UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA - v. - RICHARD LEE., Defendant.	13-CR-00539 (PGG)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT RICHARD LEE'S MOTION TO WITHDRAW GUILTY PLEA

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Defendant Richard Lee respectfully submits this memorandum of law in support of his motion to withdraw his guilty plea pursuant to Rule 11(d)(2)(B) of the Federal Rules of Criminal Procedure.

PRELIMINARY STATEMENT

Richard Lee is currently scheduled to be sentenced for conduct that he now believes does not constitute a crime. Mr. Lee's criminal case is rooted in certain trades that he executed during his time as a portfolio manager at SAC Capital ("SAC") over eight years ago. Because of circumstances beyond his control—specifically the lack of access to crucial documents and the continued evolution of insider trading law—Mr. Lee moves this Court to permit him to withdraw his plea some four years after he entered it.

On July 23, 2013, Mr. Lee entered a guilty plea to one count of conspiracy to commit securities fraud and one substantive count of securities fraud in connection with alleged insider trading. He now wishes to withdraw his plea for two reasons. First, due to developments in the landscape of insider trading law in the years after his guilty plea, Mr. Lee understands that his plea is infirm because it fails to account for personal benefit or knowledge of personal benefit. Second, and more importantly, recently discovered evidence now indicates that Mr. Lee did not, in fact, commit insider trading when he purchased 725,000 shares of Yahoo Incorporated stock in his SAC portfolio on July 10, 2009, as alleged in Count II of the criminal information to which he pled. Mr. Lee maintains that he would not have entered a guilty plea in this case had he understood the facts then as he understands them now.

From the moment he first proffered to the government in 2013 until very recently, Mr. Lee labored under a significant misapprehension of the facts of his own case. Mr. Lee understood, based on representations the government made to him during his proffer sessions, that on July 10, 2009, he learned material nonpublic information from Sandeep Aggarwal, a sell-

side analyst at Collins Stewart, and subsequently traded on that information. Indeed, there is a recording of the telephone conversation between Mr. Lee and Mr. Aggarwal that occurred around 11:30am that day. However, documents that counsel recently obtained from the government in preparation for Mr. Lee's sentencing demonstrate three exculpatory facts: (1) Mr. Lee knew the alleged material nonpublic information more than two hours *prior* to his call with Mr. Aggarwal; (2) Mr. Lee did not initially learn the information from Mr. Aggarwal, but instead from at least two other individuals because the information was being widely circulated; and (3) Mr. Lee purchased 97% of the Yahoo shares he bought at SAC that day well before he ever spoke to Mr. Aggarwal.

At the time he entered his guilty plea, Mr. Lee understood the facts as they occurred on July 10, 2009 to be as follows:

- At approximately 11:30 am, Mr. Lee spoke with Mr. Aggarwal;
- Mr. Aggarwal disclosed material nonpublic information to Mr. Lee (that Yahoo and Microsoft were likely to enter into a partnership deal within approximately two weeks); and
- In the aftermath of that call, Mr. Lee purchased 725,000 shares of Yahoo stock in his SAC portfolio.

However, after the government recently provided two documents to Mr. Lee, he now understands that the actual facts from July 10, 2009 are as follows:

- Before 9:13am, Mr. Lee learned that Collins Stewart informed its clients that Yahoo and Microsoft were likely to enter into an internet search partnership deal within approximately two weeks;
- At 9:13am, Mr. Lee sent an instant message to his then-boss, Steven Cohen, that shared this information and indicated that Mr. Lee intended to purchase Yahoo shares to add to his already substantial position at SAC;
- At 9:38am, a trader at SAC informed Mr. Lee via instant message that sales representatives from Collins Stewart were disseminating the Yahoo/Microsoft information via instant message and, in fact, sent part of it to Mr. Lee;

- Between 9:50am and 11:00am, Mr. Lee instructed his trader at SAC to purchase 700,000 shares of Yahoo;
- At 11:30am (30 minutes after his last order to purchase shares) Mr. Lee spoke with Mr. Aggarwal and received the same information he received over two hours prior from at least two separate sources;
- After the call with Mr. Aggarwal, Mr. Lee ordered another 100,000 shares of Yahoo stock, and subsequently cancelled 75,000 of those shares.

This true and irrefutable set of facts evidenced by documents previously unavailable to Mr. Lee has caused him to conclude that he did not, in fact, commit insider trading by purchasing Yahoo stock on July 10, 2009.

Because of these facts, Mr. Lee cannot, in good conscience, proceed to sentencing because he now knows that he is innocent of the charges. He believes that withdrawing his plea is the only way to undo the errors that put him in this position. Indeed, withdrawal is the only remedy that will place Mr. Lee back into the position he occupied before he suffered the prejudice that resulted from moving through this case under a grave misunderstanding of the facts—which was not of his own doing. Mr. Lee thus respectfully requests that the Court permit him to withdraw his guilty plea, and set a briefing schedule for him to move to dismiss the charges or, in the alternative, set a date for trial.

STATEMENT OF RELEVANT FACTS

A. Early Procedural Background

Over four years ago, Mr. Lee worked as a portfolio manager at the Chicago office of SAC Capital.[1] On March 28, 2013, agents from the Federal Bureau of Investigation ("FBI")

[1] Mr. Lee worked previously at SAC's New York office from about April 2009 until June 2011, after which he pursued other endeavors before rejoining SAC in its Chicago office from about September 2012 until March 2013. *See* Affidavit of Richard Lee in Support of his Motion to Withdraw Guilty Plea, ¶ 2 (the "Lee Aff.").

approached Mr. Lee on the streets of Chicago. Lee Aff., ¶ 3. They played a July 10, 2009 recording of Mr. Lee speaking with stock analyst Sandeep Aggarwal from the sell-side firm Collins Stewart (the "Aggarwal Call"). *Id*. During the Aggarwal Call, Mr. Aggarwal stated that he had a friend at Microsoft, who reported that the long-rumored internet-search partnership deal between Microsoft and Yahoo could happen within the next two weeks. The agents informed Mr. Lee that, after the Aggarwal Call, Mr. Lee traded 725,000 shares of Yahoo for SAC.

