Id.* at 103. It held that "viewed in its totality, the evidence of willfulness is insufficient to dispel reasonable doubt on the part of a reasonable fact finder" and affirmed the grant of a post-verdict acquittal motion. *Id.*

The evidence here suffers from the same defects, individually and collectively, which this Court identified in *Cassese*. No reasonable juror could find beyond a reasonable doubt that Kosinski knew he was performing "a wrongful act under the securities laws." *Id.* at 98. The evidence is "equal[ly] or nearly

equal[ly],” supportive of an interpretation consistent with innocence, requiring reversal. *Id.* at 103.

1. The CSRA Rebuts Willfulness.

The CSRA demonstrates Kosinski’s lack of willful intent, because it contained no bar on trading, whereas the CDA that it expressly superseded prohibited Kosinski from “using” or “exploiting” inside information by trading. The difference between these two contracts could only have signaled to Kosinski that the CSRA *did* permit trading. Likewise, the financial disclosure form indicated that principal investigators could own and trade Regado’s securities while working on the clinical trial: it expressly contemplated that their holdings could exceed $50,000 and that there might be a “change” during the trial. (A-292, A-298).

Additionally, Regado never instructed Kosinski that he couldn’t trade the company’s securities. He had to fill out a “Statement of Investigator” form asking principal investigators to comply with eight separate commitments. (A-290). There was no commitment not to trade in the stock of the trial sponsor. (*Id.*). And at the Regado training sessions that Kosinski attended, no one mentioned insider trading or suggested that principal investigators couldn’t trade Regado’s stock. (A-98-102, A-121). All of this demonstrates that it was reasonable to assume he could trade. *Cf. Safeco*, 551 U.S. at 69 (under lower civil “willfulness” standard,

defendant's "reading of the statute, albeit erroneous, was not objectively unreasonable" and thus not willful).[9]

2. Kosinski's Statements To The FBI Do Not Prove Willfulness.

Nor do Kosinski's August 3, 2016 statements to the FBI establish willfulness. Kosinski was obviously reacting to the stress of the indictment with the benefit of hindsight when he described the trades as "a stupid thing that he did," and said that "greed and stupidity had caused him to make those trades" and "he didn't feel good about making those trades when he had made them." (A-164-65). Cassese's similar after-the-fact statement that "he had made a stupid mistake" was arguably even more probative than Kosinski's, because Cassese made it just two months after his trades (not two years later) and had sought to cancel those trades two days after he placed them. *Cassese*, 428 F.3d at 101-02. But even if Kosinski had "realized one day after making the [trade] that it was a mistake to do so," that would be insufficient to prove willfulness. *Id.* at 101. Kosinski's statements to the agent reflect regret and disappointment—not knowledge that his conduct was wrong under the securities laws. *See also id.* (evidence of "after-the-fact consciousness of guilt…is 'insufficient proof on which to convict where other

[9] The district court cited generic testimony that "principle [sic] investigators are expected not to trade on confidential information" as evidence of willfulness. (SPA-28). But neither the witness who made that statement nor any other evidence suggested that Regado ever informed Kosinski that he couldn't trade.

evidence of guilt is weak and the evidence before the court is as hospitable to an interpretation consistent with the defendant's innocence as it is to the Government's theory of guilt.'") (quoting *United States v. Johnson*, 513 F.2d 819, 824 (2d Cir. 1975)).

3. Kosinski's Representations About His Stock Ownership Rebut Any Inference Of Willfulness.

Kosinski's representations about his stock ownership show that he disclosed his financial interest in Regado and believed he had nothing to hide.

The government argued that on October 16, 2013, Kosinski signed a St. Vincent's Medical Center form inaccurately disclaiming any ownership of Regado stock, when he in fact owned 4,000 shares. (A-135-36, A-275). But that form was prepared and signed three months before Kosinski was hired and eight months before the phase three allergic reactions and Kosinski's subsequent trades. His actions on October 16, 2013 have nothing to do with his mental state on June 30, 2014 or July 30, 2014. *See Cassese*, 428 F.3d at 101 ("only his mind set on the day he purchased the shares is relevant"); *cf. United States ex rel. O'Donnell v. Countrywide Home Loans, Inc.*, 822 F.3d 650, 658-59, 662 (2d Cir. 2016) ("a representation is fraudulent only if made with the contemporaneous intent to defraud"). Furthermore, Kosinski's assistant filled out the form in September—before he owned any Regado shares. (A-155-56, A-293). The most reasonable inference is that Kosinski inadvertently failed to update the form between the time

that his assistant accurately filled it out and the time that he signed it—not that he was deliberately attempting to hide his trading. *See*, *e.g.*, *United States v. D'Amato*, 39 F.3d 1249, 1256 (2d Cir. 1994) (on sufficiency review, only "reasonabl[e]" inferences should be drawn in favor of government); *accord United States v. Quattrone*, 441 F.3d 153, 169 (2d Cir. 2006).

