

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of

CHARLES L. HILL, JR.

INITIAL DECISION
April 18, 2017

APPEARANCES: M. Graham Loomis, Harry B. Roback, Melissa J. Mitchell, and Joshua A. Mayes for the Division of Enforcement, Securities and Exchange Commission

Ross A. Albert of The Albert Law Firm and John H. Williamson and Adamson B. Starr of Williamson Law LLC for Charles L. Hill, Jr.

BEFORE: James E. Grimes, Administrative Law Judge

Summary

This is an insider trading case. The four principal actors in this matter are John Heyman, Andrew Heyman, Todd Murphy, and Respondent Charles L. Hill, Jr. During the relevant time period, May to July 2011, John Heyman was the CEO of Atlanta-based Radiant Systems, Inc. Tr. 369. Andrew Heyman, who is John Heyman's younger brother, was Radiant's chief operating officer. Tr. 369-70. Murphy, who has no connection to Radiant, is an artist and close personal friend of Andrew Heyman. Tr. 861-64. Murphy is also a close friend of Hill, who is a commercial real estate developer. Tr. 87, 96-97, 861. Hill similarly has no connection to Radiant.

From May to July 2011, John Heyman, Andrew Heyman, and other senior officers at Radiant were involved in active negotiations with NCR Corporation regarding the latter's acquisition of Radiant. Tr. 379-82. These negotiations culminated on July 11, 2011, when the companies announced that Radiant's board had accepted NCR's cash tender offer. Div. Ex. 54 at 16. During this same time, Hill purchased, for himself and his daughters, more than \$2 million of Radiant's stock. *See infra* § 1.2.3. When he sold all his and his daughters' shares on July 12, he gained over \$740,000 in profits. *Id.*

Suspicious of Hill's trades, the Division of Enforcement investigated and concluded that Hill traded while in possession of material, nonpublic information about Radiant's potential

acquisition by NCR. See Order Instituting Proceedings (OIP) ¶¶ 2-5. It theorized that Hill received this information via Murphy, who received it from Andrew Heyman. *Id.* ¶ 2. The Division thus charged Hill with violating statutory and regulatory prohibitions on trading while in possession of material, nonpublic information about a tender offer. *Id.* ¶ 46. As is discussed below, while Hill may have possessed certain information about Radiant, there is no evidence that he received any information from Murphy or that Murphy ever had any knowledge of the negotiations between NCR and Radiant. Nor is there any evidence that Andrew Heyman passed any information about those negotiations to Murphy. The charges against Hill must therefore be dismissed.

Introduction

In February 2015, the Securities and Exchange Commission instituted this proceeding under Section 21C of the Securities Exchange Act of 1934. In the OIP, the Division alleged that Hill violated Section 14(e) of the Exchange Act and Exchange Act Rule 14e-3. OIP ¶ 46. I scheduled the merits hearing to begin on June 15, 2015. *Charles L. Hill, Jr.*, Admin. Proc. Rulings Release No. 2414, 2015 SEC LEXIS 930, at *2 (ALJ Mar. 12, 2015). On June 8, 2015, the United States District Court for the Northern District of Georgia preliminarily enjoined the Commission from conducting this proceeding. See *Hill v. SEC*, 114 F. Supp. 3d 1297, 1320-21, *vacated*, 825 F.3d 1236 (11th Cir. 2016). As a result of the district court's order, the merits hearing was canceled. *Charles L. Hill, Jr.*, Admin. Proc. Rulings Release No. 2789, 2015 SEC LEXIS 2288 (ALJ June 9, 2015).

After the Eleventh Circuit later vacated the district court's order, *Hill v. SEC*, 825 F.3d 1236 (11th Cir. 2016), I rescheduled the merits hearing in this matter, which took place in Atlanta from December 12 to 15, 2016, see *Charles L. Hill, Jr.*, Admin. Proc. Rulings Release No. 4232, 2016 SEC LEXIS 3799 (ALJ Oct. 6, 2016). During the hearing, the Division called five witnesses, including Hill, and Hill called two witnesses. In line with the parties' stipulation, I admitted all but twelve of the Division's exhibits and all but nine of Hill's exhibits. Tr. 925-28. After the hearing, I granted Hill's request to withdraw certain exhibits that were duplicates of some of the Division's admitted exhibits. *Charles L. Hill, Jr.*, Admin. Proc. Rulings Release No. 4620, 2017 SEC LEXIS 543 (ALJ Feb. 22, 2017).

Findings of fact

I base the following findings of fact and conclusions on the entire record and the demeanor of the witnesses who testified at the hearing, applying preponderance of the evidence as the standard of proof. See *John Francis D'Acquisto*, Investment Advisers Act of 1940 Release No. 1696, 1998 WL 34300389, at *2 (Jan. 21, 1998) (“[P]reponderance of the evidence . . . is the standard of proof in [Commission] administrative proceedings.”). All arguments that are inconsistent with this decision are rejected. I find the following facts to be true.

1.1 The Chronology: Radiant and NCR engage in merger negotiations and Hill buys stock in Radiant.

John Heyman was the CEO of Radiant from 2004 until NCR acquired it in 2011. Tr. 368-69. To avoid confusion, I will refer to each Heyman brother by his first name. NCR's CEO, William Nuti, contacted John in May 2011 about the possibility of acquiring Radiant. Tr. 391-92. The two met in New York on May 11, and Nuti said that he thought NCR might be willing to pay between \$24 and \$26 per share for all of Radiant's stock. Tr. 393-94. Nuti reiterated these figures in a letter dated the following day. Div. Ex. 331 at 6085.¹

On Tuesday, May 17, 2011, John scheduled a meeting of Radiant's board for the following Monday to discuss NCR's offer. Tr. 402-03; Div. Exs. 278, 339. He also communicated to senior Radiant officers, including his brother, the need to quickly "complete due diligence" and the transaction. Tr. 407. By Thursday, May 19, 2011, John was prepared to engage investment banks to assist Radiant in completing the transaction with NCR. Tr. 413; *see* Div. Exs. 346-48.

The board meeting took place as scheduled on May 23. *See* Div. Ex. 278. During the meeting, which Andrew attended, John updated the board on the status of negotiations with NCR and recommended several courses of action. *Id.* at 1; Tr. 414, 543.

After the meeting, John telephoned Nuti and explained that although Radiant would not accept NCR's initial offer in the price range Nuti earlier proposed, a deal could be possible if NCR were willing to increase its offer. Tr. 419-20. Shortly after that, the two exchanged information about their companies' respective investment bankers. Tr. 420-22; *see* Div. Ex. 360. NCR quickly contacted Radiant's bank. Tr. 422. To John, this evidenced a "high level of interest" by Nuti and NCR. Tr. 422.

At the same time, Radiant began to engage in a due diligence process in which it explored the possibility of finding other buyers. Tr. 423-25. NCR also began engaging in a due diligence process in which Andrew was very involved. Tr. 541; *see* Tr. 588. In that capacity, he helped educate NCR representatives about Radiant's business. Tr. 541.

By May 26, John arranged to introduce Andrew to Nuti at a dinner meeting scheduled for Thursday, June 2, 2011. Div. Ex. 381. John's goal was for Nuti "to get to know" Andrew, because John anticipated or hoped that Andrew would run Radiant after NCR acquired it. Tr. 432-33. Indeed, at some point in May, John told Nuti that he (John) did not intend to remain with Radiant after its acquisition. Tr. 418. He recommended Andrew to Nuti as the person who should run Radiant going forward. Tr. 418. Around the time John arranged the dinner meeting, John told Andrew that he arranged the meeting to position Andrew to "take over the business." Tr. 436-37. By May 26, Andrew assumed that if the merger occurred, his brother would leave the company and he (Andrew) would be installed to run the business. Tr. 558-59.

¹ Citations to an exhibit's Bates numbers are to the numerical digits only, excluding any leading zeros.

On May 27, Radiant agreed to terms with its investment banker. Tr. 443. On June 1 and 2, John, Andrew, and Radiant's investment bankers met with other potential buyers. Tr. 443-46.

On June 1, Hill purchased 4,500 shares of Radiant for his daughters at a combined cost of over \$91,000, excluding fees and commissions. Tr. 157-59; Div. Ex. 202, 219, 249. The specifics of this and all of Hill's later Radiant trades are discussed more fully below. *See infra* § 1.2.3.

During the dinner on June 2, John, Andrew, Nuti, and an NCR vice president discussed a variety of topics, including the post-merger organizational structure. Tr. 662-63; *see* Tr. 434-35 (discussing who attended the dinner). Andrew had a good idea at that point that he might take over for his brother if the merger occurred. Tr. 663-64. John, Andrew, and Radiant's investment bankers participated in due diligence meetings with NCR in New York on June 3. Tr. 447-48, 582-83.

Also on June 3, Hill purchased 50,000 shares of Radiant for slightly more than \$1 million through his SunTrust account. Div. Ex. 121 at 1; *see infra* § 1.2.3.

Radiant's inner circle had additional due diligence meetings with NCR on June 9 and 10. Tr. 449, 588-89; Div. Exs. 308, 423. On June 13, Nuti sent John a letter offering to buy all of Radiant's stock for \$26 per share. Div. Ex. 428 at 5435. Nuti also requested that Radiant negotiate exclusively with NCR. *Id.*; Tr. 459-60. Nuti and John spoke briefly the next morning before Radiant's board meeting. Tr. 457. According to John, Nuti's tone suggested that he and NCR were flexible regarding price. Tr. 457.

During Radiant's board meeting on June 14, the board determined that NCR's offer was inadequate. Tr. 462; Div. Ex. 279 at 1, 4. The board nonetheless decided that the companies should continue discussions. Tr. 462; Div. Ex. 279 at 4. John communicated the board's decision to Nuti the following day. Div. Ex. 429.

John and Nuti spoke on June 17 and 21 about the possibility of NCR raising its offer to \$28 per share. Div. Ex. 54 at 14; Tr. 465-66. Radiant's board met on June 21 and agreed to sell at \$28 per share. Tr. 469. John reported this fact to Andrew and other senior officers immediately afterwards.² Tr. 470. The next day, John e-mailed Nuti saying that Radiant would "work with" NCR to "enter into a definitive agreement at a cash price of \$28 per share." Div. Ex. 434; Tr. 469. On June 24, Radiant's counsel sent NCR's counsel a draft merger agreement. Div. Ex. 54 at 14; Div. Ex. 436 at 2556.

Also on June 24, Hill phoned Vanguard and purchased 13,000 shares of Radiant at a total cost of nearly \$260,000. Tr. 197-200; Div. Exs. 91, 196; *see infra* § 1.2.3.

On June 26, Nuti e-mailed John a letter confirming NCR's continuing interest in purchasing Radiant for \$28 per share and proposing terms of the possible arrangement. Div. Ex.

² Andrew attended board meetings but, as a non-board member, was typically excused when the board voted. Tr. 470.

