In the
United States Court of Appeals
for the Seventh Circuit

No. 19-2814

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ERIC WELLER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 17 CR 643 — **Matthew F. Kennelly**, *Judge*.

ARGUED SEPTEMBER 24, 2020 — DECIDED JULY 7, 2022

Before EASTERBROOK and MANION, *Circuit Judges*.*

EASTERBROOK, *Circuit Judge*. Eric Weller has been convicted of a crime related to inside trading in securities, see *United States v. O'Hagan*, 521 U.S. 642 (1997), and sentenced to a year and a day in prison. The evidence at trial permitted a jury to find that Weller was

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* Circuit Judge Kanne, a member of the panel at the time of argument, died on June 16, 2022. This appeal is being decided by a quorum. 28 U.S.C. § 46(d).

a remote tippee of Shane Fleming, a vice president of Life Time Fitness, Inc., who learned that his company was likely to be acquired by a private-equity firm at an above-market price.

Fleming alerted his friend Bret Beshey, who passed the information to Chasity Clark and Peter Kourtis. Both Clark and Kourtis knew that Fleming had misappropriated the information. Clark tipped off one additional person, while Kourtis relayed the information to four more, including Weller. Most of the tippees made profits by buying out-of-the-money call options, which they sold once the offer was announced. Weller made more than $550,000. After reaping profits, the tippees showed their appreciation through kickbacks. Weller, for example, provided Kourtis with at least 10 pounds of marijuana, which he sold for $20,000. Kourtis shared some of those proceeds with Beshey, and Beshey shared with Fleming. All of this could have been found by a reasonable jury, as the district judge concluded when denying Weller's motion for acquittal. 2019 U.S. DIST. LEXIS 126515 (N.D. Ill. July 30, 2019).

One element of trading on inside information is breach of a duty to keep the information confidential. See *Dirks v. SEC*, 463 U.S. 646 (1983). Weller contends that the indictment does not adequately allege that he knew of Fleming's violation of that duty. The parties agree that this allegation, if present at all, must be found in ¶3(f) of the indictment, which says (with names in all-caps type written normally):

> Beginning on or about February 24, 2015, Kourtis, while in possession of the material, nonpublic information he received from Beshey, which information Kourtis knew that Beshey's close personal friend and Life Time Fitness, Inc. insider, "Shane," had misappropriated in breach of a duty of trust and confidence to keep such information confidential, provided the information to [4 names, including Weller], with each of whom Kourtis had a close personal relationship. Based on the information provided by Kourtis, [4 names, including Weller] knew: (i) that Kourtis had learned the material, nonpublic information from Kourtis' close personal friend [Beshey]; (ii) that Kourtis's close personal friend had learned the information from a close personal friend and senior employee [Fleming] at Life Time Fitness, Inc.; and (iii) that the senior employee at Life Time Fitness, Inc. had misappropriated the material, nonpublic information from Life Time Fitness, Inc. in breach of a duty of trust and confidence to keep such information confidential.

What's missing from this stilted verbiage is an express allegation that Fleming breached a duty to his employer by providing the information to Beshey. And that omission, Weller contends, means that the indictment does not allege an offense. But the district judge denied Weller's motion to dismiss. *United States v. Beshey, Mansur & Weller*, 2019 U.S. DIST. LEXIS 9569 (N.D. Ill. Jan. 22, 2019).

An express allegation that Beshey's gratitude was a benefit to Fleming would have sufficed. Weller says not, relying on *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), for the proposition that the benefit must be in the form of money or other property. But *Salman v. United States*, 137 S. Ct. 420, 428 (2016), disapproved *Newman* and reaffirmed the statements in *Dirks* that assisting a friend or relative counts as a personal benefit.

Still, the indictment does not allege in so many words that Fleming received a forbidden benefit. It does say that Beshey was Fleming's friend and that Fleming violated a duty to his employer. Is that close enough? Given *Salman* and *Dirks*, the answer must be yes. An indictment suffices when it notifies the defendant of the charge, which can be done without parroting the words of the statute-or, for inside-trading doctrine, parroting the language of the Supreme Court's decisions. See *United States v. Resendiz-Ponce*, 549 U.S. 102 (2007); *United States v. Khan*, 937 F.3d 1042 (7th Cir. 2019). *Resendiz-Ponce* holds that an implicit allegation suffices. 549 U.S. at 107. Paragraph 3(f) meets that standard.

To the extent that Weller contests the sufficiency of the evidence on the ground that the United States did not prove a monetary benefit to Fleming, that again rests on the holding of *Newman*, which did not survive *Salman*. Weller does not contend that the jury instructions were deficient on this score, so we agree with the district judge that both the indictment and

the evidence permit a conviction consistent with *Dirks* and *Salman*.

A careful reader may have noticed the odd phraseology in this opinion's first sentence: "a crime related to inside trading in securities". We put it that way because, although Weller was charged with three violations of § 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b), and the SEC's Rule 10b-5, 17 C.F.R. § 240.10b-5, the jury acquitted him of those substantive charges. He was convicted on a single charge of conspiracy to violate the securities laws, in violation of 18 U.S.C. § 371, and he maintains that the prosecution did not show a conspiracy. The jury's decision is inscrutable, but there is no priority among inconsistent verdicts. *United States v. Powell*, 469 U.S. 57 (1984); *Yeager v. United States*, 557 U.S. 110 (2009). We must assess the conspiracy conviction as if it had been the only charge.

When denying Weller's motion for judgment of acquittal, the district judge remarked that it is hornbook law that conspirators need not know everyone else's names and roles. *Blumenthal v. United States*, 332 U.S. 539 (1947). Weller insists that things are otherwise for inside trading. He relies on *United States v. Geibel*, 369 F.3d 682 (2d Cir. 2004), which holds that it is not possible to find a conspiracy among the first tipper and all remote tippees unless the first tipper expected or intended wide distribution of the information. The indictment alleges that Fleming met with some of the remote tippees and received kickbacks from at least two, but it does not include language matching *Geibel*'s.

Nor did the jury instructions. It follows, Weller contends, that he must be acquitted.