Mr. Lee referred the agents to an attorney in Chicago. The agents informed the Chicago attorney that, on July 10, 2009, Mr. Lee had committed insider trading with respect to Yahoo. The FBI indicated that the United States Attorney's Office for the Southern District of New York (the "government") wanted to interview Mr. Lee. Mr. Lee subsequently retained counsel in New York ("NY Counsel") to advise him. *Id*., ¶ 4.

Mr. Lee met with NY Counsel for the first time on April 2, 2013. Thereafter, NY Counsel spoke with attorneys for the government and heard the Aggarwal Call. Within a few weeks, Mr. Lee met with the government to proffer. *Id*., ¶ 5.

Mr. Lee met with the government six times over the course of two months. *Id*., ¶ 6. During these proffer sessions, Mr. Lee came to believe that he must have violated the law because of the facts presented to him by the government. He heard the Aggarwal Call during his first proffer meeting and understood from the government that he purchased 725,000 shares of Yahoo stock in his SAC portfolio *after* that call. In addition, during the proffer sessions Mr. Lee answered questions and disclosed conduct relating to his trading in other securities.

Following these proffers, the government offered Mr. Lee a cooperation agreement, which he accepted. As part of his cooperation, Mr. Lee pled to a criminal information that charged one count of conspiracy to commit securities fraud (Count I) and one substantive count of securities

fraud (Count II). *See* No. 13-cr-539 (PGG), ECF Dkt. No. 2; *see also* Lee Aff., ¶ 7. The conspiracy in Count I has two objects: (1) an allegation that Mr. Lee purchased Yahoo stock in April 2009 after he received an advanced copy of an earnings release (the "April Yahoo Trade"); and (2) an allegation that Mr. Lee purchased stock in 3Com Corporation in November 2009 after receiving information from a consultant about a potential acquisition (the "3Com Trade"). Count II, which charges Mr. Lee with substantive insider trading, relates to his purchase of Yahoo stock following the Aggarwal Call in July 2009 (the "July Yahoo Trade"). At his plea, Mr. Lee, through a prepared written statement, allocuted to Counts I and II as follows:

> On a number of occasions, I traded while in possession of material nonpublic information that I had received from others under circumstances where I knew, or had reason to believe, the other person had breached a fiduciary duty or a duty of confidentiality. For example, on one occasion in April 2009, at my urging, somebody I knew provided me with a copy of an earnings release for Yahoo Incorporated before that earnings release was made public. I thereafter traded in Yahoo before that release was made public. I knew at the time I should not have traded on that information, but I did anyway. On another occasion in July 2009, I obtained material nonpublic information by [sic] Yahoo from a sell-side analyst. I thereafter traded while in possession of that information. I knew at the time it was wrong for me to trade. On another occasion in November 2010, I obtained material nonpublic information about a company called 3Com Corporation through a consultant. I thereafter traded while in possession of that information. I knew at the time it was wrong for me trade.

No. 13-cr-539 (PGG), Plea Hearing Tr. at 21, attached as Exhibit F to the Declaration of Gregory Morvillo (the "Morvillo Decl."); Lee Aff. ¶ 8 ("The topic of personal benefit went unaddressed at my plea").

On July 23, 2013—the same day that Mr. Lee made the above statement before the Court—a grand jury returned an indictment against SAC Capital, among other related entities. The SAC indictment and related civil complaint listed Mr. Lee as one of seven SAC employees

whose alleged insider trading formed the basis for the charges against his former employer. *See, generally, United States v. SAC Capital LP, et al.*, No. 13-cr-541 (LTS), No. 13-cv-5182 (RJS).

B. Mr. Lee's Road to Withdrawal

In the aftermath of the Second Circuit's 2014 decision in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), *reh'g denied*, No. 13-1837 (2d Cir. Apr. 3, 2015), and the Supreme Court's denial of the government's petition for *certiorari*, No. 15-137 (S.Ct. Oct. 5, 2015) (hereinafter "*Newman*"), Mr. Lee changed his legal representation from NY Counsel to present counsel. Lee Aff., ¶¶ 8, 9; Morvillo Decl., ¶ 2. In December 2015, present counsel initiated discussions with the government about the sufficiency of Mr. Lee's plea in light of the lack of any discussion of personal benefit. Morvillo Decl., ¶¶ 4, 5. The government agreed that Mr. Lee's plea might be infirm because it did not address either personal benefit or knowledge of personal benefit. During this meeting, the government also indicated that it was unaware of any personal benefit or knowledge of personal benefit relating to the 3Com Trade. In fact, neither Mr. Lee nor the government knew—or know today—the identity of the insider who provided the tip, and the government never spoke with the first-level tippee. The government thus does not know whether the insider breached a duty in exchange for a personal benefit, or whether subsequent tippees—including Mr. Lee—knew of the breach or benefit.

However, at the time of these discussions, another insider trading case, *United States v. Salman*, had progressed from the Ninth Circuit to the Supreme Court (No. 15-628, cert. filed Nov. 10, 2015, decided Dec. 6, 2016, 580 U.S. __ (2016)) (hereinafter "*Salman*"). Because the Supreme Court would soon weigh in on another insider trading issue relating to personal benefit, the parties agreed to wait to make any decisions about Mr. Lee's case until after the *Salman* decision. Morvillo Decl., ¶ 6. Mr. Lee and his present counsel understood that the government

would refrain from arguing that the time elapsed was an unreasonable delay in the event Mr. Lee later decided to withdraw his plea. *Id*., ¶ 6; Lee Aff., ¶ 10. The parties agreed to request that the Court adjourn Mr. Lee's sentencing until after the *Salman* decision. *See* Exhibit A to the Morvillo Decl. (03-28-2016 email from S. Stevenson to AUSA evidencing agreement to adjourn sentencing until after *Salman*); *Lee*, 13-cr-539, ECF Dkt. Nos. 23, 26, 29 (adjourning sentencing).