436. Following approval of certain material terms by Radiant's board on June 30, Radiant entered into an exclusivity agreement with NCR, running through July 11. Div. Ex. 54 at 15; Tr. 472.

The next day, July 1, Hill purchased 20,000 shares of Radiant through Vanguard at a total cost of over \$430,000. Div. Ex. 198; Tr. 207-08. He also purchased 4,100 shares in his daughters' accounts on July 5, at a combined cost of approximately \$88,000. Tr. 211-20; Div. Exs. 203, 220, 250.

As negotiations continued, NCR indicated that as a condition to consummating its purchase of Radiant, Andrew would be required to sign a retention agreement. Tr. 473-74. On July 6, Andrew flew to New York for a dinner meeting with Nuti. Tr. 477-79. Andrew planned to meet Murphy after his dinner with Nuti. See Tr. 637-44. Andrew's flight was diverted to Baltimore due to inclement weather and he was forced to travel from there to New York by car service. Tr. 616-20. He nonetheless made it to New York around 7:00 p.m. for dinner with Nuti. Tr. 628; Div. Ex. 439. During the day and into the evening, Andrew and Murphy exchanged thirty text messages. Div. Ex. 506 at 9-10.

Andrew's dinner with Nuti went well from an overall merger standpoint. Tr. 725-26. On the other hand, for the next three days after the dinner, Andrew was unsure whether he would be able to reach an agreement with NCR regarding his compensation and continued employment. Tr. 726-27. Although he eventually reached an agreement, the two to three days after the dinner witnessed some heated discussions about Andrew's continued employment. Tr. 726-27; see Tr. 481-82. After dinner, Andrew took a short cab ride to meet Murphy at another restaurant in Manhattan. Tr. 637-42, 644, 725. Given the uncertainty about whether he would continue with Radiant after the merger, Andrew's evening with Murphy was not celebratory. Tr. 727.

Radiant's board held a meeting on Friday, July 8, during which John announced "that NCR had completed its due diligence activities" and that he expected the board would be in a position on Monday, July 11, to approve NCR's offer. Div. Ex. 280. Andrew attended this meeting. *Id.*; Tr. 650-51.

Also on July 8, Hill purchased 10,000 shares of Radiant stock in his SunTrust account for nearly \$220,000. Div. Ex. 122 at 2; Tr. 225.

Over the ensuing weekend, Radiant's counsel and NCR's counsel finalized the terms of NCR's acquisition of Radiant. Div. Ex. 54 at 16. On July 11, Radiant's board approved NCR's offer to purchase all of Radiant's stock at \$28 per share. Div. Ex. 281. NCR's board similarly voted to approve the purchase of Radiant's stock. Div. Ex. 54 at 16. After the close of financial markets, NCR and Radiant issued a joint press release announcing the transaction. *Id.*; Div. Ex. 489. Murphy texted John congratulations at 9:34 p.m. that evening, saying that he had seen the news on CNBC. Tr. 488; Div. Ex. 66.

On July 12, Hill sold his daughters' 8,600 shares of Radiant for almost \$240,000. Tr. 248-51; Div. Exs. 204, 221, 251. Hill also sold all 93,000 shares he held in his SunTrust and Vanguard accounts for approximately \$2.6 million. Tr. 251-58; Div. Exs. 114, 199.

1.2 *The links in the alleged insider-trading chain: Andrew, Murphy, and Hill*

John and Hill knew each other because their children ran in the same social circles. Tr. 110-11, 374. The Division, however, did not allege, and no evidence was presented, that John divulged confidential information to Hill. Instead, armed with the fact of Hill's trades and quick, sizeable profits, it focused on Hill's connection to Murphy and Murphy's connection to Andrew.

The Division presented evidence that from May 11 to July 11, 2011, Andrew and Murphy communicated primarily by text messages and occasionally by phone, and Murphy and Hill primarily spoke by phone and exchanged the occasional text message. Div. Ex. 506. On some days Andrew and Murphy exchanged a good number of texts. For example, on May 13 and June 19, 2011—days with no particular correlation to events during the merger negotiations—they exchanged ten and eight texts, respectively, and on June 26 they exchanged sixteen texts. Div. Ex. 506. On July 6, the day Andrew's plane was diverted, Andrew and Murphy exchanged thirty texts. *See* Tr. 646-47, 652-53, 894; Div. Ex. 506 at 9-10. But on many other days, they exchanged few if any texts; the longest period without any texts was eleven days, from June 7 to 17, although they were instead in contact by phone. Div. Ex. 506. And on five other days during the May 11 to July 11 window, they exchanged only one text. *Id.* During that period, they also had twenty-seven phone conversations lasting more than sixty seconds. *Id.*

Murphy and Hill spoke to each other regularly by phone during the May 11 to July 11 window. They had forty-six phone conversations lasting more than sixty seconds. Div. Ex. 506. They texted each other only nine times, all on July 7 and 8. *Id.*

Hill presented evidence that the number of calls between him and Murphy during May to July 2011 was consistent with their monthly average from January 2008 to July 2011. *See* Resp. Ex. 99. And Andrew testified—without contradiction—that his pattern and frequency of texts with Murphy during the relevant time was not unusual. Tr. 716. As a factual matter, I determine that Murphy's communication patterns with Andrew and Hill during May to July 2011 were consistent with his overall communication patterns with them.

1.2.1 *Andrew Heyman*

In various ways, Andrew netted several million dollars as a result of the merger.³ Tr. 535-36, 672-74. After the merger, he became a senior vice president with NCR. Tr. 534, 701. In that capacity, he was in charge of most of what had been Radiant's business, as well as portions of NCR's previously existing business that was in the same industry segment previously occupied by Radiant. Tr. 534. In late 2016, Andrew was promoted to executive vice president and was on "the short list of one person on the CEO succession plan." Tr. 732. In Andrew's opinion, his being linked to this matter was a "non-event in NCR's mind." Tr. 732. He left NCR, however, in November 2016 to pursue an opportunity with another company. Tr. 729.

³ The sale of Radiant also netted John a substantial sum. *See* Tr. 377-79; Div. Ex. 54 at 7-8, I-32, I-34.

There is no dispute that as a senior officer with Radiant, Andrew was aware of the status of Radiant's negotiations with NCR. *See* Tr. 383-84, 398-99, 407, 541. Andrew testified that although he might not have had daily conversations with his brother about the status of negotiations, he felt that he was "in the loop." Tr. 541.

Andrew agreed that Radiant had a "strict," "[b]lack and white" insider trading policy. Tr. 704; *see* Div. Ex. 18. In the written statement of its policy, Radiant noted that "[t]he consequences of insider trading violations can be staggering." Div. Ex. 18 at 1. The written policy detailed the possible civil and criminal sanctions that could result from such violations. *Id.* It also provided that dismissal for cause from the company would result if an employee traded on material, nonpublic information about the company and could result simply from the fact of a Commission investigation. *Id.* The policy also offered an explanation and examples of material, nonpublic information that was subject to the insider-trading bar and warned against "[t]ipping [i]nformation to [o]thers." *Id.* at 1-2.

In May through July 2011, Andrew knew that as an officer of Radiant, he could not pass insider information to others and that dismissal for cause and imprisonment for a term of years could result from trading on insider information. Tr. 705-07, 709-10. He also understood that he should avoid the appearance of improper trading and even a Commission investigation could have serious repercussions. Tr. 707-08. Andrew was further aware during the merger negotiations that if he were to divulge insider information, he could lose the millions of dollars he stood to gain from the merger with NCR. Tr. 710. He also agreed that his business reputation would be harmed if it were determined that he divulged confidential information. Tr. 741-42. Andrew thus additionally acknowledged that in 2011, he was "careful not to get even close to the line in violating this policy." Tr. 709.

Knowing the foregoing, Andrew took care to comply with Radiant's insider trading policy. Tr. 704-05. He testified that, as a general matter, if he received a business call while with a friend, he would "step away" from the friend. Tr. 717, 739. And if the call concerned inside information, his practice was to "make sure that [he] was in a closed environment in front of nobody." Tr. 717; *see* Tr. 739, 745-46. The Division presented no evidence to contradict this testimony; no one testified that this was not Andrew's practice or that he had ever acted in a manner inconsistent with this practice.

Andrew also testified about his friendship with Murphy. He said that they first met when they were about eight years old. Tr. 511. They became good friends while fraternity brothers at the University of Georgia. Tr. 511-12. Andrew said Murphy was "as close to being a family member" as someone could be "without being one." Tr. 513. In the early 2000s, Andrew invested several hundred thousand dollars in business ventures with Murphy. Tr. 721.

Andrew said that he and Murphy talked by phone or texted very regularly, typically several times per day. *See* Tr. 514. Andrew and Murphy often discussed personal, family, and health issues. Tr. 517-20, 525. Andrew trusts Murphy because Murphy has "never done [him] wrong," is a close friend, and has shared much wisdom over the decades of their friendship. Tr. 525-26. Although the two occasionally discussed Andrew's business dealings, those discussions were a "small fraction" of their dialogue and arose only terms of what was going on in Andrew's

life. Tr. 527. Andrew did not know whether Murphy invested and did not believe he and Murphy had ever discussed investing. Tr. 527.

In 2011, Murphy determined that he needed to move to New York in order to advance his career as an artist. Tr. 530-31. Andrew, along with Hill and other friends of Murphy, provided Murphy with financial support so that he could move to New York. *See* Tr. 531, 690-91, 896-97; Cohen Dep. at 20-22, 24-25.⁴ The idea to provide this support was developed by Scott Cohen, who was also a friend of Murphy's. Cohen Dep. at 25. Because Andrew made a sizeable contribution to the effort, he and Cohen worked together on a way to raise funds and present the gift to Murphy. *Id.* at 25-26; Tr. 692-93.

As the Division's investigation progressed, it sent Andrew a subpoena seeking certain evidence. *See* Div. Ex. 513 at 1. In response, he hired a firm to retrieve all of his documents for production. Tr. 576, 649. Andrew explained that he "was given options of minimum to maximum levels of production that [he] [c]ould consider" and he "opted for the maximum levels of production," Tr. 576, because he "ha[d] nothing to hide," Tr. 714. The firm he hired visited his home and was given "full access" to his office and all of his electronic devices and went "through every device and every piece of paper in [his] office." Tr. 576, 712. Andrew paid over \$20,000 to compile all the information the Commission sought. Tr. 713.

During his testimony, Andrew was forthright and precise. He struck me as intelligent, thorough, and exact. When questioned about whether he gave Murphy confidential information, Andrew credibly and plainly testified that he did not tell Murphy anything about the possible merger with NCR. Tr. 653-56, 702; *see* Tr. 733-34, 742. He conceded that he could not "rule out [the] possibility" that "some communication slipped [and] that something was inferred" by Murphy. Tr. 654-55, 657, 702. In context, this concession simply reflected Andrew's efforts to be precise. In light of his demeanor and all of his testimony, it was apparent that he was attempting to convey that although he did not say anything to Murphy and took steps to protect the confidential information he possessed, *see* Tr. 717, he could not rule out the metaphysical possibility that Murphy overheard or inferred something, *see* Tr. 702 (confirming that he testified in that fashion because he could not "get inside Todd Murphy's mind"). Indeed, he characterized even that possibility as "highly unlikely" because of how "protective" he is about confidential information of this nature, Tr. 703, and said he would be "shock[ed]" if Murphy overheard anything, Tr. 739; *see* Tr. 653-54. And he affirmed that he did not think he actually did let anything slip in front of Murphy and did not think that Murphy actually inferred anything. Tr. 717-18.

