UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

- against -

JON-PAUL RORECH AND RENATO NEGRIN,

Defendants.

09 Civ. 4329 (JGK)

OPINION AND ORDER

JOHN G. KOELTL, District Judge:

INTRODUCTION

This is a case about alleged insider trading in credit derivatives. The Securities and Exchange Commission (the "SEC") alleges that the defendants, Jon-Paul Rorech and Renato Negrin, engaged in insider trading in credit-default swaps ("CDSs").

While there are different types of CDSs, the CDSs that are at issue in this case are contracts that provide protection against the credit risk of a particular company. The seller of a CDS agrees to pay the buyer a specific sum of money, called the notional amount, if a credit event, such as bankruptcy, occurs in the referenced company. If a credit event occurs, the buyer generally must provide to the seller any of certain debt instruments that are deliverable pursuant to the CDS contract. In exchange for this risk protection from the CDS-seller, the CDS-buyer agrees to make periodic premium payments during the course of the contract. The CDS-buyer can use the CDS to provide protection, like insurance, against the possibility that the debt instruments the buyer holds will seriously deteriorate in value because of a credit event in the referenced company. The CDS-buyer could also buy the CDS without owning the underlying referenced security, a "naked CDS," in the expectation that it would increase in value based on any one of a number of factors including the likelihood that a credit event will occur in the referenced company.

The CDSs at issue in this case provided for payment if certain credit events occurred at VNU N.V. ("VNU"), a Dutch media holding company. The CDSs referenced a specific VNU security that would have to be delivered in return for the notional amount, although it was possible to deliver certain other securities instead.

In July 2006, Deutsche Bank Securities Inc. ("Deutsche Bank") served as the lead underwriter for a bond offering by two of VNU's subsidiaries. During its efforts to sell the bonds, Deutsche Bank learned that there was demand in the market for bonds issued by the holding company, VNU, rather than by its subsidiaries. This demand existed because the bonds to be issued by VNU's subsidiaries would not be deliverable instruments under the terms of VNU CDSs then in the market. Because VNU was also planning on retiring its then-outstanding deliverable bonds, CDS-holders would be left with only a limited number of bonds that would be deliverable under the CDS contracts. Holders of VNU CDSs, and prospective purchasers, preferred that VNU modify the bond offering to issue at least some bonds at the holding company level.

The SEC alleges that Mr. Rorech, a high-yield bond salesperson at Deutsche Bank, passed confidential information to Mr. Negrin, a portfolio manager for the hedge fund Millennium Partners, L.P. ("Millennium"), regarding plans to modify the VNU bond offering. The SEC alleges that Mr. Rorech told Mr. Negrin during two unrecorded cellular telephone calls on July 14 and July 17, 2006, (1) that Deutsche Bank would recommend to VNU's financial sponsors that VNU issue the holding company bonds and (2) that at least one of Mr. Rorech's customers already had placed an order for $100 million of the holding company bonds.

Mr. Negrin bought two VNU CDSs on behalf of Millennium on July 17 and July 18, 2006. After the July 24, 2006, announcement that VNU's bond offering would be amended to include bonds issued by the holding company, the price of VNU CDSs increased substantially. Mr. Negrin subsequently sold the VNU CDSs for a profit to Millennium of approximately $1.2 million.

The Court conducted a non-jury trial in this case from April 7, 2010, to April 28, 2010. Despite the SEC's allegations of the information passed by Mr. Rorech to Mr. Negrin during the two cellular phone calls, there is no evidence of what was actually said on those calls and neither Mr. Rorech nor Mr. Negrin could recall the substance of the calls. While the SEC attempts to attribute nefarious content to those calls through circumstantial evidence, there is, in fact, no evidence to support this inference and ample evidence that undercuts the SEC's theory that the defendants engaged in insider trading.

First, the SEC produced no evidence that Deutsche Bank had actually decided to recommend that the sponsors issue a holding company tranche at the time of Mr. Rorech's cellular phone calls with Mr. Negrin, and there is no evidence that any such decision was conveyed to Mr. Rorech before the phone calls. Having set forth no evidence that Mr. Rorech either received or shared with Mr. Negrin any allegedly confidential information concerning Deutsche Bank's recommendation, the SEC's allegation of insider trading based on that information fails.

Second, the SEC has failed to prove that either piece of alleged information was material. Immediately after the bond deal was announced, there was widespread discussion in the market regarding investor demand for a restructuring of the VNU bond offering to include deliverable bonds. Even the SEC's own expert, David Barcus, admits that it was publicly known—particularly to sophisticated high yield bond buyers—that, with such strong market demand, Deutsche Bank would be speaking to the sponsors and working with them to try to find a way to issue additional deliverable bonds. Because any information that Mr. Rorech possessed on July 17, 2006, about Deutsche Bank's alleged intention to recommend a holding company issuance was based on information in the market and was completely speculative in any event, any information Mr. Rorech shared with Mr. Negrin cannot be considered material. Likewise, information regarding Mr.

Rorech's customer's indication of interest was not material because the demand for deliverable bonds was known in the market. The fact that Jeremy Barnum, a portfolio manager at the hedge fund Blue Mountain Capital Management LLC ("Blue Mountain") who placed the initial $100 million indication of interest, subsequently sold VNU CDSs after having actually learned of Deutsche Bank's intent to recommend the holding company tranche and after having placed his own indication of interest is substantial evidence that these two pieces of information were not considered material to reasonable investors in VNU CDSs.

Third, the evidence also confirms that the information that Mr. Rorech could have shared with Mr. Negrin was not confidential and that Mr. Rorech did not breach any duty to Deutsche Bank. Pursuant to Deutsche Bank's written policy on the use of confidential information, as well as testimony from Deutsche Bank's compliance officer, information is deemed confidential only when there is an expectation or contractual agreement that it will be kept confidential. The evidence does not show that Mr. Rorech possessed any information about Deutsche Bank's decision to recommend that VNU issue the holding company bonds. Any information that he did share with Mr. Negrin, therefore, would have been speculative and his own opinion. If Mr. Rorech shared such information, that would not amount to a breach of his duty of confidentiality to Deutsche Bank. Similarly, Mr. Rorech's customer's indication of interest in holding company bonds was not confidential, because, among other things, Mr. Barnum at Blue Mountain, who submitted the order for holding company bonds, testified unequivocally that he had no expectation of confidentiality in his proposed order. To the contrary, Mr. Barnum, like other customers, expected that Deutsche Bank would discuss his order with other potential investors to generate additional demand for a holding company issuance of bonds. Because Mr. Barnum had no expectation that the information would be confidential, Deutsche Bank did not consider the information confidential and Mr. Rorech did not breach any duty to Deutsche Bank.