The Supreme Court issued its *Salman* decision in December 2016. Because there was no significant change in insider trading law as a result of *Salman*, Mr. Lee proceeded toward sentencing.[2] Accordingly, the government requested that the Court schedule a sentencing date and order the presentence investigation. The Court set sentencing for October 26, 2017. *Lee*, 13-cr-539, ECF Dkt. No. 29.

In an effort to prepare for sentencing, present counsel made several requests that the government provide documents sufficient to calculate the alleged gain in this case. Present counsel sought these documents over a period of several months.[3] Morvillo Decl., ¶¶ 8-10.

After requesting information numerous times, in May 2017 the government provided a single document to present counsel. *Id*., ¶ 11. This document was not what counsel requested,

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[2] Present counsel still believed Mr. Lee's plea to be infirm because personal benefit and knowledge of personal benefit went unaddressed at the plea. However, counsel believed that the parties could remedy this infirmity just prior to sentencing without a need to disturb the plea. Counsel also continued to believe, based on representations from the government, that the 3Com Trade would drop out of the conspiracy charge because of the unknown identity of the tipper and, therefore, the unknown nature of the disclosure of information.

[3] During the course of Mr. Lee's case, three different Assistant United States Attorneys ("AUSAs") have worked on this matter. Thus, the delay in getting documents to Mr. Lee is at least in part because the matter was older, and new AUSAs were assigned during the relevant time periods. *See* Morvillo Decl., ¶¶ 7, 9-10. Mr. Lee is in no way intending to blame the government for the length of time it took produce the requested documents.

but it is the catalyst for this motion to withdraw. The government provided an instant message ("IM") from Mr. Lee to his then-boss, Steven Cohen (the "Cohen IM"). Mr. Lee sent the Cohen IM at 9:13am on July 10, 2009, the morning of the Aggarwal Call and the July Yahoo Trade. The Cohen IM states:

> Hi Steve, just tried reaching you on your cell Re YHOO. I mentioned the Collins Stewart call on YHOO this morning, they seem to think something might happen within 2 wks. We have no view regarding this but 1) Collins Stewart has been the only broker in line with our views regarding the initial 'coldness' of discussions and now they are the only broker to turn positive regarding the discussions. We're trying to be price sensitive as we think upside might be $17.50-$19 on a deal, depending on the split of economics between YHOO and MSFT (many possible permutations...)

Cohen IM, Exhibit B to the Morvillo Decl.

Mr. Lee sent the Cohen IM more than two hours *prior* to the Aggarwal Call. Thus, well in advance of the Aggarwal Call, Mr. Lee learned—from a source other than Mr. Aggarwal himself—the same information that the government deemed to be material and nonpublic.[4] The critical import of the Cohen IM is clear: more than two hours before the Aggarwal Call, Mr. Lee learned that Collins Stewart disclosed to its clients that one of its analysts expected the long-rumored Yahoo/Microsoft search partnership to happen within about two weeks; that Mr. Lee

[4] On the morning of July 10, 2009, Collins Stewart held its "morning call"—an internal call among certain Collins Stewart employees, including, *inter alia*, analysts and sales representatives. On the July 10, 2009 morning call, Mr. Aggarwal disclosed to participating Collins Stewart employees the information about the potential Yahoo/Microsoft partnership and that it was likely to be announced within two weeks. Following that call, but before the market opened, Collins Stewart sales representatives began disseminating Mr. Aggarwal's information to its clients. According to a 2010 Collins Stewart Annual Report, it appears that around this time, Collins Stewart had somewhere in the vicinity of 800 employees and served over 400 institutional clients. Collins Stewart's sales representatives were responsible for, among other duties, widely disseminating its analysts' data to its clients. A copy of the 2010 Collins Stewart Annual Report is attached as Exhibit D to the Morvillo Decl.

relayed the information to Mr. Cohen; and that Mr. Lee indicated his intent to trade.[5] *See* Morvillo Decl., ¶¶ 12-13.

After receiving the Cohen IM from the government, Mr. Lee understood that he first learned the information in question much earlier in the day than he had previously believed, and that he indicated to Mr. Cohen that he planned to purchase Yahoo that day. Lee Aff., ¶¶ 12-14. Accordingly, Mr. Lee, through his counsel, sought to learn the time of day that he ordered the purchase of Yahoo shares on July 10, 2009. Again, present counsel sought information from the government in the form of IMs and electronic chats, which would reflect the timing of the purchase order. Morvillo Decl., ¶ 14. However, because time was of the essence, present counsel also sought information from Mr. Lee's former employer. *Id*., ¶ 15. SAC's legacy firm did not provide documents, but an individual from the firm orally explained that Mr. Lee ordered 700,000 of the 725,000 shares to be purchased *before* the Aggarwal Call occurred at approximately 11:30am. *Id*., ¶ 16

Subsequently, on July 31, 2017, the government provided present counsel with a series of electronic communications from the RLDB chat room dated July 10, 2009 (the "RLDB Chat").[6] *Id*., ¶ 18. The RLDB Chat is attached as Exhibit C to the Morvillo Decl. The RLDB chat contains several critical pieces of information:

1) At 9:38am, Mr. Lee's trader sent Mr. Lee an excerpt of an IM from a Collins Stewart sales representative conveying that the Yahoo-Microsoft deal would likely happen within two weeks: "Collins [Stewart] Mike Herrero [09:36:07 AM]: Sandeep, my

[5] The deal timing of two weeks is the information that the government and the Securities and Exchange Commission ("SEC") alleged Mr. Lee improperly received that caused him to trade. The SEC complaint makes this clear. *See SEC v. Lee*, No. 13-cv-5185 (RMB), ECF Dkt. No. 1, Complaint ¶ 2 (the "SEC Complaint") (alleging Mr. Lee learned that "the probability of a Microsoft/Yahoo partnership agreement, which had long been the subject of market rumors, had increased, and that a deal was likely to be announced in the next two weeks.").