Although there were times during his testimony when Andrew could not recall specific events, he was not evasive. *See* Tr. 611. The Division asked him specific questions that would be difficult for anyone to answer five years after the fact. *See* Tr. 529-31, 544-46, 551-53, 556-57, 566, 579, 591, 614, 620, 623, 652; *see also* Tr. 540, 636-37, 670. Three examples

⁴ I granted Hill's motion for the videotaped deposition of Scott Cohen, who was scheduled to be out of the country during the hearing, then scheduled to take place in June 2015. *Charles L. Hill, Jr.*, Admin. Proc. Rulings Release No. 2680, 2015 SEC LEXIS 1921 (May 15, 2015). The deposition was held on June 1, 2015.

illustrate this point. First, many times during the December 2016 hearing, the Division asked Andrew whether he remembered the contents of a phone conversation he had with Murphy in June or July 2011 or the substance of text messages the two exchanged during the same time frame. Tr. 612-13. Given the passage of time, one would not expect Andrew—or anyone else—to remember what was said in a text or phone conversation over five years earlier.

The Division also asked whether Andrew recalled participating in a due diligence meeting at an Atlanta law firm from 2:00 to 4:00 p.m. on Thursday, June 9, 2011. Tr. 588-89. Andrew could not recall the meeting, but explained that he “remember[ed] a lot of meetings” and could not specifically remember the June 9 meeting. Tr. 589.

Finally, the Division asked Andrew if he had dinner with Murphy at a particular Atlanta restaurant at 5:30 p.m. on May 26, 2011. Tr. 565-67; *see also* Tr. 594 (asking about a dinner at a different restaurant on June 9, 2011). The Division showed Andrew an e-mail and his credit card statement that suggested that he had dinner with Murphy at the Atlanta restaurant. Tr. 565-67. Andrew conceded that he probably did have dinner there on May 26 with Murphy, but confessed that he could not specifically recall ever eating there with Murphy. Tr. 566-68.

From my perspective watching Andrew’s testimony, his precise answers to questions of this nature reflected his attempts to be exact, rather than to evade. He was unwilling to say he remembered something if he did not remember it, but was willing to concede that which appeared to be reflected from his review of documents he was shown.⁵ *See* Tr. 595 (“On the other hand, I have no reason to doubt I was there. I have no idea where I was June 9th. Again, I’m not trying to be difficult. I’m just trying to be clear.”). And, as it developed, there was uncertainty regarding whether the purported May 26 dinner with Murphy occurred. *See* Tr. 570-71.

Given the foregoing, I find that Andrew testified credibly. Andrew had substantial reasons not to share confidential information with Murphy or anyone else. He stood to gain millions of dollars from the merger. On the other hand, if he divulged confidential information, he knew he could jeopardize that possible gain, his job, and his reputation. Andrew also knew that severe criminal and civil sanctions could result if he divulged confidential information. Given Andrew’s credible testimony and the fact that the Division offered no evidence that Andrew would have any reason to give Murphy confidential information, I credit Andrew’s testimony that he did not pass confidential information about Radiant’s negotiations with NCR to Murphy.

⁵ Another example of Andrew’s efforts to be precise concerned whether he stayed at a hotel in Manhattan called the Surrey on July 6, 2011. Division counsel showed Andrew a \$443 charge for the Surrey on Andrew’s corporate credit card statement. *See* Tr. 634-36; Div. Ex. 98. Andrew conceded what his statement reflected and conceded that he likely stayed at the Surrey that night, but because “hotel ownership groups have multiple hotels,” he could not testify under oath that he stayed there. Tr. 634-35.

1.2.2 *Murphy*

In the OIP, the Division alleged that Murphy was the conduit through which Hill received information from Andrew. *See* OIP ¶¶ 2, 24, 27. It was therefore telling that, despite its burden of proof and its allegations that Murphy passed insider information to Hill, the Division rested without calling Murphy to testify. Tr. 833. Instead, *Hill* called Murphy, who testified that he never learned anything from Andrew about Radiant’s possible merger with NCR. Tr. 868-69, 874-76.

Murphy, who wore dark-framed, round glasses, had a full beard and a slightly ruffled appearance. He radiated peace and calm. Murphy was unshakeable and credible in his testimony. Listening to him testify, it was clear why, despite its burden, the Division declined to call him; his calm and collected testimony made plain that if Hill had learned anything about Radiant’s merger, he did not learn it from Murphy.

Murphy is a successful artist, having shown his works in well-known domestic and international venues. Tr. 862. At least one prominent celebrity owns some of Murphy’s works. Tr. 862. Like the Heyman brothers and Hill, Murphy graduated from the University of Georgia. Tr. 863. By July 2011, it had been twenty years since Murphy had a brokerage account. Tr. 910. He did not own any stocks in 2011 and did not have any other investments. Tr. 911. Murphy conceded that he would not “win any awards for [his] financial acumen.” Tr. 911.

During his testimony, Murphy described his close, forty-year friendship with Andrew and confirmed Andrew’s view of their friendship. Tr. 864; *see* Tr. 882-83. The Division confirmed that, as one might expect given their close friendship, Murphy and Andrew spoke to each other about many topics and issues that affected their lives. Tr. 883-84. Murphy admitted that he could not recall the specifics of any particular text exchange, phone call, or dinner conversation he had with Andrew five years earlier in 2011. Tr. 885-86.

Murphy denied that he had any knowledge of Radiant’s merger with NCR before it was announced. Tr. 868. He also denied being told anything about it by Andrew, overhearing Andrew discuss it, or seeing anything or inferring anything about the merger. Tr. 868-69. His calm and direct responses to questions belied any indication to the contrary.

Murphy denied that he ever spoke to Hill about Radiant’s business. Tr. 869. He did not speak to Hill about Hill’s investment in Radiant or about any other investment. Tr. 870. Murphy agreed that he spoke with Hill by phone three to four times per week. Tr. 881.

When asked about the Division’s specific allegations in the OIP, Murphy had no doubt “whatsoever” that Andrew did not discuss confidential information with him about the merger. Tr. 874; *see* Tr. 875. He also denied the allegation that he “relayed . . . material, nonpublic information he learned from [Andrew] to Hill.” Tr. 874. Murphy explained that he “didn’t have the information in the first place to give to” Hill. Tr. 874; *see* Tr. 876 (denying that he “ever receive[d] any material nonpublic information from Andy Heyman”).

Even on cross-examination, Murphy came across as honest and direct. He never became flustered when the Division attempted to rattle him. On the contrary, in the main, the Division's attempts fell flat.

The evidence showed that Murphy texted John at 9:34 p.m. on July 11, 2011, four or five hours after the merger was publicly announced. Div. Ex. 66 at 1; Tr. 908-09. In his text, Murphy offered his congratulations and said he saw the news reported on CNBC. Div. Ex. 66 at 1. After establishing that Murphy is an artist with no brokerage account and little financial acumen, the Division asked “[a]nd yet, you told John Heyman that you saw on CNBC news about Radiant being acquired?” Tr. 910-11. Rather than rising to the bait and answering the implication suggested by the Division's questioning, Murphy simply and confidently said, “That's right.” Tr. 911.

This led to an extended and ultimately fruitless discussion during which the Division sought to cast doubt on the likelihood that Murphy was actually watching CNBC at 9:30 p.m. that night. Tr. 911-15. This questioning included the Division's resort to CNBC's program listing for July 11, 2011, which purportedly showed that CNBC ran recorded programming at that hour. Tr. 913-14. The end result of this discussion was that: (1) Murphy actually did watch CNBC because of the state of the economy, his “responsibility . . . as a business owner,” and his desire “to understand what was going on”; and (2) owing to the fact that he has five children, Murphy likely saw the CNBC report hours before he texted John and then texted when he first had a chance to do so. Tr. 911-15.

Given Murphy's calm and collected demeanor, I find that he testified credibly. I therefore credit his testimony that he (1) did not obtain confidential information from Andrew; (2) never possessed confidential information about Radiant's merger; and (3) never relayed confidential information about Radiant's merger to Hill.

1.2.3 Hill and his trades

As noted, Hill's purchase of a large number of Radiant shares during the merger negotiations and his later sale and profit got the Division's attention. During its investigation—and initially during this proceeding—Hill maintained that he had never purchased any shares of Radiant before June 2011. Tr. 46-47. Hill later discovered that he had purchased \$10,000 worth of Radiant stock in 2001. Tr. 50-55. In any event, prior to June 2011, he had not purchased any stock in four years. Tr. 171, 303. Hill explained that he avoided stocks during the recession. Tr. 302.

During the hearing, the Division explored Hill's purchases by calling him as its second witness. Hill is a real estate developer who buys commercial sites and then leases them to restaurant chains, such as Chick-fil-A. Tr. 87. In 2011, he averaged making about \$350,000 per year, and his net worth was over \$5 million, excluding his home. Tr. 88-89.

Hill agreed that he and Murphy have been close friends for over twenty years and that they spoke several times a week by phone. Tr. 97, 110. Hill occasionally loaned Murphy money, for which Murphy expressed his appreciation. Tr. 98-100.

Hill knew Andrew through Murphy. Tr. 103-04. Hill was aware that Andrew worked for Radiant, and Andrew occasionally came up in Hill's conversations with Murphy. Tr. 103-05. Hill also knew John because their children were friends. Tr. 110-13. Finally, Hill knew Mark Haidet, Radiant's CFO. Tr. 114. At John's recommendation, Hill once helped Haidet find a location for a restaurant. Tr. 114-15.

Hill netted \$3.4 million on the sale of a restaurant site in February 2011. Tr. 229-30. He intended to allocate \$2.55 million of this amount to the purchase of two other sites. Tr. 231-32. One of the purchase contracts, involving \$2 million, terminated in March, however. Tr. 235-36. The other, involving \$550,000, terminated in May. Tr. 239-40.

Hill thus had cash on hand when, in mid-May 2011, he visited a SunTrust branch regarding one of his business accounts. Tr. 116. While there, he was referred to a financial adviser named Lynn Carter. Tr. 116-17. Hill told Carter that he had \$1.1 million to invest. Tr. 118-19. According to Hill, it was not his idea to speak with Carter and he was simply being polite in listening to her. Tr. 119-20. She "pitched" a number of different products to Hill, including a conservative investment fund. Tr. 122-24; *see* Div. Ex. 473. He did not mention being interested in buying Radiant or any other stock. Tr. 120.

