UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARVIN PEARLSTEIN, Individually And On Behalf of All Others Similarly Situated, Plaintiff, vs. BLACKBERRY LIMITED (formerly known as RESEARCH IN MOTION LIMITED), THORSTEN HEINS, BRIAN BIDULKA, and STEVE ZIPPERSTEIN Defendants.	**File No. 1:13-CV-7060-TPG** **SECOND CONSOLIDATED AMENDED CLASS ACTION COMPLAINT FOR VIOLATIONS OF FEDERAL SECURITIES LAWS** **JURY TRIAL DEMANDED**

1. Lead Plaintiffs Todd Cox and Mary Dinzik ("Plaintiffs") and additional Plaintiffs Yong M. Cho and Batuhan Ulug bring this federal securities class action pursuant to Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure, on behalf of the purchasers of BlackBerry Limited ("BlackBerry" or the "Company") common stock between March 28, 2013 and September 20, 2013 (the "Class Period"), against BlackBerry, its former Chief Executive Officer Thorsten Heins, its former Chief Financial Officer Brian Bidulka, and its Chief Legal Officer Steve Zipperstein (collectively, "Defendants") for violations of the Securities Exchange Act of 1934 (the "Exchange Act"). The claims asserted herein arise from a series of materially false and misleading statements and omissions concerning BlackBerry, its new BlackBerry 10 smartphones, its recognition of revenue, and compliance with Generally Accepted Accounting Principles ("GAAP") that Defendants made during the Class Period.

2. Plaintiffs allege the following based upon the investigation of Plaintiffs' counsel, which included a review of United States Securities and Exchange Commission ("SEC") filings by BlackBerry, securities analysts' reports and advisories about the Company, press releases and other public statements issued by the Company and its executives, media reports about BlackBerry, a criminal complaint concerning Z10 sales and returns data, and interviews with witnesses with knowledge of the allegations herein and consultation with industry experts. Plaintiffs believe that substantial additional evidentiary support will exist for the allegations set forth herein after a reasonable opportunity for discovery.

POST-*OMNICARE* ALLEGATIONS AND NEW INFORMATION SUPPORTING SCIENTER AND FALSITY

3. Plaintiffs submit this pleading in light of *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S.C. 1318 (2015), which provides new guidance for the pleading of statements and omissions of opinion, and in light of new evidence demonstrating that Defendants made material misrepresentations and omissions concerning the sales and rate of returns of the Z10s (and, accordingly, the proper amount of revenues to record) and that Defendants knew those statements and omissions were outright lies at the time of the statements and omissions. An overview of the new allegations based on *Omnicare* and the new information – comprising a criminal complaint, plea and sentencing hearing transcripts, a government sentencing memorandum and an FBI Special Agent affidavit related to negative sales data concerning the Z10s during the Class Period that Defendants admit they obtained from retailers and partners and reviewed and monitored – is set forth directly below at ¶¶ 4-33.

Defendants' Actionable Statements and Omissions of Opinion In Light of *Omnicare*

4. Defendants' opinion statements omitted material facts about Defendants' inquiry into or knowledge concerning such statements of opinion. The omitted facts show the statements

made by Defendants lacked the basis for making those statements that a reasonable investor would expect, even if Defendants subjectively held those opinions, which they did not. A reasonable investor in BlackBerry expects not just that Defendants believe the opinions publicly stated (however irrationally), but that they fairly align with the information in Defendants' possession at the time.

5. Class members' expectations about the degree of certainty underlying an opinion is the function of the context in which the opinion is expressed, including the specificity of the opinion itself and the speaker's special knowledge that is unavailable to Class members. For statements of opinion, the proper analysis is what a reasonable person would naturally understand a statement to convey beyond its literal meaning. For opinion statements, this means considering the foundation investors would expect an issuer to have before making the statement. Where, as here, Defendants omitted material facts about their inquiry into or knowledge concerning their statements of opinion, and those facts conflict with what a reasonable investor would take from the statements themselves, the omissions create liability.

6. Defendants knew at the time they made these statements of opinion particular facts the omission of which made the opinions at issue misleading to a reasonable person reading the statement fairly and in context.

7. Defendants' false and misleading statements and omissions based on opinions are actionable. Defendants' April 12, 2013 press release includes materially untrue statements and omissions of opinion. The opinion component of the April 12, 2013 release includes the following language: "Everyone is entitled to their opinion about the merits of the many competing products in the smartphone industry, but when false statements of material fact are deliberately purveyed for the purpose of influencing the markets a red line has been crossed."

8. Defendants' choices of accounting treatments are statements of opinion. Those opinions imply that Defendants had a basis in fact to utilize the particular treatment and that Defendants were not in possession of facts that rebutted the opinion. The material misrepresentations and omissions concerning Defendants' accounting practices are actionable statements of opinion. These practices include BlackBerry's misstated revenue recognition policy and improperly recorded revenues from the Z10 upon shipment; its delay in taking a charge against income to account for decreased value of the Z10 inventory; and its failure to record a charge against income to reflect the fact that supply commitments outstripped demand for the Z10.

The *Dunham* Action Criminal Complaint, Plea and Sentencing Transcripts, Sentencing Memorandum and Affidavit Support Falsity and Scienter as To Defendants' Statements and Omissions

9. The material falsity and misleading nature of Defendants' statements and omissions concerning the Z10's sales and returns, customer acceptance of the Z10s, and Defendant Heins' vigorous denial of the accuracy of an April 11, 2013 analyst report concerning returns of the Z10s, as well as other Class Period statements and omissions (including Defendants' accounting judgments or opinions) are further demonstrated by a criminal complaint and accompanying affidavit in the case *U.S. v. James Dunham, Jr.*, filed in Federal District Court for the District of Massachusetts on February 24, 2015, Mr. Dunham's subsequent guilty plea, in addition to hearing transcripts and the government's sentencing memorandum. This new evidence shows that Defendants' opinion statements had no reasonable basis – even if they were subjectively believed, which they were not.

10. The Affidavit of FBI Special Agent David Makor submitted with the criminal complaint ("Affidavit"), incorporated herein by reference and attached hereto as Exhibit A, paints a compelling picture of the manner in which Mr. Dunham, a former executive at a wireless

franchisor [Wireless Zone], obtained very specific, confidential financial data and information concerning sales and returns of a wireless smartphone manufacturer [BlackBerry] and provided it to a financial analyst [Detwiler Fenton]. In the Affidavit, Special Agent Makor swears based on interviews with multiple witnesses that Mr. Dunham provided this detailed, real-time financial data to the analyst, which issued a report revealing the negative, information, resulting in a stock drop of 7% in the wireless manufacturers' [BlackBerry's] stock.

11. On March 26, 2015, despite the fact that no names of the business entities involved were contained in the criminal complaint, the *Boston Business Journal* reported that a comparison of data in the criminal complaint to public information shows that the wireless manufacturer in question is BlackBerry; that Mr. Dunham was an executive at Wireless Zone; and that the financial analyst 13-is Detwiler Fenton. February 26, 2015 *Boston Business Journal* article, "*Detwiler Fenton Facing Criminal Case Over BlackBerry Sales Data.*" The franchisor where Dunham worked is one of six exclusive national Verizon retailers that sell the smartphone maker's devices. February 26, 2015 *Bloomberg News* article, *BlackBerry Sales Leak Coincides with Alleged Fraud Scheme.*

12. The *Boston Business Journal* article states that a "former executive at a Verizon Wireless retailer [who was also a former executive at Wireless Zone at the time of the alleged misconduct] was arrested Thursday for allegedly selling confidential sales and product information to the Boston financial services firm Detwiler Fenton, including information that caused BlackBerry's stock price to plummet in April 2013. According to the [criminal] complaint, Dunham was the source behind a controversial research note published by Detwiler analyst Jeff Johnston in April 2013."

13. Based on the *Dunham* criminal proceedings and related press coverage, as well as research and investigation by Plaintiff's Counsel, it is now clear that the detailed, negative financial data at issue related to sales and returns of the BlackBerry Z10 and that Detwiler Fenton relied upon this true, real-time data in its analyst report of April 11, 2013 concerning BlackBerry. This data was available to Dunham in his capacity as an executive at Wireless Zone, which had access to "very specific information [about BlackBerry] from [approximately 400] franchisees, including sales…product launch information, and cost information." Exhibit A at ¶9.

14. Indeed, throughout the Dunham criminal proceedings, the accuracy of this information was raised several times. During the plea hearing before Judge Woodlock in the District of Massachusetts on June 4, 2015, Mr. Dunham acknowledged that he had taken confidential information from his employer, given it to a Detwiler analyst, and the subsequent Detwiler report was based on that confidential information:

> MS. WALTERS:
>
> If this case were to proceed to trial, the Government would present evidence establishing the following:
>
> Between approximately August of 2009 and September of 2013, Mr. Dunham served as the Chief Strategy Officer and then the President and Chief Operating Officer of a wireless franchisor which is an exclusive national indirect retailer for a major provider of wireless services.
>
> And so, how this would work is the major wireless providers have agency relationships with a series of indirect retailers throughout the country. This particular one had relationships with, I believe, six. Mr. Dunham's employer was one of those six.
>
> Those six were exclusive to this particular service provider and sold products and services provided by that specific wireless provider. Examples of wireless providers are T-Mobile, Verizon, Sprint.

Those wireless providers then, obviously, sell various devices, Blackberry devices, Apple devices, Samsung devices, through each of the wireless providers. So, as a national indirect retailer, Mr. Dunham's employer supervised or maintained 400 franchisees which sold wireless services and wireless devices to the public.

In his roles at the wireless franchisor Dunham had access to very specific confidential information from the wireless franchisor's franchisee. So, specific sales information, specific return information, compensation information, information regarding activating or upgrading, simply buying a new service plan, product launch information and other cost information.

Again, all of that information was confidential, as witnesses would testify, and as set forth in his employment agreements. Again, in light of his position at the wireless franchisor, and pursuant to his employment agreements, Mr. Dunham had a duty not to disclose wireless franchisor confidential information, and he certainly had a duty not to disclose it without permission, specific permission from the wireless franchisor. As Dunham knew, disclosure of such information could jeopardize key business relationships with business providers, with his business partners, including the service provider, including the manufacturers of the smartphones and other devices that were sold through the franchisees.

…

Beginning in May 2010 and continuing through at least April 2013, and unbeknownst to Mr. Dunham's employer, the wireless franchisor, Dunham acted as a paid consultant to a Boston-based financial services firm that provides investment research to institutional clients who then use that research for the purposes of trading. ***Pursuant to that consulting agreement, Mr. Dunham provided that research firm with confidential information belonging to the wireless franchisor, including specifically sales information, return information, also a variety of information about sales numbers of upgrades and downgrades in service***, and he did this in exchange for $2,000 monthly payments.

Again, he wasn't permitted to disclose the information at all from the wireless franchisor without permission. He was not permitted to disclose it for his own personal purposes, which is what he was doing in this instance. The wireless franchisor was, in fact, unaware that he had this consulting relationship, and the CEO of the wireless franchisor would testify at trial he would not have given such permission, given the potential disastrous effect on business relationships.

As Mr. Dunham knew, ***the confidential information that was being disclosed by him was then included in research notes that were distributed by the research firm to its institutional clients for use in trading decisions.***

> In particular, in April, 2002,[1] ***Mr. Dunham disclosed the wireless franchisor's confidential business information regarding sales and return information for a specific smartphone that had been recently launched by a major smartphone manufacturer and had just recently become offered by the major wireless provider with whom Mr. Dunham's employer had a relationship. The analyst then drafted and the research firm released an April 11, 2013 research note on that smartphone, which note included the specific sales and return information that had been provided by Dunham.***
>
> THE COURT:
> All right. You have heard what Ms. Walters tells me the evidence would be in this case. ***Is that what happened***?
>
> MR. DUNHAM: ***Yes, your Honor***.
>
> THE COURT: ***You did what was recited there***?
>
> MR. DUNHAM: ***Yes, your Honor***.[2]

(Emphasis added).

15. The Government's sentencing memorandum, executed on September 11, 2015, similarly described Mr. Dunham's actions, and expressly stated that the "real time" information Mr. Dunham conveyed to Detwiler was "accurate" as it concerned his employer's 400 retail stores:

> ***According to the analyst, Dunham's information was valuable because he provided "real time" information based on what was happening in the Wireless Franchisor's 400 retail stores***, which information then was the basis for research reports authored by the analyst and distributed to the Research Firm's investor clients. In exchange for his consulting services, the Research Firm paid Dunham $2,000 per month.
>
> The scheme came to light in April 2013 in connection with information Dunham provided to the analyst about sales and returns of a newly released smartphone. Specifically, at the end of March 2013, the Major Smartphone Manufacturer released its much anticipated smartphone—the success or failure of which was

[1] The date "2002" is a typo in the transcript, as the transcript itself and other documents in the *Dunham* action make clear, Mr. Dunham provided this data to Detwiler Fenton in April 2013.

[2] Rule 11/Plea Hearing Transcript, 1:15-cr-10110, Dkt. No. 36 (D. Mass. June 4, 2015), incorporated by reference and attached hereto as Exhibit B at 19:18-23:12.

> widely considered critical to the troubled company's prospects. By early April, reports had been circulating that the smartphone's sales had been lagging and so the analyst reached out to Dunham to see if he could obtain more specific information on sales. In an April 10, 2013 telephone call, Dunham told the analyst that some Wireless Franchisor stores were seeing returns of the smartphone exceeding sales. This information was not publicly available and was highly confidential to the Wireless Franchisor, as well as the Wireless Franchisor's business partners. ***The analyst used that information in a research report that his Firm published the next day.*** That same day, the share price of the Major Smartphone Manufacturer's stock dropped more than seven percent and ***the Major Smartphone Manufacturer publicly disputed the accuracy of the information. In fact, <u>the information was accurate</u>, in-so-far as it reflected what was happening in the Wireless Franchisor's stores***, although it may not have been accurate with respect to the Major Smartphone Manufacturer's overall sales and returns.[3]

(Emphasis added).