[6] The RLDB chat room was an electronic forum established for Mr. Lee and his then-partner to communicate quickly with the trader who executed trade orders for their portfolio at SAC.

msft/yhoo analyst is making a major call that the recently cooled off MSFT/YHOO talks have heated back up in a big way. He believes it's possible something could happen in the next week or two based on his channel checks as YHOO has come back to the table since Bing has debuted to strong mkt share gains." Morvillo Decl. Ex. C at 1.

2) At 9:47am, Mr. Lee's trader informed Mr. Lee that Steve Cohen purchased Yahoo shares: "YHOO cohe bot 300k to get to 1.1M position." *Id*.

3) At 9:50am, Mr. Lee indicated to his trader that his intent was to continue to build his Yahoo position, which was already above 3 million shares leading into the trading day: "Buy 100,000 YHOO < 95 cents pls. Short 3,500 GOOG > 414.75 to hedge. *Id*.

4) At 9:58am, Mr. Lee instructed his trader to continue purchasing Yahoo: "Pls buy another 100,000 YHOO > 95 cents." *Id*. at 2.

5) At 10:08am, Mr. Lee's trader informed Mr. Lee that Mr. Cohen sought to purchase more Yahoo: "YHOO cohe buying 200k more." *Id*.

6) At 10:48am, Mr. Lee purchased more Yahoo: "YHOO Buy 500,000 < 15 pls." *Id*. This purchase order totaled 700,000 shares of Yahoo, which represented approximately 97% of the shares he purchased for SAC that day. *Id*.

7) At 11:16am, Mr. Lee expressed frustration with Collins Stewart: "These Collins Stewart people are frustrating. Can you ask them to have their Analyst on YHOO give us a call? . . . Sandeep, I think is his name . . . He apparently called [Eric] Gerster [a portfolio manager at SAC]. . . . But not us." *Id*. at 3.

8) At 11:39am, Mr. Lee said: "Talking to guy [Aggarwal] now." *Id*. at 3.

Mr. Lee's present counsel contacted the government to discuss the implications of this newly-discovered evidence. Morvillo Decl., ¶ 17. After multiple meetings and conversations, the parties ultimately did not agree on the import of the information. Mr. Lee, through his counsel, immediately contacted the Court to make the Court aware of recent developments, to adjourn sentencing, and to set a briefing schedule for Mr. Lee's motion to withdraw. *Id*., ¶ 21.

ARGUMENT

A defendant who moves to withdraw his guilty plea after the court's acceptance, but before sentencing, must show that there is a "fair and just reason" for requesting withdrawal. Fed. R. Crim. P. 11(d)(2)(B). The standard "implies that motions to withdraw prior to sentence

should be liberally granted," however, it is the defendant's burden to convince the court of valid grounds for relief. *United States v Benedict*, 62 Fed.Appx. 14, 15-16 (S.D.N.Y. 2003), citing *United States v. Gonzalez*, 970 F.2d 1095, 1100 (2d Cir. 1992); *see also United States v. Maher*, 108 F.3d 1513, 1529 (2d Cir. 1997). Bald statements contradicting a defendant's plea allocution are insufficient. *See United States v. Torres*, 129 F.3d 710, 715 (2d Cir. 1997). However, if the Court determines that the factual basis for any guilty plea is insufficient, it should grant a defendant's motion to withdraw. *See United States v. Smith*, 160 F.3d 117, 121 (2d Cir. 1998) ("The district court's obligations under Rule 11[(b)(3)] continue until it has entered judgment. If it decides there was no factual basis for a guilty plea after accepting it, the court should vacate the plea and enter a plea of not guilty on behalf of the defendant.").

Courts evaluate whether a "fair and just" reason exists by examining three factors: (1) whether the defendant asserts that he is innocent; (2) the time lapse between the plea and the motion to withdraw; and (3) whether the government would be prejudiced by withdrawal of the plea. *United States v. Schmidt*, 373 F.3d 100, 102–03 (2d Cir. 2004); *see also United States v. Karro*, 257 F.3d 112, 117 (2d Cir. 2001).

A. Mr. Lee Asserts His Innocence on Two Grounds: Newly-Discovered Evidence and Developments in the Law Since the Time of His Plea

Of the three factors evaluated in considering a motion to withdraw, "the most critical is the defendant's declaration of innocence." Kirke D. Weaver, *A Change of Heart or a Change of Law - Withdrawing a Guilty Plea under Federal Rule of Criminal Procedure 32(e)*, 92 J. Crim. L. & Criminology 273 (2001). Indeed, the Second Circuit has repeatedly instructed district courts to evaluate whether the defendant claims his factual or legal innocence in moving to withdraw a guilty plea. *See United States v. Carreto*, 583 F.3d 152, 157 (2d Cir. 2009) (directing district courts to consider "whether the defendant has asserted his or her legal innocence in the

motion to withdraw the guilty plea."); *Schmidt*, 373 F.3d at 102-03 (denying motion to withdraw where *not* based on innocence); *Woodward v. United States*, 426 F.2d 959, 964 (3d. Cir. 1970) ("a defendant's claim of innocence may provide a basis for a finding that the guilty plea was not entered intelligently or that withdrawal of the plea is necessary to correct manifest injustice.").

Now, having had access to information he never before had, Mr. Lee asserts his innocence in this case on two grounds: (1) newly discovered evidence; and (2) developments in the landscape of insider trading law. Lee Aff., ¶¶ 14, 16; *see also* Morvillo Decl., ¶ 22.

1) Newly-Discovered Evidence Points to Mr. Lee's Innocence

Mr. Lee asserts his innocence with regard to Count II because of newly-discovered evidence regarding the time he learned allegedly improper information about a Yahoo/Microsoft partnership deal and the time that he traded. Taken together, these facts demonstrate that Mr. Lee purchased Yahoo shares on July 10, 2009 in an entirely legal manner.