That's not an appropriate conclusion. What follows from *Geibel* is that *Fleming* would have been entitled to acquittal, had he been charged with conspiring with Weller and other fourth-tier tippees. Fleming conspired with Beshey but not with Weller. The problem for Weller, however, is that a jury need not convict all charged members of the conspiracy in order to convict any given charged member. If the indictment charges that A, B, C, D, and E conspired, and the jury finds that only A, B, and C did so, a conviction of A is valid if supported by the evidence. *United States v. Duff*, 76 F.3d 122, 126 (7th Cir. 1996). The difference is a variance, to be sure, but not a prejudicial one. In *Geibel* itself the Second Circuit concluded that the conspiracy supported by the evidence was smaller than the one charged in the indictment, but it affirmed the convictions of those inside traders who conspired with at least one other person. No matter what else one makes of the evidence, Weller and Kourtis conspired to misuse material nonpublic information. They acted in concert for their private benefit, in violation of legal rules, which is a conspiracy. For the same reason *Geibel* affirmed the convictions of three defendants, we affirm Weller's. (And, again for the same reason, the jury instructions did not need to include a buyer-seller instruction. The instructions defined the word "conspiracy" in a way that excluded stand-alone commercial transactions.)

Weller has three other arguments: that the judge should not have allowed the jury to hear statements he made to other tippees after the inside trading had ended; that his sentence is too high compared with other defendants; and that he should not have been ordered to forfeit his profits. None of these contentions persuades us. Weller's statements were properly received as admissions, whether or not they came within the coconspirator exception to the hearsay rule. Fed. R. Evid. 801(d)(2)(E). The sentence is proper because Weller made more than any other tippee, which produced a higher range under the Sentencing Guidelines. The 366-day sentence is below the Guideline range and therefore cannot be attacked as creating unwarranted disparities, in violation of 18 U.S.C. § 3553(a)(6). *United States v. Bartlett*, 567 F.3d 901, 907-08 (7th Cir. 2009). What's more, Fleming pleaded guilty and cooperated; Weller did not. And the judge was entitled to find, by a preponderance of the evidence, that Weller made forfeitable profits by substantive violations of the securities laws. The jury's conclusion that guilt was not shown beyond a reasonable doubt does not constrain a judge's decision on a lower standard of proof. *United States v. Watts*, 519 U.S. 148 (1997).

AFFIRMED

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

UNITED STATES OF AMERICA	)	
vs.	)	**Case No. 17 CR 643 – 6**
ERIC WELLER	)	

MEMORANDUM OPINION AND ORDER

(Filed Jul. 30, 2019)

MATTHEW F. KENNELLY, District Judge:

After a trial, a jury returned a verdict convicting Eric Weller on a charge of conspiracy under 18 U.S.C. § 371 and acquitting him on three charges of securities fraud under 15 U.S.C. § 78j(b) and 78ff(a) and 17 C.F.R. § 240.10b-5. Weller has moved for entry of a judgment of acquittal on the conspiracy charge or for a new trial.

1. Motion for judgment of acquittal

In considering Weller's motion for judgment of acquittal, the Court assesses whether there is sufficient evidence from which the jury reasonably could find him guilty beyond a reasonable doubt. The Court views the evidence in the light most favorable to the government and draws reasonable inferences in its favor, keeping in mind that it is the jury's function to determine the credibility of the witnesses, resolve evidentiary conflicts, and draw reasonable inferences. *See*,

e.g., *United States v. Payne*, 102 F.3d 289, 295 (7th Cir. 1997).

With regard to the conspiracy charge, the indictment alleged that Weller conspired along with eight others to willfully use, via the facilities of a national securities exchange, a manipulative and deceptive device by engaging in a scheme to defraud and a course of conduct that operated as a fraud on others. The charged conspiracy involved the use (by Weller and others) of material, non-public information disclosed in violation of fiduciary duty by a high-level executive at Life Time Fitness, Inc. to purchase out-of-the money Life Time call options, expecting that the price of the stock would increase significantly when the information became public. Weller was a downstream tippee who did not deal directly with the executive, Shane Fleming. The allegations are discussed further in the Court's ruling denying a co-defendant's motion to dismiss the indictment, which Weller adopted. *See United States v. Beshey*, No. 17 CR 643, 2019 WL 277730 (N.D. Ill. Jan. 22, 2019).

In his motion, Weller argues first that the government failed to prove the charged conspiracy and instead proved, at most, a series of individual deals between tippees and Peter Kourtis, who had obtained the inside information from Bret Beshey, who in turn had obtained it directly from Fleming. *See* Def.'s Mot. at 8. (Weller also may be renewing the motion to dismiss; if so, the Court overrules the request for the reasons stated in its earlier decision.)

The Court overrules Weller's argument. Kourtis testified that he disclosed to Weller and others the information that Fleming had provided; told each of them that Life Time would soon be acquired by another company, which would drive its stock price up; told each of them that the information was reliable because it had come from his close friend (Beshey), who in turn had received the information from his longtime friend (Fleming); and told each of them that the Life Time insider who had disclosed the information had done so for the benefit of his friend Beshey and not for a legitimate corporate purpose. There was also evidence, taken in the light most favorable to the government, that Weller acted on this information by purchasing out-of-the-money Life Time call options. Finally, there was evidence—testimony from Kourtis—that Weller paid him a kickback consisting of a total of ten to fifteen pounds of marijuana, which Kourtis was able to sell for over $20,000. Kourtis also testified that other recipients of the information paid kickbacks, in cash. Kourtis further testified that he, in turn, paid kickbacks to Beshey.

This evidence was sufficient to permit a reasonable jury to find that the single conspiracy alleged in the indictment had been proven beyond a reasonable doubt. There was no evidence that Weller was aware of any other remote tippee, but as the Court stated in denying the motion to dismiss, the law does not require each conspirator to know all of the others or all of the details of the conspiracy. *United States v. Blumenthal*, 332 U.S. 539, 557 (1947); *United States v. Bolivar*, 532

F.3d 599, 603 (7th Cir. 2008). The evidence support the proposition that there was an overarching agreement to benefit the conspirators and others by misuse of the information Fleming had disclosed and that Weller knowingly joined a conspiracy and had a common objective that was wider objective than simply person A giving information to person B.