16. Then, during Mr. Dunham's sentencing hearing on September 15, 2015, Judge Woodlock discussed with the prosecuting attorney the issue of whether Mr. Dunham deceived the market by disclosing this information and, if not, whether this should be a mitigating factor to his sentencing. The prosecuting attorney, who had access to and reviewed the specific sales and return data at issue, acknowledged that the information that Mr. Dunham had provided to Detwiler Fenton was accurate:

> MS. WALTERS: But here, of course, we are talking about leaking information that is confidential, and in this case, at least from the public reports and in terms of how the major Smartphone manufacturer responded to it, they said, "That's not accurate information." Now the market is reacting to inaccurate information about –
>
> THE COURT: ***But it was accurate information, wasn't it***?
>
> MS. WALTERS: ***It was accurate as to Mr. Dunham's employer***.[4]

[3] Government's Sentencing Memorandum, 1:15-cr-10110, Dkt. No. 34, (D. Mass. Sept. 11, 2015), incorporated by reference and attached hereto as Exhibit C at 2-3.

[4] Sentencing Hearing and Motion Hearing Transcript, 1:15-cr-10110, Dkt. No. 41, (D. Mass. October 1, 2015), incorporated by reference and attached hereto as Exhibit D at 7:20-8:4.

(Emphasis added).

17. The filings and court proceedings in the *Dunham* action demonstrate that the statements made in the Detwiler Report were based on the true, real-time data of 400 retail stores selling the BlackBerry Z10; how Mr. Dunham had access to this information; and the manner in which Mr. Dunham gave the information to Detwiler to be published in the April 11, 2015 report.

18. In an April 12, 2013 BlackBerry press release, however, Defendant Heins falsely told investors the Detwiler Report was "materially false and misleading" and "absolutely without basis." At the time of Heins' vigorous denial of the veracity of the Detwiler Fenton report and Defendants' issuance of positive statements and omissions about the Z10, Defendants, including Defendant Heins, by their own admission, were in possession of facts incompatible with their opinions. Defendants have ***expressly acknowledged*** they had the relevant data in hand and monitored it actively during the Class Period. Defendants publicly stated in their April 12, 2013 press release "[s]ales of the BlackBerry Z10 are meeting expectations and that ***data we have collected from our retailers and carrier partners demonstrates that customers are satisfied… Return rate statistics show that we are at or below our forecasts and right in line with the industry***." This statement demonstrates two things: 1) Defendants admittedly had the very real data from retailers and partners concerning sales and returns of the Z10 that had been in the possession of Mr. Dunham and provided to Detwiler Fenton; and 2) Defendants' statements and omissions, including statements of opinion regarding customer satisfaction and return rates being at or below forecast and right in line with the industry were outright lies and known to be lies at the time the statements were made. Further demonstrating Defendants' active role in monitoring demand requirements, as noted in the Company's Fiscal 2013 Form 40-F, Defendants concede

"***the Company performs an assessment of inventory*** during each reporting period, ***which includes a review of***, among other factors, ***demand requirements***, component part purchase commitments of the Company and certain key suppliers, product life cycle and development plans, component cost trends, product pricing and quality issues." (Emphasis added).

19. Defendants monitored and reviewed the very detailed negative financial data that formed the basis for Detwiler Fenton's revelations of unusually-high returns of the Z10 – as that data is the very same data and underlying information that Defendants admitted they collected from retailers and partners and reviewed and monitored throughout the Class Period. Thus, Defendants made opinion statements and omissions that lacked a reasonable basis and omitted facts known to them concerning their stated opinions – *e.g.*, omitted that Detwiler Fenton obtained very specific, negative data about the Z10 that was real and material. Defendants – while simultaneously and aggressively denying the validity of the information reported by Detwiler Fenton – had no reasonable basis to issue this denial and did so with knowledge the denial was false when made or, at a minimum, was made with recklessness. Such omitted facts conflict with what a reasonable investor would take from the statement itself.

20. The criminal complaint in *United States v. James Dunham, Jr.*, 15MJ7051JCB (D. Mass.), related Affidavit, plea and sentencing hearing transcripts and government sentencing memorandum demonstrate the veracity of the Detwiler Fenton research report and the fact that Defendants' denials of its contents were lies. According to the Affidavit and sentencing memorandum, the statements contained in the research report were based on confidential, real-time sales and return data relating to about 400 retailers of the wireless manufacturer's products that was in the hands of Dunham and which he sold to the Analyst. During his plea hearing, Dunham himself acknowledged that these facts were true and admitted to the charged conduct.

Dunham's Access To "Very Specific" Confidential Sales Data Relating to the Z10 for 400 Retailers

21. The Affidavit states that Dunham had access to "***very specific***" confidential sales and return data that he learned through his employment at a wireless franchisor later identified by the *Boston Business Journal* as Connecticut-based Wireless Zone, one of six exclusive national Verizon retailers that sold BlackBerry's devices. *See Boston Business Journal* article "*Detwiler Fenton Facing Criminal Case Over BlackBerry Sales Data*"; *see also* 02/26/2015 *Bloomberg News* article "*BlackBerry sales leak coincides with alleged fraud scheme*." According to the Affidavit, between August 2009 and September 2013, Dunham served as the Chief Strategy Officer and then President and Chief Operating Officer of a wireless franchisor, which is a retailer for a major provider of wireless services. Exhibit A at ¶4. During at least some of that time, Dunham was a paid consultant to a Boston-based financial service firm that provided investment research to institutional clients. *Id.* Dunham shared with the analyst "information regarding the wireless industry, including ***sales, return and other confidential business information that he learned through his employment at the wireless franchisor.*** The information disclosed by Dunham then was included in research notes distributed by the Research Firm." *Id*. (emphasis added). The Affidavit also confirms that "[***t]he Wireless Franchisor has access to very specific information from the franchisees, including sales, compensation, service activating or upgrading information, product launch information, and cost information.***" *Id*. at ¶9 (emphasis added).

22. Dunham's access to the data in question was confirmed not only through the analyst firm Detwiler Fenton, but also through Dunham's boss at Wireless Zone, who confirmed "in Dunham's role as Chief Strategy Officer and later as the President and COO of the Wireless Franchisor, Dunham had access to certain business information, including… ***sales and return***

information for Wireless Franchisor franchisees." *Id*. at ¶10 (emphasis added). According to the Affidavit, Dunham "recalled the Analyst had told him Dunham's information was valuable and that the Analyst wanted to put him on a monthly retainer." *Id*. at ¶16. The Analyst explained "***Dunham's information was valuable because Dunham had real-time visibility into sales from the Wireless Franchisor's 400 locations***." *Id*. at ¶17 (emphasis added).

23. Dunham's access to this information was also confirmed by Dunham himself during his plea hearing. Specifically, the Assistant United States Attorney ("AUSA") explained that "as a national indirect retailer, Mr. Dunham's employer supervised or maintained 400 franchisees which sold wireless services and wireless devices to the public" and therefore "Dunham had access to very specific confidential information from the wireless franchisor's franchisee. So, specific sales information, specific return information, compensation information, information regarding activating or upgrading, simply buying a new service plan, product launch information and other cost information." Exhibit B at 20:12-17. When asked by the Court to confirm the AUSA's evidence, Mr. Dunham stated, under oath, "Yes, your Honor." *Id*. at 23:10.

Dunham's Sharing of Confidential Data with Detwiler Fenton

24. The Affidavit states that Dunham and the Analyst spoke by telephone on April 10, 2013, the day before the April 11, 2013 Research Note was released. Exhibit A at ¶24. The call took place at 2:00pm and lasted approximately eight minutes. *Id*. The Affidavit further states that the following language contained in the April 11, 2013 research note was information provided to the Analyst by Dunham: "We believe ***key retail partners*** have seen a significant increase in [Wireless Manufacturer] returns to the point where, in several cases, returns are now exceeding sales, a phenomenon we have never seen before." *Id*. at ¶26 (emphasis added).

25. Dunham was charged with mail and wire fraud because he allegedly received payments from Detwiler Fenton, which deprived his employer, Wireless Zone, of its right to his honest and faithful service through bribes and kickbacks that were mailed to him. The information supplied by Dunham was supplied in part by telephone and also distributed electronically to the analyst's clients, some of which were out of state. *Id.* at ¶33. In other words, Dunham allegedly defrauded his employer by providing the real-time, confidential information and research data concerning BlackBerry's sales and returns of the Z10 to Detwiler Fenton.

26. During the June 4, 2015 Plea Hearing, Mr. Dunham admitted to this conduct. According to the transcript, Mr. Dunham provided Detwiler Fenton "with confidential information belonging to [Wireless Zone], including specifically sales information, return information, also a variety of information about sales numbers of upgrades and downgrades in service, and he did this in exchange for $2,000 monthly payments." Exhibit B at 21:24-22:5. Moreover, "[a]s Mr. Dunham knew, the confidential information that was being disclosed by him was then included in research notes that were distributed by the research firm to its institutional clients for use in trading decisions." *Id*. at 22:14-17. Specifically, Mr. Dunham admitted to disclosing Wireless Zone's specific sales and return information for BlackBerry Z10s to Detwiler Fenton, who "then drafted and the research firm released an April 11, 2013 research note on that smartphone, which note included the specific sales and return information that had been provided by Dunham." *Id*. at 22:24-23:2.

Defendants Admitted They Possessed Data from Retailers and Partners and Actively Monitored this Data – which Includes the Negative Z10 Sales and Returns Data Forming the Basis of the Detwiler Fenton Report

27. The criminal complaint, Affidavit, plea and sentencing hearing transcripts, and sentencing memorandum show that Dunham had this real-time data concerning sales and returns of the Wireless Manufacturer's product on April 10, 2013, in his possession and sold it to the Analyst. BlackBerry had the data as well, as the manufacturer working with a key retailer, Verizon, for which Wireless Zone served as a franchisor. As noted above, Defendants affirmatively admitted that they monitor the "data we have collected from our retailers and carrier partners" and that they not only looked at "return rate statistics" throughout the Class Period but also stated that those return rates were "at or below our forecasts and right in line with the industry" as of April 12, 2013. The April 11, 2013 Detwiler Report specifically refers to "key retail partners" – the same partners whose data Defendants state they monitored.

28. When Defendant Heins aggressively denied the Detwiler Fenton report and asserted that the information was therein false and "absolutely without basis," he had in truth prior to that time actively reviewed the real-time sales data that plainly showed the veracity of the statements by Detwiler Fenton, and revealed the falsity of his own aggressive denial and Defendants' positive statements and omissions concerning sales, returns, customers, financials, and accounting judgments.

29. It has now been publicly revealed that the specific, negative financial information concerning the sales and returns of the Z10 revealed by Detwiler Fenton on April 11, 2013, was based on confidential, true and specific sales and return numbers relating to the Z10. The criminal complaint, notarized Affidavit, plea and sentencing hearing transcripts, and sentencing memorandum demonstrate that real-time data concerning the Wireless Manufacturer was true –it was specific, confidential, financial information that was sold to the Analyst. These new revelations come as no surprise as they strongly support BlackBerry's belated announcement of a

$930-960 million restatement relating to the Z10 that occurred within weeks of repeated positive statements about sales and returns and customer acceptance of the Z10s during the Class Period.

Additional Allegations Concerning Actionable Financial Misstatements of Opinion and Omissions

Defendants' Statements and Omissions Concerning Revenue Recognition Policy and Recording of Revenue

30. Defendants' statements and omissions of opinion concerning Defendants' accounting practices regarding BlackBerry's misstated revenue recognition policy and improperly recorded revenues from the Z10 upon shipment were materially false and misleading when made. Defendants knew particular, material facts going to Defendants' opinion at the time, and the omission of those facts made the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context. Those particular, material facts included that Defendants' revenue recognition on Z10 sales was objectively unreasonable at the time for at least three reasons: the likelihood of price concessions due to the newness of the product; the introduction of competitors' products with superior technology or greater expected market acceptance; and prior, multiple, failed new product launches. In addition, the sales price for the Z10 devices was not fixed but rather in flux as the result of price concessions and other facts. Therefore, Defendants' statements of opinion regarding their accounting judgments concerning the misstated revenue recognition policy and improperly recorded revenues from the Z10 upon shipment lacked a reasonable basis and are actionable under Section 10(b) of the Securities Exchange Act, even if Defendants subjectively (and irrationally) believed their unreasonable opinions at the time.

Defendants' Statements and Omissions Regarding Delay in Taking Timely Charge

31. Defendants' material misrepresentations and omissions regarding BlackBerry's delay in taking a timely charge against income to account for decreased value of the Z10 inventory were materially false and misleading when made. Defendants knew particular, material facts going to Defendants' opinion at the time, and the omission of those facts made the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context. Those particular, material facts included possession of real-time sales and returns data concerning the Z10s that showed sales and returns were not in line with estimates. Further, BlackBerry's policy – providing that inventory would be written down if management believes that demand (or lack thereof) no longer allowed smartphones to be sold above cost – is actionable where Defendants' belief – even if subjectively true – *had no reasonable basis*. Further, Defendants' failure to take a timely charge against income to reflect a deterioration in the value of the Z10 inventory was objectively unreasonable at the time for several reasons: the likelihood of price concessions due to the newness of the product; the introduction of competitors' products with superior technology or greater expected market acceptance; and prior, multiple, failed new product launches. Defendants had no reasonable basis for their failure to record a timely charge against income to reflect deterioration in the value of Z10 inventory. Thus, Defendants' opinion statements were either known to be false or, at a minimum, made with reckless disregard that they had no reasonable basis.

Defendants' Misleading Statements of Opinion Regarding Failure To Record a Charge for Supply Commitments

32. Defendants' representations concerning BlackBerry's consolidated gross margin from continuing operations in its March 28, 2013 earnings release, its 2013 Form 40-F, and its June 28, 2013 6-K were materially false and misleading as a result of BlackBerry's failure to record a charge for supply commitments for quantities that Defendants knew or recklessly

disregarded were in excess of any reasonable anticipated future customer demand forecasts. Defendants' accounting statements of opinion lacked a reasonable basis and are actionable under Section 10(b) of the Securities Exchange Act even if Defendants irrationally believed their opinions.

33. Defendants' statements of opinion regarding failure to record a charge for supply commitments were also materially false and misleading because BlackBerry's supply commitments for Z10 devices were larger than demand for the devices during the Class Period, and if BlackBerry had properly recorded a charge for supply commitments it would have reported much lower gross margins in March and June. Defendants' accounting statements of opinion lacked a reasonable basis. Further, Defendants possessed sale and return data concerning the Z10s that showed sales and returns were not in line with estimates. Therefore, Defendants' opinion statements are actionable. Thus, Defendants' opinion statements were either known to be false or, at a minimum, made with reckless disregard that they had no reasonable basis.