"[A] defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution's case, and of information that may be available to cast doubt on the fact or degree of his culpability, ... even a guilty plea that was 'knowing' and 'intelligent' may be vulnerable to challenge if it was entered without knowledge of material evidence withheld by the prosecution." *United States v. Millan-Colon*, 829 F. Supp. 620, 635 (S.D.N.Y. 1993), *aff'd sub nom., United States v. Millan*, 17 F.3d 14 (2d Cir. 1994) (citation omitted). In the context of a plea, evidence is "material" if there is a reasonable probability that "but for the failure to produce such information the defendant would not have entered the plea but instead would have insisted on going to trial." *Id*. (citing *Tate v. Wood*, 963 F.2d 20, 24 (2d Cir. 1992).

Here, Mr. Lee has recently learned material information that would have altered his decision at the time he pled guilty. From the inception of this case, the government's position

has been that Mr. Lee engaged in insider trading because he learned material nonpublic information *directly* from Sandeep Aggarwal and *subsequently* traded on that information. Until recently, Mr. Lee could not readily refute this allegation because Mr. Lee's understanding of the facts at hand came from his proffer sessions with the government, where he possessed a limited memory of the events from a single morning four years earlier, and was presented with only a smattering of information. Indeed, the government and Mr. Lee jointly proceeded on the fact that, *after* the Aggarwal Call, Mr. Lee purchased 725,000 shares of Yahoo stock for SAC. This, it turns out, is not true.[7]

a. Mr. Lee Learned the Critical Information More Than Two Hours Prior to His Call with Mr. Aggarwal

What is true and established by contemporaneous documents is that Mr. Lee learned more than two hours before he ever spoke to Mr. Aggarwal that Mr. Aggarwal and Collins Stewart were disclosing to their numerous institutional clients—SAC among them—that the Yahoo/Microsoft deal was likely to happen within two weeks. Present counsel did not learn this information until recently. Morvillo Decl., ¶¶ 11-16.

This new information shows that Mr. Lee did not trade 725,000 shares of Yahoo in his SAC portfolio based on information he learned from Mr. Aggarwal because, more than two hours before Mr. Lee spoke to Mr. Aggarwal, Mr. Lee already knew the alleged material nonpublic information—the timing of the deal. Mr. Lee clearly learned that Collins Stewart disseminated information about the likelihood and timing of a Yahoo/Microsoft partnership

[7] Mr. Lee does not mean to suggest that the government intentionally misled him about the timing of the trades. Nevertheless, the government—and not Mr. Lee—had at least the ability to investigate and access this information (if not actual access to it) at the time of the proffers. Either way, Mr. Lee's lack of understanding on the timing of the trades at issue is a result of the government's failure to understand, discover or disclose it.

before 9:13am. This is obvious because, at 9:13am, he sent an instant message to Mr. Cohen disclosing the information, and, clearly, Mr. Lee could not have disclosed the information before he learned it. *See* Cohen IM, Morvillo Decl. Ex. B.

What is more, Mr. Lee received the deal-timing information a second time, also about two hours before the Aggarwal Call. The second source of the information appears in the RLDB Chat, which demonstrates that Mr. Lee's trader shared with Mr. Lee the same Collins Stewart information *after* Mr. Lee had already sent the Cohen IM but *before* the Aggarwal Call. The RLDB Chat contains an IM from Collins Stewart salesman Mike Herrero, which the trader copied and pasted into the chat to show Mr. Lee. The IM from the Collins Stewart sales representative says:

> Sandeep, my msft/yhoo analyst is making a major call that the recently cooled off MSFT/YHOO talks have heated back up in a big way. He believes it's possible something could happen in the next week or two based on his channel checks as YHOO has come back to the table since Bing has debuted to strong mkt share gains.

RLDB Chat, Morvillo Decl., Ex. C at 1.

Thus, by 9:38am on July 10, 2009, Mr. Lee learned from two different sources—neither of them Mr. Aggarwal—the very information that the government alleged Mr. Lee learned from Mr. Aggarwal.

The fact that Mr. Lee learned this information from two separate sources[8] demonstrates that Collins Stewart actively disseminated the same information that the government called nonpublic. It also shows that other people were unabashedly discussing—electronically and

[8] Logic dictates that the trader who forwarded the IM to Mr. Lee at 9:38am is not the same person who Mr. Lee learned the information from prior to 9:13 am. It makes no sense that the trader would tell Mr. Lee the information at 9:00am and then tell him again at 9:30am.

otherwise—this supposed material nonpublic information. In any event, it proves that Mr. Lee knew *before* he spoke with Mr. Aggarwal that Collins Stewart was reporting that Yahoo and Microsoft were likely to strike a deal within two weeks. As a result, there is at least a serious question—if it is not dispositive—as to whether this Yahoo information was already public by the time of the Aggarwal Call.[9]

b. Mr. Lee Purchased 97% of the Yahoo Shares at SAC Before the Call with Mr. Aggarwal

The timing of the receipt of information was not enough, standing alone, to cause Mr. Lee to conclude that he is innocent of the charges in this case. But this conclusion became unavoidable after he learned when he ordered the purchase of Yahoo shares on July 10, 2009. As discussed above, during the proffer sessions, the government led Mr. Lee to believe that he purchased all 725,000 shares after the Aggarwal Call. However, the recently produced RLDB Chats demonstrate that this is false. In fact, the contemporaneous documents make it clear that Mr. Lee ordered the purchase of 700,000 shares of Yahoo stock between 40 and 100 minutes *prior* to the Aggarwal Call, not after it.

