U.S. Securities and Exchange Commission v. Van Gilder Doc. 222 Att. 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 12-cv-02839-JLK-MJW

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

ROGER PARKER,

Defendant.

JURY INSTRUCTIONS

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INSTRUCTION NO. 1.0

OPENING INSTRUCTIONS

Before the trial begins, I am giving you instructions that will help you to understand what will be presented to you and how you should conduct yourself during this process.

During jury selection and the trial you have heard or will hear me use a few terms that you may not have heard before. I will briefly explain them to you. If there are other terms you don't recognize, please let me know and I will explain them.

The party who brings a lawsuit is called the plaintiff. In this case, the plaintiff is the Securities and Exchange Commission, sometimes referred to as the "SEC" or "the Commission." The SEC is the agency of the federal government that is responsible for enforcing the securities laws of the United States. In everyday language, these are the laws dealing with the purchase and sale of financial investments such as stocks and bonds.

Comment [A1]: Defendant's objection is sustained as represented in my edits, but is otherwise overruled.

The party against whom the lawsuit is brought is called the defendant. In this case, the defendant is Roger Parker, who is the former Chief Executive Officer of an oil and gas exploration company named Delta Petroleum Corporation, which will often be called "Delta."

You will sometimes here me refer to "counsel." "Counsel" is another way of saying "lawyer" or "attorney."

When I "sustain" an objection, I am ruling that evidence cannot be presented or considered. When you hear that I have "overruled" an objection, I am allowing that evidence to be presented or considered.

When I say "admitted into evidence" or "received into evidence," I mean that the statement or exhibit may be considered by you in making the decisions you must make at the end of the case. I am not indicating in any way that you must accept it, but only that you may consider it.

In any trial, there are, in effect, two judges. I am one of the judges; you are the other. I am the judge of the law. You, as jurors, are the judges of the facts. It is my duty to direct the trial and decide what evidence is proper for you to consider. It is your responsibility to decide what is true or not true based on the evidence that you can legally consider. It is also my duty to explain to you the law that you must follow and apply in deciding your verdicts.

The first step in the trial is your selection as jurors. The second step is my reading of these instructions to you. I will first give you some general instructions that apply in every case—for example, instructions that may help you to judge whether to believe a witness. Then, I will give you some specific laws that apply to this case.

Comment [A2]: The parties' Stipulated Proposed Instruction No. 1.2 is eliminated, and the information is added into this instruction for clarity.

After I read the instructions, the lawyers for each side may make opening statements. What is said in the opening statements is not evidence, but is an introduction to help you understand what the evidence will be. It is a roadmap to show you what lies ahead. After the opening statements, the SEC will present evidence to support its claim and Mr. Parker's lawyers may cross-examine its witnesses. After the SEC's evidence, Mr. Parker may present evidence and the SEC's lawyers may cross-examine his witnesses. The SEC may then present what is known as rebuttal evidence to counter Mr. Parker's evidence. After the evidence is presented, the parties' lawyers will make closing arguments explaining what they think the evidence has shown. What is said in the closing arguments is also not evidence. After the arguments, I will instruct you one final time on the law that you must follow and apply in making your decision and helpful procedures you should follow in deciding your verdict. You will then go to the jury room to begin discussing the case.

You are to consider all the evidence I allow in this trial and only that evidence. It will be up to you to decide what evidence to believe and how much of any witness's testimony to accept or reject.

During the course of the trial I may ask a question of a witness or an attorney. If I do, that does not mean I have any opinion about the facts in the case. I am only trying to bring out facts that you may consider. From time to time during the trial, I may also direct your attention to one of these instructions.

Ordinarily, the attorneys will present all the evidence that is be necessary for you to reach your verdicts. However, in rare situations, a juror may have a question that is very important for considering a necessary element of the case. In that situation, you may write out a question and give it to the courtroom deputy at the next recess. I will then consider that question with the lawyers. If it is determined to be a proper and necessary question, it will be asked. If it is not, I will tell you why and explain why you cannot consider what the answer to the question might be.

If you would like to take notes during the trial, you may. On the other hand, you do not have to take notes. If you decide to take notes, be careful not to get so involved in note taking that you become distracted. Remember that your notes will not necessarily reflect exactly what was said, so you should only use your notes as memory aids. You should not rely on your notes over your independent memory of the evidence. You should also not be unduly influenced by the notes of other jurors. If you do take notes leave them in the jury room at night and do not discuss their contents until I send you to decide the verdict at the end of the trial.

During the trial, you may not talk with any witness, the parties, or any of the lawyers. Most importantly, during the trial you may not talk about it with anyone else. Also, you should not discuss the evidence in this case with each other until you have gone to the jury room to make your decision at the end of the trial. It is important that you wait until all the evidence is presented and you have again heard my instructions before you discuss the case with each other. In other words, keep an open mind and form no opinions until you can consider all the evidence and the instructions together.

Comment [A3]: The parties' Stipulated Proposed Instruction No. 1.9 is eliminated, because the same information is provided here.

Comment [A4]: The parties' Stipulated Proposed Instruction No. 1.8 is eliminated, because the same information is provided here.

Gathering any information on your own that you think might be helpful in this case is against the law and violates your oath. Do not do any outside reading on this case, even including dictionaries or a bible, do not attempt to visit any places mentioned in the case, and do not in any other way try to learn about the case outside the courtroom.

You also cannot use any outside technology. I wish I did not have to spend so much time on this topic, but recent events around the United States and recent technologies require me to point out that some common practices and habits many of you enjoy are strictly forbidden for you as jurors. You may not, under any circumstances, have your cell phones, iPads, or the like on when court is in session. Whether you are here or away from the court during recess you may not Google, tweet, text message, blog, Instagram, SnapChat, post or anything else with those gadgets about or concerning anything to do with this case.