The actions and testimony of the capital markets officers who were directly involved in the VNU bond offering—and who were responsible for determining whether information was confidential—confirm that neither piece of information was confidential. Not only did these individuals openly share the alleged "inside" information in this case, but they also never initiated so-called "wall-crossing" procedures for Mr. Rorech during the marketing period for the VNU bond offering. "Wall-crossing" procedures are typically followed if confidential information is shared with employees, like Mr. Rorech, who work with the Bank's public customers and clients. Moreover, other salespeople at Deutsche Bank, including the head of high yield sales in New York and sales supervisors in London, similarly shared information about a potential holding company issuance and customers' orders, further demonstrating that Deutsche Bank did not view such information to be confidential.

Moreover, Deutsche Bank's actions show that the bank did not view the information as confidential. No one at Deutsche Bank, which did its own internal review of this matter, ever advised Mr. Rorech that he had to change the way he shared information with customers when marketing a high yield bond deal. Instead, Mr. Rorech's supervisors praised him for his work on the VNU bond offering, and Deutsche Bank celebrated the performance of its capital markets professionals in creating a holding company tranche to provide additional demand for the bond offering.

Fourth, deceit—or the unauthorized theft of confidential information—is the cornerstone of the misappropriation theory of insider trading liability, on which the SEC's case relies. United States v. O'Hagan, 521 U.S. 642, 652-55 (1997). The SEC has not established that there was any deception in this case. Mr. Rorech disclosed to his supervisors on the sales desk and in capital markets that he was, in fact, sharing information about the potential holding company issuance with his customers, including Mr. Negrin's hedge fund, Millennium. Mr. Rorech was never told to stop sharing such information nor cautioned as to its allegedly confidential nature.

Similarly, Mr. Rorech lacked the requisite intent to be held liable for insider trading. Mr. Rorech believed that, in discussing the information about VNU with prospective investors, he was doing his job as a high yield salesperson. This belief comported with both the custom and practice in the industry as well as the actions of capital markets officers and other Deutsche Bank salespeople on the high yield desk, including Mr. Rorech's direct supervisor, Wight Martindale. It is farfetched to think that Mr. Rorech could believe that the very information shared with outsiders by his supervisor and the head of high yield capital markets would somehow not be appropriate for him to share.

The SEC also has failed to present any evidence that Mr. Rorech had any motive to provide "inside" information to Mr. Negrin, who was neither a personal friend nor his most significant account. This is not a case where a securities firm employee receives undisclosed benefits for his "tips." The only benefit Mr. Rorech allegedly received was any increase in compensation that he received from doing his job of selling securities. The SEC did not even present any evidence as to the significance of Mr. Negrin's CDS order on Mr. Rorech's overall compensation. Mr. Negrin's CDS order of a $10 million VNU CDS from Deutsche Bank appears relatively small compared to the $200 million in VNU bond orders that Mr. Rorech obtained during the same period. In light of all of the evidence that shows that Mr. Rorech believed his conduct was entirely appropriate, the fact that Mr. Rorech and Mr. Negrin had two cellular phone calls during the marketing period of the VNU bond offering is insufficient to establish scienter.

This is only a summary of the case, which is discussed in greater detail below. Having heard the testimony of the witnesses, having assessed their credibility, and having reviewed the evidence and the parties' post-trial submissions, the Court makes the following findings of fact and reaches the following conclusions of law.

FINDINGS OF FACT

I. Background

A. The Parties Involved

1. The Defendants

1. Jon-Paul Rorech began at Deutsche Bank in 2003 at the hedge fund sales desk. (Trial Transcript ("Tr.") 1169:1-18.)

2. In about January 2006, Mr. Rorech transferred to the high yield sales group at Deutsche Bank. (Joint Pretrial Order,

CONCLUSIONS OF LAW

1. The single claim in this case alleges insider trading in CDSs in violation of section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5, promulgated thereunder. (Stipulated Law ¶ 1.) The SEC brings this action under the misappropriation theory of insider trading. (Stipulated Law ¶ 2.)

2. To prevail, the SEC first must prove by a preponderance of the evidence that the Court has subject matter jurisdiction over this action.

3. To establish liability as to Mr. Rorech, the SEC must prove that Mr. Rorech, in connection with the purchase or sale of a security or "securities-based swap agreement," misappropriated material nonpublic information in breach of a fiduciary duty to Deutsche Bank, and that Mr. Rorech acted with scienter. See United States v. Falcone, 257 F.3d 226, 232 (2d Cir. 2001) (citing United States v. O'Hagan, 521 U.S. 642, 652 (1997)); United States v. Chestman, 947 F.2d 551, 566 (2d Cir. 1991) (in banc); see also Aaron v. SEC, 446 U.S. 680, 691 (1980) (finding that scienter is a necessary element of every section 10(b) and Rule 10b-5 claim). (Stipulated Law ¶ 3.)

4. To establish liability as to Mr. Negrin, the SEC must first prove that Mr. Rorech is liable. The SEC must also prove that Mr. Negrin knew that Mr. Rorech provided him with material

nonpublic information in breach of a fiduciary duty to Deutsche Bank, and that Mr. Negrin purchased VNU CDSs while in possession of that material nonpublic information. See Falcone, 257 F.2d at 234; Chestman, 947 F.2d at 571.

5. The SEC bears the burden of proof and must prove every element of its claim by a preponderance of the evidence. Herman & MacLean v. Huddleston, 459 U.S. 375, 389-91 (1983); SEC v. Willis, 825 F. Supp. 617, 622 (S.D.N.Y. 1993).

I. Subject Matter Jurisdiction

A. Statutory Provisions

6. In 2000, Congress passed the Commodity Futures Modernization Act ("CFMA"), Pub. L. No. 106-554, 114 Stat. 2763 (2000), which amended section 10(b) to extend the rules promulgated by the SEC under that section to prohibit fraud, manipulation, and insider trading, and judicial precedents decided under section 10(b), to "securities-based swap agreement[s] (as defined in section 206B of the Gramm-Leach-Bliley Act)."