This is completely new information to Mr. Lee. And this, in conjunction with the timing on the receipt of the information, caused him to conclude that he is innocent of the charges with respect to the Yahoo/Microsoft trades. Had Mr. Lee known that he ordered his trader to purchase 700,000 shares before he ever spoke to Mr. Aggarwal, he would not have entered a

[9] Mr. Lee's argument concerning the public nature of the information disseminated by Collins Stewart is buttressed by Yahoo's share price activity on July 10, 2009. Collins Stewart's sales force disseminated the deal timing information (i.e., *two weeks*) prior to market open on July 10, 2009. When the market opened, Yahoo opened at a higher price than the price at which it closed the day before; this pre-market activity can reasonably be attributed to the partnership deal information. Indeed, the day prior, Yahoo closed at $14.55, but on July 10, 2009, Yahoo opened at $14.78 and reached a high during the day of $15.18. *See* YHOO Price Data Compilation, attached at Exhibit E to the Morvillo Decl.

guilty plea. Lee Aff., ¶ 16. And even though Mr. Lee ordered his trader to purchase an additional 25,000 shares after the Aggarwal Call, he did not learn any new information on that Call that induced him to purchase additional shares.[10] The government deemed the timing of the Yahoo/Microsoft partnership deal to be the material and nonpublic information at issue in this case. Mr. Lee learned the very same information and traded more than two hours before the Aggarwal Call.

It is important to understand how Collins Stewart disseminated the Aggarwal information to its clients.[11] At approximately 6:00am on July 10, 2009, Collins Stewart held an internal call with, among others, Sandeep Aggarwal and the Collins Stewart sales force. Mr. Aggarwal disclosed the Yahoo/Microsoft information on that call. Thereafter, the Collins Stewart sales force flooded Wall Street with this information. *See* Morvillo Decl., Ex. D (Collins Stewart had approximately 400 institutional clients, at least some of which received this information). Regardless of the exact number, the sales force contacted their clients and informed them about the timing of the Yahoo/Microsoft partnership deal.

The RLDB Chat excerpting the communication from salesman Mike Herrero demonstrates that Collins Stewart disclosed the information via rapid-delivery media such as

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[10] Mr. Lee also purchased an additional 25,000 shares in his personal account at the end of the day on July 10, 2009. This motion deals primarily with the 725,000 shares Mr. Lee purchased in his portfolio at SAC because those shares were the principal subject of his proffer sessions. However, the 25,000 shares he purchased in his personal account are subject to the same analysis: by the time Mr. Lee traded, the information about the Yahoo/Microsoft partnership deal was public, and he first learned that information through sources other than Mr. Aggarwal.

[11] Cases in this district note that information can be public if disclosed through, *inter alia*, press releases, trade publications, analysts' reports, newspapers, rumors, word of mouth or other sources. *See United States v. Riley*, 90 F.Supp.3d 176 (S.D.N.Y. 2015) (citing *United States v. Cusimano*, 123 F.3d 83, 89 n. 6 (2d Cir. 1997)). While the Collins Stewart sales force did not disseminate an analyst's *written* report, they nonetheless delivered information to their institutional clients from their analyst, Mr. Aggarwal, who also issued a written report after market close the same day.

instant messaging, which can—as seen here—be further distributed to an untold number of individuals. To be sure, Mr. Lee noted in the RLDB Chat that Mr. Aggarwal had already spoken with another SAC portfolio manager named Eric Gerster to follow up on the information the sales force disseminated. *See* Morvillo Decl. Ex. C at 3. This means, at least in Mr. Lee's subjective view, that Collins Stewart released this information publicly.

Because he received the information from multiple sources, Mr. Lee subjectively believes that the information was public. Lee Aff., ¶¶ 12-14. Mr. Lee was not the only person to receive this information, nor did he receive it first. Thus, his understanding based on the newly obtained evidence is that many, many people learned this information before he did, and before he ever spoke with Mr. Aggarwal.

c. The Yahoo Price Impact Analysis Supports Mr. Lee's View that the Yahoo/Microsoft Information was Public Before He Spoke with Mr. Aggarwal

There is empirical data to suggest that a large number of investors knew the Yahoo/Microsoft information from Collins Stewart and traded on it. The price of Yahoo stock rose during pre-market activity and continued to rise throughout the early morning while Mr. Lee was trading. *See* RLDB Chat, Morvillo Decl. Ex. C; *see also* YHOO Price Data July 2009, Morvillo Decl. Ex. E; Lee Aff., ¶ 13. Because Yahoo stock opened higher and rose during the day, Mr. Lee believes that many investors knew the same information that he did, particularly relevant institutional investors that determine the price of a stock through large volume trading. *See United States v. Contorinis*, 692 F.3d 136, 143 (2d Cir. 2012) ("information is also deemed public if it is known only by a few securities analysts or professional investors. This is so because their trading will set a share price incorporating such information."); *see also S.E.C. v. Mayhew*, 121 F.3d 44, 50 (2d Cir. 1997) ("[i]nformation becomes public when . . . although

known only by a few persons, their trading on it 'has caused the information to be fully impounded into the price of the particular stock,' (citations omitted).").

Here, the fact that the Yahoo stock price increased in the wake of Collins Stewart disclosing the Aggarwal information suggests that a number of institutional investors knew and traded on the information, and thus it was "fully impounded" into the stock price.

The public nature of the deal-timing information, coupled with the timing of his receipt of the information and of his order to purchase Yahoo stock, causes Mr. Lee to know that he would not have entered a guilty plea had he understood this information, because he would not have believed himself to be guilty. Lee Aff., ¶¶ 12-14, 16.

d. Newly-Discovered Evidence Altered Mr. Lee's View of His Culpability Such that the Court Should Grant His Motion

Mr. Lee's hindsight view of his conduct is relevant to the Court's determination regarding his motion to withdraw his plea. In the *Millan-Colon* case cited above, the Government did not disclose impeachment evidence concerning a witness's credibility—specifically, that the witness was indicted on federal narcotics charges. *Millan-Colon*, 829 F. Supp. at 635 (S.D.N.Y. 1993). Finding a "reasonable probability" that this information would have caused certain defendants to proceed to trial rather than enter guilty pleas, the court granted those defendants' motions to withdraw their guilty pleas. *Id*. at 635-36.

There is far more than a "reasonable probability" in this matter; there is certainty. Here, Mr. Lee recently learned that he ordered 700,000 out of the 725,000 shares that his trader bought at SAC that day before Mr. Lee ever had the Aggarwal Call, and that Mr. Lee knew the information he allegedly learned on that call more than two hours before it occurred. Had Mr. Lee known this exculpatory information in 2013, he would not have pled guilty to the instant charges. The newly-discovered information is material to Mr. Lee's case because it goes directly

to his factual innocence and to his state of mind. Accordingly, Mr. Lee respectfully requests that the Court permit him to withdraw his plea.