OVERVIEW OF CASE

34. This overview section comprises the summary of allegations, exclusive of the allegations set forth above.

35. BlackBerry, formerly Research In Motion,[5] revolutionized the mobile communication industry in 1999 with its unique portable email device, which utilized a thumb-based keyboard and a track wheel for scrolling through menus and messages. The technology was immensely popular in the business world, where email was quickly becoming the primary form of communication. Then, in 2002, when the Company integrated its messenger capabilities

[5] On July 10, 2013, the Company changed its name from Research in Motion Limited ("RIM") to BlackBerry Limited.

into cellular phones, BlackBerry became a household name. BlackBerry saw its subscriber base grow from around 500,000 in 2003 to nearly 5 million in 2006, as the Company kept improving its handsets with color displays, Wi-Fi, Bluetooth, predictive typing and more.

36. By 2007, BlackBerry was valued at over $40 billion and more than 1 out of every 3 new smart device purchases in the United States was a BlackBerry. BlackBerry owned the market. However, 2007 was a pivotal year for BlackBerry and the mobile communications world, as in July of that year Apple released the first iPhone.

37. Although BlackBerry still dominated the industry at the time of the iPhone's introduction, the iPhone was a technologically superior product that utilized two processors and, unlike BlackBerry products, had a fully internet-capable browser. BlackBerry still enjoyed a healthy market share, but the Company and its devices were not positioned well for the future. Over the next couple years, BlackBerry struggled to keep pace with Apple and, subsequently, the introduction of Android-based systems. The Company would either cobble together technologies and rush poorly designed products to market, or it would experience long delays in launching new products that would render its devices stale by the time they reached the market.

38. Over the next several years, BlackBerry started losing its market share and with it, the Company's torrid revenue growth began to slow. Between the fourth quarter of fiscal 2011 (Feb. 26, 2011) and the third quarter fiscal 2012 (Nov. 26, 2011), BlackBerry reported revenues between $4.2 billion and $5.6 billion per quarter. However, signs of a diminishing brand and market share were starting to manifest themselves in BlackBerry's financial results, because although revenues were averaging approximately $5 billion per quarter, net income was dropping precipitously each and every quarter.

(USD in millions)

	FY 2011	FY 2012		
	4th Quarter	1st Quarter	2nd Quarter	3rd Quarter
Quarter Ended:	Feb. 26, 2011	May 28, 2011	Aug. 27, 2011	Nov. 26, 2011
Revenues	$5,556	$4,908	$4,168	$5,169
Net income (loss)	934	695	329	265

39. Things were about to get worse. Starting in the fourth quarter of fiscal 2012 (March 3, 2012), prior to the start of the Class Period, Blackberry reported losses in 3 out of 4 quarters with cumulative net losses approximating $869 million, resulting from the Company's plummeting revenue stream. For example, BlackBerry reported revenue of $2.8 billion for the first quarter of fiscal 2013 (June 2, 2012), a decrease of approximately $2.1 billion, or 42.7%, from $4.9 billion in the first quarter of fiscal 2012 (May 28, 2011). In fact, BlackBerry's quarterly revenues in fiscal 2013 dropped significantly each and every quarter, as compared to fiscal year 2012.

(USD in millions)

	FY 2012	FY 2013		
	4th Quarter	1st Quarter	2nd Quarter	3rd Quarter
Quarter Ended:	Mar. 3, 2012	June 2, 2012	Sept. 1, 2012	Dec. 1, 2012

Revenues	$4,190	$2,814	$2,873	$2,727
Net income (loss)	(125)	(518)	(235)	9

40. As the Company fell further and further behind its competitors, it became clear BlackBerry needed something new, different and superior to existing products to attract new customers and retain its current users and re-capture its lost customers. In April 2010, BlackBerry announced a deal to acquire QNX Software ("QNX"), a cutting edge software engineering firm that would help create the operating system for the BlackBerry 10, a new smartphone that the Company hoped would save it from ruin. The Company would strip away its former, Java-based applications and build the BlackBerry 10 entirely from scratch. In addition to the newly acquired QNX team, BlackBerry pulled its resources off of its failed BlackBerry 7 phones and dedicated all its time, money and personnel to the new BlackBerry 10 project.

41. Mounting delays on the BlackBerry 10 and another product flop—the PlayBook, a failed tablet intended to compete with Apple's iPad—combined to push BlackBerry into full decline. BlackBerry 7 phones were not selling, the Company's revenues were tumbling, and its stock plunged from $69 (Canadian) in February 2011 to less than $15 by the year's end. In January 2012, the failures of the PlayBook and BlackBerry 7 phones drove Jim Balsillie and Mike Lazaridis to step down as co-CEOs of BlackBerry in favor of Defendant Thorsten Heins, a German executive who had run the Company's handset division. As opposed to Lazaridis, who felt that the physical keyboard was vital to the success of BlackBerry, Defendant Heins' management team believed the market wanted full touchscreen, and therefore pushed to launch the all-touchscreen Z10 phone and continue developing the Q10 keyboard phone.

42. The year 2012 turned out to be the most challenging year in the Company's history. The 2012 fiscal fourth quarter (three months ended March 3, 2012), marked the first time that BlackBerry recorded a net loss (-$128 million) for the quarter. The BlackBerry 7 smartphones' weak sell-through also resulted in a $355 million charge for the impairment of goodwill and a $267 million inventory write-down of those devices in the quarter, and necessitated the introduction of aggressive customer incentive programs to improve sales throughout FY 2013. That trend continued through the year (1Q:13 (three months ended June 2, 2012) loss of $518 million, 2Q:13 (three months ended September 1, 2012) loss of $142 million, 3Q:13 (three months ended December 1, 2012) loss of $114 million), for a cumulative net loss of $869 million. For example, BlackBerry reported revenue of $2.8 billion for the first quarter of fiscal 2013 (three months ended June 2, 2012), a decrease of approximately $2.1 billion, or 42.7%, from $4.9 billion in the first quarter of fiscal 2012 (three months ended May 28, 2011). In fact, BlackBerry's quarterly revenues in fiscal 2013 dropped significantly each and every quarter, as compared to fiscal 2012. BlackBerry needed to stop the bleeding.

43. Further evidencing BlackBerry's dramatic fall from grace and the desperate situation Defendants found themselves in necessitating success of the BlackBerry 10 line, a December 14, 2012 *THE WALL STREET JOURNAL* article entitled "*A Swedish Tribe Aids BlackBerry Rescue Bid*" reported that in 1999 BlackBerry had a whopping 50% of smartphone market. By 2011 it had just 9.5% of that market. In 2012, BlackBerry was holding onto a paltry 4.7% share of the smartphone market. Even shipments of BlackBerry's devices to the Company's hardcore target market -- corporations and the government -- were expected to be surpassed by iPhones by 2013.

44. The delays in production for the Z10 had proven costly. By December 20, 2012, a month before introduction of the BlackBerry 10 device, the Company reported revenues for its fiscal third quarter ended December 1, 2012 had fallen 48% from the previous year's third quarter, and that after adjusting for a charges and a tax gain, the Company had a loss of $114 million, or $0.22 per share compared with earnings of $265 million, or $0.51 per share in the prior year's third quarter. As *The New York Times* reported on December 20, 2012, "[t]he [C]ompany has pinned all of its hopes on the BlackBerry 10 to win back customers who may have defected to iPhones or phones using Google's Android operating system." Defendant Heins, during an analyst conference call on December 20, 2012, stated that "[w]e believe the company has stabilized and will turn the corner in the next year," and that the introduction of the BlackBerry 10 would bring an end to the Company's cash hoarding and it would dig into its cash reserves during its fiscal fourth quarter to stockpile BlackBerry 10 phones in advance of their release and to finance advertising and other marketing campaigns for the devices.

45. The Company also reported it shipped slightly over 7 million current BlackBerry models during its fiscal third quarter; BlackBerry officials conceded those products were being heavily discounted.

46. Based on the lack of market acceptance of the BlackBerry 7, it was critical that Defendant Heins condition the market to believe that the launch of the BlackBerry 10 was running according to plan and, during the December 2012 analyst conference call reported by *The New York Times,* stated that, "[w]e are realistic about our competitors, but we know that customers in the industry demand and respond to innovation." In fact, however, as Defendant Heins and the other Defendants were aware, when the Company finally unveiled the upcoming

BlackBerry 10 smartphones, the technology was two years behind what was already on the market.

47. Although the long-awaited BlackBerry 10 debuted at a flashy launch event in January 2013 featuring Alicia Keys, BlackBerry's "global creative director," the launch fizzled. Indeed, soon after the launch, a scandal emerged as Alicia Keys was caught tweeting from her iPhone when she had publicly sworn allegiance to the new BlackBerry 10.

48. As the Z10 rolled out to consumers across the globe, the response to the new phones was tepid. Despite vigorous assurances from BlackBerry that the phones were selling well and any reports to the contrary were untrue, in reality, inventory was piling up and BlackBerry was forced to offer its carrier and distributor partners costly sales incentives to move bloated inventories of the Z10s off the shelves. For example:

a. On January 30, 2013, BerryReview reported that Rogers, a major Canadian wireless communications provider, confirmed it would offer the white BlackBerry Z10 for up to $100 off.

b. On February 6, 2013, Telegraph.co.uk reported that shops in the UK were denying claims by defendant Heins that Z10 phones were selling out.

c. On March 5, 2013, BGR reported that the UK's leading mobile phone retailer, Carphone Warehouse, had cut the monthly package price of the BlackBerry Z10 from £36 to £29, which amounted to a £160 price drop over the life of a 24-month contract. BGR also reported that Vodafone was offering a package deal for the Z10 that was £72 cheaper than its previous one.

d. On March 4, 2013, Telegraph.co.uk reported that UK-based Carphone Warehouse had cut the price of the Z10 by about £139 over a two-year contract period.

e. On March 17, 2013, Softpedia.com reported: "The Z10 was launched at all Canadian carriers, including TELUS, Rogers and Bell, for $150/€110 with a new three-year agreement. Well, it appears at least three Canadian carriers dropped the phone's price one more time. As MobileSyrup points out, Rogers, Bell and Virgin Mobile are now offering the BlackBerry Z10 for only $100/€75 on a 3-year term." Softpedia.com added: "Even though only three carriers discounted the BlackBerry Z10, we expect more Canadian operators to add to the initiative."

f. On March 19, 2013, Know Your Mobile India related that BlackBerry had decided to slash the price of its Z10 smartphone in India, from Rs 43,490 to Rs 39,990. According to NerdBerry.com, a site focused on BlackBerry news, "[t]here was a lot of controversy over the price tag of the Z10 in India …"

g. On March 25, 2013, Emirates 24/7 in Dubai published a report with the headline "BlackBerry Z10 sales & prices are sinking: Blame Samsung Galaxy S4." The report noted that, with "the unveiling of newer offerings from rivals, including the HTC One, the Sony Xperia Z and the Samsung Galaxy," "[i]t might come as no surprise, then, that the device that showed a lot of promise during its not-so-distant launch, seems to be now headed downhill – including its price." "Online deals on the BlackBerry Z10 are getting hotter by the day across the UAE, with group buying websites jumping in on the frenzy – the best bargain yet, Dh2,170 for the handset that is officially priced at Dh2,599." The Emirates 24/7 report also noted: "A new research note from Citigroup analyst Jim Suva states that sales of the BlackBerry Z10 smartphones have 'dramatically slowed' after an initial 'honeymoon' and that carriers 'have already shifted promotions to other products [read: Samsung Galaxy S4] and moved the Z10 to less favourable in-store locations.'" Emirates 24/7 further noted that "[t]he Z10 has been officially available in the UAE since February 10, and today, within a month-and-a-half since then, prices seem to have slipped more than 16 per cent" and that "the price-slash is not limited to the UAE – retail price of the Z10 has reportedly been slashed elsewhere in the world too."

h. On March 26, 2013, the *International Business Times* reported: "Despite Heins' confident assertions that stock of the BlackBerry Z10 had run low in several stores and shops – 'White is sold out already,' he said – many retailers have pointed to the contrary, saying the BlackBerry Z10 handsets haven't sold too well at all. In fact, according to the *Daily Telegraph*, many British stores said they had 'loads left' and 'plenty left,' while Phones 4U, the exclusive UK supplier of the white BlackBerry Z10, said it didn't sell out of the handsets, contrary to Heins' statement." The *International Business Times* went on: UK "retailers are reportedly slashing prices for the BlackBerry Z10 to spur along sales of the struggling handset."

i. On April 5, 2013, BBin, a blog for BlackBerry users in India, reported that Junglee.com, an online shopping site, was offering the Z10 at a discounted price of Rs 37,990, and that Rediff.com, an India-based shopping portal, was selling the phone at an even more discounted price of Rs 37,500.

j. On April 10, 2013, CrackBerry.com reported that in the United States, Amazon had dropped the price of the Z10 on both AT&T and Verizon to just $99 with a two-year contract and that those who already had purchased a Z10 from Amazon could claim a $50 credit.

k. According to an April 13, 2013 *New York Post* article, "Blackberry is in the bargain bin. Retailers [in the United States] are turning to steep discounts on the

newest Blackberry Z10 smartphone in an effort to move millions stockpiled on store shelves." "A number of retailers -- some of whom said they were having trouble moving their Z10s -- have begun discounting from the initial $200 price with a two-year contract. A Verizon store in Bayside [in Queens, New York] is selling the Z10 for $100 -- or half price -- with a two-year contract. And it wasn't the only seller cutting prices. Amazon was offering the same cut-rate deal for the phone. A manager at the Bayside store said the Z10 was not selling well."

l. On May 23, 2013, Cheap-Phones.com, an online provider of phones at discounted prices based in New York, announced it was offering the BlackBerry Z10 on its site at "a fraction" of the retail price.