If you gather any outside information or communicate information about this case, it could cause a mistrial, meaning all of our efforts would have been wasted and we would have to start all over again with a new trial before a new jury. If you were to cause a mistrial by violating these orders, you could be subject to paying all the costs of these proceedings and perhaps punished for contempt of court. Part of my job is to protect you from outside influences. Your job is to limit your decisions to what happens in this courtroom

You will be surprised to learn that, despite the repeated warning by trial judges, there have been instances in which jurors disobeyed this instruction. All of us: the parties, attorneys, witnesses, judge, and trial jurors only want to do this one time. Therefore, please follow these instructions. When the case is over, you will be free to say or do anything you wish about the case. Until then, there should be no outside research or discussion. What you may do is advise anyone who needs to know, such as family members, employers, employees, schools, teachers, or daycare providers that you are a juror in a case and the judge has ordered you not to discuss it until you have reached a

verdict and been discharged from the case. At that point you will be free to discuss this case or search for information about it to your heart's delight.

Comment [A5]: Defendant's insertion of the words "on each claim" is rejected, as there is only a single claim in this case.

Fairness to all concerned requires that all of us connected with this case deal with the same information and with nothing other than the same information. The reason for this is that justice requires a full and public understanding of the basis for any verdict.

Finally, I note that the court reporter is making stenographic notes of everything that is said. This is basically to assist any appeals. You will *not* have a typewritten copy of the testimony to use during your discussions. Any exhibits admitted at trial, though, *will* be available to you at that time.

INSTRUCTION NO. 1.1

Comment [A6]: Defendant's objections to the SEC's Proposed Instruction No. 1.1 are sustained. The SEC's explanation of the effects of insider trading on the securities markets is a matter for argument and should not be included in the jury instructions. I have edited the instruction to contain both parties' theories of the case without inserting unnecessary language that would confuse the jury at the outset.

STATEMENT OF THE CASE

This case is about "insider trading," which is when a person obtains "material," "nonpublic information" regarding a certain "security" and then trades in that security or "tips" another person so that he can trade in that security. It is a form of cheating in that the person who trades on the secret information has an unfair advantage.

During the trial, you may hear reference to the term "tipper"—the term simply refers to someone who may have provided certain information and does not necessarily indicate that the individual has acted unlawfully. Similarly, the term "tippee" is used to refer to individuals who may have received information, and the term does not necessarily indicate that the individual has acted unlawfully.

The SEC charges that while Roger Parker was the CEO of Delta, he "tipped" his close friends Michael Van Gilder and Scott Reiman with inside information about a $684 million investment by the Tracinda Corporation into Delta, and that both Mr. Reiman and Mr. Van Gilder traded in Delta stock while knowing that secret inside information. The term "tipping" has a special definition in the insider trading context, which I will define in greater detail later in these instructions. The SEC also says that Roger Parker tipped Michael Van Gilder about Delta's third quarter 2007 earnings results before they were public, after a news article called into doubt whether Delta would achieve its earnings estimates, and that Michael Van Gilder traded in Delta stock while knowing the secret inside information.

Mr. Parker denies these allegations and claims that any information Mr. Parker may have conveyed to Mr. Van Gilder or Mr. Reiman was given in confidence, based on their long history of sharing nonpublic business information with each other and their mutual understanding that information conveyed within their relationships was to be kept confidential. To the extent Mr. Van

Gilder or Mr. Reiman traded on this information, Mr. Parker asserts they violated his confidence and misappropriated the information for their own benefit.

INSTRUCTION NO. 1.2

DUTY TO FOLLOW INSTRUCTIONS

You, as jurors, are the judges of the facts. But in figuring out what actually happened, it is your sworn duty to follow all of the law as I explain it to you.

You may not ignore or give special attention to any one instruction or question the wisdom or correctness of any rule I tell you about. You must not substitute or follow your own idea or opinion as to what the law is or should be. It is your duty to apply the law as I explain it to you, regardless of the result.

In your discussions you must make sure that no one else on the jury ignores the instructions or attempts to decide the case on anything other than the law that is given to you by me and the evidence that has been presented in this trial. You must remember that we are all committed to equal justice under the law. Matters of race, religious belief, color, nationality, gender, and sexual orientation have no place in this process. To the best of your ability, you are to judge others as you would want others to judge you under the law I give you. The very heart of justice is that all apply the same law to the same evidence and leave our personal desires out of it.

You should not read into these instructions or anything else I say or do as a suggestion as to what your verdict should be. That is entirely up to you.

It is also your duty to base your verdict only on the evidence, without prejudice or sympathy. That is the promise you make and the oath you take.

INSTRUCTION NO. 1.3

EVIDENCE – GENERAL

You must make your decision based only on the evidence that you see and hear here in court. Do not let rumors, guesses, or anything else that you may have seen or heard outside of court influence your decision in any way. You, and you alone, are the judges of the facts. You will hear the evidence, decide what the facts are, and then apply those facts to the law I give you. That is how you will reach your verdict.

You will decide what the facts are from the evidence that the parties will present to you during the trial. That evidence will include the sworn testimony of witnesses on both direct and cross-examination, documents and other things received into evidence as exhibits, and any facts on which the lawyers agree or which I may instruct you to accept as true.

The following things are not evidence and you must not consider them as evidence in deciding the facts of this case:

1. The fact that the Securities and Exchange Commission filed this lawsuit is not evidence that Roger Parker violated the law. Similarly, the fact that Mr. Parker denies the SEC's allegations is not evidence that he did not violate the law. Both the complaint and the denial are merely the formal way in which the case is brought to court for you to decide.

2. Statements and arguments by lawyers are not evidence. The lawyers are not witnesses. What they say in their opening statements, closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of the facts controls.

Comment [A7]: The Plaintiff's Proposed Instruction No. 1.6 is eliminated, and the information is included here in the list of "not evidence." Defendant's objection to that Instruction is overruled, and his Proposed Instruction No. 1.6 is rejected.