2) Legal Developments in Insider Trading Law

In addition to permitting Mr. Lee to withdraw his plea to the Count II substantive charge based on new evidence, the Court should permit Mr. Lee to withdraw his plea with respect to the Count I conspiracy charge for two reasons. First, but for his plea to the July Yahoo Trade charged in Count II, Mr. Lee would not have entered a guilty plea with respect to the conspiracy alleged in Count I. Lee Aff., ¶ 16. Mr. Lee takes this position because it is the July Yahoo Trade based on the Aggarwal Call that is the catalyst for the government's investigation into Mr. Lee, and, in turn, it was the July Yahoo Trade that propelled Mr. Lee toward a guilty plea. Had Mr. Lee understood the true facts underlying the July Yahoo Trade, he would have taken a very different view of his case holistically.

The second reason that the Court should permit Mr. Lee to withdraw his plea to the Count I conspiracy is that his plea is legally infirm because it fails to account for personal benefit.[12] A court must grant a motion to withdraw a guilty plea where the defendant's factual allocution is insufficient to support each and every element of the offense. *See* Fed. R. Crim. P. 11(b)(3). This is so even when the insufficiency is based on a change in the law between the time of the plea and the motion to withdraw. *See United States v. Ortega-Ascanio*, 376 F.3d 879, 883-84 (9th Cir. 2004). As noted above (*supra* at 5), Mr. Lee's allocution fails to address personal benefit entirely, and the developments in insider trading cases make clear that this element must be addressed during a plea. *See, e.g., United States v. Conradt, et al.*, 12-cr-887 (JSR), ECF Dkt. No. 166, Order Vacating Def's Guilty Plea (vacating guilty plea where

[12] To be sure, Mr. Lee's plea is infirm as to both Counts I and II because he never allocuted to personal benefit or knowledge thereof.

allocutions were insufficient as to personal benefit in light of *Newman*). Because it did not address each element of the crime, Mr. Lee's allocution cannot support his guilty plea.

As this Court is well aware, the past three years have seen wide-reaching developments in insider trading law with respect to the element of personal benefit and a remote tippee's knowledge thereof. *See Salman*; *Newman*; *United States v. Martoma*, No. 14-3599, slip op. (2d Cir Aug. 23, 2017). In the instant case, Mr. Lee did not address and the Court did not inquire about personal benefit or Mr. Lee's knowledge of personal benefit. Lee Aff., ¶ 8. As such, one of the elements of insider trading is not established by the plea.

In his allocution to Count I, Mr. Lee said nothing about personal benefit. He stated: "I traded while in possession of material nonpublic information that I had received from others under circumstances where I knew, or had reason to believe, other persons had breached a fiduciary duty or a duty of confidentiality." Morvillo Decl. Ex. F, Plea Hearing Tr. at 21. This statement does not satisfy the element of personal benefit or knowledge of personal benefit. Because the allocution is not satisfactory as to the very element that causes a breach of fiduciary duty to be criminal, it cannot be said that Mr. Lee truly understood that to which he pled. *See Millan-Colon*, 829 F. Supp. at 634 (a plea must be knowing and intelligent).

Furthermore, because Mr. Lee stated that he was aware of a breach of fiduciary duty *or* a breach of confidentiality, the Court cannot take for granted that it was the former and not the latter—and the latter is wholly insufficient because it does not contemplate personal benefit. *See Newman*, at 448 ("[W]e find no support for the Government's contention that knowledge of a breach of the duty of confidentiality without knowledge of the personal benefit is sufficient to

impose criminal liability."). Thus, Mr. Lee's allocution does not satisfy the element of personal benefit or knowledge thereof.[13]

The government cannot rely on the notion that the law evolved after Mr. Lee's plea.[14] Although Mr. Lee's plea was pre-*Newman*, his plea is insufficient under *Dirks v. S.E.C.*, 463 U.S. 646 (1983). Here, the law did not actually change from *Dirks*, but certainly it came into sharper view. *Newman* focused its attention on the personal benefit issues first raised in *Dirks*. 463 U.S. at 663. Because Mr. Lee neither allocuted to personal benefit nor to knowledge thereof, and because the Court and the government did not inquire about it, Mr. Lee's plea is deficient as to one element and cannot stand.

There are examples in this district of withdrawals based on personal benefit and the attendant knowledge required for remote tippees. Certain defendants charged with insider trading have been permitted to withdraw their guilty pleas or had their cases dismissed outright because a sufficient factual basis for the pleas no longer existed. *See United States v. Adondakis*, No. 11-cr-360 (JFK), Nolle Prosequi, ECF Dkt. No. 16 (S.D.N.Y. Oct. 22, 2015) (nolle prosequi entered for cooperating witness in the *Newman* case following the Supreme Court's *certiorari* denial); *see also United States v. Conradt, et al.*, No. 12-cr-887 (ALC) (S.D.N.Y. Jan. 22, 2015)

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[13] The *Newman* case clearly lays out the elements of insider trading, which have remained untouched in subsequent related opinions: "In sum, we hold that to sustain an insider trading conviction against a tippee, the Government must prove each of the following elements beyond a reasonable doubt: that (1) the corporate insider was entrusted with a fiduciary duty; (2) the corporate insider breached his fiduciary duty by (a) disclosing confidential information to a tippee (b) in exchange for a personal benefit; (3) the tippee knew of the tipper's breach, that is, he knew the information was confidential and divulged for personal benefit; and (4) the tippee still used that information to trade in a security or tip another individual for personal benefit."

[14] Neither can the government rely on Mr. Lee's allocution because it was prepared and delivered while Mr. Lee labored under a misapprehension of the facts of his case, as described in detail herein. Mr. Lee's allocution thus is not reliable.

(vacating the pleas of five defendants where the factual basis did not support the personal benefit element post-*Newman*).