Murphy and Hill spoke four times on May 26, 2011.⁶ Div. Ex. 506 at 3. The next day, Friday, May 27, 2011, while driving to a week-long beach vacation, Hill called Vanguard to set up a trading account. Tr. 127-28, 146; *see* Div. Ex. 169. After completing that call, Hill phoned Murphy and spoke to him for sixty-eight minutes. Tr. 151; Div. Ex. 506 at 4.

Hill's three daughters each had Wells Fargo accounts that were established by Hill's father. Tr. 151-53. Hill became the custodian of these accounts in 2006. Tr. 153. Between 2006 and 2011, Hill did not purchase any stocks in his daughters' accounts. Tr. 153-54. On June 1, Hill purchased 1,500 shares of Radiant stock in each of his daughters accounts—4,500 total shares—at a combined cost of over \$91,000, excluding fees and commissions.⁷ Tr. 156-59; Div. Exs. 202, 219, 249. Around that same time, Hill attempted to wire over \$1 million from one of his business accounts at SunTrust to the Vanguard account. Tr. 141-42, 162-63; *see* Div. Ex. 110; Div. Ex. 146 at 1. The next day, Thursday, June 2, 2011, Hill learned that the wired funds would not be available until the following day. Div. Ex. 82 at 4:20-6:00; Tr. 164-65.

The following day, June 3, 2011, while driving home from vacation, Hill again phoned Vanguard. Tr. 169. This time he was told that he could not execute a trade because he needed to open a separate brokerage account. Tr. 170. Hill was also told that it would take another one to two business days before he would be able to trade in the account. Div. Ex. 85; Tr. 172-73.

⁶ Although the phone records show that Murphy and Hill exchanged a total of eight phone calls, only four of those calls lasted for more than sixty seconds. Div. Ex. 506 at 3 (showing four calls under twenty seconds and four calls between seven and seventeen minutes).

⁷ Hill's daughters each had sufficient cash in their accounts to cover the purchases in question. *See* Div. Exs. 205, 224, 252.

Hill immediately called SunTrust⁸ because he wanted to buy Radiant “as soon as [he] was able to execute the trade.” Tr. 173-75. Hill spoke to Carter and told her he wanted to purchase \$1 million of Radiant stock. Tr. 175. He did not issue a stop-loss order. Tr. 175-76.

Carter executed the trade on Hill’s behalf, netting him 50,000 shares at a cost, not including commissions and a fee, of \$1,013,565. Div. Ex. 112. Hill denied that Carter asked whether he knew anyone affiliated with Radiant or whether he had any insider information. Tr. 188-89. He asserted that she only asked him those questions when he later sold his shares. Tr. 188.

Hill admitted that no investment adviser recommended Radiant to him. Tr. 90. Instead, he said that he had followed Radiant for a number of years by reading the business section of The Atlanta Journal Constitution.⁹ Tr. 93-94. He also said that he received positive feedback about Radiant’s point-of-sale products from restaurant employees who used the products. Tr. 245-47. He deemed it important that Chick-fil-A, which he described as a “big company,” used Radiant’s products. Tr. 247.

During the hearing, Division counsel questioned Hill about his SunTrust brokerage account application. Tr. 179-81. Although Hill agreed that he signed it, he did not agree with everything depicted on it and suggested that Carter, or someone at SunTrust, completed the form and that he should have done a better job of reviewing it. Tr. 180, 298-300. He noted that some information listed on the form was contradictory and some information was contrary to what he would have told Carter. Tr. 179-81. Hill said that he did not review the application carefully before signing it. Tr. 300.

On June 24, Hill phoned Vanguard and purchased 13,000 shares of Radiant at a cost of \$259,626. Tr. 196-199; Div. Ex. 196. He also purchased 20,000 shares of Ford for \$265,600. Div. Ex. 197. Hill phoned Vanguard again on July 1 and purchased 20,000 shares of Radiant for \$430,264. Tr. 207; Div. Ex. 198.

Hill purchased more Radiant shares in his daughters’ accounts on July 5. He purchased 1,100 shares in one daughter’s account for \$23,659, 1,700 shares in another account for \$36,630, and 1,300 shares in a third account for \$27,950. Tr. 211-20; Div. Exs. 203, 220, 250. The total purchase cost for these 4,100 shares was approximately \$88,240, excluding fees and commissions.

On July 8, Hill purchased 10,000 shares of Radiant in his SunTrust account at a cost of \$219,521. Div. Ex. 122 at 2; Tr. 225. When he did so, Hill did not tell Carter about his Radiant purchases in his Vanguard account or in his daughters’ accounts. Tr. 228.

⁸ Hill testified that he kept money in a brokerage account at SunTrust because he had a business banking relationship there which he wanted to maintain. Tr. 197.

⁹ Hill testified that he read quarterly reports. Tr. 94. In explaining that statement, it became apparent that what he meant was that he read reports about Radiant in the local newspaper and on the internet. Tr. 93-95.

As of Hill's July 8 transaction, Hill had purchased 93,000 shares of Radiant for a total cost of \$1,922,976. On his daughters' behalf, he had purchased 8,600 shares at a total cost of \$179,669.

Four days later, after the merger was announced, Hill sold his daughters' shares of Radiant for almost \$240,000, a 34% profit. Tr. 248-51; Div. Exs. 204, 221, 251. Hill also sold all 93,000 shares that he held in his SunTrust and Vanguard accounts for \$2,606,448, a 35% profit. Tr. 251-58; Div. Exs. 114, 199. In combination, Hill and his daughters' made over \$740,000 on his Radiant trades. According to Hill, when he sold the shares in his SunTrust account on July 12, Carter said she might receive questions from SunTrust's compliance department. Tr. 259. He also testified that she asked whether he knew anyone at Radiant. Tr. 259. Hill testified that he said that he did and that his familiarity with some of Radiant's people was a factor in his decision to buy its stock. Tr. 259-60.

Hill testified that he did not have any inside information when he purchased Radiant's stock. Tr. 292.

1.3 Hill's broker: Lynn Carter and her testimony

The parties disputed what Hill told Carter when he established his SunTrust brokerage account and what they discussed when he later executed transactions involving Radiant's stock. Hill asserted that prior to July 12 when he sold his Radiant shares, Carter had not asked him whether he knew anyone at Radiant or had any inside information. Tr. 188-89, 227-28, 259-60. Relying on Carter's testimony, the Division disputed these assertions.

On direct examination, Carter said that when she first met Hill in May 2011, he said that he wanted to invest conservatively. Tr. 756. According to Carter, investing over \$1 million in Radiant was inconsistent with a conservative investing strategy. Tr. 763. She also testified that she completed Hill's brokerage account application and that she did so based on information Hill gave her. Tr. 768-70. Contrary to Hill's testimony, Carter stated that before executing Hill's purchases on June 3 and July 8, she asked him whether he had any inside information or knew anyone at Radiant. Tr. 770-71, 779. She said that Hill said he did not have such information or know anyone there. Tr. 771, 779. Carter denied that Hill told her that he had purchased Radiant shares in other accounts. Tr. 780.

Carter testified that she was concerned about Hill's decision to sell on July 12 and consulted with her boss about whether to execute Hill's sell order. Tr. 781. According to Carter, after her boss directed her to execute the trade, she phoned Hill and warned him that because of his short-swing profits, he might encounter "problems in the future." Tr. 781. She testified that after Hill again assured her that he did not know anyone at Radiant, near the end of their conversation, he "made reference to the fact that he was happy for the guys at Radiant Systems, you know, they deserved to make money." Tr. 781-82. This comment concerned Carter because it was seemingly inconsistent with Hill's alleged statement that he did not know anyone at Radiant. Tr. 782.

Carter's cross-examination did not go well. Carter began by repeatedly contradicting herself—sometimes in the same sentence—while doggedly taking issue with the suggestion that she reached a conclusion that Hill wanted to invest conservatively. She first denied that she “concluded” that Hill should follow a conservative investment strategy and instead asserted “[i]t wasn't my conclusion; *it* was based on the conversation that I had with Mr. Hill during that initial meeting.” Tr. 785 (emphasis added). The only logical antecedent for the italicized “it,” however, is Carter's conclusion. Moreover, after denying that it was her conclusion that Hill should follow a conservative investment strategy, it is telling that Carter did not then say that Hill told her that he wanted to follow a conservative investment strategy. In context, the second half of her response makes sense only as a justification for her conclusion.

When confronted with her investigative testimony that “I guess my intent was or my objective for him was that it should be more conservative-based,” she said the quoted language was taken out of context. Tr. 786. Her explanation, however, demonstrated that, in fact, she concluded that he would or should invest conservatively because he chiefly invested in real estate.¹⁰

Hill's counsel next referenced Carter's investigative testimony that “maybe [she] was leading him to that conclusion of being more conservative,” and asked whether she remembered that she pushed Hill toward a conservative approach. Tr. 787. Carter responded that “[m]ost people” do not speak in terms of investing conservatively or aggressively and that Hill “*didn't use that terminology.*” Tr. 787-88 (emphasis added). Instead, she relied on what Hill told her to determine that he “needed” to be more conservative. Tr. 788. When Hill's counsel attempted to clarify that Hill “did not come in and say, Ms. Carter, I want to pursue a conservative investment strategy, did he,” Carter immediately contradicted herself, saying “yes, he did” before saying “[b]ecause he needed the money to invest in other places at some point in the future potentially.” Tr. 788. Once again, the second half of her response makes sense only as a justification for her conclusion. This sort of contradictory testimony continued before Hill's counsel moved on, having made his point. Tr. 788-89.

¹⁰ After Carter said her words were taken out of context, Hill's counsel noted that “they are your words,” and Carter said:

Well, because he said he wanted to make additional investments in Chick-fil-A. So he needed large sums of money periodically to invest in Chick-fil-A, because he was kind of a loan developer for Chick-fil-A and Willie's, and so he would need chunks of cash. So that in itself makes someone more conservative if they don't have a really long-term investment strategy. So if that could be interpreted that I persuaded him, I did not. That was something that he discussed with us saying that he -- his investment strategy was mostly real estate.

Tr. 787.

Counsel later returned to Hill's brokerage account application and asked whether Carter specifically discussed each item with Hill or instead completed it for him because he did not "speak the language." Tr. 793. Carter again showed sensitivity to the idea that she might have completed the application based on conclusions she reached from Hill's answers rather than based on what he directly said. Instead of directly answering counsel's question, she said that (1) she and Hill "discussed *it*," apparently referencing the application as a whole rather than each item; (2) Hill was sent the application and "had every opportunity to review every single thing that was on this form before signing it"; and (3) "he agreed with what was on it." Tr. 793 (emphasis added). Seeking to clarify, counsel asked Carter whether Hill told her, as was reflected on the application, that he both wanted to preserve capital and had an aggressive risk tolerance. Tr. 793. She responded "[y]es. The aggressive was because we're purchasing one stock," Tr. 793, thereby suggesting that listing an aggressive risk tolerance was a conclusion she reached based on what Hill wanted to do rather than what he directly said.