7. Section 206B of the Gramm-Leach-Bliley Act, in turn, defines a "security-based swap agreement" as "a swap agreement (as defined in section 206A . . .) of which a material term is based on the price, yield, value, or volatility of any security or any group or index of securities, or any interest therein."

Gramm-Leach-Bliley Act, Pub. L. No. 106-102, § 206B, 113 Stat. 1138 (1999) (set out as a note under 15 U.S.C. § 78c). (Stipulated Law ¶ 8.)

8. A "non-security-based swap agreement" is defined by the Gramm-Leach-Bliley Act as "any swap agreement (as defined in section 206A) that is not a security-based swap agreement (as defined in section 206B)." Gramm-Leach-Bliley Act § 206C (set out as a note under 15 U.S.C. § 78c).

9. A "swap agreement" is defined in section 206A of the Gramm-Leach-Bliley Act as

> any agreement, contract, or transaction . . . the material terms of which (other than price and quantity) are subject to individual negotiation, and that . . . (2) provides . . . for the exchange . . . of one or more payments based on the value or level of one or more interest or other rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind . . . including any such agreement, contract, or transaction commonly known as an interest rate swap, including a rate floor, rate cap, rate collar, cross-currency rate swap, basis swap, currency swap, equity index swap, equity swap, debt index swap, debt swap, credit spread, credit default swap, credit swap, weather swap, or commodity swap.

Gramm-Leach-Bliley Act § 206A (set out as a note under 15 U.S.C. § 78c).

B. The Meaning of "Based On"

10. The SEC argues that section 10(b) and Rule 10b-5's proscription of insider trading applies to the CDSs sold in this case because, among other reasons, the price term (or spread) of the two CDSs was based on the price, yield, value, or volatility of VNU bonds.

11. The defendants respond that the price of the two CDSs may have been related to the price, yield, value, or volatility of VNU bonds, but argue that the price of the CDSs was not "based on" those characteristics of the bonds. The defendants argue that "based on" should be interpreted to require a direct, or exclusive dependence, and that, in this case, the price of the VNU CDSs was negotiated between the buyer and seller and was affected by many factors, including the strength of the overall economy and the market's assessment of the referenced company's credit risk.

12. The defendants contend that the Court should determine whether the material terms of the CDSs were "based on" the price, yield, value, or volatility of the bonds by looking solely at the terms of the CDSs contracts. They argue that because the price of the CDSs is stated in basis points and does not explicitly refer to the price or value of any security, the

price of the CDSs could not be "based on" the price, yield, value, or volatility of the VNU bonds.

13. The Court is not aware of any case that has addressed the question whether CDS agreements that reference a corporate debt security are "security-based swap agreements" for purposes of 15 U.S.C. § 78j, as amended by the CFMA.

14. Because the Gramm-Leach-Bliley Act does not itself define "based on," "the ordinary meaning of the words chosen by Congress provides the starting point for interpreting the statute." Cuomo v. Clearing House Ass'n, L.L.C., 129 S.Ct. 2710, 2723 (2009).

15. Webster's Third New International Dictionary 180 (1993) states that the verb "base" or "based," sometimes used with "on or upon," means "to use as a base or basis for." The noun "base," in turn, is defined as "the fundamental part of something" or a "basic principle." Id. "[B]asis" is defined as "the principle component of anything" or a "fundamental ingredient." Id.

16. The plain meaning of "based on," therefore, does not imply an exclusive relationship, as the defendants urge. Rather, it means to use as the fundamental part or ingredient of, or principal component of, something.

17. It is possible that "based on" can have different meanings, depending on the context in which the phrase is used. In deciding whether a consumer was subjected to an adverse action "based in whole or in part on any information contained in a consumer report" for purposes of the Fair Credit Reporting Act, 15 U.S.C. § 1681m(a), the Supreme Court stated that "'based on' indicates a but-for causal relationship and thus a necessary logical condition." Safeco Ins. Co. v. Burr, 551 U.S. 47, 63 (2007).

18. However, there is no reason to believe that this interpretation of "based on" applies to all statutory uses of the phrase. Indeed, in other contexts, courts have interpreted "based on" to mean something closer to its dictionary definition. See, e.g., Environmental Defense v. EPA, 369 F.3d 193, 203-05 (2d Cir. 2004) (interpreting "based on photochemical grid modeling" in the Clean Air Act to mean "'having as the foundation' or 'arising from'"); McDaniel v. Chevron Corp., 203 F.3d 1099, 1111-12 (9th Cir. 2000) (noting that courts interpret "based upon" to mean "arising from" and to refer to a "starting point" or "foundation"); United States v. Becton Dickinson & Co., 21 F.3d 1339, 1348 (4th Cir. 1994) (finding that a qui tam action is "based upon" a public disclosure when the allegations are "actually derived" from the disclosure rather than an independent source).

19. In this case, the context in which the phrase "based on" is used in section 206B of the Gramm-Leach-Bliley Act, and the statutory scheme as a whole, support the conclusion that "based on" in that statute does not require a necessary dependence or exclusive relationship.

20. The Gramm-Leach-Bliley Act broadly defines "swap agreement" to include not only CDSs, but also, among other things, interest rate swaps, currency swaps, and weather swaps—items which clearly are not "security-based swap agreement[s]" for purposes of applying section 10b and Rule 10b-5's anti-fraud provisions. See School District of Erie v. J.P. Morgan Chase Bank, No. 08 Civ. 7688, 2009 WL 234128, at *1 (S.D.N.Y. Jan. 30, 2009) (finding that interest rate swap agreement was not security-based swap agreement); St. Matthew's Baptist Church v. Wachovia Bank Nat'l Ass'n, No. 04 Civ. 4540, 2005 WL 1199045, at *12-13 (D.N.J. May 18, 2005) (finding that swap agreement based on LIBOR was not security-based).

21. The fact that Congress extended section 10(b) and Rule 10b-5's anti-fraud rules to "security-based swap agreement[s]," and not other "swap agreement[s]" that clearly are not based on securities, appears to bring CDSs like those in this case into the heartland of the swap agreements Congress intended to govern under section 10(b) and Rule 10b-5. The defendants in this case

allegedly exchanged inside information regarding securities that affected the price of CDSs that were based on those securities. It is no surprise that Congress intended to extend the anti-fraud provisions that would prohibit sharing inside information in connection with trading those securities to also prohibit insider trading in transactions involving the CDSs themselves.