In his reply brief, Weller argues that the evidence was also insufficient because the government did not prove that he was aware of any personal benefit to Fleming and that he did not agree to commit an unlawful act in furtherance of the alleged conspiracy. These arguments are forfeited because Weller did not make them in his motion, but even if they are not forfeited, they lack merit. Kourtis's testimony, which the jury was entitled to believe, was sufficient to establish Weller's awareness that Fleming was personally benefitting from a breach of fiduciary duty and that he agreed to carry out the conspiracy by making trades to profit personally and pay a kickback in return. The proposition that Kourtis's testimony regarding his dealings with Weller is not directly corroborated does not carry the day; the testimony was not inherently unbelievable in such a way that it could not support a jury verdict. And the fact that Weller may have done his own investigation before trading does not detract from the proposition that he had, and used, material nonpublic information to make his trades.

For these reasons, the Court denies Weller's motion for a judgment of acquittal.

2. Motion for new trial

In seeking a new trial, Weller argues that the Court should have given his proposed "buyer-seller" instruction regarding proof of the conspiracy charge, *see* Def.'s Mot. at 9-10; the Court erroneously admitted post-conspiracy conversations that were not in furtherance of the charged conspiracy, *see id.* at 10-11; and one of the instructions on the substantive insider trading charge was erroneous, *see id.* at 12.

On the first issue, a defendant is entitled to a theory-of-defense instruction if it is a correct statement of the law; the evidence supports the instruction; the defense is not otherwise covered in the jury charge; and the failure to give the instruction would deprive the defendant of a fair trial. *See*, *e.g.*, *United States v. Brown*, 865 F.3d 566, 571 (7th Cir. 2017). "Similarly, a district court may refuse a proposed jury instruction if the other instructions convey the same message as the proposed instruction." *Id.* at 571-72 (internal quotation marks omitted). Here, Weller has not shown that the failure to give the instruction deprived him of a fair trial. And the instructions describing what the government was required to prove to sustain the conspiracy charge accurately required the government to prove Weller's knowing membership in "the conspiracy as charged in count 1," including the following:

> The government must prove beyond a reasonable doubt that the defendant was aware of the illegal goals of the conspiracy and knowingly joined the conspiracy. A person is not a member of a conspiracy just because he knows

> or associates with people who were involved in a conspiracy, knows that there is a conspiracy, or is present during conspiratorial discussions.

Jury Instructions (dkt. no. 248) at 15. For these reasons, as well as the others cited by the government, the absence of this instruction does not entitle Weller to a new trial.

Second, the Court did not improperly admit post-conspiracy declarations that were not in furtherance of the conspiracy as Weller contends. This evidence concerned statements by Weller to Kourtis and Alex Carlucci, another charged conspirator, about not cooperating with and lying to law enforcement, as well as a statement by Weller to Carlucci that he should not talk to law enforcement and should not testify and that he (Weller) "can crush Pete [Kourtis] in court." The Court notes, first, that Weller did not object to the admission of these statements on this basis before or contemporaneously with their admission, and thus he has forfeited the point. But even if not forfeited, Weller's contention lacks merit. His own statements, even if seen as post-conspiracy, are nonetheless relevant statements of an opposing party that the government appropriately could introduce under Federal Rule of Evidence 801(d)(2)(A) and thus were not hearsay. And the statements of others during the same conversation were appropriately admissible to put Weller's own statements in context and likewise were not hearsay. *See*, *e.g.*, *United States v. Tolliver*, 454 F.3d 660, 666 (7th Cir. 2006).

Finally, Weller's challenge to one of the instructions on the substantive insider trading charges—arguing that it effectively directed a verdict in the government's favor—is somewhat perplexing, seeing as how the jury acquitted him on those charges. And this instruction was not incorporated into the instructions regarding the conspiracy charge (nor did Weller ever ask the Court to do so). The Court cannot see a viable argument regarding how the absence of this instruction deprived Weller of a fair trial. That aside, the instruction was legally appropriate in light of the Court's analysis on the motion to dismiss and during the jury instruction conference.

For these reasons, the Court denies Weller's motion for a new trial.

Conclusion

For the reasons stated above, the Court denies defendant Eric Weller's motion for judgment of acquittal or for a new trial [dkt. no. 270].

Date: July 30, 2019

/s/ Matthew F. Kennelly
MATTHEW F. KENNELLY
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

UNITED STATES,	)	
Plaintiff,	)	
vs.	)	
BRET BESHEY, AUSTIN MANSUR, and ERIC WELLER,	)	**Case No. 17 CR 643**
Defendants.	)	

MEMORANDUM OPINION AND ORDER ON DEFENDANTS' PRETRIAL MOTIONS

(Filed Jan. 22, 2019)

Bret Beshey, Austin Mansur, and Eric Weller are charged, along with several other defendants, with securities fraud and conspiracy. Three defendants have entered guilty pleas, and the charges against three others have been deferred via pretrial diversion agreements. Beshey, Mansur, and Weller have filed motions seeking dismissal of the charges as well as various discovery particulars. The Court rules on the motions as described below.

1. Motion to dismiss

Mansur, joined by Weller, have moved to dismiss the charges against them on the ground that they fail to charge an offense. The indictment alleges as follows.

Shane Fleming, a defendant who has since pled guilty, was a vice president at Life Time Fitness, Inc. In that capacity, he learned of acquisition discussions involving private equity firms that would result in an increase in the price of LTF's stock to at least $65 per share. Fleming had a fiduciary duty to LTF to maintain the confidentiality of this material, nonpublic information and not to disclose it to others. Fleming nonetheless misappropriated this information and disclosed it to Beshey, with whom he had a close personal relationship, knowing that Beshey would use the information to purchase and sell securities or cause others to do so based on the information. Beshey agreed to pay Fleming some of the profits he made as a result.

Beshey, in turn, provided the information to defendants Chasity Clark (Beshey's girlfriend), Peter Kourtis (a close friend and business partner), and Bonvissuto (a friend of Clark, who had introduced him to Beshey). The indictment alleges that each of the others knew that "Shane," Beshey's close friend and a senior employee of LTF, had misappropriated the information in breach of his duties to the company. They agreed that Kourtis would purchase out-of-the-money LTF call options and would pay Beshey some of the profits earned; and that Bonvissuto would do the same and pay some of the profits to Beshey and Clark, who in turn would share them with Fleming.

The indictment alleges that Kourtis, in turn, provided the same inside information to Weller, Mansur, Carlucci, and Kandalepas, with whom Kourtis had a close personal relationship. According to the

indictment, each of the others knew that Kourtis had learned material, nonpublic information from a close personal friend, who in turn had learned the information from a close personal friend and senior employee at LTF, who had misappropriated the information from LTF in breach of his duties to the company. The five agreed that they would purchase out-of-the-money LTF call options and that each (except for Kandalepas) would pay Kourtis some of the profits they made.