49. BlackBerry had very recent experience with a product failure, as both the PlayBook and the BlackBerry 7 seriously underperformed. Familiar with the mechanics of a product failure, BlackBerry was desperate to hide the BlackBerry 10 catastrophe, and thus the failure of Defendant Heins' BlackBerry 10 strategy as well as its broader implications of that failure on future sales of BlackBerry 10s.[6]

50. As a result of their desperation, BlackBerry began issuing false and misleading financial reports. Notwithstanding Defendants' knowledge by the time BlackBerry filed its 40-F for its fiscal year ended March 2, 2013, that the BlackBerry 10s were failing commercially and steep discounting was and would in the future be required to sell, if at all possible, the outstanding inventory of BlackBerry 10s, BlackBerry, reported its fiscal year revenues based on shipments of BlackBerry 10s rather than end-user sales of the product. Consequently, BlackBerry's revenue recognition was not compliant with Generally Accepted Accounting Principles ("GAAP"), as it was recognizing revenues despite the Company's inability to reasonably and reliably estimate price concessions to carriers and retailers, and thus the price

[6] As more of the 10s failed to sell through, the fewer 10s would be sold as consumers feared either that providers would cease supporting the product or BlackBerry itself would cease to exist.

was neither fixed nor determinable. Thus, Defendants were able to inflate BlackBerry's revenues for the fiscal year and portray to the investing public that BlackBerry was again profitable.

51. Moreover, to preserve the illusion of profitability and success of the BlackBerry 10s, Defendants failed, in violation of GAAP, to increase BlackBerry's reserves for costs related to the BlackBerry 10s and obsolete or unsalable 10 products even though Defendants knew by the time the 2013 fiscal year end financial statements were issued that BlackBerry would likely need to take charges in the future for losses related to the BlackBerry 10s. By failing to properly increase reserves, Defendants were able to conceal their knowledge that the 10s were a commercial failure and to further inflate BlackBerry's earnings as reserves would have reduced those earnings and signaled to the market the problems with the BlackBerry 10s.

52. The truth began to emerge on June 28, 2013, when, prior the opening of the market, BlackBerry filed its 1st quarter fiscal 2014 financial report for the period ending June 1, 2013 on Form 6-K. The Company posted a surprise loss for the quarter, and disclosed that it had shipped just 2.7 million new BlackBerry 10 devices, which made up just 40% of the Company's total smartphone shipments in the period. Given that this was the first full quarter that the new devices were on sale, analysts had widely expected the Company to post a profit with a much larger number of BlackBerry 10 shipments.

53. The market reacted swiftly and negatively to the disclosure, which partially revealed the truth behind Defendants' misrepresentations regarding the purported success of and positive customer reaction to the BlackBerry 10 smartphones. BlackBerry stock fell from $14.48 per share at close on June 27, 2013, to $10.46 per share at close on June 28, 2013, a decline of approximately 28% on heavy trading volume.

54. Defendants continued to mislead investors after these revelations came to light, and downplayed the significance of the 1st quarter fiscal 2014 results. Indeed, during the BlackBerry earnings call later that day on June 28, 2013, when analysts questioned the low shipment numbers of the BlackBerry 10 devices, Defendant Heins reassured that the Company was "still in our launch cycle" and that "[w]e're focusing on driving the sell-through so our customers get the devices in their hands. And when they get them in their hands, they seem to be really happy with what they see, and what they can experience with the new user experience on BlackBerry." But when an analyst asked if the Company "could give us what you sold through of BlackBerry 10," Defendant Bidulka refused, saying "[w]e're not going to provide the split on sell-through on the BB10 versus BBOS." Defendant Heins added that "[w]hat I can tell you, qualitatively, is that I received very, very good feedback." In truth, sell-through of the BlackBerry 10s was dismal, returns were mounting, and inventory was piling up.

55. It was not until September 20, 2013, the end of the Class Period, that the truth fully emerged concerning the BlackBerry 10 smartphones and the impact on the Company's performance and prospects. That day, Defendants announced that BlackBerry would report a "charge against inventory and supply commitments in the second quarter of ***approximately $930 million to $960 million, which is primarily attributable to BlackBerry Z10 devices;***" that the current quarter would also include a "restructuring charge" in the approximate amount of $72 million;" that the Company planned "to transition its future smartphone portfolio from six devices to four;" and that the Company would implement "a workforce reduction of approximately 4,500 positions or approximately 40% of the Company's global workforce."

56. Immediately, BlackBerry stock plummeted, on heavy volume, losing almost a quarter of its market value in just days, dropping from a closing price of $10.52 per share on

September 19, 2013 to close at $8.73 per share on September 20, 2013. By close of trading on September 25, 2013, the price of BlackBerry stock slid down to just $8.01.

57. The news came as a shock to financial analysts. For example, UBS issued a report on September 20, 2013, which stated in part:

> BBRY negatively preannounces F2Q results now anticipating Revs of $1.6b (cons$3.1b) and EPS loss, prior to an inventory write-down charge of $930-960m, of -$0.47 to -$0.51 vs. cons at -$0.15. There were 2 main surprises in our opinion: a) the magnitude of the miss (50% in revenues); b) of the 3.7m phones for which revs were recognized, almost all were BB7, i.e., almost no revenue was recognized for the newer BB10 devices.

58. The BlackBerry 10 line of smartphones represented a Hail Mary play for BlackBerry that would either launch the Company back into the mobile forefront, or render it and its products antiquated and passé. Throughout the Class Period, Defendants materially misrepresented to investors the true financial condition of BlackBerry and that its supposed recovery was an illusion created by manipulating the Company's final statements coupled with public misrepresentations regarding the BlackBerry 10s' success as a product. In turn, these false and misleading statements and omissions to disclose material information artificially inflated the market price of BlackBerry common stock.

59. Defendants Heins and Bidulka were further motivated to tout the BlackBerry 10 phones and conceal the accompanying waxing inventory and waning revenues because – after seeing the prior co-CEOs Mike Lazaridis and Jim Balsillie forced out of the Company following the failure of the BlackBerry PlayBook – they were able to secure substantial performance based bonuses (tied to the Company's improperly inflated revenues) and delay for months their own forced departures from BlackBerry which promptly occurred after the truth

was revealed in order to continue receiving their high salaries and other compensation and benefits for as long as they could conceal the true commercial failure of the BlackBerry 10s.

60. Defendants knew or recklessly disregarded that the Company's Class Period statements regarding the BlackBerry Z10's success were materially false and misleading because the BlackBerry Z10 had already launched in other countries without success, and carriers in those countries were already offering steep discounts to move the phones off their shelves. Defendants also actively monitored real-time sales and return data concerning the Z10s that showed sales and returns were not in line with estimates.

61. Fundamentally, Defendants bet the Company on the BlackBerry 10 phones, and the wager did not pay off. New CEO John Chen even expressed that BlackBerry – the inventor of the smart phone – will cease making smartphones if the Company cannot profit from them, telling Reuters, "If I cannot make money on handsets, I will not be in the handset business."

JURISDICTION AND VENUE

62. The claims asserted herein arise under and pursuant to Sections 10(b) and 20(a) of the Exchange Act [15 U.S.C. §§ 78j(b) and 78t(a)] and Rule 10b-5 promulgated thereunder by the SEC [17 C.F.R. § 240.10b-5].

63. This Court has jurisdiction over the subject matter of this action pursuant to §28 U.S.C. §§ 1331 and 1337, and Section 27 of the Exchange Act [15 U.S.C. § 78aa].

64. Venue is proper in this District pursuant to Section 27 of the Exchange Act, and 28 U.S.C. § 1391(b). The violations of law complained of herein occurred in part in the District, including, but not limited to, the dissemination of materially false and misleading statements into this District.

65. In connection with the acts alleged in this Complaint, Defendants, directly or indirectly, used the means and instrumentalities of interstate commerce, including, but not limited to, the mails, interstate telephone communications, and the facilities of the national securities markets.

PARTIES

A. Plaintiffs

66. Lead Plaintiff Todd Cox, as set forth in his previously-filed certification [Dkt. # 13-1], incorporated herein by reference, purchased BlackBerry common stock at an artificially inflated price during the Class Period, and was harmed when the price of BlackBerry stock dropped as a result of the revelations of the truth at the end of the Class Period.

67. Lead Plaintiff Mary Dinzik, as set forth in her previously-filed certification [Dkt. # 13-1], incorporated herein by reference, purchased BlackBerry common stock at an artificially inflated price during the Class Period, and was harmed when the price of BlackBerry stock dropped as a result of the revelations of the truth at the end of the Class Period.

68. Additional Plaintiff Yong M. Cho ("Cho"), purchased BlackBerry common stock at an artificially inflated price during the Class Period, and was harmed when the price of BlackBerry stock dropped as a result of the revelations of the truth at the end of the Class Period. The previously-filed certification for Plaintiff Cho is incorporated herein by reference.

69. Additional Plaintiff Batuhan Ulug ("Ulug"), purchased BlackBerry common stock at an artificially inflated price during the Class Period, and was harmed when the price of BlackBerry stock dropped as a result of the revelations of the truth at the end of the Class Period. The previously-filed certification for Plaintiff Ulug is incorporated herein by reference.

B. Defendants

70. Defendant BLACKBERRY is incorporated under the laws of Canada, maintaining its principal place of business 295 Phillip Street, Waterloo, Ontario, Canada, N2L 3W8. As explained above, BlackBerry is a designer, manufacturer and marketer of wireless solutions, through the development of integrated hardware, software, and services.

71. Defendant Thorsten Heins ("Heins") was, during the Class Period, the Chief Executive Officer ("CEO") and President of BlackBerry. Heins also served as a member of the Board of Directors. Heins resigned as President and CEO and as a director on November 13, 2013, after the end of the Class Period. Heins personally certified all of the Company's financial reports issued during the Class Period.

72. Defendant Brian Bidulka ("Bidulka") was, during the Class Period, Chief Financial Officer ("CFO") of BlackBerry. Bidulka resigned as CFO on November 25, 2013, after the end of the Class Period. Bidulka personally certified all of the Company's financial reports issued during the Class Period.

73. Defendant Steve Zipperstein ("Zipperstein") was, during the Class Period, Chief Legal Officer of Blackberry. He made materially false and misleading statements and omissions during the Class Period.

74. Collectively, BlackBerry, Heins, Bidulka, and Zipperstein are referred to as "Defendants."

DEFENDANTS' MATERIALLY FALSE AND MISLEADING STATEMENTS AND OMISSIONS DURING THE CLASS PERIOD

A. Materially False and Misleading Statements Regarding the Success of BlackBerry and its BlackBerry 10 Smartphones

75. Throughout the Class Period, BlackBerry made materially false and misleading statements and omissions regarding the Company's new BlackBerry 10 line of smartphones,

customer satisfaction with the phones, meeting of sales expectations, and return rates for the phones. In truth, the BlackBerry 10 phones were not selling-through to customers, return rates exceeded expectations, and BlackBerry was forced, almost immediately after their introduction, to initiate steep discounts on the phones to attempt to move inventories.

76. On March 28, 2013, the first day of the Class Period, BlackBerry filed with the SEC its Annual Information Form on Form 40-F for the fiscal year ending March 2, 2013. BlackBerry's filing stated: **"**Successfully transitioning to BlackBerry 10, the Company's nextgeneration BlackBerry platform. . . . **The launch of BlackBerry 10 in January 2013 marked the beginning of the organization's transition to becoming a leading mobile computing organization.**" (Emphasis added).

77. The foregoing statement was materially false and misleading when made because by March 28, 2013, Defendants knew and/or recklessly disregarded the facts available to them that, among other things, the BlackBerry 10s were not "successful," and that the 10s would not return BlackBerry to being "a leading mobile computing organization." In reality, the launch of BlackBerry Z10 smartphones in overseas markets, which took place months before the March 22, 2013 U.S. launch, had already proven to be a disaster for the Company. As early as January 2013, BlackBerry was already working with its carriers to discount the new BlackBerry Z10 smartphones overseas, which indicated that the launch of the BlackBerry 10 was not "successful" because end-users were not buying the phones.

78. On March 28, 2013, BlackBerry issued a press release (also filed with the SEC on Form 6-K) announcing fourth quarter and year-end results for fiscal 2013 (the fiscal year ended March 2, 2013). The press release quoted Defendant Heins:

> "We have implemented numerous changes at BlackBerry over the past year and ***those changes have resulted in the*** **Company returning to profitability**

> in the fourth quarter," said Thorsten Heins, President and CEO. "With the launch of BlackBerry 10, we have introduced the newest and what we believe to be the most innovative mobile computing platform in the market today. ***Customers love the device and the user experience, and our teams and partners are now focused on getting those devices into the hands of BlackBerry consumer and enterprise customers."*** (Emphasis added).

79. Defendant Heins' statements quoted in the March 28, 2013 press release were materially false and misleading when made because Defendants knew and/or recklessly disregarded facts available to them that BlackBerry's purported return to profitability in the fourth quarter of fiscal 2013 was the result of improper revenue recognition techniques which would likely have to be reversed by charges or write-downs in future quarters) and that the vast majority of the pool of potential BlackBerry 10 customers were shunning the product. For example, a March 5, 2013 Forbes.com report quoted Pacific Crest analyst, James Faucette, asserting "that U.K inventory levels of the Z10 touch-screen BB10-based smartphones are 'already too high,' and that inventory levels in Canada are 'quickly approaching typically targeted levels.'"[7] James Faucette also stated that "'[o]ur checks indicate that as sell-through run-rates for the Z10 have declined meaningfully in the weeks following launch, we believe carriers and third-party retailers in the U.K. are already well above typically targeted inventory.'"

80. During an earnings call on March 28, 2013, Defendant Heins stated:

- Over the past year, we have also regained the confidence and excitement of our carrier distribution partners with the introducing of the amazing Blackberry 10 platform for consumers and enterprises. The Blackberry 10 platform has been worth the wait.

- As mentioned at our launch in January, availability of Q10 will commence in April. ***The initial early global demand for the 10 has been better than anticipated, and our recent announcement of the largest single purchase***

[7] http://www.forbes.com/sites/ericsavitz/2013/03/05/blackberry-z10-inventories-piling-up-in-u-k-analyst-says/

> ***order in our history, for 1 million units, is also indicative of a strong initial support and demand.***

(Emphasis added).