22. The legislative history of the CFMA supports the view that Congress intended to extend section 10(b) and Rule 10b-5's protections to CDSs such as those at issue in this case.

23. At the time of its passage, it was noted that the CFMA's amendment to section 10(b) would allow "current and future anti-fraud rules [to] apply to swap agreements to the same extent as they do to securities." Thus, the Act would "enhance protection for investors and for the financial markets, and will permit the SEC to respond as necessary to developments in these markets." 147 Cong. Rec. S11946-01 (daily ed. Jan. 2, 2001) (statement of Sen. Sarbanes). The relevant legislative history prior to its passage is consistent. Administration officials and congressional members expressed support for making it clear that the SEC's traditional anti-fraud and insider trading enforcement authority applied to novel financial instruments. <u>See</u> <u>The Commodity Futures Modernization Act of 2000: Hearing on S. 2697 Before the Senate Committee on</u>

Agriculture, Nutrition, and Forestry and the Senate Committee on Banking, Housing and Urban Affairs, 106th Cong. 4 (2000) (statement of Sen. Gramm) ("We need the SEC in all areas to exercise its authority on anti-fraud and insider trading."); id. at 20 (statements of Sen. Sarbanes and Federal Reserve Chairman Greenspan, expressing agreement that "we should focus on insider trading, fraud, manipulation, and make sure that any possibility for those practices to take place is precluded under the regulatory scheme").

24. The defendants' interpretation of "based on," as requiring a direct, explicit relationship that must be spelled out in the text of a CDS contract, would allow traders to escape the ambit of section 10(b) and Rule 10b-5 through clever drafting. Under the defendants' view, as long as CDSs' material terms did not make actual reference to the price or value of securities, the CDSs would not be "security-based," no matter how closely tied to securities their material terms actually were.

C. The Price Term of the CDSs Was "Based On" the Price, Yield, and Value of VNU Securities

25. While it is possible that not all CDSs are "based on" securities, the jurisdictional issue in this case is whether the material terms of the particular VNU CDSs purchased by Mr.

Negrin were based on the price, yield, value, or volatility of securities.

26. While Mr. Negrin may have considered other factors in determining the price at which he was willing to purchase VNU CDSs, it is clear from the evidence in this case that a fundamental part of his decision was the spread or yield (or, inversely, the price) of deliverable VNU bonds and the value of deliverable VNU bonds.

27. Mr. Negrin's deposition testimony and his recorded conversations with Mr. Rorech reveal that the spread of deliverable VNU bonds was central to his decision to buy VNU CDSs. Mr. Negrin and Mr. Rorech twice discussed and calculated the target price of VNU CDSs based on the expected spread of the VNU holding company bonds. (Findings of Fact ¶ 247.)

28. Moreover, the value of deliverable VNU bonds served as a fundamental part of Mr. Negrin's evaluation of the target price of the VNU CDSs. Mr. Negrin was keenly interested in the odds of VNU issuing a holding company tranche of bonds and repeatedly discussed the issue with Mr. Rorech. Mr. Negrin and Mr. Rorech also discussed the fact that the price of the VNU CDSs would increase if the value of deliverable bonds increased. (Findings of Fact ¶ 257.)

29. The importance of the price, yield, and value of VNU bonds to Mr. Negrin in determining whether to purchase VNU CDSs is unsurprising in light of the evidence from other market participants that the price, yield, and value of VNU's bonds was critical to the price of the VNU CDSs. Many market participants, including investors such as Mr. Masel and Mr. Sherry, and investment bank professionals at Deutsche Bank and other institutions, were focused on the price, yield, and value of deliverable VNU bonds in evaluating the price of VNU CDSs in July 2006.

30. Moreover, apart from the VNU transaction, the evidence suggests that market analysts and experts considered CDS prices in general to be based on the price, yield, or value of the referenced entity's bonds.

31. The fact that bond spreads and CDS prices can move in opposite directions on a daily basis (DEX 1 at ¶ 70), and the fact that CDSs can continue to be priced and traded even after their reference obligations have matured (DEX 1 at ¶ 94), is not dispositive of the question whether the material terms of the VNU CDSs actually purchased by Mr. Negrin in this case were based on the price, yield, value, or volatility of VNU bonds.

D. Section 9.9 of the ISDA Definitions Was a Material Term of the CDSs and Was "Based On" the Price of Securities

32. In addition, the SEC argues that a material term of the VNU CDSs was based on the price of a security because Section 9.9 of the ISDA Credit Derivatives Definitions, a term incorporated in the CDSs through the Master Confirmation Agreements, was based on the price of VNU securities.

33. Section 9.9 allows CDS counterparties to deduct the price of the reference entity's securities from the amount owed to the CDS-buyer if a triggering credit event occurs and the CDS-buyer fails to deliver the covered securities. Because the provision explicitly relies on the price of deliverable VNU obligations as the basis for calculating the cash settlement terms of the CDS, the provision is "based on" the price of a security for the purposes of section 206B of the Gramm-Leach-Bliley Act. (See Tr. 1636:10-1337:4.)

34. The question remains whether Section 9.9 is a "material term" of the CDSs for the purposes of the Gramm-Leach-Bliley Act.

35. The material terms of a contract are those terms that must be sufficiently definite to allow the contract to be enforceable. Examples of material terms include subject matter, price, payment terms, quantity, timing, compensation, and

duration. See, e.g., Local 917, Int'l Bhd. of Teamsters v. N.L.R.B., 577 F.3d 70, 74 (2d Cir. 2009) (citing 17A Am.Jur.2d Contracts § 190 (2004)); Sevel Argentina, S.A. v. Gen. Motors Corp., 46 F. Supp. 2d 261, 269 (S.D.N.Y. 1999); Rosenthal v. Nat'l Produce Co., 573 A.2d 365, 370 (D.C. 1990).

36. In this case, Section 9.9, together with the contracts' physical settlement provisions, provided the terms on which the VNU CDSs were to be settled if a credit event occurred. The CDS-sellers' agreement to pay the CDS-buyer the notional amount at settlement upon the occurrence of a credit event was plainly part of, if not all of, the consideration for which the CDS-buyer agreed to make the premium payments.

37. If Millennium actually held the referenced VNU bond when a credit event occurred, it could deliver the bond for the notional amount. But the actual value of the settlement would depend on the value of the bond surrendered. The greater the value of the bond, the less valuable the exchange would be for Millennium. If Millennium did not deliver the bond, then Section 9.9 would be used to determine the amount of money that the CDS-seller would have to pay Millennium and that would be calculated based on the notional amount minus the price of the VNU bond that could be acquired in the marketplace.