The strangest part of these exchanges about Hill's application was that it is not entirely clear what distinction Carter was trying to draw or why she attempted to draw it. In any event, her testimony made plain both that she concluded that Hill should invest conservatively and that, for whatever reason, she very much did not want to be seen as being responsible for having reached that conclusion.

Hill's counsel also asked Carter about the investment fund she had discussed with Hill during their initial meeting. *See* Tr. 122-24, 757-58 (initial discussion about the fund). Counsel asked whether, as specifically reflected in the documents Carter gave Hill,¹¹ the fund manager charged a 2% management fee. Tr. 790; *see* Div. Ex. 473 at 144. Instead of saying "yes," as was reflected on the fund brochure, Div. Ex. 473 at 144, Carter responded that the fee was "generic" and that SunTrust "could charge less than that," Tr. 790. Counsel responded by asking whether the brochure she provided to Hill—which was in front of her—stated that there would be a 2% fee. Tr. 790. Carter responded that "[a]ll brochures are generic" and that the brochure did not say that *Hill* would be charged 2%. Tr. 790-91. As with the investment strategy issue, why Carter refused to concede that the brochure said what it plainly said is a mystery.

Hill's initial purchase generated alerts in SunTrust's internal compliance system. *See* Tr. 771; Div. Ex. 26. The alerts were that Hill's investments were excessively concentrated in one industry and one security, Hill's order exceeded certain thresholds for amount and quantity, and the dollar-amount of the order was high in relation to assets held in his account. Div. Ex. 26 at 1. Carter responded within the compliance system to questions posed by stating that Hill's net worth was over \$7 million, relaying his knowledge of commercial real estate and Radiant's product, and indicating that Hill had no insider information. *Id.*

Given that Hill's application listed his net worth as \$5 million, his counsel asked Carter why she said his net worth was over \$7 million. Tr. 797. Carter responded that the higher figure included the value of Hill's home, which was not included in the lower figure. Tr. 797. When asked about investigative testimony in which she said she had forgotten that Hill said his net worth was \$5 million, and whether she now remembered that he said his house was worth \$2

¹¹ Carter e-mailed the brochure to Hill shortly after their first meeting. Tr. 757; *see* Tr. 122.

million, Carter affirmed that she now remembered that which she could not remember in February 2014. Tr. 798. When asked why she said Hill had no inside information but not that he did not know anyone at Radiant, she said those two things could be the same thing, then that she did ask Hill whether he knew anyone, next that saying whether Hill knew anyone was not required information, and finally that knowing someone at Radiant and having “illegal” information about it was included in her personal definition of having inside information. Tr. 799-801.

In March 2012, a SunTrust compliance analyst contacted Carter and asked for her “synopsis” of her conversation with Hill about his Radiant stock purchases. Div. Ex. 27 at 1. In responding, Carter did not mention whether Hill was asked or said anything about knowing anyone at Radiant or having insider information. *Id.* This led Hill’s counsel to ask whether she mentioned in the synopsis that Hill denied having inside information. Tr. 830. Carter’s response to this simple, foundational question was telling.

Carter first responded with a rambling, ten-line response that did not answer counsel’s yes-or-no question. Tr. 830. Counsel thus asked the question again, and Carter said that addressing whether Hill knew anyone at Radiant or had insider information “was not asked of me,” that she was not asked “to be extremely specific,” and “[t]hat was never required of me, you know, in, you know, in writing.” Tr. 830-31. Counsel then tried a third time, asking whether it was correct that Carter’s synopsis did not “reference . . . either insiders or inside information.” Tr. 831. Carter non-responsively replied:

You know, my interpretation, again, of insider trading and knowledge of the -- of insider trading might be different than yours. I’ve never been in a trial like this. I don’t know how to answer those questions.

Tr. 831. At this point, I intervened and the following colloquy occurred:

JUDGE GRIMES: Ms. Carter, it’s just a “yes” or “no” question. Does it say that?

THE WITNESS: Okay.

JUDGE GRIMES: Does it say that?

THE WITNESS: It basically says --

BY MR. WILLIAMSON:

Q Ms. Carter, isn’t the answer to my question “no”?

A What is the question?

Q The answer to my question is “no,” is it not?

A Ask me the question again, please.

Q Does the word -- does the phrase “inside information” or alternatively “material non-public information” appear in your e-mail?

A What I said was the client --

Q “Yes” or “no,” please, ma’am. I mean, I’ve been --

A I guess technically no.

Q And does it say that you asked him if he had knowledge of any insiders and he said no?

A It does not say that specifically.

Tr. 831-32.

As the foregoing demonstrates, Carter was easily the least believable witness who testified during this proceeding. Her responses during cross-examination evidenced her discomfort regarding questions about Hill's brokerage account application and whether she discussed knowledge of insiders or insider information. Given Carter's lack of credibility on these points, I cannot credit her testimony. I therefore credit Hill's testimony about the process of opening his account and his discussions with Carter. Carter completed the application, reaching her own conclusions about Hill's investing. She did not ask Hill—before either Radiant purchase—whether he knew anyone at Radiant or whether he had any insider information.

1.4 *The hearing*

In November 2016, I granted the Division's motion in limine to prevent Hill from calling one of the Division's counsel to testify in support of certain constitutional arguments he had raised. *Charles L. Hill, Jr.*, Admin. Proc. Rulings Release No. 4399, 2016 SEC LEXIS 4424 (ALJ Nov. 29, 2016). During a prehearing conference held a week later, I offered Hill's counsel the opportunity at the start of the hearing to make a proffer regarding Hill's constitutional claims. Prehr'g Tr. 35. Counsel accepted the offer and during the hearing preserved equal protection and due process arguments. Tr. 11-16. During the proffer, counsel referenced alleged differences in success rates that the Division enjoys in administrative proceedings as compared to when it litigates in district court.¹² Tr. 12, 14. When I asked counsel for the basis for this statement, he referenced the Wall Street Journal.¹³ Tr. 14. When I asked counsel whether he had reviewed the later law review articles questioning the validity of the statistics reported by the Wall Street

¹² In May 2015, I granted Hill's request for a subpoena for Commission records related to allegations reported in the Wall Street Journal that the Commission's chief administrative law judge admonished a former administrative law judge for not ruling in the Division's favor. *See Charles L. Hill, Jr.*, Admin. Proc. Rulings Release No. 2706, 2015 SEC LEXIS 2016 (ALJ May 21, 2015). I later denied a request that I certify my order for interlocutory review to the Commission. *Charles L. Hill, Jr.*, Admin. Proc. Rulings Release No. 2751, 2015 SEC LEXIS 2188 (ALJ June 1, 2015). The Office of the General Counsel filed a petition for interlocutory review, but withdrew it in October 2016 and provided Hill the documents he sought. *See Notice of Withdrawal of Petition* (Oct. 28, 2016). During his subsequent proffer, Hill's counsel did not reference any constitutional claim related to the allegation that the chief administrative law judge pressured anyone to rule in the Division's favor. *See* Tr. 11-16.

¹³ Presumably, counsel was referencing a May 2015 article. *See* Jean Eaglesham, *SEC Wins with In-House Judges*, The Wall Street J., May 6, 2015.

Journal, he responded that he was not aware of the articles and that the Division had not disputed the reported statistics. Tr. 15. I thus later referred counsel to the law review articles.¹⁴ Tr. 144.

After resting, the parties presented closing arguments. During its closing, the Division evidenced uncertainty regarding whether its position was that: (a) Andrew lied when he said he gave no confidential information to Murphy; or (b) he merely let slip, multiple times, that Radiant was in merger discussions. Tr. 941-44. As the argument progressed, it became clear that the Division was not comfortable with the idea of calling Andrew a liar but was equally uncomfortable with the improbable nature of the alternative theory.

During the Division's closing, I expressed doubt about counsel's assertion that I did not need to find that Andrew or Murphy lied. Tr. 940-41. Counsel first said I could merely decline to credit their "denials on . . . specific point[s]" and that I could do this because Andrew could not "remember a lot of details." Tr. 940-41. When I pointed out that one might be expected to remember intentionally divulging insider information, counsel said that I did not need to find that Andrew "intentionally divulged material, nonpublic information to Todd Murphy." Tr. 941. I responded by asking, if Andrew did not intentionally divulge information, how many times I would have to find that Andrew "accidentally let [confidential information] slip?" Tr. 941. Counsel did not directly answer my question and instead generally said that when all the evidence is considered, I could reasonably infer both that Hill had inside information and that he received that information from Andrew via Murphy. Tr. 941-42.

We then engaged in the following discussion:

JUDGE GRIMES: But aren't you -- I mean, you tried to show that some of the trading in this case occurred after specific events that were occurring between Radiant and NCR, right?

DIV. COUNSEL: Yes.

JUDGE GRIMES: So necessarily I think I would either have to find that Mr. Andrew Heyman was lying or that he let it slip -- let something slip multiple times if we're going to tie those events to the trading.

DIV. COUNSEL: Well, to be clear, Your Honor, we think the evidence would support the inference that he did tell Todd

¹⁴ See Urska Velikonja, *Reporting Agency Performance: Behind the SEC's Enforcement Statistics*, 101 Cornell L. Rev. 901, 976 (2016) ("After . . . add[ing]" the "dozens of contested court cases" the Commission wins in district court on motion but which the Wall Street Journal article omitted, "defendants' odds of prevailing against the SEC are the same in court and before an ALJ."); David Zaring, *Enforcement Discretion at the SEC*, 94 Tex. L. Rev. 1155, 1189 (2016) ("[T]here is no statistically significant distinction between the rates of success."); see also Joseph A. Grundfest, *Fair or Foul?: SEC Administrative Proceedings and Prospects for Reform Through Removal Legislation*, 85 Fordham L. Rev. 1143, 1178 (2016) ("[T]he data suggest that, in the aggregate, the Commission has no particular advantage or disadvantage in federal court or before an ALJ.").

Murphy, not even that it was something that slipped, to be clear for the record.

JUDGE GRIMES: So you think he's lying then?

DIV. COUNSEL: Your Honor, I think the evidence would support that finding. What I think in terms of answering --

JUDGE GRIMES: Let me be clear, are you arguing that he's lying?

DIV. COUNSEL: We are arguing that his testimony on that point should not be credited and that he -- whether he was confiding in Todd Murphy intentionally about the deal and revealing more than he meant to or not, that's something, Your Honor --

JUDGE GRIMES: Well, yeah, I realize that, but I'm trying to figure out what your position is. I mean, and you can -- you know, [you] can brief me. Either you're saying he was lying, that he didn't confide, or you're saying that he let things slip on multiple occasions. I can't see any other option. I'm trying to work this through. I mean, that's what you -- that has to be your position.

DIV. COUNSEL: Yes, sir.

JUDGE GRIMES: Tell me if that's your position or not.

DIV. COUNSEL: Yes, Your Honor.

JUDGE GRIMES: It's one of those two things, is what you think happened?

Tr. 942-43. Counsel agreed that there were two possibilities but, after an extended monologue, ultimately did not decide between the two. Tr. 943-44.