The government also relied on Kosinski's purported failure to "promptly" update a financial disclosure form to reflect his ownership of Regado shares. (A-217-19). But the form provided no particular deadline for updating a change in stock ownership, and the fact that it contemplated that principal investigators' holdings might change during the trial, if anything, indicated that Kosinski was permitted to buy or sell its securities during that period. Moreover, when Kosinski signed the form on December 4, 2013, he truthfully declared that he did not own more than $50,000 in Regado securities. (A-137-39, A-298). It was not until February 2014 that his ownership exceeded $50,000. (A-139). And Kosinski *did* promptly update the form just two days after Regado asked him to do so. (A-302-03). If Kosinski had believed that his trading was unlawful, he would not have disclosed it.

4. The Timing Of The Trades Is Irrelevant.

In its opinion denying Kosinski's Rule 29 motion, the district court cited, as evidence of willfulness, "the short timeframe" between when he received the

information in the two e-mails and when he traded. (SPA-28). But that is not evidence that Kosinski knew doing so was wrong or unlawful. At worst, the timing of the trades shows that Kosinski traded based on Regado's inside information. But without more, that is not illegal. As explained, there is no general duty to refrain from trading on material nonpublic information; such trading rises to the level of "fraud" only in "extraordinary" circumstances, *Dirks*, 463 U.S. at 654, 657; *see also Chiarella*, 445 U.S. at 233 (broad duty not to trade on inside information would "depart[] radically from the established doctrine" requiring a fiduciary relationship). Without a fiduciary or similar relationship, or any other indications that trading was prohibited,[10] there was no reason for Kosinski to think that he couldn't trade. *See Kaiser*, 609 F.3d at 569 ("it is easy to imagine a[]…trader who receives a tip and is unaware that" trading on it "was illegal"); *see also*, *e.g.*, *Staples v. United States*, 511 U.S. 600, 605 (1994) (defendant must know facts that make his conduct illegal).

5. Kosinski's Trading Experience Is Irrelevant.

Even if Kosinski was "a sophisticated investor," as the government argued (A-219), that does not prove he knew his trading was unlawful. This Court has rejected similar efforts to rely on mere financial sophistication to prove willfulness.

[10] For example, information involving a tender offer could alert a person that trading is impermissible due to the specific rule governing such information. 17 C.F.R. §240.14e-3.

For example, in *Newman* this Court was unpersuaded that the defendants—who, unlike Kosinski, were investment professionals employed at a hedge fund—must have known that the information they were receiving was disclosed by insiders in breach of a fiduciary duty because they were "sophisticated traders." 773 F.3d at 443-44. The Court found that their status was not sufficient to establish scienter, and that the government had to adduce actual evidence demonstrating that the defendants were aware of facts that would have made their trades unlawful. *Id.* at 454-55.

Kosinski was no hedge fund portfolio manager; he did not even work in the securities industry. The notion that a cardiologist would have divined that his promise to keep Regado's information confidential somehow also made him Regado's fiduciary even though their contract expressly disclaimed that, just because he traded in ordinary consumer brokerage accounts, is nonsense. *See SEC v. Steadman*, 967 F.2d 636, 641-42 (D.C. Cir. 1992) (rejecting argument that defendant's academic credentials and experience in securities industry were sufficient to establish scienter).

### B. At A Minimum, Kosinski Is Entitled To A New Trial With A Proper Willfulness Instruction

At a minimum, Kosinski is entitled to a new trial because the jury instructions "fail[ed] to adequately inform the jury of the law" and "misle[d] the jury as to [the] correct legal standard" on willfulness. *Quattrone*, 441 F.3d at 177

(internal quotations omitted). The willfulness instruction failed to adequately convey that the government had to prove that Kosinski knew his conduct was "wrongful…under the securities laws." *Cassese*, 428 F.3d at 98.