3. Questions and objections by the lawyers are not evidence. Lawyers have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by my ruling on it.

4. The lawyers may highlight parts of some exhibits. While the exhibit is evidence, the highlights are not. It is for you to determine the significance of the highlighted parts.

5. Testimony that I do not allow or that I instruct you to disregard is not evidence and must not be considered by you.

6. Anything you may see or hear when the Court is not in session is not evidence, even if what you see or hear is done or said by one of the parties or by one of the witnesses.

During the trial, I may not let you hear the answers to some of the questions that lawyers ask. I may also rule that you cannot see some of the exhibits that the lawyers want you to see. And sometimes I may order you to ignore things that you saw or heard. I may "strike" things from the record, which means you cannot consider that piece of evidence. Do not even think about it. Do not guess what a witness might have said or what an exhibit might have shown. These things are not evidence, and you are bound by your oath not to let them influence your decision in any way.

INSTRUCTION NO. 1.4

Comment [A8]: Defendant's objection is overruled, and his Proposed Instruction No. 1.5 is rejected.

EVIDENCE—DIRECT AND CIRCUMSTANTIAL—INFERENCES

Generally speaking, there are two types of evidence. One is direct evidence, and the other is circumstantial evidence.

Direct evidence is evidence that proves a fact directly. For example, where a witness testifies to what he or she saw, heard, or observed, that is direct evidence.

Circumstantial evidence is evidence that tends to prove a fact by proof of other facts. To give a simple example, suppose that when you came into the courthouse today the sun was shining and it was a nice day, but the courtroom blinds were drawn and you could not look outside. Then later, as you were sitting here, someone walked in with a dripping wet umbrella and, soon after, somebody else walked in with a dripping wet raincoat. Now, you cannot look outside of the courtroom and you cannot see whether or not it is raining. So you have no direct evidence of that fact. But the combined facts about the umbrella and the raincoat make it reasonable for you to "infer" that it had begun raining.

Comment [A9]: The parties' Stipulated Proposed Instruction No. 1.11 is eliminated, because inferences are adequately covered here.

An inference is a conclusion that reason and common sense may lead you to make based on facts which have been proved. While you must consider only the evidence in this case, you can make reasonable inferences from the testimony and exhibits, inferences you think are justified by common experience.

The law makes no distinction between direct and circumstantial evidence. Circumstantial evidence is of no less value than direct evidence, and you may consider either or both, and may give them such weight as you conclude you should.

INSTRUCTION NO. 1.5

CONFERENCES WITH COUNSEL

It may be necessary for me to talk to the lawyers about an issue of law out of your hearing. The purpose of these conferences is to decide how certain legal matters are to be treated. We will not be discussing factual matters.

Sometimes we will talk briefly at the bench. But if some of these conferences take more time, I will excuse you from the courtroom. I will try to avoid such interruptions whenever possible, but please be patient even if the trial seems to be moving slowly because conferences often actually save time in the end. The lawyers and I will do what we can to limit the number and length of these conferences.

INSTRUCTION NO. 1.6

CREDIBILITY OF WITNESSES

In deciding the facts of this case, you will have to decide which witnesses to believe and which witnesses not to believe. You are the only judges of the credibility or "believability" of each witness and the weight to be given to the witness's testimony. You should think about the testimony of each witness you hear and decide whether you believe all or part of what each witness has to say and how important that testimony is. In making that decision, I suggest that you ask yourself a few questions: Did the witness seem to be honest? Did the witness have any reason not to tell the truth? Did the witness have a personal interest in the outcome of this case? Did the witness have any relationship with either the government or the defense? Did the witness have a good memory? Did the witness clearly see or hear the things about which he or she testified? Did the witness have the opportunity and ability to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses? When weighing the conflicting testimony, you should consider whether the conflict has to do with a significant fact or with an unimportant detail. And you should keep in mind that an innocent failure to remember is not uncommon.

If you believe a witness has willfully lied regarding any material fact, you have the right to disregard all or any part of that witness's testimony. In reaching a conclusion on a particular point or a verdict in this case, do not make any decisions simply because there were more witnesses on one side than on the other.

If the defendant testifies, his testimony should be weighed and his credibility evaluated in the same way as that of any other witness.

INSTRUCTION NO. 1.7

SINGLE WITNESS

If, after consideration of all the evidence in the case, you hold greater belief in the accuracy and reliability of one witness, the testimony of that single witness is sufficient to prove any fact and can justify a verdict, even if a number of other witnesses testified to the contrary.

INSTRUCTION NO. 1.8

EXPERT WITNESSES

Scientific, technical, or other specialized knowledge may assist you in understanding the evidence or in finding a fact to be true or not true. A witness who has special knowledge, skill, experience, training, or education, may testify and state his or her opinion based on that background.

You do not have to accept expert opinions. You should consider opinion testimony just as you consider other testimony in this trial. Give opinion testimony as much weight as you think it deserves, considering the education and experience of the witness, the reasons given for the opinion, and other evidence in the trial.

INSTRUCTION NO. 1.9

EQUALITY OF PARTIES

All persons are equal before the law regardless of race, national origin, citizenship, whether the party is a corporation or whether the party is an agency of the United States government. I tell you that all parties are equal before the law to remind you that you must base any decision in this case on the law and the facts, not outside factors such as corporate status or status as a government agency.

INSTRUCTION NO. 1.10

BURDEN OF PROOF

This is a civil, rather than criminal, case and therefore the Securities and Exchange Commission has the burden of proving its claim by what is called a preponderance of the evidence. “By a preponderance of the evidence” means that no matter who produces the evidence, when you consider the claim of the SEC in light of all the facts, you believe that the SEC’s claim is more likely true than not true. To put it differently, if you were to put all of the evidence in favor of the SEC and all of the evidence in favor of Roger Parker on opposite sides of the scale, the SEC would have to make the scale tip to its side. If the SEC fails to meet this burden, your verdict must be for Roger Parker.