38. Therefore, the terms of that settlement were central to the VNU CDSs and are material terms without which the contracts would be unenforceable.

39. Moreover, the defendants' financial economics expert testified that the settlement terms, including Section 9.9, were part of the "key terms" in the CDS contracts.

40. For all of the reasons stated above, the material terms of the VNU CDS contracts were based on the price, yield, value, or volatility of VNU's securities. Therefore, the CDSs at issue in this case are security-based swap agreements for the purposes of section 206B of the Gramm-Leach-Bliley Act and are subject to section 10(b)'s antifraud provisions and the rules promulgated, and judicial precedents decided, thereunder.

II. Misappropriation Theory

41. Under the misappropriation theory, an individual violates section 10(b) and Rule 10b-5 "when he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information." O'Hagan, 521 U.S. at 652.

42. One engages in "misappropriation" for purposes of insider trading laws when he engages in "conduct constituting secreting, stealing, [or] purloining . . . [of] material non-

public information in breach of an employer-imposed fiduciary duty of confidentiality." United States v. Carpenter, 791 F.2d 1024, 1031 (2d Cir. 1986), aff'd, 484 U.S. 19 (1987).

43. Therefore, to establish that the defendants are liable for insider trading under the misappropriation theory, the SEC must prove that the information at issue was both material and nonpublic. See SEC v. Lyon, 605 F. Supp. 2d 531, 541 (S.D.N.Y. 2009). The SEC must also show that Mr. Rorech breached a duty of confidentiality in sharing the information—"the cornerstone of a misappropriation liability case." Id. at 542. Finally, the SEC must prove that the defendants acted with scienter. Aaron, 446 U.S. at 691.

A. Mr. Rorech's Conduct

44. There is no evidence of what was actually said on the cellular phone calls between Mr. Rorech and Mr. Negrin on July 14, 2006, and July 17, 2006. The SEC asks the Court to draw the inference that Mr. Rorech shared inside information with Mr. Negrin from circumstantial evidence. However, that evidence does not support the conclusion that Mr. Rorech or Mr. Negrin violated insider trading laws.

1. Mr. Rorech Did Not Know that Deutsche Bank Would Recommend that the Sponsors Issue the Holding Company Bonds at the Time of His Calls with Mr. Negrin

45. It is self-evident that insider trading liability cannot be premised on the disclosure of information that did not exist at the time of the allegedly illegal activity. See SEC v. Gonzalez de Castilla, 184 F. Supp. 2d 365, 376-77 (S.D.N.Y. 2002) (granting summary judgment for defendants where the alleged insider information "could not have been known at the time of the attacked [stock] purchases as it did not, as a matter of uncontroverted fact, exist at that time"); SEC v. Truong, 98 F. Supp. 2d 1086, 1102 (N.D. Cal. 2000) ("A tippee cannot be liable, of course, where the SEC fails to show that the alleged tipper possessed inside information.").

46. The SEC alleges that Mr. Rorech improperly shared with Mr. Negrin information regarding Deutsche Bank's intention to recommend that the sponsors issue holding company bonds during a cellular phone call on July 14 and, again, on another cellular phone call on July 17. (Joint Pretrial Order, Plaintiff's Summary of Claims at 6.)

47. At the time of the cellular phone calls on July 14 at 8:58 a.m. and July 17 at 9:49 a.m., Mr. Rorech did not possess any information about Deutsche Bank's recommendation because

Deutsche Bank had not yet made any decision to recommend that the financial sponsors issue the holding company bonds.

48. Even if Deutsche Bank or Mr. Fedorcik had decided to recommend the holding company deal to the sponsors as of the morning of July 17, Mr. Fedorcik had not yet told Mr. Rorech of his or the bank's intention to do so. (See Findings of Fact ¶ 87.)

49. Mr. Fedorcik did not share his intention to recommend a holding company issuance to the sponsors with Mr. Rorech until nearly four hours after the second cellular phone call, at 1:28 p.m. on July 17, and even then his tentative recommendation was conditional on investor demand for a holding company tranche of bonds. Thus, Mr. Rorech did not, and could not, possess this information at the time that he and Mr. Negrin spoke.

50. Deutsche Bank, consistent with the standard practice in the industry, had a wall in place to control the flow of information between its investment banking and sales and trading businesses. Rorech was never wall-crossed in connection with the VNU bond offering, and there is no evidence that Deutsche Bank's wall was breached or failed to function during the marketing for the VNU bond offering.

51. The fact that Mr. Rorech was a Deutsche Bank employee, and that he may have spoken with Mr. Fedorcik (or merely had the opportunity to do so) does not mean that Mr. Rorech actually

possessed information about Mr. Fedorcik's plans prior to the recorded telephone conversation between Mr. Rorech and Mr. Fedorcik at approximately 1:28 p.m. on July 17, 2006. Potential "access" to material nonpublic information, without more, is insufficient to prove that Mr. Rorech actually possessed any such information. See Truong, 98 F. Supp. 2d at 1097-99 (finding that the fact that an employee worked in an office with open cubicles and had "routine interactions with senior management" who knew of the company's negative financial condition did not create a triable issue of fact that the employee possessed information); see also SEC v. Anton, No. 06 Civ. 2274, 2009 WL 1109324, at *7-8 (E.D. Pa. Apr. 23, 2009) (finding that the fact that insider was aware that increasing loss reserves was a "strong possibility" but was not involved in internal discussions on the issue was insufficient to establish that insider possessed the information).

52. In short, because the alleged material nonpublic information about Deutsche Bank's recommendation did not exist at the time of the cellular phone calls, there could have been no insider trading based on that information. See SEC v. Hoover, 903 F. Supp. 1135, 1143 (S.D. Tex. 1995) ("A defendant's liability for insider trading can be based only on material non-public information known at the time of the trade, not on information learned later.").

2. The Information Mr. Rorech Did Know at the Time of the Calls Was Not Material

53. For purposes of the securities laws, information is deemed "material" if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of [available] information." Basic, Inc. v. Levinson, 485 U.S. 224, 231-32 (1988) (quoting TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)). With respect to "contingent or speculative" information, "materiality will depend at any given time upon a balancing of both indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity." Basic, 485 U.S. at 238 (citing SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968)) (internal quotation marks omitted).