Later I asked what would happen to the Division's case if Murphy and Hill were not friends and did not know each other. Tr. 945. Counsel responded that the absence of the connection would "undermine" the Division's case because there would be no "link" between Andrew and Hill. Tr. 945. When I asked the Division why it thought that link was necessary, another counsel responded that the link was necessary because the Division has to show that Hill knew or should have known the information came from an insider. Tr. 945-46. The obvious upshot of this is that if Murphy credibly testified that he never had confidential information about Radiant's merger and never gave confidential information to Hill, the Division cannot meet its burden, no matter how suspicious Hill's trades were.

Issue

To carry its burden of proof, the Division had to show that Hill traded while in possession of insider information about Radiant that he knew or had reason to know came from Andrew indirectly through Murphy. Andrew credibly testified that he never gave such information to Murphy. Murphy credibly testified that he never received such information from Andrew, and as a result, never relayed it to Hill. Did the Division fail to carry its burden of proof?

Discussion and Conclusions of Law

2.1 Legal Principles

The Division charged Hill with violating Section 14(e) of the Exchange Act and Exchange Act Rule 14e-3. OIP ¶ 46; *see* 15 U.S.C. § 78n(e); 17 C.F.R. § 240.14e-3. In relevant part, Section 14(e) bars “fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders.” 15 U.S.C. § 78n(e). It also directs the Commission to promulgate “rules and regulations . . . reasonably designed to prevent[] such acts and practices.” *Id.* Under the authority in Section 14(e), the Commission promulgated Rule 14e-3, which provides:

(a) If any person has taken a substantial step or steps to commence, or has commenced, a tender offer (the “offering person”), it shall constitute a fraudulent, deceptive or manipulative act or practice within the meaning of section 14(e) of the Act for any other person who is in possession of material information relating to such tender offer which information he knows or has reason to know is nonpublic and which he knows or has reason to know has been acquired directly or indirectly from:

- (1) The offering person,
- (2) The issuer of the securities sought or to be sought by such tender offer, or
- (3) Any officer, director, partner or employee or any other person acting on behalf of the offering person or such issuer, to purchase or sell or cause to be purchased or sold any of such securities or any securities convertible into or exchangeable for any such securities or any option or right to obtain or to dispose of any of the foregoing securities, unless within a reasonable time prior to any purchase or sale such information and its source are publicly disclosed by press release or otherwise.

17 C.F.R. § 240.14e-3(a).

Hill concedes the threshold requirement in Rule 14e-3(a), commencement or substantial steps to commencement of a tender offer. Prehr’s Tr. 36. He also concedes materiality. *Id.* As the Division framed this case, it is therefore left to show that Hill: (1) traded while in possession of nonpublic information about NCR’s offer to buy Radiant; and (2) knew or had reason to know

the information was (a) nonpublic, *and* (b) acquired indirectly from Andrew.¹⁵ *See* Div. Reply Br. at 3 (asserting that Hill may be found liable “as long as [he] knew or had reason to know that the information about the merger originated with [Andrew] Heyman”); Tr. 946. To prove a violation of Rule 14e-3, the Division must show that Hill acted with scienter, meaning that he acted with “intent to deceive, manipulate, or defraud.” *SEC v. Ginsburg*, 362 F.3d 1292, 1297 (11th Cir. 2004). Breach of a duty is not an element under Rule 14e-3. *SEC v. Svoboda*, 409 F. Supp. 2d 331, 341 (S.D.N.Y. 2006).

The Division may prove its case through circumstantial evidence.¹⁶ Although suspiciously timed trades constitute significant circumstantial evidence,¹⁷ evidence of suspiciously timed trades, without more, is not sufficient to carry the Division’s burden.¹⁸ This is the case because such trades alone do not allow a factfinder to infer what information a Respondent possessed or from whom he obtained the information.¹⁹

2.2 *The Division failed to carry its burden of proof*

The outcome of this case turns on whether the Division carried its burden to show that Hill knew or had reason to know that he traded while in possession of nonpublic information that he acquired from Andrew via Murphy. The Division argues that in light of Hill’s unusual trading pattern, his relationship with Murphy, Murphy’s relationship with Andrew, Murphy’s pattern of communications with Hill and Andrew, and allegedly non-credible denials by Andrew

¹⁵ The Division could have attempted to show that Hill knew or had reason to know the information came from NCR, Radiant, or “[a]ny officer, director, partner[,] . . . employee[,] or” representative of NCR or Radiant. 17 C.F.R. § 240.14e-3(a) (emphasis added). It did not charge or present evidence, however, that Hill acquired information from any person or entity other than one particular Radiant officer, Andrew via Murphy.

¹⁶ *Ginsburg*, 362 F.3d at 1298; *SEC v. All Know Holdings, Ltd.*, 949 F. Supp. 2d 814, 817 (N.D. Ill. 2013); *see United States v. Rodriguez*, 392 F.3d 539, 544 (2d Cir. 2004) (holding that even in a criminal case, “the government is entitled to prove its case solely through circumstantial evidence, provided, of course, that” it meets its burden of proof as to “each element of the charged offense”).

¹⁷ *See Ginsburg*, 362 F.3d at 1299; *SEC v. Warde*, 151 F.3d 42, 48 (2d Cir. 1998).

¹⁸ *See SEC v. Happ*, 392 F.3d 12, 25 (1st Cir. 2004) (citing *SEC v. Truong*, 98 F. Supp. 2d 1086, 1097-98 (N.D. Cal. 2000)); *SEC v. Gonzalez de Castilla*, 184 F. Supp. 2d 365, 378-79 (S.D.N.Y. 2002) (relying on *Truong*); *cf. SEC v. Carroll*, 9 F. Supp. 3d 761, 768 (W.D. Ky. 2014) (“[E]vidence of mere contact with an insider followed by a trade is not enough to support an inference of liability.”).

¹⁹ *See Truong*, 98 F. Supp. 2d at 1097-98 (stating in a Section 10(b) case that “[a]llowing the SEC to tell a jury that ‘because the tipper’s trading was suspicious, the tipper must have possessed some material nonpublic information,’ would relieve the SEC of its burden to identify the information, prove its materiality, and prove possession and use by the tipper”).

and Murphy, I should infer both that Hill learned inside information *and* that he learned it from Andrew via Murphy, knowing or having reason to know it came from Andrew. Drawing reasonable inferences is part of an adjudicator's bread and butter. An adjudicator errs, however, when he or she relies solely on speculation, *i.e.*, when he or she reaches a conclusion in the "complete absence of probative facts to support the conclusion." *Lavender v. Kurn*, 327 U.S. 645, 653 (1946); *see Truong*, 98 F. Supp. 2d at 1098 ("[T]he Agency may not rest on evidence that would require a jury to speculate that the defendant possessed [material, nonpublic] information." (emphasis omitted)).

Here, Hill's trading pattern only goes so far. The timing of Hill's trades and the amounts he invested and profited, in light of his previous trading patterns, strongly suggests that Hill knew something about Radiant. *See Div. Br.* at 22-24. Indeed, Hill concedes that his trades were sufficiently suspicious to warrant the Division's investigation. *Tr.* 955. The trades, however, offer no basis to infer *who* told him whatever he knew, much less what he knew. At most, the Division has offered speculation, based on the fact Murphy and Hill spoke by phone and Murphy and Andrew spoke by phone, exchanged texts, and met in person, that Hill learned information from Andrew via Murphy. But nothing about the fact of Hill's trading pattern remotely suggests that Hill received information about Radiant *from Andrew via Murphy*, as opposed to some other source. In other words, the trading pattern does not reveal what Hill knew or from whom he learned it. In the face of credible denials from Murphy and Andrew, and the absence of any other evidence, there is no basis to credit the Division's speculation that, because Hill's trades were suspicious, Andrew gave Murphy information, intentionally or otherwise, or that Murphy gave information to Hill.

The Division, however, points to the number of texts between Andrew and Murphy and cell phone calls between Murphy and Hill as evidence to support its speculation. *Div. Br.* at 26. The Division's evidence showed that Andrew had various opportunities to convey confidential information to Murphy, who in turn had opportunities to relay information to Hill. Viewed in connection with Hill's trades and quick profits, the large number of text exchanges and phone conversations during the relevant period could be suspicious.

But Murphy's communication patterns with both Hill and Andrew were the same during Radiant's negotiation with NCR as before NCR launched its tender offer. Given how close Andrew and Murphy were and some personal events that occurred in Andrew's life during that time, *see Tr.* 511-26, the frequency of Andrew's communications with Murphy in 2011 is not unusual and, without more, is evidence of very little. Moreover, the Division presented no direct evidence of any particular text message or phone call in which anything remotely suspicious was discussed. Instead, the only direct evidence it presented about the content Murphy's text messages reflected entirely innocuous communications.²⁰ *See Div. Exs.* 37, 39, 41. Considering

²⁰ The Division states that it subpoenaed Andrew and Murphy in 2014 for their text messages, "but neither one was able to produce them." *Div. Reply Br.* at 9. It says "[t]he inability of Hill's friends to produce these text messages is not a deficiency in the Division's case." *Id.* Putting aside the characterization of Andrew as Hill's friend, this assertion misses the point. While it might not be the Division's fault that it could not show the content of texts exchanged between Andrew and Murphy, the Division nonetheless bears the burden of proof.

the foregoing facts together, the evidence of the number of texts or phone calls Murphy exchanged is significant of little or nothing. *See SEC v. Schvacho*, 991 F. Supp. 2d 1284, 1299-1302 & n.4 (N.D. Ga. 2014).

The Division made much of the fact that Andrew and Murphy exchanged over thirty texts on July 6. *See* Tr. 645-47, 652-53, 894; Div. Ex. 506 at 9-10. They also had three brief phone conversations. Div. Ex. 506 at 10. But July 6 was the day that Andrew's flight to New York was diverted to Baltimore, forcing him to use a car service to travel from Baltimore to New York for his 7:00 p.m. dinner with Nuti. Tr. 647, 652-53. He was also trying to arrange to meet Murphy afterwards at 9:30. It is thus not surprising that the two exchanged a higher than normal number of texts on July 6. *See* Tr. 647, 652-53. Absent more, the large number of texts they exchanged on July 6 is not significant and only supports the inference that Andrew and Murphy were trying to work out their plans for the evening. The number of texts does not support an inference that Andrew passed insider information to Murphy.