Those of you who have sat on criminal cases will have heard of “proof beyond a reasonable doubt.” The standard of proof in a criminal case is a stricter standard, requiring more proof than a preponderance of the evidence. The reasonable doubt standard does not apply to a civil case like this one and you should put that standard out of your mind.

Comment [A10]: The parties’ Stipulated Proposed Instruction No. 1.17 has been added here.

In evaluating whether the Securities and Exchange Commission has met its burden on its claims, you should also know that the law does not require parties to call as witnesses all persons who may have been involved in the case or who may appear to have some knowledge of the issues brought up in this trial. Nor does the law require parties to present as exhibits all papers or other things mentioned in the evidence in the case.

INSTRUCTION 2.0
CHARTS AND SUMMARIES

There are two types of charts or summaries that may be used in this case.

Not Received in Evidence (Demonstrative Exhibit).

An exhibit such as a chart or summary often referred to as a "Demonstrative Exhibit" is not received in evidence. Its only purpose is as an illustrative aid to help explain the evidence in the case. It is not evidence itself and does not prove any fact.

Received in Evidence.

However, some summaries are evidence because they accurately and reliably summarize complex or voluminous evidence in a manner that may materially assist you in understanding that evidence. You are instructed that a summary is not independent evidence of its subject matter and is only as valid and reliable as the underlying evidence it summarizes. I will tell you when a chart or summary is being used whether it is a demonstrative exhibit or evidence.

Comment [A11]: Plaintiff's Proposed Instruction 2.1 is rejected as the instruction is unnecessary since Defendant's Motion i*n Limine* Regarding the SEC's Use of Mr. Parker's Deposition Testimony was granted. The instruction may be added at a later time if it becomes necessary.

INSTRUCTION NO. 2.1

STIPULATED FACTS

Before the trial of this case, I held a conference with the lawyers for both parties. At this conference, the parties entered into certain stipulations of facts, which means they agreed that the following facts can be taken as true without further proof.

1. Delta was a publicly traded company that owned various oil and gas leaseholds on properties across the western United States.

2. During the pertinent period, Mr. Parker was Chief Executive Officer of Delta and Chairman of Delta's Board. Kevin Nanke was the Chief Financial Officer and Ted Freedman was Delta's general counsel.

3. Van Gilder Insurance Company ("VGIC") is a Colorado based insurance brokerage firm. VGIC was Delta's insurance broker and brokered Delta's general liability, operations, property damage, and officer and director liability policies.

4. Mike Davis, an oil and gas deal broker who worked out of Las Vegas, routinely contacted Mr. Parker and other Delta executives about possible oil and gas transactions. Delta had previously worked with Mr. Davis on a number of oil and gas transactions.

5. The Tracinda Group is a private investment corporation wholly owned by the late Kirk Kerkorian. Tracinda's primary business is buying, selling, and holding selected equity securities.

6. In the late morning or early afternoon of December 2, 2007, while duck hunting in Northern Colorado, Mr. Parker received a phone call in which both Mr. Mike Davis and Mr. Kirk Kerkorian were on the other end of the line.

7. On that phone call, Mr. Kerkorian inquired whether Mr. Parker was interested in flying to Las Vegas. Mr. Parker ultimately agreed to make the trip the following day.

8. Mr. Parker spoke with Mr. Reiman at 9:31 a.m. on the morning of December 3, 2007.

9. At approximately 11:00 a.m. on December 3, 2007, Mr. Parker flew to Las Vegas with Ted Freedman and two outside lawyers.

10. Upon arrival, Mr. Parker and the others went directly to the Bellagio Resort, where they waited for Mr. Davis, Mr. Kerkorian, and the rest of the Tracinda team.

11. The meeting lasted no more than 30 minutes. At the end of the meeting, as Mr. Kerkorian was leaving the room, he inquired whether an investment of half a billion dollars would help Delta's operations grow.
12. On December 13, 2007, Delta held an analyst conference in Denver, Colorado.

13. Delta's Board of Directors held a regularly scheduled meeting on December 17, 2007.

14. More than two hours into this meeting, Mr. Parker mentioned his meeting with Mr. Kerkorian in Las Vegas. This was the first time that the Las Vegas meeting and Tracinda's possible interest in making an investment in Delta was discussed with the Board.

15. On either December 17 (sometime after the Board meeting) or December 19, 2007, Tracinda contacted Mr. Parker for the first time since the December 3rd meeting in Las Vegas. Tracinda offered to purchase 36 million shares of Delta stock at $17/share, which would have given Tracinda approximately 35% of the voting control of Delta and would have affected Board representation.

16. The Board held a special emergency meeting on December 19, 2007 to consider Tracinda's offer. The Board voted to decline the offer and made no counter offer. The Board directed Mr. Parker to engage investment advisors to help evaluate any Tracinda proposal.

17. In a phone call the afternoon of December 22, 2007, Tracinda increased its offer to $19/share and indicated that this would be its final offer.

18. Tracinda's increased offer was presented to the Delta Board on December 26, 2007. The meeting was adjourned to allow Mr. Parker time to conduct additional negotiations.

19. On December 27, 2007, the Board reconvened and discussed the status of the Tracinda offer. Since the agreement was still in draft form and legal counsel needed additional time to fully review the terms, the Board adjourned the meeting without taking a final vote on the offer.

20. On December 29, 2007, the Board met again and voted unanimously to accept Tracinda's offer and approve the transaction.

21. Among the final terms of the agreement were that Tracinda would purchase 36,000,000 shares (approximately 35% of the voting stock) of Delta for $684,000,000 and Delta would increase the size of its Board of Directors to allow Tracinda pro rata representation.