81. Defendant Heins' statements during the March 28, 2013 earnings call regarding having "regained the confidence and excitement of [its] carrier distribution partners" with the introduction of the BlackBerry 10, were materially false and misleading when made because Defendants failed and omitted to disclose BlackBerry carriers in the UK, Canada, Dubai, India, and elsewhere were already offering steep discounts on BlackBerry's supposedly "amazing" Z10 smartphones as early as January 2013. Thus, to the extent there was an "initial early global demand for the 10 has been better than anticipated," that demand had waned by March 28, 2013 and consumers had already soured on the device. Furthermore, Defendants possessed, reviewed and actively monitored real-time sales and returns data concerning the Z10s that showed sales and returns were not in line with estimates.

82. Furthermore, with respect to the 1 million unit order, that order came from Brightstar, a national distributor of smart phones. The Brightstar order came before the BlackBerry 10s had been available to consumers in the U.S. market. According to a Brightstar Marketing Manager, who was specifically assigned from July 2013 to mid-October 2013 to assist sales of the Z10 and Q10 for the Verizon dealer network, and who worked directly with Verizon Channel Marketing Managers and BlackBerry employees to develop a sales program to incentivize franchisee sales managers to create sell-through on the BlackBerry 10 devices, that customers were simply not asking for the BlackBerry 10. The Marketing Manager explained that part of the reason was that BlackBerry 10's did not have support from software developers and therefore had no "apps" like the iPhone and other leading devices. He also stated that the BlackBerry 10 platform was not compatible with very many applications, which is key to

smartphone utility and acceptance. The Brightstar Marketing Manager informed BlackBerry personnel of these issues, saying "there is nothing they can do to move the needle" and ultimately put his hands up and said "we can't help you."

83. On April 11, 2013, THE WALL STREET JOURNAL'S DIGITS blog reported that, according to analyst Jeff Johnston from research and investment firm Detwiler Fenton, "customer returns of the Z10 are actually outnumbering sales."[8] The Detwiler Fenton report stated that "'We believe key retail partners have seen a significant increase in Z10 returns to the point where, in several cases, returns are now exceeding sales, a phenomenon we have never seen before.'"[9]

84. On April 12, 2013, BlackBerry issued a strongly-worded press release (filed with the SEC on Form 6-K) aggressively denying the claims from Detwiler Fenton that BlackBerry Z10 phones were being returned in unusually high numbers:

> "**Sales of the BlackBerry® Z10 are meeting expectations and the data we have collected from our retail and carrier partners demonstrates that customers are satisfied with their devices.**" said BlackBerry President and CEO Thorsten Heins. "**Return rate statistics show that we are at or below our forecasts and right in line with the industry. To suggest otherwise is either a gross misreading of the data or a willful manipulation.** Such a conclusion is absolutely without basis and BlackBerry will not leave it unchallenged."
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> * * *
>
> BlackBerry Chief Legal Officer Steve Zipperstein said: "**These materially false and misleading comments about device return rates in the United States harm BlackBerry and our shareholders, and we call upon the appropriate authorities in Canada and the United States to conduct an immediate investigation.** Everyone is entitled to their opinion about the merits of the many competing products in the smartphone industry, but **when false statements of**

[8] http://blogs.wsj.com/digits/2013/04/11/analyst-blackberry-z10-returns-outnumber-sales/
[9] *Id.*

material fact are deliberately purveyed for the purpose of influencing the markets a red line has been crossed." (Emphasis added).

85. Defendants' denials of reports concerning high level of returns on BlackBerry 10 devices made in the April 12, 2013 press release were materially false and misleading when made because Defendants knew and/or recklessly disregarded the facts available to them that the Detwiler Fenton report was accurate, and that BlackBerry Z10 customers were not "satisfied with their devices." In fact, BlackBerry Z10 devices were not moving off the shelves and the Company had already spent months working with carriers to discount the phones to try to sell them off. Defendants' April 12, 2013 statements and omissions are also materially false and misleading for the reasons set forth at ¶¶3-33. In truth, Defendants had admittedly reviewed the sales and returns data which directly contradicted their public denial of the veracity of the Detwiler Fenton report.

86. During a June 28, 2013 earnings call, CEO Heins stated:

- The BlackBerry Z10 has been an effective launch product to showcase the renewed and reengineered BlackBerry 10 experience to both consumers and enterprises.

- Let's remember, one year ago none of these products existed, and today they are just launching, **and have been well-received**, because of the performance and quality of BlackBerry 10. It has been very exciting and challenging for our teams, and we are looking forward to the next stage of our transition this year. (Emphasis added).

87. Defendant Heins' statements during the June 28, 2013 earnings call were materially false and misleading when made because Defendants knew and/or recklessly disregarded facts known to him that the BlackBerry 10 was not "well received." Indeed, the opposite was true. By January 2013, it had failed abroad and was subject to steep discounting to attempt to move inventory, and by April 2013, BlackBerry was forced to have U.S. carriers

discount the devices as well. Defendants' April 12, 2013 statements and omissions are also materially false and misleading for the reasons set forth above at ¶¶ 3-33.

88. On August 12, 2013, the Company issued a press release (filed with the SEC on Form 6-K) announcing that BlackBerry's Board of Directors was exploring strategic alternatives. The press release quoted Defendant Heins:

> We continue to see compelling long-term opportunities for BlackBerry 10, we have exceptional technology that customers are embracing, we have a strong balance sheet and we are pleased with the progress that has been made in our transition.

89. Defendant Heins' statements in the August 12, 2013 press release were materially false and misleading when made because Defendants knew and/or recklessly disregarded facts available to him that customers were not "embracing" the 10's technology but shunning the product. At the time these statements were made, carriers all over the world were offering the BlackBerry 10 smartphones at a fraction of the cost because consumers simply would not purchase the phones at BlackBerry's initial price point. For example, BlackBerry Z10 phones were released in the United States through Verizon on March 28, 2013 at an initial price of $200 with a two-year contract. According to an article published on April 13, 2013, just weeks after the Verizon Z10 release, a Verizon store in Queens, NY was selling the Z10 at $100—half the price—with the same two-year contract. Similarly, on April 10, 2013, CrackBerry.com reported that in the United States, Amazon had dropped the price of the Z10 on both AT&T and Verizon to just $99 with a two-year contract and that those who already had purchased a Z10 from Amazon could obtain a $50 credit. In addition, Defendants had reviewed and monitored real-time sales and returns data from retailers and partners that demonstrated customers were no embracing Blackberry's technology.

90. Furthermore, to the extent Defendant Heins was "pleased with the progress" of the Company's transition to the BlackBerry 10 (as far-fetched as that would have to be for a rational CEO), he failed and omitted to disclose that, irrespective of his purported personal pleasure with the product's lackluster performance, from any objective standpoint the introduction of the BlackBerry 10s – the Company's make-it, or break-it product – was a disaster for the Company and its investors.

91. Likewise, as discussed more fully below, Defendant Heins' statement regarding BlackBerry's "strong balance sheet" was false and misleading because, as Defendant Heins knew and/or recklessly disregarded, that balance sheet was the product of material violations of GAAP and SEC accounting rules as well as SEC financial statement reporting rules and rules and regulations governing management's discussion in public filings that rendered them artificially inflated and thereby fraudulent. Defendants' April 12, 2013 statements and omissions are also materially false and misleading for the reasons set forth above at ¶¶ 3-33.

B. BlackBerry's False and Misleading Financial Statements

92. In addition to the materially false and misleading representations concerning the purported success of and positive consumer reaction to the BlackBerry 10 smartphones, during the Class Period, Defendants issued materially false and misleading financial results for the Company that improperly recognized and inflated revenue and that did not comply with GAAP (as Defendants certified they did).

93. BlackBerry's financial statements are based on a fiscal year ending at the beginning of March. Thus, the following financial statements issued during the Class Period: 1) the 2013 40F annual report for the fiscal year ending March 2, 2013 (also includes financial report for the 4th quarter of fiscal 2013, which covered the three months ending on March 2,

2013); 2) the first fiscal quarter 2014, which covered the three months ending on June 1, 2013; 3) the second fiscal quarter of 2014, which covered the three months ending on August 31, 2013; and 4) the third fiscal quarter of 2014, which covered the three months ending on November 30, 2014.

1. Defendants' Financial Statements Failed to Comply with GAAP

94. During the Class Period, in the Company's SEC filings and elsewhere, Defendants represented that BlackBerry's financial statements were prepared in conformity with GAAP. GAAP are recognized by the accounting profession and the SEC as the uniform rules, conventions and procedures necessary to define accepted accounting practice at a particular time. BlackBerry discloses in each of its interim financial statements filed on a 6-K the following:

> "These interim consolidated financial statements have been prepared by management in accordance with United States generally accepted accounting principles ("U.S. GAAP"). They do not include all of the disclosures required by U.S. GAAP for annual financial statements and should be read in conjunction with Research In Motion's (the "Company") audited consolidated financial statements (the "financial statements") for the year ended March 2, 2013, which have been prepared in accordance with U.S. GAAP."

95. The foregoing statements were materially false and misleading because BlackBerry's financial statements did not comply with GAAP, but rather resulted from a series of decisions by Defendants designed to conceal the truth regarding BlackBerry's actual financial position and operating results. Defendants caused the Company to violate GAAP and SEC rules, among other things, by improperly recognizing revenues, misreporting other related financial metrics, and failing to take timely and adequate loss reserves. As a result, Defendants materially inflated the Company's financial results reported for at least the three months and fiscal year ended March 2, 2013 (fourth quarter and full year fiscal 2013) and the three months ended June 1, 2013 (first quarter Fiscal 2014).

96. Defendants' statements and omissions of opinion concerning Defendants' accounting practices regarding BlackBerry's misstated revenue recognition policy and improperly recorded revenues from the Z10 upon shipment were materially false and misleading when made. Defendants knew particular, material facts going to Defendants' opinion at the time, and the omission of those facts made the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context. Those particular, material facts included that Defendants' revenue recognition on Z10 sales was objectively unreasonable at the time for at least three reasons: the likelihood of price concessions due to the newness of the product; the introduction of competitors' products with superior technology or greater expected market acceptance; and prior, multiple, failed new product launches. In addition, the sales price for the Z10 devices were not fixed but rather in flux as the result of price concessions and other facts. Therefore, Defendants' statements of opinion regarding their accounting judgments concerning the misstated revenue recognition policy and improperly recorded revenues from the Z10 upon shipment lacked a reasonable basis and are actionable under Section 10(b) of the Securities Exchange Act, even if Defendants subjectively (and irrationally) believed their unreasonable opinions at the time.

97. As set forth in Financial Accounting Standards Board ("FASB") Statements of Concepts ("Concepts Statement") No. 1, one of the fundamental objectives of financial reporting is to provide accurate and reliable information concerning an entity's financial performance during the period being presented. Concepts Statement No. 1, paragraph 42, states:

> Financial reporting should provide information about an enterprise's financial performance during a period. Investors and creditors often use information about the past to help in assessing the prospects of an enterprise. Thus, although investment and credit decisions reflect investors' and creditors' expectations about future enterprise performance, those expectations are commonly based at least partly on evaluations of past enterprise performance.

98. Regulation S-X (17 C.F.R. §210.4-01(a)(1)) states that financial statements filed with the SEC which are not prepared in compliance with GAAP are presumed to be misleading and inaccurate, despite footnote or other disclosure.

99. SEC Rule 4-01(a) of SEC Regulation S-X provides that: "Financial statements filed with the [SEC] which are not prepared in accordance with [GAAP] will be presumed to be misleading or inaccurate." 17 C.F.R. § 210.4-01(a)(1). Management is responsible for preparing financial statements that conform to GAAP. As stated in the professional standards adopted by the AICPA:

> [F]inancial statements are management's responsibility . . . . [M]anagement is responsible for adopting sound accounting policies and for establishing and maintaining internal control that will, among other things, record, process, summarize, and report transactions (as well as events and conditions) consistent with management's assertions embodied in the financial statements. The entity's transactions and the related assets, liabilities and equity are within the direct knowledge and control of management . . . . Thus, the fair presentation of financial statements in conformity with Generally Accepted Accounting Principles is an implicit and integral part of management's responsibility.

100. In connection with the Company's fiscal 2013 40F annual report for the year ending March 2, 2013, both Defendant Heins and Defendant Bidulka executed and filed certifications pursuant to the Sarbanes-Oxley Act of 2002 ("SOX Certifications") that attested to the purported accuracy and completeness of the Company's financial and operational reports as well as statements concerning BlackBerry's internal controls and procedures, as follows:

> 1. I have reviewed this annual report on Form 40-F of Research In Motion Limited;
>
> 2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;

3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the issuer as of, and for, the periods presented in this report;

4. The issuer's other certifying officer(s) and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the issuer and have:

a. Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the issuer, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;

b. Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;

c. Evaluated the effectiveness of the issuer's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and

d. Disclosed in this report any change in the issuer's internal control over financial reporting that occurred during the period covered by the annual report that has materially affected, or is reasonably likely to materially affect, the issuer's internal control over financial reporting; and

5. The issuer's other certifying officer(s) and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the issuer's auditors and the audit committee of the issuer's board of directors (or persons performing the equivalent function):

a. All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the issuer's ability to record, process, summarize and report financial information; and

> b. Any fraud, whether or not material, that involves management or other employees who have a significant role in the issuer's internal control over financial reporting.

101. Defendants' SOX Certifications were materially false and misleading because the financial reports in the Company's fiscal 2013 40F annual report improperly recognized and inflated revenue, failed to properly account for inventory, and did not comply with GAAP as Defendants claimed. Furthermore, contrary to the statements in Defendants' SOX Certifications that internal controls were in place, BlackBerry's internal controls and procedures suffered from material weaknesses, and, as a result, the Company's financial reports were inaccurate, unreliable, and/or subject to manipulation.

102. In BlackBerry's desperate attempt to create the perception that its new BlackBerry 10 platform was successful, Defendants violated GAAP in at least two ways: 1) Defendants improperly recognized revenue upon the shipment of the BlackBerry 10 devices despite the Company's inability to reasonably and reliably estimate future price concessions; and 2) Defendants failed to take a timely charge against earnings to account for the fact that the market value of the Company's Z10 inventory had deteriorated substantially below cost.

a. Defendants' Improper Recognition of Revenue

103. BlackBerry's Fiscal 2013 Form 40-F, filed on March 28, 2013, represented the following:

> Revenue Recognition
>
> ***The Company recognizes revenue when it is realized or realizable and earned.*** The Company considers revenue realized or realizable and earned when it has persuasive evidence of an arrangement, the product has been delivered or the services have been provided to the customer, ***the sales price is fixed or determinable*** and collection is reasonably assured. In addition to this general policy, the following paragraphs describe the specific revenue recognition policies for each of the Company's major categories of revenue.