Kosinski objected to the court's proposed charge because it did not require proof that he knew "his conduct was unlawful" (A-205), and because it instructed that "the Government need not show that Dr. Kosinski knew of a specific statute that he was violating" in a way that lowered the government's burden. (A-199-202). Kosinski also argued that the phrase "with a bad purpose to either to disobey or disregard the law" was inconsistent with *Bryan* and *Cassese*. (A-204-07).

The district court rejected Kosinski's arguments and erroneously instructed the jury that 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" (A-223-24) instead of requiring knowledge that "[the defendant] was doing a wrongful act under the securities laws." *Newman*, 773 F.3d at 447.

The court watered down the willfulness standard further by suggesting that Kosinski did not have to know that his trading was unlawful: "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." (A-223-24) (emphasis added). It is true that the government was not

required to prove Kosinski's knowledge of a specific statute. But the instruction suggested that the jury only had to find that Kosinski "knew what he was doing"—trading on nonpublic information—and not that he also knew that his trading was illegal under the securities laws.

The next sentence further weakened the government's burden by saying Kosinski "must have acted with knowledge and intent to carry out the insider trading scheme." (A-224). As explained, not all "insider trading" is illegal, but the instruction suggested that an intent to carry out *any* "insider trading"—even perfectly legal trading on material nonpublic information—establishes willfulness. The risk of misleading the jury was compounded because during voir dire the court had already erroneously told the jury, over Kosinski's objection and without qualification: "The law does not permit a person to buy or sell stock or other securities based on information unknown to the general public ('insider trading')." (A-54-55). The jury was already under the mistaken impression that *any trading* on material nonpublic information was categorically unlawful, which was reinforced by the court's instruction that an intention to participate in an "insider trading scheme" proved willfulness. This could only have "compounded the jury's bewilderment regarding [Kosinski's principal factual] defense." *United States v. Kopstein*, 759 F.3d 168, 182 (2d Cir. 2014) (vacating conviction due to confusing jury instruction); *see also Hudson v. New York City*, 271 F.3d 62, 70-71 (2d Cir.

2001) (vacating civil judgment because jury instructions were "confusing as to whether intent to do wrong" was required to establish liability).

Given the serious deficiencies in the government's case on willfulness identified in Point II.A and the fact that the erroneous instruction "'call[s] into question the fairness and integrity of [Kosinski's] conviction,'" he is entitled to a new trial. *Kopstein*, 759 F.3d at 182 (quoting *United States v. Rossomando*, 144 F.3d 197, 200-01 (2d Cir. 1998)).

## III. THE DISTRICT COURT'S ERRONEOUS EXCLUSION OF EXCULPATORY EVIDENCE REQUIRES A NEW TRIAL

The district court permitted the government to introduce two statements that Kosinski allegedly made to the FBI agent during a brief conversation in which the agent told Kosinski that he had been indicted. However, the district court precluded the defense from eliciting that, during the same conversation, Kosinski said he "can't believe this is happening" and had not retained counsel even after the agent questioned him two months earlier about his trading. These statements were admissible under the rule of completeness as well as the excited utterance exception. The erroneous rulings deprived the jury of critical exculpatory evidence and painted an inaccurate and one-sided picture of Kosinski's reaction to being charged. Given the importance of his scienter, the error was plainly not harmless and requires a new trial.

### A. Kosinski's Statements Were Admissible Under The Rule Of Completeness

The rule of completeness provides: "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time." Fed. R. Evid. 106. The rule also applies to oral statements. *See United States v. Johnson*, 507 F.3d 793, 796 n.2 (2d Cir. 2007). It requires admitting a statement in its entirety—even if portions of it are hearsay—where the statement is necessary to (1) explain the admitted portion; (2) put the admitted portion in context; (3) avoid misleading the jury; or (4) ensure a fair and impartial understanding of the admitted portion. *See Coplan*, 703 F.3d at 85. *See also* Fed. R. Evid. 106 advisory committee's note (explaining that the rule is designed to remedy "the misleading impression created by taking matters out of context").