22. The Tracinda purchase was announced by press release the morning of December 31, 2007.

23. On November 6, 2007, Mr. Van Gilder bought 1250 shares of Delta stock worth approximately $19,000.

24. On November 26, 2007, Mr. Van Gilder bought 1750 shares of Delta stock worth approximately $25,000.

25. On December 10, 2007, Mr. Van Gilder purchased 4,000 shares of Delta stock worth approximately $70,000.

26. On December 17, 2007, Mr. Van Gilder wired $40,000 to his Merrill Lynch brokerage account for the purpose of buying additional Delta stock and options. The funds arrived in his account on December 19, 2007.

27. On December 19, 2007, Mr. Van Gilder bought 200 options at a price of $20,900.

28. On December 24, 2007, Mr. Van Gilder purchased 3000 shares in Delta for $46,000 and 90 option contracts for $9,000.

29. On December 28, 2007, Mr. Van Gilder wired $272,212 to his Merrill Lynch account.

30. On December 31, 2007, Mr. Van Gilder purchased 4000 shares and 114 options worth a total of approximately $110,000.

31. In January 2012, Mr. Van Gilder was approached by the FBI about his November/December 2007 trades in Delta.

32. On May 1, 2013, Mr. Van Guilder pled guilty to one count of securities fraud through insider trading in violation of 15 U.S.C. §§ 78j(b), 78ff, and 17 C.F.R. § 240.10b-5.

33. Mr. Van Gilder agreed to forfeit $86,100 to the United States Government, which the Government and Mr. Van Gilder agreed was the amount gained on the purchase of 290 Delta call options on December 19 and 24, 2007.

34. On November 28, 2007, Mr. Reiman purchased 7000 shares of Delta on his personal account, 4300 shares on his wife's account, and 1000 option contracts.

35. On December 3, 2007, Mr. Reiman bought 500 options in Delta for a price of $68,530.

36. On December 14, 2007, Mr. Reiman bought 500 options for Delta stock at a price of $69,583.

37. On November 5, 2007, Barron's magazine published an article entitled "Day of Reckoning."

38. On November 8, 2007, Delta publicly announced, and filed with the SEC, a quarterly report disclosing its operational performance, revenues, earnings and other financial performance for its quarterly period ended September 30, 2007.

INSTRUCTION NO. 2.2

ADVERSE INFERENCE

Scott Reiman refused to answer questions on the subject of this case on the ground that his answers may tend to incriminate him. You may but are not required to infer that the answers to those questions would have been adverse to Roger Parker. Mr. Reiman's assertion of his Fifth Amendment privilege alone is not a proper basis for finding Roger Parker liable in this case. However, in conjunction with other evidence that was presented, you may consider Mr. Reiman's assertion of the Fifth Amendment privilege in determining Roger Parker's liability in this case.

Comment [A12]: Plaintiff's Proposed Instruction No. 3.7 is moved to this Section, since it involves testimony that may be given during the trial. Defendant's objection to the instruction is overruled in accordance with my ruling on the SEC's Motion to Admit the 5th Amendment Assertions of Reiman and Brownstein, Request an Adverse Inference as to Reiman, and to Admit Certain Emails (Doc. 155). Defendant's Proposed Alternate Instruction No. 3.7 is rejected. His Proposed Instruction No. 3.71on an adverse inference against the SEC is also rejected on the basis of Plaintiff's objection as it is not proper in this case where the Department of Justice is not a party.

INSTRUCTION NO. 3.0

LIABILITY IN GENERAL

With the introductory instructions in mind, we now turn to the specific claim brought by the SEC against Roger Parker. In evaluating the claim, you must decide whether the SEC has proved each of its elements "by a preponderance of the evidence." This is known as proving liability. If you find that the SEC has proven each element of its claim so that Roger Parker is liable, then at a later date, I will decide what money or other relief should be awarded to the SEC. The determination of that relief should not play any part in your deliberations.

INSTRUCTION NO. 3.1

SECURITIES EXCHANGE ACT § 10(b)—17 C.F.R. § 240.10b-5

INSIDER TRADING ELEMENTS OF LIABILITY

The SEC claims that Roger Parker violated the Securities Exchange Act by engaging in what is known as "insider trading" in connection with Michael Van Gilder and/or Scott Reiman's purchase of Delta stock and options. For you to find that Roger Parker violated Section 10(b) of the Securities Exchange Act and the related Rule 10b-5, the SEC must prove both of the following elements on which the parties do not agree:

(1) That Roger Parker, directly or indirectly, "used a device, scheme, or artifice to defraud" in connection with the purchase or sale of a "security"; AND

(2) That Roger Parker acted "knowingly" or with "recklessness."

Each of these elements has requirements within it and terms that must be defined, which I will explain in the following instructions. If you find that the SEC has proven each element "by a preponderance of the evidence," you should return a verdict for the SEC on its claim. But if you find that the SEC has failed to prove either element, your verdict must be for Mr. Parker.

As stated before in Instruction No. 1.10, "by a preponderance of the evidence" means that, when you consider the claim of the SEC in light of all the facts, you believe that the SEC's claim is more likely true than not true.

Comment [A13]: There is a third element under the Rule: "That Roger Parker used an 'instrumentality of interstate commerce' 'in connection with' the purchase or sale of a 'security.'" I have drafted this instruction assuming that the parties will stipulate that the first element is fulfilled and only the other two must be proven.

Comment [A14]: Defendant's assertion that a showing of recklessness is insufficient proof of scienter is incorrect. *See C.E. Carlson, Inc. v. S.E.C.*, 859 F.2d 1429, 1435 (10th Cir. 1988) ("Proof of scienter may be satisfied by a showing of recklessness . . . ."). His objection that the mens rea must be specified for each element is likewise overruled. Here, it is an overarching element for the use of a device, scheme, or artifice to defraud in connection with the purchase or sale of a security.