> Hardware
>
> Revenue from the sale of BlackBerry wireless hardware products (e.g. BlackBerry® handheld devices and BlackBerry® PlayBook™ tablets) is recognized when persuasive evidence of an arrangement exists, delivery has occurred, the sales price is fixed or determinable, and collection is probable. Product is considered delivered to the customer once it has been shipped and title and risk of loss have been transferred. For most of the Company's product sales, these criteria are met at the time the product is shipped. For hardware products for which the software is deemed essential to the functionality of the hardware, the Company recognizes revenue in accordance with general revenue recognition accounting guidance.

(Emphasis added).

104. GAAP permits the recognition of revenue only if the following criteria are met: (i) persuasive evidence of an arrangement exists; (ii) delivery has occurred; (iii) the vendor's fee is fixed or determinable; and (iv) collectability is probable. SEC Staff Accounting Bulletin ("SAB") No. 104. Moreover, in order for revenue to be recognized, it must be earned and realized or realizable. Concepts Statement No. 5, *Recognition and_Measurement in Financial Statements of Business Enterprises*, ¶ 83, ASC § 605-10-25-1(a)[10].

105. Revenues are earned when the reporting entity has substantially accomplished what it must do to be entitled to the benefits represented by the revenues. *Id*. Revenues are realizable when related assets received or held are readily convertible to known amounts of cash or claims to cash. *Id*. If collectability is not reasonably assured, revenues should be recognized on the basis of cash received. Concepts Statement No. 5, ¶ 84g; *see also Accounting Research Bulletin* No. 43 ("ARB 43"), Ch. 1A, ¶ 1 (June 1943); ASC § 605-10-25-1; Accounting

[10] With the issuance of FASB Statement No. 168, *The FASB Accounting Standards Codification and the Hierarchy of Generally Accepted Accounting Principles*, the FASB approved the Codification ("ASC") as the source of authoritative US GAAP for non-governmental entities for interim and annual periods ending after September 15, 2009. The *FASB Accounting Standards Codification*, hereinafter cited as "ASC __."

Principles Board Opinion No. 10 ("APB 10") *Omnibus Opinion-1966* ¶ 12 (Dec. 1966). If payment is subject to a significant contingency, revenue recognition is improper. ASC § 450-30-25-1.

106. BlackBerry's representations in its Fiscal 2013 Form 40-F, filed on March 28, 2013, that the Company recognizes revenue when it is ***realized or realizable and earned*** was false and misleading because the sale price of the BlackBerry Z10 device was not ***fixed or determinable.*** BlackBerry could not reasonably and reliably estimate future price concessions, thus revenue recognition was improper and in violation of GAAP. BlackBerry knew or recklessly disregarded that various factors precluded the Company from reasonably and reliably estimating future price concessions, including: (1) ***excess levels of inventory in a distribution channel*** due to substantially lower sell through than shipping volumes); (2) ***larger than expected returns of current products***; (3) the ***newness of a product***; (4) the ***introduction of competitors' products with superior technology*** or greater expected market acceptance; and (5) ***prior adverse historical results*** in connection with the Company's release of the BlackBerry 7 and PlayBook, necessitating material write-downs of goodwill and inventory. BlackBerry was required to carefully analyze all factors, including trends in historical data, which could affect the Company's ability to make reasonable and reliable estimates of expected price concessions. Moreover, BlackBerry was acutely aware of the forgoing factors. For example, in the Company's 1st quarter fiscal 2014 earnings' release on June 28, 2013, Blackberry disclosed that "[t]he smartphone market remains highly competitive, making it difficult to estimate units, revenue and levels of profitability."

107. First, BlackBerry was experiencing excess levels of inventory due to a lack of sell-through on BlackBerry 10 smartphones. On March 25, 2013, a FOX BUSINESS story titled

"Citi: BlackBerry Z10 U.S. Launch a 'Big Disappointment'" quoted Jim Suva, an analyst at Citigroup, as stating in a note to investors that the "'new product launch was not what people were expecting,'" that the new phones suffered from "poor product placement, with the Z10 pushed to the side or back of AT&T stores," and that "[c]arriers abroad [had] already shifted promotions to other products and there [had] been an increasing number of customer returns, with the most cited reason being lack of apps, including Instagram and Netflix."[11] Moreover, by March 2013, carrier and distributor partners were carrying excess levels of inventories. For example, a March 5, 2013 Forbes.com report quoted Pacific Crest analyst, James Faucette, asserting "that U.K inventory levels of the Z10 touch-screen BB10-based smartphones are 'already too high,' and that inventory levels in Canada are 'quickly approaching typically targeted levels.'"[12] James Faucette also stated that "'[o]ur checks indicate that as sell-through run-rates for the Z10 have declined meaningfully in the weeks following launch, we believe carriers and third-party retailers in the U.K. are already well above typically targeted inventory levels.'"

108. Second, BlackBerry also could not reasonably and reliably estimate price concessions as a result of the larger than expected returns of its current products – BlackBerry 10 devices. On April 11, 2013, THE WALL STREET JOURNAL'S DIGITS blog reported that, according to analyst Jeff Johnston from Detwiler Fenton, "customer returns of the Z10 are actually outnumbering sales."[13] The Detwiler Fenton report stated that "'We believe key retail partners have seen a significant increase in Z10 returns to the point where, in several cases, returns are

[11] http://www.foxbusiness.com/technology/2013/03/25/citi-blackberry-z10-us-launch-big-disappointment/

[12] http://www.forbes.com/sites/ericsavitz/2013/03/05/blackberry-z10-inventories-piling-up-in-u-k-analyst-says/

[13] http://blogs.wsj.com/digits/2013/04/11/analyst-blackberry-z10-returns-outnumber-sales/

now exceeding sales, a phenomenon we have never seen before.'"[14] The veracity of the Detwiler Fenton report is demonstrated by the allegations at ¶¶ 9-29 above.

109. Third, BlackBerry could not reasonably and reliably estimate price concessions as a result of the newness of the product. The launch of BlackBerry 10 was "the launch of an entirely new mobile computing platform."[15] According to a report on abcnews.go.com:

> BlackBerry 10 is a completely new version of the BlackBerry software; it doesn't share a line of code with the previous version called BlackBerry 7 and was built completely for the touchscreen. While the operating system is similar to that of the iPhone or Android, as it is built around pages of apps, BlackBerry says the other platforms are now outdated and that the BlackBerry 10 will provide "differentiating" features.[16]

Defendants also knew that the "results [were] very difficult to estimate during this transition...."[17]

110. Fourth, BlackBerry could not reasonably and reliably estimate price concessions as a result of the introduction of competitors' products with superior technology or greater expected market acceptance. On February 12, 2014, IDC[18] issued a press release titled "Android and iOS Continue to Dominate the Worldwide Smartphone Market with Android Shipments Just

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[14] *Id.*

[15] BBRY Q1 Fiscal 2014 Earnings Call Tr. (Jun. 28, 2013).

[16] http://abcnews.go.com/Technology/blackberry-reinvents-blackberry-10-blackberry-z10-q10-launch/story?id=18353250

[17] BBRY Q1 Fiscal 2014 Earnings Call Tr. (Jun. 28, 2013).

[18] International Data Corporation (IDC) is the premier global provider of market intelligence, advisory services, and events for the information technology, telecommunications and consumer technology markets. IDC helps IT professionals, business executives, and the investment community make fact-based decisions on technology purchases and business strategy. More than 1,100 IDC analysts provide global, regional, and local expertise on technology and industry opportunities and trends in over 110 countries worldwide. For 50 years, IDC has provided strategic insights to help our clients achieve their key business objectives. IDC is a subsidiary of IDG, the world's leading technology media, research, and events company.

Shy of 800 Million in 2013, According to IDC." The press release stated in pertinent part, the following:

> BlackBerry was the only operating system to realize negative year-over-year change both for the quarter (-77.0%) and for the year (-40.9%). ***Moreover, its legacy BB7 outpaced BB10 towards the end of the year, definitely not the results that the company had hoped for when it released BB10 in January.*** With new leadership, management, and a tighter focus on the enterprise market, BlackBerry may in a better position, but still finds itself having to evangelize the new platform to its user base.[19]

(Emphasis added).

111. As a result of the anemic sales and larger than expected returns of the BlackBerry Z10 devices, BlackBerry was forced to offer price concessions to retailers. In the fourth quarter fiscal 2013 financial report filed on Form 40F on March 28, 2013, BlackBerry disclosed that it had shipped 1 million BlackBerry 10 devices. That same day, on the 4th Quarter Fiscal 2013 Earnings Call, Defendant Heins represented that "two-thirds to three-quarters already have sold through." But prior to Defendant Heins' representations on March 28, 2013, BlackBerry was already offering substantial price concessions to carriers and retailers on the Z10 (some as early as January 2013) worldwide, including in the United Kingdom, India, Canada, Dubai and elsewhere. For example:

Source	Date	Retailer	Location	Discount
BerryReview	1/30/2013	Rogers	Canada	White Z10 for $100 off
Telegraph.co.uk	3/4/2013	Carphone Warehouse	U.K.	Appx. £139 price drop over 2 year contract
BGR	3/5/2013	Carphone Warehouse; Vodafone	U.K.	Monthly package price drop from £36 /mo. to £29 /mo. (£160 value over 2 yrs.); £72

[19] http://www.idc.com/getdoc.jsp?containerId=prUS24442013

Source	Date	Retailer	Location	Discount
				discount off package deal.
Softpedia.com	3/17/2013	Rogers; Bell; Virgin Mobile	Canada	Drop from $150/€110 on 3-year contract to $100/€75 on same contract.
Know Your Mobile; Nerdberry.com	3/19/2013	BlackBerry	India	Drop from Rs 43,490 to Rs 39,990.
Emirates 24/7	3/25/2013	n/a	Dubai	Drop from Dh 2,599 to Dh 2,170.

112. Observed discounts and incentives offered after Defendant Heins' March 28, 2013 earnings call statement that "two-thirds to three-quarters already have sold through" confirm that his statement was false at the time it was made.

Source	Date	Retailer	Location	Discount
BBin	4/5/2013	Rediff.com; Junglee.com	India	Drop from Rs 43,490 to Rs 37,990; drop from RS 43,490 to Rs 37,500.
CrackBerry.com	4/10/2013	AT&T; Verizon	U.S.	Drop from $200 to $99 with two-year contract; previous purchasers could receive $50 credit
New York Post	4/13/2013	Verizon; Amazon	U.S.	Drop from $200 to $100 with two-year contract

113. On June 28, 2013 BlackBerry filed its 1st quarter fiscal 2014 financial report for the period ending June 1, 2013 on Form 6-K, reporting that it had shipped 6.8 million smart

phones of which approximately 40% or 2.7 million were BlackBerry 10 devices. During the 1st quarter fiscal 2014 earnings call held on June 28, 2013, Defendant Bidulka refused "to provide the split on sell-through on the BB10 versus BBOS."

114. Fifth, BlackBerry could not reasonably and reliably estimate price concessions because of adverse historical data showing declining demand for the BlackBerry 7 smartphone and BlackBerry's PlayBook tablets, resulting in weak sell-through. The BlackBerry 7 smartphones' weak sell-through resulted in a $355 million charge for the impairment of goodwill and a $267 million inventory write-down of those devices in the 4th quarter fiscal 2012,[20] and necessitated the introduction of aggressive customer incentive programs to improve sales throughout FY 2013. The weak sales of the PlayBook tablets necessitated a $485 million inventory write-down of those products in the 3rd quarter of fiscal 2012.

115. On March 28, 2013, the Company issued a press release announcing BlackBerry's fourth quarter and year end fiscal 2013 results via a 6-K, stating the following:

> Revenue for the fourth quarter of fiscal 2013 was approximately $2.7 billion, down $49 million or 2% from approximately $2.7 billion in the previous quarter and down 36% from $4.2 billion in the same quarter of fiscal 2012. The revenue breakdown for the quarter was approximately 61% for hardware, 36% for service and 3% for software and other revenue. During the quarter, BlackBerry shipped approximately 6 million BlackBerry smartphones and approximately 370,000 BlackBerry PlayBook tablets.
>
> GAAP income for the quarter from continuing operations was $94 million, or $0.18 per share diluted, compared with the GAAP income from continuing operations of $14 million, or $0.03 per share diluted, in the prior quarter and a GAAP loss from continuing operations of $118 million, or $0.23 per share diluted, in the same quarter of fiscal 2012. GAAP income for the quarter, including income from discontinued operations, was $98 million, or $0.19 per share diluted, compared with the GAAP income including loss from discontinued operations of $9 million, or $0.02 per share diluted, in the prior quarter and a

[20] BBRY 6-K at 4, 5 (Mar. 30, 2012).

> GAAP loss, including loss from discontinued operations of $125 million, or $0.24 per share diluted, in the same quarter of fiscal 2012.
>
> Adjusted income from continuing operations for the fourth quarter was $114 million, or $0.22 per share diluted.
>
> Fiscal 2013 Results
>
> Revenue from continuing operations for the fiscal year ended March 2, 2013 was $11.1 billion, down 40% from $18.4 billion in fiscal 2012. The Company's GAAP net loss from continuing operations for fiscal 2013 was $628 million, or $1.20 per share diluted, compared with GAAP net income from continuing operations of $1.2 billion, or $2.23 per share diluted in fiscal 2012.

116. Defendants' March 28, 2013 statements regarding revenues and earnings were materially false and misleading when made because Defendants knowingly and/or recklessly disregarded that Blackberry was recognizing revenues at the time of shipment, despite the Company's inability to reasonably and reliably estimate price concessions to carriers and retailers, and thus the price was neither fixed nor determinable.

117. Defendants knew or recklessly disregarded that various factors precluded the Company from reasonably and reliably estimating future price concessions, including larger than expected returns, the newness of Blackberry 10 devices, lower than expected sell through, and new competitor introductions.