54. A generalized confirmation of an event that is "fairly obvious" to every market participant who was knowledgeable about the company or the particular instrument at issue is not material information. See, e.g., SEC v. Monarch Fund, 608 F.2d 938, 942 (2d Cir. 1979) (generalized tips that do not divulge the specific terms of an impending but not yet publicly announced securities offering, where no specific terms or dates or names of participants was divulged, "lack[] the basic

elements of specificity" to be considered material for purposes of insider trading laws); Anton, 2009 WL 1109324, at *8 (quoting SEC v. Bausch & Lomb, Inc., 565 F.2d 8, 15 (2d Cir. 1977)) (alleged tip that company was increasing its loss reserves, without any specific information as to the extent of the reserves, was not material where the likelihood that reserves would be increased was subject of analyst speculation in research reports).

a. Information Regarding the Potential Restructuring

55. Even if Mr. Rorech had shared his opinions with Mr. Negrin as to the likelihood of a holding company issuance or provided Mr. Negrin with general information about the potential deal, such information does not constitute material inside information. See Anton, 2009 WL 1109324, at *7-8 (finding that information about possible increased loss reserves without any specifics was not material); In re Allaire Corp. Sec. Litig., 224 F. Supp. 2d 319, 333 (D. Mass. 2002) ("vaguely optimistic language" by corporation not material nonpublic information).

56. Information that Deutsche Bank's investment bankers were advising the sponsors on the deliverability issues in general, and that the sponsors were likely to address the investor demand for deliverable bonds was widely discussed in the marketplace in July 2006. In this context, Mr. Rorech's opinion, or even knowledge, that Deutsche Bank was working on a

solution to solve the deliverability problem was not sufficiently different from the information that was available in the marketplace to be material.

57. Moreover, any information that Mr. Rorech allegedly shared with Mr. Negrin regarding Deutsche Bank's intention to recommend a holding company issuance was speculative information that does not rise to the level of materiality. First, there is no evidence that Deutsche Bank made, or that Mr. Rorech was informed of, any decision to recommend the holding company deal to the sponsors by the time of his cellular phone calls with Mr. Negrin. Second, the ultimate decision as to whether or not to actually issue a holding company tranche was up to the financial sponsors, not Deutsche Bank. Indeed, even if Deutsche Bank recommended a holding company issuance, the sponsors' approval was far from guaranteed. Issuers regularly decline structural changes proposed by investors in high-yield bond offerings. Furthermore, there were additional issues discussed in the market that made a holding company issuance less likely notwithstanding a recommendation from Deutsche Bank, including tax and jurisdictional concerns. Given the inherently speculative nature of any information that Mr. Rorech possessed at the time of the cellular phone calls, the SEC has failed to prove by a preponderance of the credible evidence that the information was material. See Glazer v. Formica Corp., 964 F.2d

149, 155 (2d Cir. 1992) (finding that mere fact that some discussion has occurred on matters that may not eventuate is not necessarily material).

b. Information Regarding Customers' Indications of Interest

58. Nor was the fact that a customer had given an indication of interest for $100 million of holding company bonds material information. This information was not materially different from the information in the market that there was substantial investor demand for deliverable bonds.

59. Information about investor interest in, and demand for, deliverable bonds was widely discussed in the market. In fact, Mr. Barnum testified that because there was such strong demand, market participants expected that indications of interest or orders for deliverable bonds would be submitted to the underwriter, such that information about his particular indication of interest was expected and not different from the information in the market.

60. In addition, Ms. Tournier had assessed as early as July 12, based solely on publicly available information, that there was quantifiable demand in the market for deliverable bonds in the amount of €100-150 million, or more than $200 million.

61. As a result of the public knowledge of demand for deliverable bonds, Blue Mountain's indication of interest in $100 million of potential holding company bonds was not sufficiently different from the general discussions in the marketplace at the time to be deemed material. See Monarch Fund, 608 F.2d at 942-43 (finding that generalized information from insider about upcoming financing that was consistent with market rumors was not material nonpublic information).

62. Furthermore, where there is a question of whether certain information is material, courts often look to the actions of those who were privy to the information in determining materiality. See Basic, 485 U.S. at 241 n.18 ("[T]rading (and profit making) by insiders can serve as an indication of materiality . . . .") (emphasis omitted); Texas Gulf Sulphur, 401 F.2d at 851 (noting that a "major factor in determining whether [discovery of mineral ore] was a material fact" was "the importance attached to the drilling results by those who knew about it"); Rothberg v. Rosenbloom, 771 F.2d 818, 821 (3d Cir. 1985) ("The best proof of the materiality of that information is that the . . . experienced investors, found it to be sufficiently material . . . to purchase [the] stock.").

63. Here, the evidence does not establish that the information about Deutsche Bank's recommendation and an indication of interest for holding company bonds was material

information. Indeed, after learning of Mr. Fedorcik's likely recommendation and after placing his own indication of interest, Mr. Barnum sold VNU CDSs. This demonstrates that the information in question was not viewed by reasonable investors as having "significantly altered the 'total mix' of [available] information." Basic, 485 U.S. at 231-32.

64. Under these circumstances, Mr. Rorech's opinion about a recommendation and information about an indication of interest was not material information. Bausch & Lomb, Inc., 565 F.2d 8, 17 (2d Cir. 1977) (finding that fact of company's negative sales was "common knowledge" and thus was not material nonpublic information); Hartford Fire Ins. Co. v. Federated Dep't Stores, Inc., 723 F. Supp. 976, 987-88 (S.D.N.Y. 1989) (finding that company's own view that it was likely to be target of takeover was not material nonpublic information where there was widespread speculation in the market that company was a likely takeover candidate).

3. Sharing the Information Mr. Rorech Did Know Was Not a Breach of His Duty of Confidentiality

65. Furthermore, Mr. Rorech did not breach his duty of confidentiality to Deutsche Bank either by sharing his opinion regarding whether Deutsche Bank would recommend that the

sponsors issue the holding company bonds or by sharing his customer's indication of interest.

66. One engages in "misappropriation" for purposes of insider trading laws when he engages in "conduct constituting secreting, stealing, or purloining . . . [of] material non-public information in breach of an employer-imposed fiduciary duty of confidentiality." Carpenter, 791 F.2d at 1031.