INSTRUCTION NO. 3.2

DEVICE, SCHEME, OR ARTIFICE TO DEFRAUD IN CONNECTION WITH THE PURCHASE OR SALE OF A SECURITY

The "device, scheme, or artifice to defraud" that the SEC alleges Roger Parker used in this case is known as "insider trading." The way in which the SEC claims Mr. Parker committed insider trading is that he was a "corporate insider" who gave "material," "nonpublic information" about his corporation to another person for that person to trade (which is known as "tipping").

To prove the first element in Instruction No. 3.1—that Mr. Parker used a "device, scheme, or artifice to defraud" in connection with the purchase or sale of a "security," the SEC must prove that:

(1) Roger Parker, a "corporate insider" at Delta, learned and gave "material," "nonpublic information" about Delta to Michael Van Gilder and/or Scott Reiman;

(2) Roger Parker breached his duty to Delta and its shareholders by disclosing that "material," "nonpublic information" to Michael Van Gilder and/or Scott Reiman for a "personal benefit"; AND

(3) After receiving the "material," "nonpublic information" from Roger Parker, Michael Van Gilder and/or Scott Reiman traded Delta "securities."

A "corporate insider" is a person who has a relationship of trust and confidence with a corporation and its shareholders. The SEC and Mr. Parker agree that he was a corporate insider at Delta. A person who receives "material," "nonpublic information" as an insider, who gives that information to another person for a personal benefit, breaches a duty owed to a corporation and its shareholders.

Information is "material" if there is a substantial likelihood a reasonable investor would

Comment [A15]: Defendant's objection to paragraphs 2-4 and 6 of the Plaintiff's Proposed Elements Instruction is sustained.

Comment [A16]: The parties' Proposed Instructions 3.1.1 on fiduciary duty are unnecessary as is a separate first element stating that Defendant owed a fiduciary duty to Delta since it is stipulated. I prefer to use the term corporate insider, instead of fully describing the fiduciary duty concept. As explained below, I agree with Plaintiff that the instructions should be limited to Mr. Parker's relationship with Delta and its shareholders, because the purpose of the trial is to determine his potential liability not that of the tippees.

Comment [A17]: As explained throughout my rulings below, Defendant's Proposed Alternate Instruction No. 3.3 is unnecessary and is an inaccurate statement of the law. It is, therefore, rejected in full.

Comment [A18]: Defendant's objection to not including that the tipper "intended to" receive the personal benefit is overruled. The law is that he provided the information and received a personal benefit. *See Dirks v. S.E.C.*, 463 U.S. 646, 662-63 (1983); *Salman v. United States*, 137 S. Ct. 420, 427 (2016).

Comment [A19]: Defendant's objection to not setting forth the personal benefit in a separate element is overruled. *See Dirks v. S.E.C.*, 463 U.S. 646, 662 (1983) ("[T]he test is whether the insider personally will benefit, directly or indirectly from his disclosure. Absent some personal gain, there has been no breach of duty to stockholders."). His Proposed Alternate Instruction No. 3.4 is, therefore, rejected.

Comment [A20]: Defendant's insertion of the requirement that the tippee traded "on the basis of that information" is rejected. As noted by Plaintiff, "awareness" of the information prior to trading is sufficient, and inclusion of the phrase "after receiving the 'material,' 'nonpublic information'" encapsulates that requirement. *See* 17 C.F.R. § 240.10b5-1(b). Furthermore, Defendant has not alleged any of the affirmative defenses set forth in §240.10b5-1(c) apply.

Comment [A21]: I have revised the materiality instruction so that it is more neutral and concise and have included it here. Defendant's objections to Plaintiff's Proposed Instruction No. 3.2.1 are overruled and his Proposed Alternate Instruction No. 3.2.1 is rejected. The instruction is sufficiently tailored for the facts of this case. Additionally, the relevant time for determining whether information was material is the time of the trade. *See Castellano v. Young & Rubicam, Inc.*, 257 F.3d 171, 185 (2d Cir. 2001).

attach importance to the information in deciding whether to purchase or sell the stock. Put another way, there must be a substantial likelihood that a reasonable investor would view the information as significantly altering the total mix of available information. A minor or trivial detail is not "material" information. The materiality of information relating to a corporate event, such as investment in the company, depends on (1) the probability that the event will occur and (2) its significance to the company. The materiality of nonpublic information is often shown by a substantial change in the company's stock when the information is made public.

"Nonpublic Information" is information that is not generally available to the public through such sources as press releases, trade publications, or other publicly available sources. Information is considered nonpublic for purposes of insider trading until such information has been effectively spread in a way to ensure its availability to the investing public.

"Personal benefit" for these purposes is broadly defined and includes anything of value, such as money, reputational benefit to the tipper, or the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend. This personal benefit may also be inferred from a relationship between tipper and tippee that suggests a pattern of favors being exchanged between the two or that the tipper intended to benefit the tippee.

Comment [A22]: Defendant's Proposed Alternate Instruction No. 3.3.1 is rejected as contrary to the law, as noted above. To be liable, the tipper does not need to know with certainty that the tippee intended to trade on the information.

A "security" is an investment in a commercial, financial, or other business enterprise with the expectation that profits or other gain will be produced by others. Common types of securities include, but are not limited to, stocks, options, and bonds.

INSTRUCTION NO. 3.3

KNOWINGLY OR RECKLESSLY

The second element that the SEC must prove is that Roger Parker acted "knowingly" or with "recklessness" in not knowing. The term "knowingly" means to act with the intent to deceive, manipulate, or defraud. A person does not act knowingly if he acts inadvertently, carelessly, or by mistake. To act with "recklessness" means to engage in highly unreasonable conduct that is an extreme departure from what an ordinary person would have realized and done to avoid the harm likely to follow.

It is not necessary for the SEC to prove that Mr. Parker knew that he was violating an SEC rule. It is also not necessary for the SEC to prove that Mr. Parker knew with certainty that Mr. Van Gilder and/or Mr. Reiman would trade on the information he gave them. But, if you find that Mr. Parker has shown that he believed in good faith that any information he disclosed to Mr. Van Gilder and Mr. Reiman would not be used for trading purposes, he did not act "knowingly" or "recklessly."