According to the indictment, Bonvissuto, Kourtis, Weller, Mansur, Carlucci, and Kandalepas each purchased out-of-the-money LTF call options for a total of about $106,000 and later sold them, receiving proceeds totaling about $866,000. The indictment alleges that Kourtis gave part of his proceeds to Beshey and Clark; Bonvissuto turned over part of his proceeds to Clark to pay her, Beshey, and Fleming (Beshey and Clark later gave part of this to Fleming); Carlucci gave part of his proceeds to Kourtis; Weller gave Kourtis 10 pounds of marijuana as payment, which Kourtis sold for about $20,000; and Mansur paid part of his proceeds to Kourtis.

Mansur and Weller first challenge the sufficiency of the securities fraud allegations in the indictment. Section 10(b) of the Securities Exchange Act of 1934 prohibits undisclosed trading on inside corporate information by an individual who is under a duty of trust and confidence that prohibits him from secretly using such information for his personal advantage. 15 U.S.C. § 78j(b). Such a person "also may not tip inside

information to others for trading." *United States v. Salman*, 137 S. Ct. 420, 423 (2016). And "[t]he tippee acquires the tipper's duty to disclose or abstain from trading if the tippee knows the information was disclosed in breach of the tipper's duty, and the tippee may commit securities fraud by trading in disregard of that knowledge." *Id.* A tipper "breaches such a fiduciary duty . . . when the tipper discloses the inside information for a personal benefit," and a jury "can infer a personal benefit . . . where the tipper receives something of value in exchange for the tip or 'makes a gift of confidential information to a trading relative or friend.'" *Id.* (quoting *Dirks v. SEC*, 463 U.S. 646, 664 (1983)). To put it another way, the "personal benefit element can be met by evidence that the tipper's disclosure of inside information was intended to benefit the tippee"; "the evidentiary bar [regarding this element] is not a high one." *United States v. Martoma*, 894 F.3d 64, 76 (2d Cir. 2018) (internal quotation marks omitted).

Weller and Mansur contend that the indictment fails to allege that they knew Fleming, the insider, received a benefit and that allegations about friendship are insufficient to establish personal benefit. The Court disagrees. The indictment alleges that the tippees (Mansur and Weller) knew the corporate insider (Fleming) had disclosed the inside information in breach of a fiduciary duty. Indictment ¶ 3(j). And more specifically, the indictment alleges that Mansur and Weller knew that Kourtis's source, a close personal friend, had learned the information from a high-level

LTF insider who was a close personal friend. *See id.* ¶ 3(f). Under the law, as just discussed, personal benefit to an insider may be inferred when the insider tips a close friend. *See Salman*, 137 S. Ct. at 423 (quoting *Dirks*); *Martoma*, 894 F.3d at 76. For these reasons, the indictment's allegations are sufficient to charge an offense.

Mansur and Weller also contend that the indictment is "internally inconsistent and contradictory" because it alleges that Fleming agreed to provide information to Beshey in return for money but alleges that Mansur and Weller were aware that the tipper (Fleming) and Kourtis's source (Beshey) were close friends, not that a monetary *quid pro quo* was involved. But nothing in section 10(b) or the cases interpreting it require a tipper to gain one, and only one, benefit from disclosing information. And defendants likewise cite no case that says that when a tipper is receiving more than one personal benefit from disclosing information, a tippee (or second-level tippee like these defendants) must be aware of each such benefit. The Court finds no such requirement in the statute, Rule 10b-5, or the caselaw interpreting them. For these reasons, the Court denies Mansur and Weller's motion to dismiss the securities fraud charges.

The Court likewise denies their motion to dismiss the conspiracy charge. Mansur and Weller contend that the indictment charges two separate conspiracies, one involving tippees who agreed to pay the insider for information and another involving tippees who are not alleged to have had knowledge that the insider was

being paid or expected payment. This argument is a non-starter. The law of conspiracy does not require each conspirator to know all the other conspirators or all the details of the conspiracy. *See*, *e.g.*, *United States v. Blumenthal*, 332 U.S. 539, 557 (1947); *United States v. James*, 540 F.3d 702, 708 (7th Cir. 2008); *United States v. Bolivar*, 532 F.3d 599, 603 (7th Cir. 2008). And so long as the conspiracy has a common purpose—in this case, the knowing use of material, nonpublic information to trade securities for personal gain in violation of the fiduciary duty of the insider who disclosed the information—the fact that the insider may have benefitted in more than one way does not establish, as defendants contend, that there were multiple conspiracies rather than one.

2. Discovery motions

a. Other act evidence (Weller motion)

The Court grants Weller's motion for disclosure of other act evidence and directs the government to disclose all other act evidence that it intends to offer in its case in chief, to impeach any witness (including the defendant), or in rebuttal. *See* Fed. R. Evid. 404(b), 1991 Advisory Committee Notes; *United States v. Vega*, 188 F.3d 1150 (9th Cir. 1999). The government must provide a written disclosure of the nature of the evidence, including a general description of the act or acts and the dates, places, and persons involved, and a statement of the issue or issues on which the government believes the evidence is relevant and admissible. It

must also produce any documents which contain or constitute evidence of any such other acts. The disclosures must be made no less than 30 days prior to trial, though the Court encourages the government to consider earlier production to facilitate pretrial resolution of admissibility issues and avoid the possible need for a continuance.

As a general rule, a defendant is not entitled to pretrial production of material to be used for impeachment purposes pursuant to Fed. R. Evid. 608(b). However, to the extent that evidence that may be used to impeach under Rule 608(b) also constitutes "other act" evidence within the meaning of Rule 404(b) and the 1991 Advisory Committee Notes to that Rule, or evidence subject to disclosure under Rule 16, the fact that it might also be admissible under Rule 608(b) does not excuse the government from pretrial disclosure pursuant to the previous paragraph of this order. *See generally United States v. Lim*, No. 99 CR 689, 2000 WL 782964, at *1-2 (N.D. Ill. June 15, 2000).

b. Agents' notes (Weller and Mansur motions)

The Court grants Weller's motion seeking an order for preservation of notes prepared by government agents relating to the investigation.