118. Then, on June 28, 2013, the Company issued a press release filed on Form 6-K announcing BlackBerry's first quarter fiscal 2014 results for the quarter ending June 1, 2013:

> Revenue for the first quarter of fiscal 2014 was $3.1 billion, up 15% from $2.7 billion in the previous quarter and up 9% from $2.8 billion in the same quarter of fiscal 2013. The revenue breakdown for the quarter was approximately 71% for hardware, 26% for service and 3% for software and other revenue. During the quarter, the Company shipped 6.8 million BlackBerry smartphones and approximately 100,000 BlackBerry PlayBook tablets.

> GAAP loss from continuing operations for the quarter was $84 million, or $0.16 per share diluted, compared with a GAAP income from continuing operations of $94 million, or diluted earnings per share of $0.18, in the prior quarter and GAAP loss from continuing operations of $510 million, or $0.97 per share diluted, in the same quarter last year.
>
> Adjusted loss from continuing operations for the first quarter was $67 million, or $0.13 per share diluted.

119. The first quarter fiscal 2014 report of revenues and earnings was likewise materially false and misleading when made because Defendants knowingly and/or recklessly disregarded that BlackBerry was recognizing revenues at the time of shipment despite the Company's inability to reasonably and reliably estimate price concessions to carriers and retailers, and thus the price was neither fixed nor determinable. Defendants knew or recklessly disregarded that various factors precluded the Company from reasonably and reliably estimating future price concessions, including larger than expected returns, the newness of BlackBerry 10 devices, lower than expected sell through, and new competitor introductions.

b. Defendants' Failure to Properly Account for Inventory

120. Defendants failed to take a charge to income for the Z10 during the Class Period. In fact, as depicted in the chart below, Defendants actually reduced the "Provision for Excess and Obsolete Inventory" at the end of fiscal 2013, compared to the third quarter of fiscal 2013, both in dollars and as a percent of total inventory – from $477 million to $434 million.

(in millions)	Period Ended				
	3-Mar-12	1-Sep-12	1-Dec-12	2-Mar-13	1-Jun-13
Raw materials	$771	$786	$622	$588	$641
Work in process	520	379	236	371	629
Finished goods	167	105	76	78	80

	1,458	1,270	934	1,037	1,350
Provision for excess and obsolete inventory	(431)	(485)	(477)	(434)	(463)
	$1,027	$785	$457	$603	$887

121. Defendants represented that the Company's accounting for inventory was consistent with GAAP. In this regard, the Company's fiscal 2013 annual report filed on Form 40-F, issued March 28, 2013, disclosed BlackBerry's accounting for inventory as follows:

> Raw materials are stated ***at the lower of cost and replacement cost***. Work in process and finished goods ***inventories are stated at the lower of cost*** and net realizable value." (Emphasis added).

122. BlackBerry violated GAAP by failing to take a timely charge against earnings to account for the fact that the market value of the Company's Z10 inventory had deteriorated substantially below cost, because, among other things: (1) BlackBerry was experiencing a lack of sell-through on the Z10s; (2) the carrier and distributor partners were holding extraordinarily high levels of excess inventory, in absolute and relative terms; and (3) the cost of the carrier and distributor partner sales incentives and refunds were increasing, and would continuing to increase for the foreseeable future.

123. Defendants' material misrepresentations and omissions regarding BlackBerry's delay in taking a timely charge against income to account for decreased value of the Z10 inventory were materially false and misleading when made. Defendants knew particular, material facts going to Defendants' opinion at the time, and the omission of those facts made the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context. Those particular, material facts included that BlackBerry's policy – providing that inventory would be written down if management believes that demand (or lack thereof) no longer allowed

smartphones to be sold above cost – is actionable where Defendants' belief – even if subjectively true – *had no reasonable basis*. Further, Defendants' failure to take a timely charge against income to reflect a deterioration in the value of the Z10 inventory was objectively unreasonable at the time for several reasons: the likelihood of price concessions due to the newness of the product; the introduction of competitors' products with superior technology or greater expected market acceptance; and prior, multiple, failed new product launches. Defendants had no reasonable basis for their failure to record a timely charge against income to reflect a deterioration in the value of Z10 inventory. Thus, Defendants' opinion statements were either known to be false or, at a minimum, made with reckless disregard that they had no reasonable basis.

124. In connection with inventory accounting, GAAP provides, in pertinent part:

> A departure from the cost basis of pricing the ***inventory*** is required when the utility of the goods is no longer as great as its cost. Where there is evidence that the utility of goods, in their disposal in the ordinary course of business, will be less than cost, whether due to physical deterioration, obsolescence, changes in price levels, or other causes, the difference should be recognized as a loss of the current period. This is generally accomplished by stating such goods at a lower level commonly designated as ***market***.

ASC 330-10-35-1. (Emphasis in original).

125. As a result of the poor sell-through, BlackBerry was holding extraordinarily high levels of excess Z10 inventory. The Z10 had launched in the UK and Canada on January 31, 2013 and February 5, 2013, respectively. But by March 2013, carrier and distributor partners were carrying excess levels of inventories. For example, a March 5, 2013 Forbes.com report quoted Pacific Crest analyst, James Faucette, asserting "that U.K inventory levels of the Z10 touch-screen BB10-based smartphones are 'already too high,' and that inventory levels in

Canada are 'quickly approaching typically targeted levels.'"[21] James Faucette also stated that "'[o]ur checks indicate that as sell-through run-rates for the Z10 have declined meaningfully in the weeks following launch, we believe carriers and third-party retailers in the U.K. are already well above typically targeted inventory levels.'"[22]

126. Consequently, BlackBerry was forced to offer its carrier and distributor partners sales incentives to increase sell-through. According to GAAP, "[t]he offer of a sales incentive that will result in a loss on the sale of a product may indicate an impairment of existing inventory." ASC 330-10-35-13. As indicated above, the price of the Z10 dropped precipitously, soon after the launch – from approximately $200 to as low as $49 or free with contract. BlackBerry representatives, however, claimed that the Z10 price drops were "part of life cycle management to tier the pricing for current devices to make room for the next ones,"[23] and not part of a build-up of excess inventory. Indeed, not until the fiscal 2014 third quarter did the Company admit in a 6-K filing made December 20, 2013 that "The company plans to implement ***further sales incentives with its carrier and distributor partners to increase sell-through***, which could be applicable to all BlackBerry 10 devices shipped in the second and third quarters of fiscal 2014." (Emphasis added).

127. The Company's Fiscal 2013 Form 40-F also disclosed the following regarding BlackBerry's accounting for inventory:

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[21] http://www.forbes.com/sites/ericsavitz/2013/03/05/blackberry-z10-inventories-piling-up-in-u-k-analyst-says/

[22] *Id.*

[23] A BlackBerry spokesman made this comment in an email to THE WALL STREET JOURNAL following dramatic price cuts in July, 2013. *See* Will Connors, *BlackBerry Z10 Prices Drop to $49 Amid Weak Sales*, The Wall Street Journal, July 12, 2013, http://online.wsj.com/news/articles/SB10001424127887324425204578601701101031158.

> The Company's policy for the valuation of inventory, including the determination of obsolete or excess inventory, requires management to estimate the future demand for the Company's products within specific time horizons. Inventory purchases and purchase commitments are based upon such forecasts of future demand and scheduled rollout of new products. The business environment in which the Company operates is subject to rapid changes in technology and customer demand. The Company performs an assessment of inventory during each reporting period, which includes a review of, among other factors, demand requirements, component part purchase commitments of the Company and certain key suppliers, product life cycle and development plans, component cost trends, product pricing and quality issues. ***If customer demand subsequently differs from the Company's forecasts, requirements for inventory write-offs that differ from the Company's estimates could become necessary. If management believes that demand no longer allows the Company to sell inventories above cost or at all, such inventory is written down to net realizable value or excess inventory is written off.***

(Emphasis added).

128. At the time BlackBerry issued this statement saying that, among other things, "[***i]f management believes that demand no longer allows the Company to sell inventories above cost or at all, such inventory is written down to net realizable value or excess inventory is written off***," Defendants already knew or recklessly disregarded that the Z10 was experiencing a lack of sell-through. A March 5, 2013 forbes.com report stated "that U.K inventory levels of the Z10 touch-screen BB10-based smartphones are 'already too high,' and that inventory levels in Canada are 'quickly approaching typically targeted levels.'" Furthermore, a FOX BUSINESS story titled "Citi: BlackBerry Z10 U.S. Launch a 'Big Disappointment'" on March 25, 2013 noted that the "'new product launch was not what people were expecting,'" suffered from "poor product placement, with the Z10 pushed to the side or back of AT&T stores," and that "[c]arriers abroad [had] already shifted promotions to other products and there [had] been an increasing number of customer returns, with the most cited reason being lack of apps, including Instagram and Netflix."

129. The March 28, 2013 Form 40-F also set forth the Company's financial results, which were essentially the same as those contained in press release issued on the same day, and disclosed that it held $603 million in inventory, after "including the determination of obsolete or excess inventory . . . ."

130. The foregoing statement regarding inventory was materially false and misleading because Defendants knew or recklessly disregarded that carriers and distribution partners were not achieving the expected sell-through on the Z10, resulting in extraordinarily high levels of excess inventory, thus requiring a charge to income to reduce the value of the inventory. However, Defendants failed to take a charge to income for the Z10 during the Class Period.

131. On June 28, 2013, the Company filed a Form 6-K with BlackBerry's consolidated financial statements for the first quarter fiscal 2014, setting forth the Company's financial results, which were essentially the same as those contained in the press release issued on the same day. The Company disclosed that it held $887 million in inventory, after "including the determination of obsolete or excess inventory . . . ."

132. The foregoing statements regarding inventory were materially false and misleading because Defendants did not take a charge to income for the Z10 even though they knew or recklessly disregarded that carriers and distribution partners were not selling-through on the Z10, resulting in high levels of excess inventory, and, as a result, requiring an appropriate charge to income to reduce the value of the inventory.

133. BlackBerry violated GAAP by failing to take a timely charge against earnings to account for the fact that the market value of the Company's Z10 inventory had deteriorated substantially below cost, because, among other things, (1) BlackBerry was experiencing a lack of sell-through on the Z10s; (2) the carrier and distributor partners were holding extraordinarily

high levels of excess inventory, in absolute and relative terms; and (3) the cost of the carrier and distributor partner sales incentives and refunds were increasing, and would continuing to increase for the foreseeable future – all of which would have a material adverse impact on reported revenues and earnings and effectively reverse the profits Defendants' financial statement manipulations produced in the fourth quarter of BlackBerry's fiscal 2013 and the first two fiscal quarters of 2014.

c. Defendants' Failure to Properly Account for Supply Commitments

134. The Company failed to record a charge for supply commitments for quantities which Defendants knew or recklessly disregarded were in excess of anticipated future customer demand forecasts. As a result of Defendants' failure to record a charge for supply commitments, BlackBerry's gross margin and earnings were materially overstated. In the Company's fiscal 2013 annual report, issued March 28, 2013, BlackBerry described purchase commitments as follows:

> The Company has negotiated favorable pricing terms with many of its suppliers, some of which have volume-based pricing. In the case of volume-based pricing arrangements, the Company may experience higher than anticipated costs if current volume-based purchase projections are not met. Some contracts have minimum purchase commitments and the Company may incur large financial penalties or increased production costs if these commitments are not met

135. In BlackBerry's earnings release dated March 28, 2013, for the fourth and fiscal year ended March 2, 2013, Defendants disclosed that: the Company achieved "Gross margin of 40% driven by higher average selling prices and hardware margins" for the fourth quarter.

136. In BlackBerry's annual report on 40-F, filed on the same date, Defendants disclosed that the Company achieved "Consolidated gross margin from continuing operations

decreased by $3.1 billion, to $3.4 billion, or 31.0% of consolidated revenue, in fiscal 2013, compared to $6.6 billion, or 35.7% of consolidated revenue, in fiscal 2012."

137. On June 28, 2013, BlackBerry filed its 6-K for the first quarter ended and disclosed that the Company achieved "Consolidated gross margin from continuing operations increased by $256 million to $1.0 billion, or 33.9% of consolidated revenue, in the first quarter of fiscal 2014, compared to $786 million, or 28.0% of consolidated revenue, in the first quarter of fiscal 2013." The disclosure further stated that "The $256 million increase in consolidated gross margin was primarily attributable to higher average selling prices and related gross margins of BlackBerry 10 devices shipped."

138. Each of the foregoing statements was materially false and misleading as a result of BlackBerry's failure to record a charge for supply commitments for quantities which Defendants knew or recklessly disregarded were in excess of anticipated future customer demand forecasts. The materiality of Defendants' false and misleading statements is exemplified by the impact of the Z10 inventory charge on gross margin which included approximately $307 million related to supply commitments. In this regard, at the end of the Class Period, Defendants disclosed a consolidated gross margin from continuing operations of $(374) million, or (23.8)% of consolidated revenue, in the second quarter of fiscal 2014, compared to $744 million, or 26.0% of consolidated revenue, in the second quarter of fiscal 2013. This was in sharp contrast to Defendants' Class Period statements regarding gross margin.

139. Defendants' representations concerning BlackBerry's consolidated gross margin from continuing operations in its March 28, 2013 earnings release, its 2013 Form 40-F, and its June 28, 2013 6-K were materially false and misleading as a result of BlackBerry's failure to record a charge for supply commitments for quantities that Defendants knew or recklessly

disregarded were in excess of any reasonable anticipated future customer demand forecasts. Defendants' accounting statements of opinion lacked a reasonable basis and are actionable under Section 10(b) of the Securities Exchange Act even if Defendants irrationally believed their opinions.

140. Defendants' statements of opinion regarding failure to record a charge for supply commitments were also materially false and misleading because BlackBerry's supply commitments for Z10 devices were larger than demand for the devices during the Class Period, and if BlackBerry had properly recorded a charge for supply commitments it would have reported much lower gross margins in March and June. Defendants' accounting statements of opinion lacked a reasonable basis. Therefore, Defendants' opinion statements are actionable. Thus, Defendants' opinion statements were either known to be false or, at a minimum, made with reckless disregard that they had no reasonable basis.