As explained in Instruction 1.5, evidence can be either direct or circumstantial. There is usually no way that a defendant's state of mind can be proved directly because no one can read another person's mind and tell what that person is thinking. But a defendant's state of mind can be proved indirectly from the surrounding circumstances. Thus, to determine Mr. Parker's state of mind at a particular time, you may consider evidence about what Mr. Parker said, what he did or failed to do, how he acted, and all the other facts and circumstances shown by the evidence that may prove what was in Mr. Parker's mind at that time.

Comment [A23]: Plaintiff's Proposed Instruction No. 3.5.2 is rejected except as included here. The second sentence— "If you find that Defendant Roger Parker reasonably expected that Mr. Van Gilder and/or Mr. Reiman would use the inside information he disclosed to trade in Delta securities, you may find that he acted recklessly"—confuses and perhaps contradicts the previous definition of recklessness.

Comment [A24]: Defendant's Proposed Instruction No. 3.5.1.1 on good faith is incorporated here. However, his proposed language is rejected, because it is inaccurate. Simply because Mr. Parker believed he was disclosing information within a confidential relationship does not mean that he cannot still be liable for insider trading.

Comment [A25]: Plaintiff's Proposed Instruction No. 3.5.1 is included here, incorporating Defendant's proposed revisions.

INSTRUCTION NO. 3.4

INVOCATION OF FIFTH AMENDMENT RIGHT

In this case, witnesses Scott Reiman and Bo Brownstein have asserted their right to not answer questions under the Fifth Amendment of the United States Constitution.

Under the Fifth Amendment of the United States Constitution, an individual has a constitutional right to decline to answer questions on the ground that the answers to those questions may tend to incriminate him or her. Where a witness has refused to answer a question by invoking his or her Fifth Amendment right, for certain questions you may, but you need not, draw a negative inference against the witness based on the witness's refusal to answer a particular question.

A negative inference means that you can infer from the witness's assertion of his Fifth Amendment privilege that the answer would have been adverse, or harmful, to the witness's interest. You can make this inference only if that inference is warranted by the facts surrounding the case and there is independent, corroborating evidence for the inference. However, you need not make such an inference.

INSTRUCTION NO. 3.5

LIABILITY OF OTHER ACTORS NOT DETERMINATIVE

In this case, Roger Parker is the alleged tipper, the person who gave the information, and Michael Van Gilder and Scott Reiman are the alleged tippees, the people who received the information and traded on it. The law permits a tippee to be liable for insider trading under the Securities Exchange Act even when the tipper did not violate the law. This sometimes happens when a tipper shares material, nonpublic information inside of a confidential relationship. If the tippee misuses that information to trade in securities, he breaches the duty of confidentiality he owes to the tipper and can be liable for insider trading. But, even though the tippee is liable, the tipper may not be if, for example, he did not act knowingly or recklessly or he does not receive a personal benefit.

Comment [A26]: Defendant's Proposed Instruction No. 3.8 is rephrased here, taking into consideration Plaintiff's objection. It is appropriate to explain that Defendant's liability is not tied to that of Mr. Van Gilder or Mr. Reiman. Confusing the jury with the specifics on other insider trading theories of liability is not, however, necessary.

Defendant's Proposed Instruction Nos. 3.1.1 and 3.1.2 are rejected, and Plaintiff's objections are sustained. The focus of this trial is whether Mr. Parker breached his duty, not whether either of the tippees breached theirs. The claim that Mr. Parker provided any material, nonpublic information *believing* it would be kept confidential can be a defense. It is his scienter and whether he received a personal benefit that matter, though, not the mere existence of a confidential relationship. Giving multiple instructions on the duties owed by Mr. Van Gilder and Mr. Reiman would only serve to confuse the jury and would not be helpful as to those ultimate issues.

INSTRUCTION NO. 4.0

Comment [A27]: To avoid being repetitive, I have combined Instructions 4.1 and 4.2 (renumbered as 4.0 for consistency).

GENERAL INSTRUCTIONS

Now that you have heard the evidence and the parties' arguments, it is your duty to find the facts from all the evidence in the case. And to those facts, you must apply and follow the laws contained in these instructions, whether you agree with them or not. If there is any difference between the law stated by the lawyers and the law in these instructions, you are governed by my instructions. You must follow all of these instructions and not single out some and ignore others; they are all equally important. The decision you reach by applying the law in these instructions to the facts as you find them is called a verdict.

You must not read into these instructions or into anything I may say or do any suggestions as to what verdict you should return. Your verdict is a matter entirely for you to decide.

You must perform your duties as jurors without bias or prejudice as to any party. The law does not permit you to be controlled by sympathy, bias, or public opinion. All parties expect that you will carefully consider all the evidence, follow the law in these instructions, and reach a just verdict, regardless of the consequences. You have taken an oath promising to do so.

INSTRUCTION NO. 4.1

JURY – DELIBERATIONS

In a moment, you will be taken to the jury room so you can begin your discussions on the verdict. You will have a copy of the instructions and verdict form, and any exhibits I allowed will also be in the jury room for you to review.

When you go to the jury room, you must choose one of you to serve as your Presiding Juror. He or she will direct your discussions and speak for you here in court. You will then talk about the case with your fellow jurors to try to reach an agreement. Your verdict must be unanimous, meaning you must all completely agree.

Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence, discussed it with the other jurors, and listened to their views. I offer some suggestions on how you might do this in the next jury instruction, entitled "Jury – The Deliberations Process."

One thing you should do in your discussions is to follow these jury instructions and the verdict form. Not only will you be more productive if you understand the legal standards, but for a verdict to be valid, you must follow the instructions during your discussions. Remember, you are judges of the facts, but you have to obey your oath to follow the law stated in these instructions. Your talks will be secret. You will never have to explain your verdict to anyone.