Here, the statements the district court excluded are necessary to explain the admitted statements, place them in context, and avoid misleading the jury into believing that the admitted statements prove Kosinski's willfulness. The excluded statements show that Kosinski plainly did not expect to be indicted and did not believe that his conduct was criminal. First, he made no effort to retain a lawyer even after learning during the agent's prior interview that the FBI was investigating his trading. Second, he expressed shock and surprise at the news of

the indictment. A person who knows he has committed a wrongful act under the securities laws is unlikely to have such a reaction. The excluded statements were thus critical to demonstrate that the admitted statements, in context, were obviously innocent hindsight expressions of regret, based on the fact that Kosinski had just learned that, to his surprise, the government believed his trades were criminal. *See*, *e.g.*, *United States v. Rubin*, 609 F.2d 51, 63 (2d Cir. 1979) (government agents' notes properly admitted because they were necessary to avoid "confusing or misleading impression that the portions quoted out of context were typical"). Without these statements showing that Kosinski was shocked by the charges, the jury likely was misled—at the government's urging—into according far greater weight to the admitted statements than they truly bore. (A-217 (government arguing in summation that "we know" that "Dr. Kosinski intended to do something he knew was wrong" because he "confessed to agent McGoey")).

The exclusion of Kosinski's exculpatory statements was reversible error. It is "obvious" what occurred here: The prosecution "made use of a portion of a [statement], such that misunderstanding or distortion can be averted only through presentation of another portion," and "the material required for completeness"—Kosinski's expression of shock and failure to retain a lawyer—"is *ipso facto* relevant and therefore admissible." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 172 (1988) (holding that "refusal to admit the proffered completion evidence was a

clear abuse of discretion" requiring vacatur of judgment). *See also, e.g.*, *Phoenix Assocs. III v. Stone*, 60 F.3d 95, 102-03, 105 (2d Cir. 1995) (vacating judgment where exclusion of documentary evidence violated rule of completeness); *United States v. Walker*, 652 F.2d 708, 715 (7th Cir. 1981) (granting new trial due to erroneous exclusion of exculpatory portions of defendant's prior testimony).

### B. Kosinski's Statements Were Admissible Under The Excited Utterance Exception

Kosinski's exculpatory statements are also admissible as excited utterances because they "relat[e] to a startling event or condition, made while the declarant was under the stress of excitement that it caused." Fed. R. Evid. 803(2). Excited utterances do not need to describe or explain the event that startled the declarant—they simply need to relate to the event in some way. *United States v. Jones*, 299 F.3d 103, 112 n.3 (2d Cir. 2002). The critical inquiry is whether the declarant was still under the stress of the excitement caused by the event or condition when he made the statement. *See Mohamed v. Laz Parking*, 79 F. App'x 482, 483 (2d Cir. 2003). Relevant factors include: the lapse of time between the event and the declarations; the declarant's age; the declarant's physical and mental state; the characteristics of the event; and the subject matter of the statements. *United States v. Jennings*, 496 F.3d 344, 349 (4th Cir. 2007).

Kosinski's statement that he "can't believe this is happening" is the quintessential excited utterance. It relates directly to the startling event (the

indictment) and was made within minutes of Kosinski learning about it—an undeniably shocking and traumatic experience for any person. It would be especially shocking for someone like Kosinski—then a 68-year-old man with no criminal record. In excluding the statement, the district court cited the length of the phone call—five minutes—and asserted that it gave Kosinski the opportunity to calm down and "reflect[]" before speaking. (A-160-61). But the district court itself subsequently characterized Kosinski's other statements on this call (the ones it admitted) as "spontaneous[] react[ions]." (SPA-22). Either Kosinski was reacting spontaneously to the shock of the indictment when he blurted out all of his remarks to the agent, or he wasn't. There is no logical basis to parse or distinguish among his various statements on the call and label some reflective and others excited utterances.

In any event, this Court has consistently held that statements are admissible under Rule 803(2) even though they were made not just minutes, but hours after the startling event. For example, in *United States v. Tocco*, this Court affirmed the admission under this Rule of a statement the defendant made three hours after he had set fire to a building. 135 F.3d 116, 127-28 (2d Cir. 1998). This Court held the statement admissible despite the passage of several hours because the declarant's excitement had not subsided—he was "all hyped" and "nervous." *Id.* at 128. And in *United States v. Scarpa*, this Court upheld the admission of the

statement a victim made five or six hours after he was attacked by gang members because he was "very nervous" and "still under the stress of excitement caused by his beating." 913 F.2d 993, 1017 (2d Cir. 1990).