67. There cannot be liability under section 10(b) and Rule 10b-5 unless the owner of the information that was allegedly misappropriated expected the information to remain confidential. See O'Hagan, 521 U.S. at 647 (emphasizing that both Grand Met and Dorsey & Whitney, O'Hagan's employer, "took precautions to protect the confidentiality of Grand Met's tender offer plans"); Dirks v. SEC, 463 U.S. 646, 655 n.14 (1983) (in order for a fiduciary duty to be imposed on a temporary insider tipper, "the corporation must expect [him] to keep the disclosed nonpublic information confidential, and the relationship [between the corporation and the tipper] at least must imply such a duty").

a. Information Regarding the Potential Restructuring

68. Deutsche Bank had no expectation that Mr. Rorech's personal opinions or general information concerning the restructuring of the VNU bond offering would be kept confidential. Indeed, it was consistent with the custom and practice in the high yield bond market for Mr. Rorech, a

salesperson, to share his ideas and opinions with Mr. Negrin, a prospective purchaser of the bonds.

69. Furthermore, the non-confidential status of the information Mr. Rorech possessed is confirmed by the fact that Deutsche Bank took no steps to ensure the confidentiality of the information. Pursuant to Deutsche Bank policy, capital markets officers, who are responsible for controlling the flow of confidential information from the private side of the Bank to the public side, cannot share confidential information with any public-side employee, including a salesperson, unless that individual is first "wall-crossed." The capital markets officers who worked on the VNU bond offering openly shared information about the potential restructuring of the deal, including considerations of recommending a potential holding company issuance, with Mr. Rorech and other salespeople without ever instituting "wall-crossing" procedures.

b. Information Regarding Customers' Indications of Interest

70. In addition, sharing information about other investors' indications of interest or orders for deliverable bonds could not have breached a duty of confidentiality to Deutsche Bank because the information was not "confidential information" under Deutsche Bank's policy and Deutsche Bank did

not consider the information to be confidential. The investors who provided the indications of interest or orders did not expect that the information would be kept confidential; on the contrary, they anticipated that that their indications of interest or orders would be shared with others in the marketplace. (Tr. 540:10-541:9 (Mr. Sherry testifying that customarily investors did not expect their indications of interest to be confidential).) In fact, Mr. Barnum specifically said that he did not think that his order was confidential and that he wanted it to be used by Deutsche Bank to anchor the deal. (Tr. 830:15-20, 833:11-834:12.)

71. In any event, it was permissible under Deutsche Bank's policy to share information about the indications of interest with other potential investors in order to build market interest for the potential structural change.

72. The wholesale absence of any expectation of confidentiality or breach of a duty of confidentiality is fatal to the SEC's claim. See Dirks, 463 U.S. at 665 (finding no insider trading liability where "[t]here was no expectation by [the analyst's] sources that he would keep their information in confidence. Nor did [the analyst] misappropriate or illegally obtain the information"); see also O'Hagan, 521 U.S. at 663 (emphasizing the absence of any expectation of confidentiality

in Dirks in contrast to the clear theft of secret information by O'Hagan).

B. Mr. Negrin's Conduct

73. The SEC has not established the content of the cellular phone calls between Mr. Rorech and Mr. Negrin or that Mr. Negrin traded while in the possession of material nonpublic information. For all of the reasons explained above, the SEC has failed to prove by a preponderance of the credible evidence that Mr. Rorech possessed or conveyed to Mr. Negrin any material nonpublic information in breach of any duty of confidentiality Mr. Rorech had to Deutsche Bank. Therefore, Mr. Negrin could not have traded on such non-existent information.

74. The SEC asks the Court to infer that Mr. Rorech must have conveyed prohibited information to Mr. Negrin based on the existence of the cellular telephone calls and on Mr. Negrin's subsequent trades. These facts alone do not support the inference that Mr. Negrin traded while in possession of material nonpublic information. See SEC v. Goldinger, No. 95-56092, 1997 WL 21221, *1-2 (9th Cir. Jan. 14, 1997) (affirming summary judgment for defendant where defendant spoke with insider who had information about a merger, engaged in substantial trading accounting for 7% of the total market volume of the stock immediately thereafter, and commented to others that he "owe[d]" the insider "for this one").

75. Mr. Negrin's VNU CDS trades were consistent with his past investment practices and trading history. Any inference of insider trading that might arise from Mr. Rorech and Mr. Negrin's cellular phone calls followed by Negrin's VNU CDS trades is negated in light of Mr. Negrin's similar practices in the past. See Freeman v. Decio, 584 F.2d 186, 197 & n.44 (7th Cir. 1978) (district court correctly determined that inference of insider trading created from an insider's sale of stock just prior to a negative corporate announcement was "nullified" in light of similar past trading patterns and reasonable explanations for the sales); SEC v. Heartland Advisors, Inc., No. 03 Civ. 1427, 2006 WL 2547090, at *1-4 (E.D. Wisc. Aug. 31, 2006) (facts that defendant portfolio manager had lunch with insider who had negative information about security just before defendant liquidated all of his holdings in that security did not support finding that he must have been tipped at the lunch where defendant had sold the same security in similar quantities in the two years prior to the trades in question and had plausible, uncontroverted reasons for the challenged sales); SEC v. Moran, 922 F. Supp. 867, 893 (S.D.N.Y. 1996) (defendant's history of purchasing large quantities of similar stocks weighed against finding of insider trading).

76. Furthermore, "trading is suspicious only when it is dramatically out of line with prior trading practices at times

calculated to maximize the personal benefit from undisclosed inside information." In re Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 986 (9th Cir. 1999). Here, Mr. Negrin had purchased VNU CDS previously on several occasions, and his particular trades on July 17 and 18 were consistent with the sizes of his other CDS trades at the time, and were immaterial relative to the size of his overall CDS portfolio.

77. Mr. Negrin also provided reasonable explanations for purchasing the VNU CDS on July 17 and July 18, because he believed that VNU CDS was underpriced in light of the substantial leverage that the company was going to be incurring. His testimony on this point is corroborated by the testimony of Mr. Masel and the various Bloomberg messages and research reports that were circulating in the market at the time. See Freeman, 584 F.2d at 197 & n.44 (finding no inference of wrongdoing where, among other reasons, defendant had reasonable explanations for the sales); Moran, 922 F. Supp. at 893 (citing to defendant's innocent explanations for his stock purchases in finding that no insider trading occurred).