INSTRUCTION NO. 4.2

JURY – THE DELIBERATION PROCESS

Once you have elected your Presiding Juror as directed by the previous instruction, you can move forward as you agree you should. I am not telling you how to proceed, but I offer the following suggestions that other juries have found helpful. They should help you move forward in an orderly way with each juror fully taking part so that you can arrive at a verdict that is satisfactory to each of you.

First, it is the responsibility of the Presiding Juror to encourage good communication and participation by all jurors and to maintain fairness and order. Your Presiding Juror should be able to make your discussions useful even when jurors cannot agree.

Second, the Presiding Juror should let each of you speak and be heard before stating his or her own views.

Third, the Presiding Juror should not try to promote or permit anyone else to promote his or her personal opinions by pressuring, intimidating, or bullying others.

Fourth, the Presiding Juror should make certain that discussions are not rushed to reach a conclusion.

If the Presiding Juror you select does not meet these standards, he or she should voluntarily step down or should be replaced by a majority vote.

After you select a Presiding Juror you should think about choosing a secretary to tally the votes, help keep track of who has or hasn't spoken on each issue, to make sure everyone is there during the discussions, and to otherwise help the Presiding Juror.

Some juries are tempted to start by holding a preliminary vote on the case to "see where we stand." It is better, however, not to vote until a full discussion is had on the issue, otherwise

you might lock yourself into a certain view before thinking about the other and possibly more reasonable interpretations of the evidence. Experience has also shown that such early votes often cause disruptive, inefficient debate and ineffective decision-making.

Instead, I suggest the Presiding Juror begin your discussions by getting you to create informal rules for how you will proceed. These rules should assure that you will focus on, analyze, and evaluate the evidence fairly and efficiently and that each of your views is heard and considered before any decisions are made. No one should be ignored. You may agree to discuss the case in the order of the questions presented in the special verdict form or in chronological order or based on the testimony of each witness. Whatever order you select, however, it is advisable to be consistent and not jump from one topic to another.

To move the process along in the event you reach a controversial issue, it is wise to pass it temporarily and move on to less controversial ones and then come back to it. You should then continue through each issue in the order you have agreed upon unless a majority of you agrees to change the order.

It is very helpful for all votes to be taken by secret ballot. This will help you focus on the issues and not be overly influenced by others. Each of you should also consider any disagreement you have with another juror or jurors as an opportunity to improve your decision. You should treat each other with respect. Any differences in your views should be discussed calmly and, if a break is needed for that purpose, it should be taken. As I mentioned at the beginning of this trial, each of you is responsible for making sure that no juror bases a decision on matters that are not evidence.

Each of you should listen attentively and openly to one another before making any judgment. This is sometimes called “active listening” and it means that you should not listen

with only one ear while thinking about a response. Only after you have heard and understood what the other person is saying should you think about a response.

Obviously, this means that, unlike TV talk shows, you should try very hard not to interrupt. If one of you is going on and on, it is the Presiding Juror who should suggest that the point has been made and it is time to hear from someone else.

You each have a right to your own opinion, but you should be open to others. When you focus your attention and best listening skills, others will feel respected and, even while they may disagree, they will respect you. It helps if you are open to the possibility that you might be wrong or at least that you might change your mind about some issues after listening to other views.

Not understanding each other can hurt your efforts. Ask for clarification if you do not understand or if you think others are not talking about the same thing. From time to time the Presiding Juror should set out the items on which you agree and those on which you have not yet agreed.

Even with all your efforts, it is still possible that there may be serious disagreements. In that happens, realize and accept that "getting stuck" is often part of the decision-making process. It is easy to fall into the trap of believing that there is something wrong with someone who is not ready to move on. Thinking that way is not helpful. It can lead to focusing on personalities rather than the issues. It is best to be patient with one another. At such times, slower is usually faster. There is a tendency to set deadlines and try to force decisions. Taking a break or more time, however, often helps shorten the overall process.

Every once in a while, it is a good idea for you all to express your mutual respect for each other and to repeat your commitment to work through any differences. Then, you will most likely decide a verdict that leaves each of you satisfied that you achieved justice.

INSTRUCTION NO. 4.3

COMMUNICATIONS WITH JUDGE

If it becomes necessary during your discussions to communicate with me, you may send a folded note through the court security officer, signed by one of you. Do not reveal the content of your note to the court security officer. No member of the jury should try to communicate with me except by signed writing; and I will only communicate with any member of the jury on anything concerning the case in writing or orally here in open court. You should never reveal to me, the Court Security Officer, or anyone else not on the jury where you stand or what your vote might be until after you have reached your verdict or I have let you go. If you send a note to me with a question or request for further direction, please think about how a response takes a lot of time and effort. Before giving an answer or direction I must first tell the attorneys and bring them back to the court. I must discuss the note with them, listen to arguments, research the law, if necessary, and reduce the answer or direction to writing.

There may be some question that, under the law, I am not permitted to answer. If I cannot answer the question, I will tell you that. Please do not guess about what the answer to your question might be or why I am not able to answer a particular question.

In some instances jurors request that certain testimony be read to them. This cannot be done as it is inappropriate for the court to single out testimony. You must rely on your own memory.

INSTRUCTION NO. 4.4

UNANIMOUS AGREEMENT AND JURY VERDICT FORM

To help you, we have given you each copies of a document called a Jury Verdict Form. The Presiding Juror will mark the answer agreed to by each and every juror in the spaces on the Form. You must reach unanimous agreement on the answers to each of the questions on the Form. After all of the questions have been answered, the Presiding Juror should date the Form, sign it, and then the rest of you should sign it. When you are done, the Presiding Juror should tell the Court Security Officer who is outside the jury room that you have reached a verdict.

Comment [A28]: Defendant's objection is overruled, and his proposal to insert "on each claim" is rejected. There is only a single claim in this case.