For example, in *Conradt*, No. 12-cr-887 (ALC) (S.D.N.Y. Jan. 22, 2015), the Court accepted defendants' guilty pleas after they allocuted to the offense of insider trading. Nevertheless, after the Second Circuit's decision in *Newman*, the Court vacated defendants' guilty pleas on the grounds that there was an insufficient factual basis:

> The Second Circuit has said that, in determining whether such a factual basis exists, judges should "match[] the facts in the record with the legal elements of the crime." (citations omitted). Facts considered to be in the record can include not only the defendant's allocution, but also any representations made by counsel for the defense and the government on the record and the allegations in the indictment (citation omitted). In this case, after reviewing the Second Circuit's decision in *United States v. Newman* . . . as well as all the facts in the record with respect to the guilty pleas of Defendants . . . this Court advised the parties on December 18, 2014 that it was inclined to vacate their guilty pleas. Specifically, the Court was skeptical that the pleas were sufficient in light of *Newman's* clarification of the personal benefit and tippee knowledge requirements of tipping liability for insider trading (citation omitted) . . . [T]he Court hereby vacates each of the aforementioned guilty pleas and enters pleas of not guilty on behalf of those Defendants.

Id., ECF Dkt. No. 166 at 1-2, Order Vacating Def's Guilty Plea in Light of *Newman*.

For reasons similar to those in the *Conradt* case, Mr. Lee asserts that his plea is lacking. There are issues regarding proof of personal benefit or knowledge thereof with respect to each of the three trades with which Mr. Lee was charged. Nowhere during the plea colloquy does Mr. Lee articulate his knowledge of personal benefit between Mr. Aggarwal and the tipper for the July Yahoo Trade, or for the 3Com Trade between the unknown tipper and tippee. Moreover, the plea is silent with respect to personal benefit in the April Yahoo Trade that is the other object of the conspiracy. For these reasons, the plea to both the substantive and conspiracy counts fail. *See Neman* at 455 ("Because the government failed to demonstrate that [defendants] had the

intent to commit insider trading, it cannot sustain the convictions on either the substantive insider trading counts or the conspiracy count").

Mr. Lee would not have entered a guilty plea to the conspiracy count had he known the determinative facts about the Yahoo/Microsoft transaction. Moreover, the plea colloquy itself is mute with respect to personal benefit. For those reasons, Mr. Lee respectfully requests that the Court permit him to withdraw his plea to both Counts I and II, and set a briefing schedule so that he may move to dismiss the case in its entirety.

B. Extenuating Circumstances Excuse the Length of Time

It is undeniable that a great deal of time has elapsed between Mr. Lee's plea and this motion. However, Mr. Lee submits that the delay is excusable in his case. Lee Aff., ¶ 17; *see also* Morvillo Decl., ¶ 23.

Extenuating circumstances militate in favor of granting a motion to withdraw where the delay is lengthier than otherwise typically acceptable. *See, e.g.*, *United States v. Hudak*, 2003 WL 22170606, *4 (S.D.N.Y. Sept. 19, 2003) (noting that a lengthy delay would not tip in favor of granting a withdrawal motion, but referencing mitigating circumstances for the delay, such as the death of the presiding judge and related need to reassign the case). Moreover, "[b]ecause the question of improper delay is so fact specific, broad generalities cannot be made regarding how long is too long. Courts have found time periods ranging from merely 13 days to 10½ years to be too long to bring a motion to withdraw a guilty plea." *See* Weaver, "A Change of Heart or a Change of Law" (citations omitted). There is no fixed point at which delay becomes excessive.

Here, Mr. Lee has explained how and why he moves to withdraw his plea today, the utmost reason being the newly-discovered evidence that demonstrates his actual innocence. Mr. Lee's case has gone through three AUSAs, two of which agreed to wait for legal developments prior to making any determinations about the disposition of this case, and the third required time

to locate and provide the documents that ultimately led to Mr. Lee's realization that his case has proceeded under a grave misunderstanding.

Mr. Lee should not be punished for the agreed-upon delay or the delay attributable to the government's production efforts. Mr. Lee diligently initiated an evaluation of his case with present counsel, and diligently asked present counsel to meet with the government and pursue his case. Mr. Lee should not be punished for an agreed-upon delay particularly where he understood that the government indicated to present counsel that it would not argue delay if Mr. Lee arrived at precisely the position he is in now.

For these reasons, the Court should excuse Mr. Lee's otherwise lengthy delay between entering his plea and moving to withdraw, and the Court should grant his motion.

C. The Government Cannot Reasonably Claim Prejudice

Allowing Mr. Lee to withdraw his guilty plea will not prejudice the government. Certainly, if any prejudice to the government does exist, it pales in comparison to the prejudice Mr. Lee bears if he must proceed to sentencing while maintaining his innocence. Courts have noted that "[e]ven if a defendant fails to demonstrate any valid grounds supporting a motion to withdraw a guilty plea, in balancing the equities, the Court may grant the motion if little or no prejudice to the government would result." *Millan-Colon* at 636 (citing *United States v. Fernandez*, 734 F.Supp. 599, 604 (S.D.N.Y. 1990), aff'd, 932 F.2d 956 (2d Cir. 1991)).

In determining whether prejudice to the government will occur, courts look to circumstances like the disposition of codefendants' cases, the requirement that the government reconstruct its case or engage in additional trial preparation. *Id.* Here, the government does not have to deal with competing trials, codefendants, reconstruction of its case, or much additional investigation. In any event, any prejudice the government alleges cannot overcome Mr. Lee's significant demonstration of "fair and just" reasons for withdrawing his plea based on newly-

discovered evidence and developments in the law. Accordingly, Mr. Lee respectfully request that the Court grant his request to withdraw his guilty plea.

CONCLUSION

For all the reasons set forth above, Mr. Lee respectfully requests that the Court grant his motion to withdraw his guilty plea pursuant to Federal Rule of Criminal Procedure 11(d), and that the Court permit Mr. Lee to move to dismiss the case in its entirety or, alternatively, to proceed to trial.

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