Although Kosinski was not physically assaulted, he had learned that he was being indicted for federal crimes less than five minutes before making the excluded statements. And his statement that he "*can't* believe this is happening" implies a *current* state of shock and disbelief—not a dispassionate and reflective state of mind. The same is true for Kosinski's statement that he had not retained a lawyer. Although it does not, on its face, reflect excitement and shock, the statement related to the indictment and Kosinski made it within minutes of learning that he had been charged with federal crimes. *See* Fed. R. Evid. 803 advisory committee's note ("statement need only 'relate' to the startling event or condition, thus affording a broader scope of subject matter coverage"). Both statements should have been admitted as excited utterances. *See*, *e.g.*, *Maggard v. Ford Motor Co.*, 320 F. App'x 367, 376-77 (6th Cir. 2009) (reversing judgment against manufacturer and remanding where district court erroneously excluded eyewitness's excited utterance made 30-40 minutes after accident).

### C. The Error Was Not Harmless

The district court's rulings impeded defense counsel's ability to cross-examine McGoey and deprived the jury of critical exculpatory evidence. This

violated Kosinski's Confrontation Clause rights and his due process right to a fair trial, which includes "'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). Accordingly, he is entitled to a new trial unless the government proves that the error was "harmless beyond a reasonable doubt." *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) (Confrontation Clause error); *Chapman* v. *California*, 386 U.S. 18, 23-24 (1967) (recognizing that evidentiary error can be "constitutional error"); *see also*, *e.g.*, *United States* v. *Surdow*, 121 F. App'x 898, 900 (2d Cir. 2005) (analyzing exclusion of defense evidence under *Chapman*).

But even if the error is not constitutional, vacatur would be warranted under the standard applied to non-constitutional errors because there is no way to "conclude with fair assurance that the error[] did not substantially influence the jury." *Litvak*, 808 F.3d at 184. Under that test, where "defense evidence has been improperly excluded," this Court considers five factors to determine whether the exclusion was harmless: "(1) the importance of…unrebutted assertions to the government's case; (2) whether the excluded material was cumulative; (3) the presence or absence of evidence corroborating or contradicting the government's case on the factual questions at issue; (4) the extent to which the defendant was otherwise permitted to advance the defense; and (5) the overall strength of the prosecution's case." *Id.* All five factors weigh in Kosinski's favor.

First, given the thin to non-existent evidence of scienter, McGoey's testimony was critical. Not surprisingly, the government played it up heavily in closing. The prosecution told the jury "we know" that Kosinski "intended to do something he knew was wrong" because he "confessed to agent McGoey that he was the one who traded the Regado stock and options, that he didn't feel good about it…and that he did it out of greed and stupidity." (A-217). Having directed the jury in its summation to focus on this evidence, the government cannot seriously claim "with fair assurance that the evidence did not substantially influence the jury." *United States v. Vayner*, 769 F.3d 125, 133 (2d Cir. 2014) (quotation marks omitted); *see also United States v. Stewart*, 907 F.3d 677, 689, 691 (2d Cir. 2018) (reversing due to exclusion of evidence rebutting other proof that prosecution emphasized in its jury addresses); *United States v. Joseph*, 542 F.3d 13, 21 & n.7 (2d Cir. 2008) (rejecting harmlessness claim where government argued to jury that erroneously admitted evidence was "devastating"); *United States v. Grinage*, 390 F.3d 746, 751-52 (2d Cir. 2004) (evidentiary error not harmless where government offered little other evidence for disputed element and urged jury to rely on improperly admitted evidence).

As to the second and third factors, the excluded statements were not cumulative, as there was no other evidence about Kosinski's reaction to the

charges, and there was extensive evidence, including the contracts and disclosure forms, which contradicted the government's willfulness arguments.