Mansur's motion contains a request for immediate production of agents' notes. This motion is denied without prejudice as premature. Mansur's motion suggests that notes may contain statements by potential witnesses. If so, the Court lacks the authority to require

their production prior to the testimony of the witness(es), except to the extent the notes contain exculpatory or impeaching material, a topic the Court will address separately. *See* 18 U.S.C. § 3500(a).

c. *Brady / Giglio* motions (Weller and Mansur)

The Court grants these motions; the requests they contain fall within the government's production obligations under *Brady* and tis progeny, including *Giglio.* To the extent these motions request information exculpating a defendant, the government must produce the material immediately, unless it has already done so. To the extent these motions request information impeaching a government witness—including material that contradicts a witness's expected testimony—the government must produce the material no less than 30 days prior to trial.

d. Drafts of grand jury statements (Mansur motion)

The government objects to Mansur's motion seeking production of drafts of grand jury statements. If the government has non-identical or marked-up drafts of statements read to the grand jury by witnesses during the investigation that resulted in the indictment, it must preserve them. The Court also directs the government to produce any such material to the Court for *in camera* inspection, along with a copy of the final statement read to the grand jury, for comparison purposes. This will allow the Court to assess whether any such

drafts may contain impeaching material that the government is obligated to produce. If the government contends that any such draft is non-producible as attorney work product or otherwise—which is unlikely at least to the extent the draft was shared with a witness or a witness's attorney—the government may make that case in a written submission to the Court.

Conclusion

For the reasons described above, the Court denies Mansur and Weller's motion to dismiss [161] and partially grants those defendants' other pretrial motions [163] [164] [166] [167] as described in the body of this memorandum opinion and order.

Date: January 22, 2019

/s/ Matthew F. Kennelly
MATTHEW F. KENNELLY
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA v. BRET BESHEY, SHANE FLEMING, PETER KOURTIS, CHASITY CLARK, AUSTIN MANSUR, ERIC WELLER, ALEX CARLUCCI, DIMITRI KANDALEPAS, and CHRISTOPHER BONVISSUTO	No. 17CR 643 Violations: Title 15, United States Code, Sections 78j(b) and 78ff; Title 17, Code of Federal Regulations, Section 240.10b-5; and Title 18, United States Code, Section 371 (Filed Sep. 28, 2017)

COUNT ONE

The SPECIAL FEBRUARY 2017 GRAND JURY charges:

1. At times material to this indictment:

a. Life Time Fitness, Inc. was a Minnesota-based company that owned a chain of fitness centers operating in the United States and Canada. Life Time Fitness, Inc.'s common stock traded on the New York Stock Exchange.

b. When the New York Stock Exchange closed on March 5, 2015, Life Time Fitness, Inc.'s share price was $57.67. After the close of trading on March 5, 2015, the Wall Street Journal published an article stating

that Life Time Fitness, Inc. was in advanced discussions to sell all of the company's outstanding shares to one of two private equity firms. On March 6, 2015, Life Time Fitness, Inc.'s share price increased to a high of $69.13.

c. On or about the morning of March 16, 2015, Life Time Fitness, Inc. issued a press release announcing that two private equity firms were purchasing all of the company's shares for $72.10 per share.

d. Defendant SHANE FLEMING was employed as a Vice President of Corporate Sales at Life Time Fitness, Inc. FLEMING resided in Chanhassen, Minnesota.

e. On or about February 23, 2015, in the course of his employment at Life Time Fitness, Inc., FLEMING learned material, nonpublic information concerning the advanced acquisition discussions between Life Time Fitness, Inc. and the two private equity firms, which FLEMING learned would result in an increase in Life Time Fitness, Inc.'s stock price to at least $65 per share.

f. As an employee of Life Time Fitness, Inc., FLEMING owed a fiduciary duty and other duties of trust and confidence to Life Time Fitness, Inc. to maintain the confidentiality of any material, nonpublic information he learned and obtained during the course of his employment at Life Time Fitness, Inc. Among other things, these duties required that FLEMING abstain from disclosing to others (i.e., "tipping") any material, nonpublic information about Life Time Fitness,

Inc., including nonpublic information about upcoming mergers or acquisitions, a duty expressly explained to FLEMING on or about February 23, 2015, by a Life Time Fitness, Inc. attorney.

g. Defendants BRET BESHEY and SHANE FLEMING had been friends since in or about 1996. Since in or about 2013, they had been partners in an online advertising business. BESHEY resided in Cave Creek, Arizona.

h. Defendant CHASITY CLARK was BRET BESHEY's girlfriend and resided with BESHEY in Cave Creek, Arizona.

i. Defendants CHRISTOPHER BONVISSUTO and CHASITY CLARK have been friends since the 1980s. CLARK introduced BRET BESHEY to BONVISUTTO in or about 2010. BONVISSUTO had sole authority over a securities brokerage account held in his name at Scottrade, Inc., an online brokerage firm. BONVISUTTO resided in Buffalo, New York.

j. Defendants PETER KOURTIS and BRET BESHEY had been friends since in or about 2003. Since in or about 2014, KOURTIS and BESHEY had been partners in an online advertising business. KOURTIS had sole authority over securities brokerage accounts held in his name at the brokerage firms Charles Schwab and TD Ameritrade. KOURTIS resided in Palatine, Illinois and Niles, Illinois.

k. Defendants ERIC WELLER and PETER KOURTIS had been friends since in or about 1989.

WELLER had sole authority over a securities brokerage account held in his name at Interactive Brokers, an online brokerage firm. WELLER resided in Hermosa Beach, California.

l. Defendants AUSTIN MANSUR and PETER KOURTIS had been friends since at least the summer of 2006. MANSUR had sole authority over securities brokerage accounts held in his name at Fidelity Investments, a brokerage firm. MANSUR resided in Chicago, Illinois.

m. Defendants ALEX CARLUCCI and PETER KOURTIS had been friends since in or about 2002. CARLUCCI had sole authority over a securities brokerage account held in his name at Charles Schwab, a brokerage firm. CARLUCCI resided in Clarendon Hills, Illinois.

n. Defendants DIMITRI KANDALEPAS and PETER KOURTIS had known each other through KANDALEPAS' relative, INDIVIDUAL A. Beginning no later than 2010, KOURTIS had invested tens of thousands of dollars in numerous businesses operated by INDIVIDUAL A, including COMPANY A, where KANDALEPAS had been employed since 2013. KANDALEPAS had sole authority over a securities brokerage account he held in his name at TD Ameritrade, an online brokerage firm. KANDALEPAS resided in Schaumburg, Illinois.

o. A call option to purchase a stock provided the holder the right, but not the obligation, to purchase a certain number of shares (usually 100) of a stock at

a particular price (referred to as the "strike price") on a specific date in the future. A call option was "out of the money" if the strike price of the option was higher than the stock price at the time the option was purchased.

p. Life Time Fitness, Inc. stock options were traded on the Chicago Board Options Exchange (CBOE), a national securities exchange with its headquarters and operations in Chicago, Illinois. The CBOE cleared stock options trades through the Options Clearing Corporation (OCC), which was headquartered in Chicago, Illinois.