This leaves the Division's arguments that Andrew and Murphy were not credible. I have, however, already determined to the contrary that they were credible, *see supra* §§ 1.2.1 – 1.2.2, and I incorporate those factual findings fully herein.²¹

Andrew explained that it was his practice to step away if he received a business call and to isolate himself if he received a call concerning confidential information. Tr. 717, 739, 745-46. The Division offered nothing to rebut this testimony; no one testified that Andrew had ever been seen doing anything inconsistent with his stated practice. Andrew explained that he understood Radiant's strict insider trading policy and the consequences of violating that policy. Tr. 704-10, 741. Other than asserting that it is "reasonable to conclude that" he would do so, the Division offers no reason to explain why Andrew would affirmatively risk those consequences by giving confidential information to Murphy. *See* Div. Reply Br. at 4. Andrew affirmatively said that he did not give insider information to Murphy and, based on his practice, said it was "highly unlikely" that Murphy could have heard or inferred anything about Radiant's negotiations with NCR. Tr. 703; *see* Tr. 653-54. Andrew also said he would be "shock[ed]" if Murphy overheard anything. Tr. 739. The Division's speculation is not enough to overcome Andrew's credible

Even if the Division was unable, through no fault of its own, to obtain Murphy's text messages, it remains a fact that no evidence was presented about the content of most of the texts at issue.

To be clear, the Division is not required to produce the content of relevant communications to prove a person traded on insider information. *See Ginsburg*, 362 F.3d at 1298-99. But to support an inference about the content of relevant communications, it must actually produce some evidence to support the inference.

²¹ The Division argues that "numerous juries and courts have concluded that inside information was disclosed despite protestations to the contrary by the corporate insider and the defendant." Div. Reply Br. at 6. The fact that courts have held that a factfinder *may* permissibly disbelieve innocent explanations offered by defendants charged with insider trading does not conversely mean that a factfinder *must* disbelieve those innocent explanations or that the witnesses' denials in this case were unbelievable.

testimony. *See Schvacho*, 991 F. Supp. 2d at 1300-01 (relying on similar evidence). Likewise, Murphy convincingly testified that he never received insider information from Andrew and, not having received such information, never passed it to Hill.

Given Hill's trades, the Division argues that I should infer that both Andrew and Murphy were lying. But there is no basis to infer that either Andrew or Murphy were lying, let alone to conclude that they both were. In light of their credible testimony denying the Division's allegations, the Division has not carried its burden of proof. For the sake of completeness, I nonetheless address the Division's arguments below.

2.3 *The Division's arguments about Andrew's credibility fail*

2.3.1 *Arguments about circumstantial evidence and common sense*

The Division argues that the "evidence overwhelmingly supports the conclusion that [Andrew] confided in Murphy about the . . . merger and then Murphy shared the information with Hill." Div. Br. at 32. For starters, the Division notes the circumstances: Andrew and Murphy had a close relationship, Andrew trusted Murphy, Andrew talked with Murphy about "everything," Andrew and Murphy had frequent contact, the merger would make Andrew "the new leader of Radiant's business" and reap him millions of dollars, Andrew would no longer "be working with his older brother," and Andrew "struggled with whether to remain with NCR post-merger." *Id.*

This evidence is hardly "overwhelming." There is no basis to infer that, because it was possible for Andrew to disclose confidential information to Murphy, Andrew actually did so. Indeed, the fact that Andrew stood to lose millions of dollars, not to mention his job, reputation, and freedom, if he disclosed information about the merger to Murphy, cuts against the inference the Division seeks to draw. And, only if one assumes that which the Division seeks to prove—that Andrew told Murphy about the negotiations—does this evidence weigh in favor of determining that Andrew lied and possibly perjured himself during the hearing.²²

The Division says that "[c]ommon sense dictates that, given the significant impact of the merger on [Andrew's] life, he would seek the guidance of his closest friend and spiritual adviser." Div. Br. at 32-33. I have no doubt that a dose of common sense can be useful in

²² The Division says that, contrary to Hill's argument, I could decline to credit Andrew's and Murphy's testimony without concluding that they perjured themselves. Div. Reply Br. at 7; Resp. Br. at 26. It notes that a factfinder could simply conclude that they were "mistaken," had "faulty memor[ies]," or even "ha[d] convinced" themselves of the truth of their untrue testimony. Div. Reply Br. at 7. It also proposes that I could conclude that in light of other evidence, their testimony was not believable. *Id.* Whether either Andrew or Murphy actually perjured themselves is beside the point. The Division argues that their denials were false. If the Division is correct—if their denials were false—Andrew and Murphy left themselves open to the possibility that they could be charged with perjury.

assessing credibility and the way people commonly interact.²³ It is not clear, however, why common sense would dictate that Andrew would risk so much to divulge confidential information to a man with little financial acumen. Perhaps he would if he had nothing to lose by doing so. But Andrew, who has no history of securities violations, had much to lose by doing so.

The Division also argues that Andrew had a motive to deny that he disclosed information: embarrassment and damage to his reputation. Div. Br. at 33. But the desire to avoid embarrassment or damage to his reputation would equally support the determination that Andrew did not disclose anything in the first place. And the Division's discussion of Andrew's motive raises the unanswered question of what motive he would have had to divulge information to Murphy at great risk to himself.²⁴

2.3.2 Andrew's alleged hostility

The Division next says that Andrew was hostile toward it during the hearing. Div. Br. at 33. There are a few problems with this argument. First, I watched Andrew's demeanor and listened to his testimony over parts of two days. I saw no evidence of hostility.

Second, although demonstrated hostility toward a party may affect a witness's credibility, *see United States v. Haggett*, 438 F.2d 396, 400 (2d Cir. 1971), even if Andrew had shown hostility, which he did not, he might have had reason to resent being called to testify. This is particularly so if he suspected that the end result of his testimony would be the Division accusing him of being dishonest or involved in an insider trading scheme. After all, Andrew testified that he spent \$20,000 of his own money complying with the Division's subpoena for documents. Tr. 576, 649, 713. He no doubt spent more than that retaining counsel who represented him during the investigation and his investigative deposition and who accompanied him to the hearing. *See* Tr. 573. One might expect that a person in Andrew's situation would not appreciate being implicated in the Division's investigation and spending tens of thousands of dollars as a result.

Third, the Division's evidence of alleged hostility does not support its argument. The Division first says Andrew's hostility is evidenced by his refusal to admit "basic and indisputable facts." Div. Br. at 33. It faults Andrew, who is not an attorney, for "claim[ing] that he did not know that documents bates-labeled with the prefix 'A.H.' were produced by him, even though they were his documents and 'A.H.' are his initials." *Id.* (citing Tr. 573-75). All Andrew did at the cited pages, however, was confess confusion after being confronted with evidence he had never seen before and for which he was asked to vouch. *See* Tr. 575-76. After being shown a letter sent by his counsel and being given a chance to consider the letter and its attachments,

²³ *See Jibril v. Gonzales*, 423 F.3d 1129, 1135 (9th Cir. 2005); *United States v. Dispoz-O-Plastics, Inc.*, 172 F.3d 275, 288 (3d Cir. 1999).

²⁴ The evidence showed that in the past, Andrew had given Murphy sizeable cash gifts. Tr. 690-93, 896-97; Cohen Dep. at 19-21, 25-26. He could easily have done that again rather than risking so much by giving Murphy insider information.

Andrew conceded that it made sense that “a document with the letters ‘AH’ would have been documents that came from” him. Tr. 578.

The Division next points to Andrew’s denial that on July 6, 2011, he stayed at a hotel in Manhattan called the Surrey. Div. Br. at 33. But Andrew did not dispute that he stayed there. Instead, he agreed that he likely did stay there. Tr. 634-35. He simply refused to testify under oath that it was a fact that he stayed there because he did not specifically remember his stay and because “hotel ownership groups have multiple hotels.”²⁵ Tr. 635.

The Division further complains that Andrew “made counsel for the Division show him a document with the address of the Mercer Kitchen restaurant—a restaurant at which he had previously dined—before he would acknowledge that it was located on Mercer street.” Div. Br. at 33 (emphasis omitted). This hardly merits mention. Andrew said he did not know where the restaurant was located but after the very next question, said his memory about its location was refreshed.²⁶ Tr. 633.

The Division lastly supports its hostility argument by asserting that although Andrew sent a contemporaneous e-mail saying his July 6 meeting with Nuti went well, he denied during his testimony that the meeting went well. Div. Br. at 33; *see* Div. Ex. 439. The Division ignores Andrew’s explanation, corroborated by an e-mail from John and his testimony, Div. Ex. 438, Tr. 481-82, that although Andrew’s dinner with Nuti went well from an overall merger standpoint, Tr. 725-26, it went less well from a personal standpoint. Tr. 725-27. In fact, Andrew was unsure whether he would be able to reach an agreement with NCR regarding his compensation and continued employment. Tr. 726-27.

2.3.3 Incredulity, alleged conflicts, and inability to recall events

Beyond alleged displays of hostility, the Division asserts that given how close they were and how important the merger was, it is incredible that Andrew did not call Murphy the night the merger was announced. Div. Br. at 34. I agree that one might expect such a call at some point. The two did, however, exchange two texts that night and, as Andrew testified, it “was a chaotic time” and he had, as one would also expect, “a ton of work going on with lots of people internally and externally talking to me.” Tr. 684; Div. Ex. 506 at 11. He did not “have a minute.”²⁷ Tr. 684.

²⁵ In context, this is simply more evidence of what I have described as Andrew’s efforts to be precise.

²⁶ Hill notes that according to the Mercer Kitchen’s website, its address is on Prince Street, rather than Mercer. Resp. Reply Br. at 8 (citing <http://www.themercerkitchen.com>). If Google Maps is accurate, the restaurant is on the corner of Prince and Mercer.

²⁷ The Division says that Andrew’s testimony about not calling Murphy is contradicted by his testimony that he “probably slept” rather than going out to celebrate. Div. Br. at 34; Tr. 669. Because Andrew said three times that he did not know what he did that night, it is plain that he was merely speculating about what did that night. Tr. 669.

The Division says Andrew contradicted his brother's testimony to the effect that John told Andrew that John wanted the negotiations to move quickly. Div. Br. at 34; *see* Tr. 381, 407. Not so. Andrew did not testify that John did not tell Andrew that John wanted the negotiations to move quickly. Instead, Andrew said he did not remember *whether* his brother had "express[ed] to [Andrew] [John's] sense as to whether the negotiations should go quickly or slowly." Tr. 541-42. The same applies to the Division's argument about whether John told Andrew in May that he (John) intended to leave Radiant. Div. Br. at 34; *see* Tr. 559 ("I did not know but I, in my mind, would have . . . assumed he wouldn't" stay; "I don't know if we were talking about that stuff or not.").

That leaves the conflict about whether Andrew knew the merger hinged on his staying with the company. Div. Br. at 34. John testified that he told Andrew that NCR had made the merger contingent on Andrew signing a retention agreement. Tr. 474-75. Given when this information was conveyed to John, his communication with Andrew would necessarily have occurred in late June or early July 2011. Tr. 474. Andrew, on the other hand, testified that he was unaware NCR had made his retention a condition. Tr. 615-16. Necessarily, Andrew was testifying either that John did not tell him or that he did not remember John telling him. Because of the significance of the information, I take his testimony to be that John did not tell him.