78. Nor do Mr. Negrin's statements in his July 24, 2006, call with Mr. Rorech thanking Mr. Rorech for suggesting the VNU CDS trade significantly support the SEC's claim of insider trading. There is no question that Mr. Rorech urged Mr. Negrin to engage in a basis trade that included purchasing the VNU CDSs

as well as bonds that Deutsche Bank was attempting to sell. Mr. Rorech repeatedly attempted to get Mr. Negrin to purchase the bonds, but Mr. Negrin purchased only the VNU CDSs. That turned out to be a profitable trade for Millennium, but it does not indicate that the VNU CDS trade was based on material nonpublic information. Mr. Rorech urged the same basis trade to other customers in recorded telephone calls. The fact that Mr. Negrin expressed appreciation for Mr. Rorech's recommendation is not surprising, nor does it indicate that Mr. Negrin made his purchase based on material nonpublic information. See Goldinger, 1997 WL 21221, at *1-2 (affirming summary judgment for defendant; defendant's statement following his heavy trading in a stock that he "owe[d]" the insider did not create triable issue of fact).

79. Under the circumstances, the trades and the cellular telephone calls do not give rise to any inference that Mr. Negrin received material nonpublic information from Mr. Rorech.

C. Scienter

80. Scienter is a necessary element of every section 10(b) and Rule 10b-5 claim. Aaron, 446 U.S. at 691. Scienter encompasses "a mental state embracing intent to deceive, manipulate, or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976).

81. The SEC has failed to prove by a preponderance of the credible evidence that Mr. Rorech, a relative newcomer to the high yield sales group, intended to deceive, manipulate, or defraud by sharing the allegedly "inside" information. Mr. Rorech heard his direct supervisor and the head of capital markets share the same information with customers. Indeed, Mr. Rorech participated in calls where Mr. Fedorcik, the head of capital markets and the source of the alleged "inside" information, provided customers with the same information that the SEC claims that Mr. Rorech shared with Mr. Negrin. (PX 55A: DX 381T.)

82. Here, the requisite mental state cannot be established merely by pointing to the two cellular phone calls. Any negative inference that the SEC attempts to draw from the calls is undermined by the fact that Mr. Rorech also disclosed the same allegedly material nonpublic information to other customers on recorded lines.

83. Moreover, on July 17, Mr. Rorech and Mr. Negrin spoke openly on recorded lines about the fact that they were going to speak on their cellular phones. (PX 98A.) If, as the SEC claims, they spoke on cellular phones so as to avoid detection of their conversation, Mr. Rorech and Mr. Negrin would not have first created a record of the cellular phone call by speaking about it on the recorded line.

84. In addition, the SEC cannot point to any reason for Mr. Rorech to give Mr. Negrin special treatment by providing him with inside information. Mr. Rorech and Mr. Negrin had a purely professional working relationship; they were not friends. See Anton, 2009 WL 1109324, at *1 n.3, *9 (alleged tipper and tippee's exclusively professional relationship–lacking any social component–made it unlikely that tipper had any motive to give the tippee material nonpublic information). Moreover, the SEC has failed to establish that Mr. Rorech obtained any quantifiable or direct financial benefit as a result of Mr. Negrin's VNU CDS trades in July and August 2006. Indeed, Mr. Negrin's $10 million CDS purchase from Deutsche Bank was small relative to the more than $200 million in VNU bonds that Mr. Rorech sold during the same time. Further, any benefit Mr. Rorech may have received from any sales he generated would have helped him only because those sales were known to Deutsche Bank, his employer, and benefited the employer.

85. This is in stark contrast to the typical insider trading case. See, e.g., United States v. Larrabee, 240 F.3d 18, 22-23 (1st Cir. 2001) (facts that tipper and tippee and their families had close personal ties, tippee-trader gave substantial monetary gifts to tipper's children and paid for their tuitions, and tippee's unusually large and well-timed

stock purchases supported inference that insider trading occurred).

86. There is also no evidence that Mr. Negrin knew that any information Mr. Rorech gave him was, in fact, material nonpublic information obtained in breach of Mr. Rorech's duty of confidentiality to Deutsche Bank. As explained above, the information that Mr. Rorech provided in the cellular telephone calls was not, in fact, prohibited information. Moreover, Mr. Negrin did not act as though the information was possibly prohibited. He made his first purchase of VNU CDSs from Deutsche Bank, and he sold or assigned both of the VNU CDSs at issue to Deutsche Bank. There was no effort to hide the transactions from Deutsche Bank.

87. Deception is also an essential element of all claims brought pursuant to the misappropriation theory of section 10(b) and Rule 10b-5 liability. O'Hagan, 521 U.S. at 654 ("Deception through nondisclosure is central to the [misappropriation] theory of liability . . . .").

88. The SEC cannot establish that Mr. Negrin or Mr. Rorech engaged in any deception. Mr. Rorech kept his direct supervisor and the head of U.S. capital markets apprised of the fact that he was speaking with his customers about a potential holding company issuance. Mr. Rorech discussed the possibility of a

holding company issuance with his customers in order to persuade them to buy bonds, and not for a "self-serving" purpose. Cf. O'Hagan, 521 U.S. at 652 (it is the "fiduciary's undisclosed self-serving use of a principal's information . . . in breach of a duty of loyalty and confidentiality" that provides the requisite "deception" to justify liability under Rule 10b-5).

89. There also was nothing deceptive about Mr. Negrin's VNU CDS trades. As explained above, he made no effort to conceal his trading in VNU CDS from Deutsche Bank or from Mr. Rorech, but rather openly traded with Deutsche Bank. See id. at 655 ("Because the deception essential to the misappropriation theory involves feigning fidelity to the source of the information, if the fiduciary discloses to the source that he plans to trade on the nonpublic information, there is no 'deceptive device' and thus no § 10(b) violation.").

90. The wholesale lack of any deceptive conduct in this case by Mr. Negrin or Mr. Rorech underscores that the SEC has failed to establish the necessary elements of its section 10(b) and Rule 10b-5 claim against the defendants.

CONCLUSION

The foregoing constitutes the Court's Findings of Fact and Conclusions of Law pursuant to Rules 52(a) and 65 of the Federal Rules of Civil Procedure. For the reasons explained above, the defendants are entitled to a Judgment **dismissing** the plaintiff's complaint. The Clerk is directed to enter Judgment in favor of the defendants and closing this case.

SO ORDERED.

Dated: New York, New York
June 24, 2010

John G. Koeltl
United States District Judge