THE CONSPIRACY TO ENGAGE IN INSIDER TRADING

2. Beginning no later than February 2015, and continuing until at least in or about January 2017, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere,

BRET BESHEY,
SHANE FLEMING,
PETER KOURTIS,
CHASITY CLARK,
AUSTIN MANSUR,
ERIC WELLER,
ALEX CARLUCCI,
DIMITRI KANDALEPAS, and
CHRISTOPHER BONVISSUTO,

defendants herein, conspired with each other, and with others known and unknown to the Grand Jury, to

commit an offense against the United States, that is, to willfully use and employ, by use of the facilities of national securities exchanges, directly and indirectly, in connection with the purchase and sale of a security, a manipulative and deceptive device and contrivance, in contravention of Title 17, Code of Federal Regulations, Section 240.10b-5, by: (a) employing a device and scheme to defraud; and (b) engaging in an act, practice, and a course of business which operated and would operate as a fraud and deceit upon any person, all in violation of Title 15, United States Code, Sections 78j(b) and 78ff(a), and Title 17, Code of Federal Regulations, Section 240.10b-5.

3. It was part of the conspiracy that:

a. As part of his employment at Life Time Fitness, Inc., on or about February 23, 2015, FLEMING learned material, nonpublic information concerning advanced acquisition discussions between Life Time Fitness, Inc. and two private equity firms, which FLEMING learned would result in an increase in Life Time Fitness, Inc.'s stock price to at least $65 per share, and FLEMING misappropriated that material, nonpublic information in violation of the fiduciary and other duties of trust and confidence he owed to Life Time Fitness, Inc. For FLEMING's benefit, and for the benefit of BESHEY, with whom FLEMING had a close personal relationship, on or about February 23, 2015, FLEMING agreed to and did provide to BESHEY material, nonpublic information about the Life Time Fitness, Inc. acquisition knowing that BESHEY would use that information to purchase and sell securities, or

cause others to purchase and sell securities, while in possession of that information. BESHEY and FLEMING further agreed that BESHEY would pay FLEMING some of the profits from those purchases and sales of securities.

b. On or about February 23, 2015, BESHEY, while in possession of the material, nonpublic information he received from FLEMING, which information BESHEY knew FLEMING had misappropriated from Life Time Fitness, Inc. in breach of a duty of trust and confidence to keep such information confidential, provided the information to KOURTIS, BONVISSUTO, and CLARK. Based on the information provided by BESHEY, KOURTIS, BONVISUTTO, and CLARK knew: (i) that the source of the information was BESHEY's long-time and close personal friend, "Shane"; (ii) that "Shane" was a senior employee at Life Time Fitness, Inc.; and (iii) that "Shane" had misappropriated the material, nonpublic information from Life Time Fitness, Inc. in breach of a duty of trust and confidence to keep such information confidential.

c. BESHEY agreed with KOURTIS, who had a close personal relationship with BESHEY, that KOURTIS would purchase out-of-the-money Life Time Fitness, Inc. call options while in possession of the material, nonpublic information. BESHEY and KOURTIS further agreed that KOURTIS would pay BESHEY some of the profits from those purchases and sales of securities.

d. BESHEY agreed with BONVISSUTO, who had a close personal relationship with CLARK, that BONVISSUTO would purchase out-of-the-money Life Time Fitness, Inc. call options while in possession of the material, nonpublic information. BESHEY, CLARK, and BONVISSUTO further agreed that BONVISSUTO would pay BESHEY and CLARK some of the profits from those purchases and sales of securities, a portion of which BESHEY and CLARK would share with FLEMING.

f. Beginning on or about February 24, 2015, KOURTIS, while in possession of the material, nonpublic information he received from BESHEY, which information KOURTIS knew that BESHEY's close personal friend and Life Time Fitness, Inc. insider, "Shane," had misappropriated in breach of a duty of trust and confidence to keep such information confidential, provided the information to WELLER, MANSUR, CARLUCCI, and KANDALEPAS, with each of whom KOURTIS had a close personal relationship. Based on the information provided by KOURTIS, WELLER, MANSUR, CARLUCCI, and KANDALEPAS knew: (i) that KOURTIS had learned the material, nonpublic information from KOURTIS' close personal friend; (ii) that KOURTIS's close personal friend had learned the information from a close personal friend and senior employee at Life Time Fitness, Inc.; and (iii) that the senior employee at Life Time Fitness, Inc. had misappropriated the material, nonpublic information from Life Time Fitness, Inc. in breach of a duty of trust and confidence to keep such information confidential.

g. KOURTIS agreed with WELLER, MANSUR, CARLUCCI, and KANDALEPAS that they would each purchase out-of-the-money Life Time Fitness, Inc. call options while in possession of the material, nonpublic information.

h. KOURTIS and WELLER further agreed that WELLER would pay some of the profits from WELLER's purchases and sales of securities to KOURTIS.

h. KOURTIS and MANSUR further agreed that MANSUR would pay some of the profits from MANSUR's purchases and sales of securities to KOURTIS.

i. KOURTIS and CARLUCCI further agreed that CARLUCCI would pay some of the profits from CARLUCCI's purchases and sales of securities to KOURTIS.

j. WELLER, MANSUR, CARLUCCI, and KANDALEPAS knew that the information they received from KOURTIS was confidential, material, and nonpublic and that FLEMING or another insider at Life Time Fitness, Inc. had misappropriated the information in breach of a duty of trust and confidence owed to Life Time Fitness, Inc.

k. Beginning on or about February 23, 2015 and continuing until at least January 2017, BESHEY, FLEMING, KOURTIS, CLARK, MANSUR, WELLER, CARLUCCI, KANDALEPAS, and BONVISSUTO misrepresented, concealed, and hid, and caused to be

misrepresented, concealed and hidden, the existence, purposes, and acts done in furtherance of the conspiracy.