Fourth, the district court repeatedly stymied Kosinski's efforts to rebut willfulness. For example, the court excluded evidence that Kosinski was a busy cardiologist who lacked the time and financial industry experience needed to understand the securities laws. (Dkt. 59 at 10-12). The court also prohibited Kosinski's counsel from even mentioning the legal standard for willfulness in his closing argument. During the charge conference, the court directed counsel not to "read from the jury instruction" because this amounted to instructing the jury on the law and was "inappropriate" and "unnecessary." (A-211-13). But it is standard practice for counsel to incorporate the jury charge into their closing argument. *See*, *e.g.*, Robert E. Larsen, Navigating the Federal Trial § 14:21 (2018 ed.) ("Once the instructions conference is concluded, the lawyers know the text of the jury instructions and may refer to them during closing arguments"). Indeed, the purpose of the Rule 30 charge conference is "to inform the trial lawyers in a fair way what the instructions are going to be in order to allow counsel the opportunity to argue the case intelligently to the jury." *United States v. Squillacote*, 221 F.3d 542, 572 (4th Cir. 2000). Here, counsel's hands were tied because the court deprived Kosinski of key evidence showing his good faith *and*

the ability to explain the willfulness test and apply it to other exculpatory evidence in a meaningful way.

Finally, as explained, the evidence was underwhelming at best. There is simply no way that this Court can conclude "with fair assurance that the jury would not have found differently if it were presented with [the excluded evidence]," particularly given that scienter was a hotly-disputed element at trial. *Litvak*, 808 F.3d at 184. *See also id.* at 188-90 (reversing securities fraud conviction due to, *inter alia*, erroneous exclusion of good faith evidence); *United States v. Biaggi*, 909 F.2d 662, 692 (2d Cir. 1990) ("Where evidence of a defendant's innocent state of mind, critical to a fair adjudication of criminal charges, is excluded, [this Court has] not hesitated to order a new trial"); *United States v. Detrich*, 865 F.2d 17, 21-22 (2d Cir. 1988) (reversing due to exclusion of statements to law enforcement, which "lend[] support to the theory of the defense" of lack of scienter).

## CONCLUSION

For the foregoing reasons, this Court should reverse the conviction and remand with instructions to enter a judgment of acquittal. Alternatively, this Court should vacate the convictions and remand for a new trial.

Dated: New York, New York
January 28, 2019

/s/ Alexandra A.E. Shapiro
Alexandra A.E. Shapiro
Philip W. Young
SHAPIRO ARATO BACH LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880

*Attorneys for Defendant-Appellant*
*Edward J. Kosinski*

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS**

The undersigned counsel of record for Defendant-Appellant Edward J. Kosinski certifies pursuant to Federal Rule of Appellate Procedure 32(g) and Local Rule 32.1 that the foregoing brief contains 13,787 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), according to the Word Count feature of Microsoft Word 2016; and that this brief has been prepared in 14-point Times New Roman.

Dated: January 28, 2019

/s/ Alexandra A.E. Shapiro
Alexandra A.E. Shapiro

# SPECIAL APPENDIX

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**UNITED STATES DISTRICT COURT**
**DISTRICT OF CONNECTICUT**

| | | |
|---|---|---|
| **UNITED STATES OF AMERICA** | : | **CRIMINAL CASE NO. 3:16-CR-00148 (VLB)** |
| **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 president 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 coordinators, 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, 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).**

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[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.**

**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 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**

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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).**

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).**

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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**

**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. <u>Whether a Fiduciary-Like Relationship Creates a Duty of Trust and Confidence</u>**

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

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**confidentiality agreement does not create a duty of trust and confidence under the misappropriation theory).**

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.**

**UNITED STATES DISTRICT COURT**
**DISTRICT OF CONNECTICUT**

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| **UNITED STATES OF AMERICA** | : | **CRIMINAL NO. 3:16-CR-00148 (VLB)** |
| **v.** | : | |
| **EDWARD KOSINSKI** | : | **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 reasonable 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]

**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.**

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

**UNITED STATES DISTRICT COURT**
**District of Connecticut**

**UNITED STATES OF AMERICA**

**v.**

**EDWARD J. KOSINSKI**

**JUDGMENT IN A CRIMINAL CASE**

**CASE NO.: 3:16-cr-00148-VLB**
**USM NO: 24972-014**

**Heather L. Cherry and Jonathan N. Francis**
**Assistant United States Attorney**

**Brian E. Spears and Nathan J. Buchok**
**Defendant's Attorney**

**THE DEFENDANT: found guilty after jury trial of Count 1 and Count 2 of the Indictment.**

**Accordingly, the defendant is adjudicated guilty of the following offense:**

| Title & Section | Nature of Offense | Offense Concluded | Count |
|---|---|---|---|
| 15 U.S.C. §§ 78j(b) and 78ff; and 17 C.F.R. § 240.10b-5 | Securities Fraud/Insider Trading | 06/30/2014 | 1 |
| 15 U.S.C. §§ 78j(b) and 78ff; and 17 C.F.R. § 240.10b-5 | Securities Fraud/Insider Trading | 08/28/2014 | 2 |