The Division is correct that John's testimony and Andrew's testimony on this point conflict. But it is neither clear why this conflict matters nor certain which brother is correct. In the event it matters, I would credit Andrew's testimony on this point because on July 5, John told Andrew by e-mail that in the event Andrew could not reach an agreement, he (John) would "step in until we can get them comfortable with" another individual. Div. Ex. 438. If anything, John's e-mail conveyed to Andrew that the merger was not conditioned on Andrew reaching an agreement; if he could not reach an agreement, the merger would still occur because John would "step in."

Finally, the Division makes much of the fact that over fifty times during the hearing, Andrew said he could not remember something. Div. Br. at 35. Repeatedly saying "I do not recall" can, depending on the circumstances, damage a witness's credibility. *See United States v. Roberts*, 858 F.2d 698, 701 (11th Cir. 1988). Here, however, the Division asked Andrew a host of things that no one would reasonably be expected to remember more than five years later. These questions included matters such as the content of specific text, phone, or e-mail conversations, where Andrew dined on particular dates and with whom, what was on his calendar on specific days in 2011, and when certain unrelated events happened. Tr. 529-31, 544-46, 551-53, 556-57, 566, 579, 591, 614, 620, 623, 652; *see also* Tr. 540, 636-37, 670. And it appears Andrew sometimes used the phrase "I do not recall" to mean, not that he did not remember, but that he did not think he had done something. *See* Tr. 516 ("I don't recall getting together with him just for drinks."); *see also* Tr. 527 ("I don't recall any conversation like that."), 536, 627. To be sure, Andrew sometimes could not recall things one might expect him to remember. *See, e.g.*, Tr. 666-68. But the number of times he could not recall matters that one might expect him to remember did not approach fifty. The record, therefore, does not support the Division's assertion that Andrew's inability to recall certain details hurt his credibility.

2.4 *The Division's arguments about Murphy's credibility also fail*

Even putting my credibility assessment aside, *see supra* § 1.2.2, the Division's argument about Murphy's credibility proceeds from the assumption that he was lying. For instance, the facts that Andrew was like a brother to Murphy and Murphy knew that Andrew would not want Murphy to reveal confidential details about his private life suggest that, if Andrew told Murphy about the merger, Murphy would keep that information to himself and not tell Hill or anyone else. *See* Div. Br. at 35. The Division's argument that these facts give Murphy a motive to protect Andrew assumes the result it hopes to prove; it does not prove that result. Likewise, the fact that in testifying Murphy would not want to embarrass Andrew or "seal Hill's fate," *id.* at 35-36, does not show in the first instance that Murphy ever had confidential information.

The Division next argues that Murphy's testimony was "flatly contradicted by" Hill's and Andrew's testimony. Div. Br. at 36. I am not entirely sure what to make of this aspect of the Division's argument. It thinks Andrew and Hill were dishonest but nonetheless argues that other aspects of their testimony that allegedly contradict Murphy's testimony are sufficiently reliable for me to conclude that Murphy also lied. Putting this anomaly aside, however, Murphy's testimony was not "flatly contradicted by" Hill's and Andrew's testimony.

As to Hill, Murphy testified that he "did not gossip to . . . Hill about developments in Andrew Heyman's life." Tr. 887. He also said that he did not "think [he] ever" "talked to . . . Hill about Andrew" or Radiant. Tr. 887-88.

For his part, Hill was asked whether, "over the years," he and Murphy had "periodically talk[ed] about Andrew." Tr. 104. Hill responded, "[n]ot very often but occasionally [Murphy] would mention [Andrew]." Tr. 104. Hill also said that Murphy "[r]arely but occasionally . . . would" mention things about Andrew to Hill. Tr. 104. For instance, Hill once asked Murphy what his plans were for a particular evening, and Murphy explained that he was going to see Andrew's "new place" and have dinner with him. Tr. 107-08. Murphy's comment about Andrew's "new place" prompted Hill to ask whether Andrew had bought a new home, and Murphy explained Andrew had recently divorced. Tr. 107-08. Hill thus testified that, at some point, he learned from Murphy that Andrew was divorced. Tr. 104. He clarified, however, that "[w]e weren't discussing [Andrew]. It was a very offhand comment like that." Tr. 108.

At another point, Murphy mentioned that Andrew was selling his house. Tr. 104-05. Once, Hill asked Murphy for a hotel recommendation in Manhattan and Murphy recommended a hotel that Andrew liked. Tr. 105. Finally, Hill testified that at some point between 2004 and 2006, either he or Murphy mentioned a news article about Radiant. Tr. 105-06. Until the merger was announced, that was the last time Hill and Murphy spoke about Radiant. Tr. 105-06, 108-09.

To say, as the Division does, that Hill "flatly contradicted" Murphy is a stretch. That Murphy might have "occasionally" mentioned Andrew's name to Hill does not mean Murphy gossiped or talked about Andrew. And off-handedly mentioning—in the context of explaining Murphy's plans for the evening—that Andrew had a "new place" and was divorced, does not constitute gossiping by Murphy or talking about Andrew with Hill. Nor, over the course of a

twenty-year friendship, does mentioning—in an unexplained context—that Andrew was selling his house. The same is true of the time Murphy passed on a hotel recommendation based on his knowledge of where Andrew stayed while in Manhattan. Finally, a single random comment ten years ago about a news article about Radiant is a thin reed on which to rest a claim that Hill “flatly contradicted” Murphy’s testimony.

As to Andrew, after denying that he gossiped or talked to Hill about Andrew, Murphy was asked whether he ever “would have spoken to Andrew . . . about . . . Hill.” Tr. 887-88. Murphy said that he would not have done so. Tr. 888. When he was asked whether he ever spoke to Andrew about his business at Radiant, Murphy responded that he did not “think Andy thinks of me as a business guy to talk to things -- about things like that.” Tr. 884.

Andrew testified that Murphy “occasionally talk[ed] to [Andrew] about . . . Hill.” Tr. 533. Andrew explained that Murphy liked to connect people and thus, in hopes of connecting Andrew and Hill, mentioned something about Hill “doing interesting things in the real estate market.” Tr. 533. Andrew testified that he and Murphy discussed Andrew’s personal and professional problems. Tr. 518. When Andrew was asked whether Murphy “ever express[ed] any interest in [Andrew’s] business,” Andrew said that “what he expressed an interest in was my life, and in doing that we would talk . . . little bits here and there, about what was going on at Radiant. It was a small fraction of the conversation, but there would be that kind of dialogue from time to time, yes.” Tr. 527.

The foregoing testimony is likewise a weak basis to attack Murphy’s credibility. Mentioning that Hill did something “interesting . . . in the real estate market” literally constitutes “talking” about Hill. But the Division set up this line of questioning by asking Murphy whether he ever gossiped with Hill about Andrew before it asked Murphy about talking to Andrew about Hill. Tr. 887-88. And pursuing Murphy’s interest in what was going on in Andrew’s life, which touched on what was going on at Radiant, could literally be encompassed in the idea of talking about Radiant. But it is not difficult to see how Murphy would view his discussions with Andrew about what was going on in Andrew’s life, as discussions about Andrew and not Radiant.²⁸

2.5 *The Division’s efforts to topple strawmen are not convincing*

Finally, the Division sets up a series of strawmen, arguing that Hill has misconstrued the Division’s burden and relevant legal requirements. Div. Reply Br. at 2-3. It accuses Hill of arguing that the Division was required to show that Andrew tipped Murphy *with the intent that* Murphy or Hill would trade and profit from doing so. *Id.* at 2 (citing Resp. Br. at 4-5). The Division ignores the context of Hill’s argument. At the cited pages, Hill simply argues about

²⁸ The Division also references Murphy’s text to John the night the merger was announced. Div. Br. at 37. Although it doubts Murphy saw news about the merger on CNBC, I have addressed Murphy’s explanation in the context of finding him credible. *See supra* § 1.2.2.

what he perceives as a change in the Division’s position.²⁹ And the change he perceives was a switch during the hearing from arguing that Andrew intentionally tipped Murphy to arguing that he might have done so unintentionally. Resp. Br. at 5. Whether Andrew tipped Murphy *with the intent that* Murphy or Hill would trade was not the subject of Hill’s argument because that was not an issue about which the Division had appeared to change its position. *See id.* at 5; Tr. 940-43.

The Division knocks this strawman down again when it says Hill’s argument—that rather than deliberately tip Murphy, Andrew would simply have given Murphy money—misunderstands the Division’s burden because it did not need to show that Andrew tipped Murphy *so that* Hill would trade and profit. Div. Reply Br. at 3-4. By its terms, however, Hill’s argument is that it would be irrational for Andrew to intentionally tip Murphy; it is not about elements the Division must prove.³⁰ *See* Resp. Br. at 27-28.

The Division also knocks down the alleged argument that it was bound to show that Andrew and Murphy violated the law. Div. Reply Br. at 5 (citing Resp. Br. at 26-27). Again, the Division is mistaken. Hill instead argued that the Division’s position in the OIP:

that Heyman deliberately shared inside information with Murphy, who then deliberately passed the information along to Hill[,] would necessitate that both [Andrew] and Murphy committed

²⁹ In full, Hill argued:

While the Division had consistently asserted – from the allegations of the Order Instituting Proceedings (“OIP”) through the close of evidence at trial – that this was an intentional tipping case, it changed course in closing argument. Tacitly conceding that it had failed to prove its case, the Division argued, “nor are we saying that Andy Heyman intentionally tipped Todd Murphy so that Todd Murphy could then intentionally tell Char[ey] Hill Instead, the Division offered a substitute theory: maybe Heyman “simply let a little too much information slip”

Resp. Br. at 5 (quoting Tr. 940).

³⁰ Hill argues that Andrew had no motive to give Hill “any sort of financial benefit.” Resp. Br. at 27. As to Murphy, Hill argues that Andrew:

said he would simply have given money to Murphy if he needed it, as he actually did in [donating money toward Murphy’s move to New York]. Thus, it would have been irrational for [Andrew] to resort to tipping, an act with severe potential criminal and civil consequences, to benefit Murphy, much less Hill.

Id. at 27-28.

securities fraud (and/or aided and abetted securities fraud) and then doubled down and perjured themselves by denying what they had done. *These actions would have been contrary to their penal, professional, personal, financial and reputational interests.*

Resp. Br. at 26-27 (emphasis added). This is not an argument that the Division was required to show that Andrew and Murphy violated the law. It is instead an appeal to common sense; Hill is essentially arguing that it would have been crazy for Andrew and Murphy to do what the Division alleges.

Record Certification

Under Rule 351(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.351(b), I certify that the record includes the items set forth in the record index issued by the Secretary of the Commission on March 27, 2017.

Order

Based on the findings and conclusions set forth above, this administrative proceeding is **DISMISSED**.

This initial decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this initial decision within twenty-one days after service of the initial decision. A party may also file a motion to correct a manifest error of fact within ten days of the initial decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then a party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct manifest error of fact. The initial decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or motion to correct manifest error of fact or the Commission determines on its own initiative to review the initial decision as to a party. If any of these events occur, the initial decision shall not become final as to that party.

James E. Grimes
Administrative Law Judge