OVERT ACTS

4. To effect the object of the conspiracy, defendants BESHEY, FLEMING, KOURTIS, CLARK, MANSUR, WELLER, CARLUCCI, KANDALEPAS, and BONVISSUTO committed and caused to be committed the following overt acts, among others, at Chicago, in the Northern District of Illinois, and elsewhere:

a. On or about February 23, 2015, FLEMING provided BESHEY with material, nonpublic information that FLEMING had obtained about the imminent acquisition of Life Time Fitness, Inc. for at least $65 per share.

b. Beginning on or about February 23, 2015, BESHEY provided material, nonpublic information regarding the acquisition of Life Time Fitness, Inc. that he received from FLEMING to KOURTIS, BONVISSUTO and CLARK.

c. Beginning on or about February 24, 2015, KOURTIS provided the material, nonpublic information regarding Life Time Fitness, Inc. that he had received from BESHEY to WELLER, MANSUR, KOURTIS and KANDALEPAS.

d. Beginning on or about February 25, 2015, BONVISSUTO, while in possession of the material, nonpublic information, used approximately $5,296 in a

securities brokerage account held in his name at Scottrade to purchase approximately 144 out-of-the money Life Time Fitness, Inc. call options with an expiration date of March 20, 2015, and a strike price of $65 per share.

e. Beginning on or about February 25, 2015, KOURTIS, while in possession of the material, nonpublic information, used approximately $10,427 in securities brokerage accounts held in his name at Charles Schwab and TD Ameritrade to purchase approximately 300 out-of-the money Life Time Fitness, Inc. call options with an expiration date of March 20, 2015, and a strike price of $65 per share.

f. Beginning on or about February 25, 2015, WELLER, while in possession of the material, nonpublic information, used approximately $54,349 in a securities brokerage account held in his name at Interactive Brokers to purchase approximately 1,010 out-of-the money Life Time Fitness, Inc. call options with an expiration date of March 20, 2015, and strike prices of $60 and $65 per share.

g. Beginning on or about February 26, 2015, MANSUR, while in possession of the material, nonpublic information, used approximately $30,841 in securities brokerage accounts at Fidelity to purchase approximately 465 out-of-the money Life Time Fitness, Inc. call options with expiration dates of March 20, 2015 and April 17, 2015, and strike prices of $60, $65, and $70 per share, as well as approximately 250 shares of Life Time Fitness, Inc. common stock.

h. Beginning on or about March 2, 2015, CARLUCCI, while in possession of the material, nonpublic information, used approximately $2,023 in a securities brokerage account held in his name at Charles Schwab to purchase approximately 40 out-of-the money Life Time Fitness, Inc. call options with an expiration date of March 20, 2015, and strike prices of $60 and $65 per share.

i. Beginning on or about March 3, 2015, KANDALEPAS, while in possession of the material, nonpublic information, used approximately $2,918 in a securities brokerage account held in his name at TD Ameritrade to purchase approximately 140 out-of-the money Life Time Fitness, Inc. call options with an expiration date of March 20, 2015, and a strike price of $65 per share.

j. Beginning on or about March 6, 2015, KOURTIS, WELLER, MANSUR, CARLUCCI, KANDALEPAS, and BONVISUTTO began selling the Life Time Fitness, Inc. call options and received illegal proceeds totaling approximately $866,629.

k. Beginning in or about March 2015, KOURTIS paid BESHEY and CLARK approximately $8,000, which KOURTIS provided as payment for the Life Time Fitness, Inc. trading profits KOURTIS owed to BESHEY and CLARK.

l. On or about March 11, 2015, CLARK deposited a $3,000 check, made payable to CLARK, which KOURTIS sent as payment for a portion of the

Life Time Fitness, Inc. trading profits KOURTIS owed to BESHEY and CLARK.

m. On or about March 16, 2015, CLARK deposited a $3,000 check, made payable to CLARK, which KOURTIS sent as payment for a portion of the Life Time Fitness, Inc. trading profits KOURTIS owed to owed to BESHEY and CLARK.

n. On or about March 16, 2015, CLARK instructed BONVISUTTO to mail her two checks totaling approximately $11,300, each in an amount less than $10,000, which checks were BONVISSUTO's payment to CLARK, BESHEY, and FLEMING for the material, nonpublic information about Life Time Fitness, Inc.

o. On or about March 16, 2015, BONVISSUTO mailed two cashier's checks to CLARK totaling $11,300, which BONVIUSSUTO mailed as payment for the Life Time Fitness, Inc. trading profits he owed to CLARK, BESHEY, and FLEMING. One check was payable to CLARK in the amount of $5,700, and the other was payable to CLARK in the amount of $5,600.

p. On or about March 20, 2015, CLARK deposited the $5,700 check from BONVISUTTO, which BONVIUSSUTO sent as a partial payment for the Life Time Fitness, Inc. trading profits he owed to CLARK, BESHEY, and FLEMING.

q. On or about March 24, 2015, CLARK deposited the $5,600 check from BONVISUTTO, which BONVIUSSUTO sent as a partial payment for the Life

Time Fitness, Inc. trading profits he owed to CLARK, BESHEY, and FLEMING.

r. On or about March 26, 2015, FLEMING met with BESHEY and CLARK in Scottsdale, Arizona and received approximately $9,500 from CLARK and BESHEY, as a partial payment of FLEMING's share of the co-conspirators' illegal trading profits.

s. In or about March 2015, CARLUCCI paid KOURTIS approximately $900 as payment for the trading profits CARLUCCI owed to KOURTIS.

t. Between in or about March 2015 and in or about September 2016, WELLER gave KOURTIS at least 10 pounds of marijuana as payment for the trading profits WELLER owed to KOURTIS. KOURTIS sold the marijuana to others and profited at least $20,000.

u. On or about April 7, 2015, MANSUR paid KOURTIS approximately $1,000 as payment for the trading profits MANSUR owed to KOURTIS.

All in violation of Title 18, United States Code, Section 371.