**The following sentence is imposed pursuant to the Sentencing Reform Act of 1984.**

**IMPRISONMENT**

**The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total of 6 months on each count to be served concurrently.**

**SUPERVISED RELEASE**

**Upon release from imprisonment, the defendant shall be on supervised release for a total term of 2 years. The Mandatory and Standard Conditions of Supervised Release and Special Financial Conditions as attached are imposed.**

**CRIMINAL MONETARY PENALTIES**

**The defendant must pay the total criminal monetary penalties under the schedule of payments as follows:**

| | | |
|---|---|---|
| **Special Assessment:** | **$200.00** | **to be paid immediately.** |
| **Fine:** | **$500,000.00** | |
| **Restitution:** | **$0.00** | |

**It is further ordered that the defendant will notify the United States Attorney for this district within 30 days of any change of name, residence or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are paid.**

**The following counts have been dismissed: none.**

**JUDICIAL RECOMMENDATION(S) TO THE BUREAU OF PRISONS**

**The Court recommends to the Federal Bureau of Prisons that the defendant be housed at a camp facility as close to Connecticut as possible with a preference for FCI Otisville.**

**The defendant shall self-surrender directly to the facility designated by the Federal Bureau of Prisons no later than 12:00 pm on January 4, 2019 under his own power and at his own expense. In the event the defendant does not receive designation by the Bureau of Prisons prior to the surrender date, the defendant must self-surrender to the United States Marshals Service by noon on January 4, 2019.**

**September 25, 2018**

**Date of Imposition of Sentence**

Vanessa Lynne Bryant Vanessa Bryant 2018.10.12 17:16:22 -04'00'

**Vanessa L. Bryant**
**United States District Judge**

## CONDITIONS OF SUPERVISED RELEASE

**In addition to the Standard Conditions listed below, the following indicated (■) Mandatory Conditions are imposed:**

### MANDATORY CONDITIONS

**(1) You must not commit another federal, state or local crime.**

**(2) You must not unlawfully possess a controlled substance.**

**(3) You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.**

**☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse.** ***(check if applicable)***

**(4) ☐ You must make restitution in accordance with 18 U.S.C.§§ 3663 and 3663A or any other statute authorizing a sentence of restitution.** ***(check if applicable)***

**(5) ■ You must cooperate in the collection of DNA as directed by the probation officer.** ***(check if applicable)***

**(6) ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901,** ***et seq.*****) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense.** ***(check if applicable)***

**(7) ☐ You must participate in an approved program for domestic violence.** ***(check if applicable)***

### STANDARD CONDITIONS

**As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.**

**(1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.**

**(2) After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.**

**(3) You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.**

**(4) You must answer truthfully the questions asked by your probation officer.**

**(5) You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.**

**(6) You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.**

**(7) You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.**

**(8) You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.**

**(9) If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.**

**(10) You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).**

**(11) You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.**

**(12) You must follow the instructions of the probation officer related to the conditions of supervision.**

**Upon a finding of a violation of supervised release, I understand that the court may (1) revoke supervision and impose a term of imprisonment, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.**
**These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.**

**(Signed)** _____ _____
**Defendant** **Date**

_____ _____
**U.S. Probation Officer/Designated Witness** **Date**

**CERTIFIED AS A TRUE COPY ON THIS DATE:** _____
**By:** _____
**Deputy Clerk**

**RETURN**
**I have executed this judgment as follows:**
**Defendant delivered on** _____ **to** _____ **a** _____**, with a certified copy of this judgment.**

_____
**Brian Taylor**
**Acting United States Marshal**

**By** _____
**Deputy Marshal**

# SPECIAL FINANCIAL CONDITIONS OF SUPERVISED RELEASE

**While on supervised release, the defendant shall comply with all of the following Special Financial Conditions:**

(1) The defendant shall not incur any debt, including credit card debt or lines of credit without the express written approval of the Probation Office;

(2) The defendant shall provide the probation officer with access to requested financial information;

(3) The defendant shall not add any new names to any lines of credit, shall not be added as a secondary card holder on another's line of credit, and shall provide the probation officer with electronic access to any online management of any lines of credit, including lines of credit for businesses/LLCs that are owned, operated or otherwise associated with the defendant;