COUNTS TWO through TEN

The SPECIAL FEBRUARY 2017 GRAND JURY further charges:

1. The allegations in paragraphs 1, 3(a)-(k), and 4(a)-(u) of Count One of this indictment are incorporated here.

2. Beginning on or about February 25, 2015, and continuing until on or about least March 16, 2015, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere,

BRET BESHEY,
SHANE FLEMING,
PETER KOURTIS,
CHASITY CLARK,
AUSTIN MANSUR,
ERIC WELLER,
ALEX CARLUCCI,
DIMITRI KANDALEPAS, and
CHRISTOPHER BONVISSUTO,

defendants herein, directly and indirectly, by the use of the facilities of a national securities exchange, willfully used and employed, in connection with the purchase and sale of securities, manipulative and deceptive devices and contrivances, in contravention of Title 17, Code of Federal Regulations, Section 240.10b-5, by: (a) employing a device and scheme to defraud; and (b) engaging in an act, practice, and a course of business which operated and would operate as a fraud and deceit upon any person, in violation of Title 15, United States Code, Sections 78j(b) and 78ff(a), and Title 17, Code of Federal Regulations, Section 240.10b-5.

3. On or about the approximate dates below, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere, BRET BESHEY, SHANE FLEMING, PETER KOURTIS, CHASITY CLARK, AUSTIN MANSUR, ERIC WELLER, ALEX CARLUCCI, DIMITRI KANDALEPAS, and CHRISTOPHER BONVISSUTO,

defendants herein, for the purpose of executing the above-described scheme to defraud, in connection with the purchases and sales of securities identified below, willfully used and caused the use of a facility of a national securities exchange:

COUNT	**DEFENDANTS**	**DATE**	**TRANSACTION**	**NATIONAL SECURITIES EXCHANGE**
Two	FLEMING, BESHEY, and KOURTIS	On or about February 2015	KOURTIS' purchase of 50 Life Time Fitness, Inc. call options with a strike price of $65 and an expiration date of March 20, 2015	Chicago Board Options Exchange (CBOE)
Three	FLEMING, BESHEY, KOURTIS, and WELLER	On or about February 26, 2015	WELLER's purchase of 100 Life Time Fitness, Inc. call options with a strike price of $65 and an expiration date of March 20, 2015	Chicago Board Options Exchange (CBOE)

Four	FLEMING, BESHEY, KOURTIS, and WELLER	On or about February 26, 2015	WELLER's purchase of 138 Life Time Fitness, Inc. call options with a strike price of $65 and an expiration date of March 20, 2015	Chicago Board Options Exchange (CBOE)
Five	FLEMING, BESHEY, KOURTIS, and MANSUR	On or about February 27, 2015	MANSUR's purchase of 50 Life Time Fitness, Inc. call options with a strike price of $65 and an expiration date of March 20, 2015	Chicago Board Options Exchange (CBOE)
Six	FLEMING, BESHEY, KOURTIS, and MANSUR	On or about February 27, 2015	MANSUR's purchase of 50 Life Time Fitness, Inc. call options with a strike price of $65 and an expiration date of March 20, 2015	Chicago Board Options Exchange (CBOE)

Seven	FLEMING, BESHEY, KOURTIS, and WELLER	On or about February 27, 2015	WELLER's purchase of 150 Life Time Fitness, Inc. call options with a strike price of $65 and an expiration date of March 20, 2015	Chicago Board Options Exchange (CBOE)
Eight	FLEMING, BESHEY, CLARK, and BONVISSUTO	On or about February 27, 2015	BONVISSUTO's purchase of 97 Life Time Fitness, Inc. call options with a strike price of $65 and an expiration date of March 20, 2015	Chicago Board Options Exchange (CBOE)
Nine	FLEMING, BESHEY, KOURTIS, and CARLUCCI	On or about March 2, 2015	CARLUCCI's purchase of 25 Life Time Fitness, Inc. call options with a strike price of $65 and an expiration date of March 20, 2015	Chicago Board Options Exchange (CBOE)

Ten	FLEMING, BESHEY, KOURTIS, and KAN-DALEPAS	On or about March 3, 2015	KAN-DALEPAS' purchase of 140 Life Time Fitness, Inc. call options with a strike price of $65 and an expiration date of March 20, 2015	Chicago Board Options Exchange (CBOE)

In violation of Title 15, United States Code, Sections 78j(b) and 78ff(a), and Title 17, Code of Federal Regulations, Section 240.10b-5, and Title 18, United States Code, Section 2.

FORFEITURE ALLEGATION

The SPECIAL FEBRUARY 2017 GRAND JURY further charges:

1. The allegations in Counts 1–10 of this indictment are incorporated here for the purpose of alleging forfeiture pursuant to Title 18, United States Code, Section 981(a)(1)(C) and Title 28, United States Code, Section 2461(c).

2. As a result of his violations of Title 15, United States Code, Sections 78j(b) and 78ff, Title 17 Code of Federal Regulations, Section 240.10b-5, and Title 18, United States Code, Section 371, as alleged in Counts 1–10 of this indictment,

BRET BESHEY,
SHANE FLEMING,
PETER KOURTIS,
CHASITY CLARK,
AUSTIN MANSUR,
ERIC WELLER,
ALEX CARLUCCI,
DIMITRI KANDALEPAS, and
CHRISTOPHER BONVISSUTO,

defendants herein, shall forfeit to the United States, pursuant to Title 18, United States Code, Section 981(a)(1)(C) and Title 28, United States Code, Section 2461(c), any and all right, title, and interest he may have in any property constituting, and derived from, proceeds they obtained directly or indirectly as the result of such violations.

3. The interests of defendants subject to forfeiture pursuant to Title 18, United States Code, Section 981(a)(1)(C) and Title 28, United States Code, Section 2461(c), includes the sum of at least $866,629.

4. If any of the forfeitable property described above, as a result of any act or omission by defendants:

(a) cannot be located upon the exercise of due diligence;

(b) has been transferred or sold to, or deposited with, a third party;

(c) has been placed beyond the jurisdiction of the court;

(d) has been substantially diminished in value; or

(e) has been commingled with other property which cannot be divided without difficulty,

the United States of America shall be entitled to forfeiture of substitute property under the provisions of Title 21, United States Code, Section 853(p), as incorporated by Title 28, United States Code, Section 2461(c);

All pursuant to Title 18, United States Code, Section 981(a)(1)(C) and Title 28, United States Code, Section 2461(c).

A TRUE BILL:

_____
FOREPERSON

_____
ACTING UNITED
STATES ATTORNEY