(4) The defendant shall transfer all assets into one main bank account and close all other savings/checking accounts, and shall not add any new account holders to the one main bank account (except that the account may include the defendant's spouse if there are joint marital assets/expenses). The defendant shall provide the probation officer with electronic "read only" access to any online management of the account. The defendant shall provide the final statement from each account that is closed to ensure that no funds are dissipated during the closing of existing accounts and opening of the single account;

(5) The defendant shall permit the probation officer to monitor all investment and retirement accounts and other assets, including conferring and coordinating with the account administrator and to receive notification of all account activity, including contemporaneous notification and duplicate account statements;

(6) The defendant shall disclose to the Probation Office all assets and other things of value in which the defendant has a direct or indirect interest of any kind, wherever located, including without limitation any and all real and personal property; securities, stock, warrants, debentures, notes, swaps, limited and general partnership interests and other investment and investment instruments, whether debt or equity; annuities, long term care policies, and other insurance and or insurance investment products; and other investment accounts;

(7) The Defendant shall not sell, swap, transfer, encumber or otherwise dispose of whether conditionally or unconditionally any asset or other thing of value whether real or personal, including without limitation consumer items, without the prior express written notice to and approval of the Probation Office and the court;

(8) Upon request, the defendant shall submit a proposed budget (detailing expected income and expenses) to the probation officer after which the probation officer shall communicate his/her approval to the defendant. The defendant shall adhere to the approved budget and any deviations must be approved before incurring and paying the expense. Any receipt of income or asset not anticipated by the approved budget shall be reported to the probation officer within two days of the receipt of the income or asset, or within two days of the defendant's receipt of knowledge that such income or asset will be received, whichever comes sooner. Such unanticipated income or asset cannot be disposed of without prior permission of the probation officer;

(9) Any expense(s) or liability(ies) individually or collectively which, when calculated over any 30-day running period, total(s) in excess of $250 and which are not included in the approved budget specified in the paragraph above shall be reported to the probation officer within two days of the first day the defendant incurred or learned of the expense(s) or liability(ies), whichever comes sooner;

(10) The defendant shall retain receipts for inspection, upon reasonable notice, for any expenditure or series of expenditures which, when calculated over any 30-day running period, total(s) more than $250.

**It is noted that these conditions are imposed pursuant to 18 U.S.C. § 3583(c), which requires the court to consider in determining the terms and conditions of supervised release the factors set forth in 18 U.S.C. § 3553(a)(1), (a)(2)(B), (a)(2)(c), (a)(2)(D), (a)(4), and (a)(7) which includes not only the seriousness of the offense, and the nature and circumstances of the offense, but also the history and characteristics of the defendant.**

**These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.**

**(Signed)** _____ _____
**Defendant** **Date**

_____ _____
**U.S. Probation Officer/Designated Witness** **Date**

# Text of Significant Rules of Law

## 15 U.S.C. § 78j
## [Securities Exchange Act of 1934 § 10(b)]

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--

* * *

(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.

* * * * *

## 15 U.S.C. § 78ff

(a) Willful violations; false and misleading statements

Any person who willfully violates any provision of this chapter (other than section 78dd-1 of this title), 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, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $5,000,000, or imprisoned not more than 20 years, or both * * *

* * * * *

## 17 C.F.R. § 240.10b-5
## [SEC Rule 10b-5]

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.

* * * * *

**17 C.F.R. § 240.10b5-2**
**[SEC Rule 10b5-2]**

Preliminary Note to § 240.10b5-2: This section provides a non-exclusive definition of circumstances in which a person has a duty of trust or confidence for purposes of the "misappropriation" theory of insider trading under Section 10(b) of the Act and Rule 10b-5. The law of insider trading is otherwise defined by judicial opinions construing Rule 10b-5, and Rule 10b5-2 does not modify the scope of insider trading law in any other respect.

(a) Scope of Rule. This section shall apply 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.

(b) Enumerated "duties of trust or confidence." For purposes of this section, a "duty of trust or confidence" exists in the following circumstances, among others:

(1) Whenever a person agrees to maintain information in confidence; * * *

* * * * *

**Fed. R. Evid. 106**

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part--or any other writing or recorded statement--that in fairness ought to be considered at the same time.

* * * * *

**Fed. R. Evid. 803**

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

* * *

(2) Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.