141. GAAP provides that "[a] net loss on firm purchase commitments for goods for inventory, measured in the same way as are inventory losses, shall be recognized in the accounts." ASC 330-10-35-17. According to analyst James Faucette, overall production remained quite high through the end of May 2013, and that even if "production is reduced by 30% or more . . . production will remain well in excess of demand." Despite Defendants' knowledge that the sales of the Z10 were "significantly less than production over the past few months," they failed to take a charge to income related to the losses incurred from supply commitments. Not until the end of the Class Period did the Company record a Z10 Inventory charge of approximately $307 million related to supply commitments. BlackBerry also recorded post-Class Period Z10 inventory charges related to supply commitments of $511 million in the third quarter fiscal 2014.

d. Defendants' Other GAAP Violations Related to Inventory and Supply Commitments

142. ASC 450 *Contingencies*, provides that an estimated loss from a loss contingency "shall be accrued by a charge to income" if: (i) information available prior to issuance of the financial statements indicated that it is probable that an asset had been impaired or a liability had been incurred at the date of the financial statements; and (ii) the amount of the loss can be reasonably estimated. ASC 450-20-25-2

143. ASC 450 also requires that financial statements disclose contingencies when it is at least reasonably possible (e.g., a greater than slight chance) that a loss may have been incurred. ASC 450-20-50-3. The disclosure shall indicate the nature of the contingency and shall give an estimate of the possible loss, a range of loss or state that such an estimate cannot be made. ASC 450-20-50-4.

144. The SEC considers the disclosure of loss contingencies to be so important to an informed investment decision that it promulgated Regulation S-X, which provides that disclosures in interim period financial statements may be abbreviated and need not duplicate the disclosure contained in the most recent audited financial statements, except that, "where material contingencies exist, disclosure of such matters shall be provided even though a significant change since year end may not have occurred." 17 C.F.R. § 210.10-01.

145. The Company violated the GAAP requirement by failing to take a provision for inventory losses in its interim financial statements, as indicated by ASC 270-10-45-6(c), *Interim Reporting*: "Inventory losses from market declines shall not be deferred beyond the interim period in which the decline occurs."

146. In addition, FASB Statement of Concepts No. 5 ("CON5") states, "[a]n expense or loss is recognized if it becomes evident that previously recognized future economic benefits of an asset have been reduced or eliminated . . . ."

THE TRUTH IS REVEALED

147. The truth began to emerge on June 28, 2013, when, prior the opening of the market, BlackBerry filed its 1st quarter fiscal 2014 financial report for the period ending June 1, 2013 on Form 6-K. The Company posted a surprise loss for the quarter, and shipped just 2.7 million new BlackBerry 10 devices. In fact, BlackBerry disclosed that BlackBerry 10 devices made up just 40% of the Company's total smartphone shipments in the period, a discouraging figure given that this was the first full quarter that the new devices were on sale.

148. The market reacted swiftly and negatively to the disclosure, which partially revealed the truth behind Defendants' misrepresentations regarding the purported success of and positive customer reaction to the BlackBerry 10 smartphones. BlackBerry stock fell from $14.48 per share at close on June 27, 2013, to $10.46 per share at close on June 28, 2013, a decline of approximately 28% on heavy trading volume.

149. As these revelations began to come to light, Defendants continued to mislead the market and downplay the significance of the 1st quarter fiscal 2014 results. During the BlackBerry earnings call later that day on June 28, 2013, when analysts questioned the low shipment numbers of the BlackBerry 10 devices, Defendant Heins reassured that the Company was "still in our launch cycle" and that "[w]e're focusing on driving the sell-through so our customers get the devices in their hands. And when they get them in their hands, they seem to be really happy with what they see, and what they can experience with the new user experience on BlackBerry." But when an analyst asked if the Company "could give us what you sold through

of BlackBerry 10," Defendant Bidulka refused, saying "[w]e're not going to provide the split on sell-through on the BB10 versus BBOS." Defendant Heins added that "[w]hat I can tell you, qualitatively, is that I received very, very good feedback."

150. On September 20, 2013, the last day of the Class Period, the truth finally emerged when BlackBerry issued a press release announcing preliminary second quarter fiscal 2014 results.

151. Specifically, BlackBerry disclosed:

> *Waterloo, ON* – BlackBerry Limited (NASDAQ:BBRY; TSX:BB), a world leader in the mobile communications market, today announced certain preliminary financial results for the three months ended August 31, 2013 and provided an update on business operations.
>
> * * *
>
> [The Company] ***expects to report a primarily non-cash, pre-tax charge against inventory and supply commitments in the second quarter of approximately $930 million to $960 million, which is primarily attributable to BlackBerry Z10 devices.***
>
> ***The current quarter will also include a pre-tax restructuring charge in the approximate amount of $72 million reflecting ongoing cost efficiency initiatives.***
>
> * * *
>
> As part of the Company's focus on enhancing its financial results, and in response to the increasing competition in the smartphone market, BlackBerry also announced plans to transition its future smartphone portfolio from six devices to four. The portfolio will focus on enterprise and prosumer-centric targeted devices, including 2 high-end devices and 2 entry-level devices in all-touch and QWERTY models. With the launch of the BlackBerry Z30 – the next generation high-tier smartphone built on the BlackBerry 10 platform -- this week, the Company will re-tier the BlackBerry Z10 smartphone to make it available to a broader, entry-level audience. At the same time, the Special Committee of the Company's Board of Directors continues to evaluate all strategic alternatives for the Company.

> Furthermore, the Company also announced that it is targeting an approximate 50% reduction in operating expenditures by the end of the first quarter of Fiscal 2015. ***As part of this, BlackBerry will implement a workforce reduction of approximately 4,500 positions or approximately 40% of the Company's global workforce resulting in a total workforce of approximately 7,000 full-time global employees.***
>
> Thorsten Heins, President and Chief Executive Officer of BlackBerry said, "We are implementing the difficult, but necessary operational changes announced today to address our position in a maturing and more competitive industry, and to drive the company toward profitability. Going forward, we plan to refocus our offering on our end-to-end solution of hardware, software and services for enterprises and the productive, professional end user. This puts us squarely on target with the customers that helped build BlackBerry into the leading brand today for enterprise security, manageability and reliability."

(Emphasis added).

152. Immediately upon the revelation of these previously undisclosed facts, BlackBerry stock plummeted, on heavy volume, from a closing price of $10.52 per share on September 19, 2013 to close at $8.73 per share on September 20, 2013, after an intra-day low of $8.19. As investors digested the bad news over the next few days, the price of BlackBerry stock continued to slide on heavy trading volume and closed at $8.01 on September 25, 2013.

153. The news also came as a shock to financial analysts. For example, UBS issued a report on September 20, 2013, which stated in part:

> BBRY negatively preannounces F2Q results now anticipating Revs of $1.6b (cons $3.1b) and EPS loss, prior to an inventory write-down charge of $930-960m, of -$0.47 to -$0.51 vs. cons at -$0.15. ***There were 2 main surprises in our opinion: a) the magnitude of the miss (50% in revenues); b) of the 3.7m phones for which revs were recognized, almost all were BB7, i.e., almost no revenue was recognized for the newer BB10 devices***. (Emphasis added).

BLACKBERRY ADMITS IT IS RESPONSIBLE FOR THE COST OF SALES INCENTIVES

154. The Company expressly admits in its earnings releases that BlackBerry – not its carriers – was responsible for discounting the BlackBerry 10 smartphones in the form of "sales incentives" in order to move its stagnant inventory. The Company's first quarter fiscal 2014 earnings release on June 28, 2013, disclosed, in pertinent part, the following:

> The decrease in net loss is primarily attributable to an increase in the Company's gross margin, partially offset by an increase in marketing expenditures and ***sales incentives*** to support the continued launch of BlackBerry 10 and a reduction in the recovery of income taxes.
>
> * * *
>
> ***In support of the launch of BlackBerry Z10 smartphones, the Company increased marketing spending and sales incentives offered to channel and carrier partners in order to enhance adoption of the platform.***

(Emphasis added).

155. The Company's second quarter fiscal 2014 earnings release on September 27, 2013 disclosed that such incentives offering would continue:

> The Company plans to implement ***further sales incentives*** with its carrier and distributor partners to increase sell-through, which could be applicable to all BlackBerry 10 devices shipped in the second quarter of fiscal 2014. As a result, the Company determined during the second quarter of fiscal 2014, that it could no longer reasonably estimate the amount of the potential future sales incentives that may be offered on the BlackBerry 10 devices shipped into the channel during the second quarter of fiscal 2014 but not sold through to end customers by the end of the second quarter of fiscal 2014. Therefore, the Company concluded that the delivery of these devices to its carrier and distributor partners did not meet the criteria for revenue recognition. The revenue for these BlackBerry 10 devices was deferred and will be recognized in future quarters when the devices sell through to end customers. (Emphasis added).

POST-CLASS PERIOD DEVELOPMENTS

156. On Monday, September 23, 2013, the next trading day following BlackBerry's revelation of its nearly $1 billion BlackBerry 10 charge and the layoff of 4,500 employees,

BlackBerry announced it had entered into a letter of intent agreement under which a consortium led by Fairfax Financial Holdings Limited ("Fairfax Financial"), BlackBerry's largest shareholder, would acquire BlackBerry. Pursuant to the proposed transaction, BlackBerry shareholders would receive $9.00 in cash for each share of BlackBerry held.

157. On October 1, 2013, BlackBerry filed with the SEC on Form 6-K its financial information for the six months ended August 31, 2013, which revealed that the Company was in even worse financial shape than previously reported. In light of the 4,500 employee reduction, the October 1, 2013 Form 6-K disclosed that the Company's cost optimization program would incur $400 million in charges – four times the $100 million in charges BlackBerry had projected in the first quarter of fiscal 2014.

158. On November 4, 2013, it was revealed that Fairfax Financial's BlackBerry buyout would not go through and that BlackBerry had abandoned the search for a buyer for the Company. Instead, BlackBerry announced it had entered into an agreement pursuant to which Fairfax Financial and other institutional investors would make a $1 billion capital investment in the Company. According to BlackBerry: "Today's announcement marks the conclusion of the review of strategic alternatives previously announced on August 12, 2013." BlackBerry also announced that Defendant Heins would step down as CEO upon the closing of the financing transaction and that John S. Chen, formerly CEO, President, and Chairman of Sybase Inc., would serve as Interim CEO pending completion of a search for a new CEO. Upon the closing of the transaction on November 13, 2013, BlackBerry announced the resignation of Defendant Heins as President and CEO and as a director. As previously announced, Mr. Chen was appointed Interim CEO and Executive Chair of the Board. On November 25, 2013, BlackBerry announced that

James Yersh, BlackBerry's Senior Vice President and Controller, had replaced defendant Bidulka as CFO.

159. On February 24, 2015, the *Dunham* criminal complaint and Affidavit were filed in the District of Massachusetts. On June 4, 2015, during a hearing before Judge Woodlock, Mr. Dunham entered a plea of guilty, acknowledging that he had taken confidential information from his employer, given it to a Detwiler analyst, and the subsequent Detwiler report was based on that confidential information.

SCIENTER ALLEGATIONS

The *Dunham* Criminal Proceedings Support a Strong Inference of Scienter for Defendants

160. The material falsity and misleading nature of Defendants' statements and omissions concerning the Z10's sales and returns, customer acceptance of the Z10s, and Defendant Heins' vigorous denial of the accuracy of an April 11, 2013 analyst report concerning returns of the Z10s, as well as other Class Period statements (including Defendants' accounting judgments or opinions) are further demonstrated by the criminal proceedings in the case *U.S. v. James Dunham, Jr.*, filed in Federal District Court for the District of Massachusetts on February 24, 2015. This new evidence shows that Defendants' opinion statements had no reasonable basis – even if they were subjectively believed, which they were not.

161. The Affidavit paints a compelling picture of the manner in which Mr. Dunham, a former executive at a wireless franchisor [Wireless Zone], obtained very specific, confidential financial data and information concerning sales and returns of a wireless smartphone manufacturer [BlackBerry] and provided it to a financial analyst [Detwiler Fenton]. In the Affidavit, Special Agent Makor swears based on interviews with multiple witnesses that Mr. Dunham provided this detailed, real-time financial data to the analyst, which issued a report

revealing the negative, information, resulting in a stock drop of 7% in the wireless manufacturers' [BlackBerry's] stock.

162. On March 26, 2015, despite the fact that no names of the business entities involved were contained in the criminal complaint, the *Boston Business Journal* reported that a comparison of data in the criminal complaint to public information shows that the wireless manufacturer in question is BlackBerry; that Mr. Dunham was an executive at Wireless Zone; and that the financial analyst is Detwiler Fenton. February 26, 2015 *Boston Business Journal* article, "*Detwiler Fenton Facing Criminal Case Over BlackBerry Sales Data.*" The franchisor where Dunham worked is one of six exclusive national Verizon retailers that sell the smartphone maker's devices. February 26, 2015 *Bloomberg News* article, *"BlackBerry Sales Leak Coincides with Alleged Fraud Scheme."*

163. The *Boston Business Journal* story states that a "former executive at a Verizon Wireless retailer [who was also a former executive at Wireless Zone at the time of the alleged misconduct] was arrested Thursday for allegedly selling confidential sales and product information to the Boston financial services firm Detwiler Fenton, including information that caused BlackBerry's stock price to plummet in April 2013. According to the [criminal] complaint, Dunham was the source behind a controversial research note published by Detwiler analyst Jeff Johnston in April 2013." *Boston Business Journal* article.

164. Based on the filings and transcripts in the *Dunham* criminal action and related press coverage, as well as research and investigation by Plaintiff's Counsel, it is now clear that the detailed, negative financial data at issue related to sales and returns of the BlackBerry Z10 and that Detwiler Fenton relied upon this true, real-time data in its analyst report of April 11, 2013 concerning BlackBerry. This data was available to Dunham in his capacity as an executive

at Wireless Zone, which had access to "very specific information [about BlackBerry] from [approximately 400] franchisees, including sales…product launch information, and cost information." Exhibit A at ¶9.

165. At the time of Heins' vigorous denial of the veracity of the Detwiler Fenton report and Defendants' issuance of positive statements about the Z10 between April 11, 2013 and the end of the Class Period, Defendants, including Defendant Heins, were in possession of facts incompatible with their opinions. Defendants have ***admitted*** they had the relevant data in hand and monitored it actively during the Class Period. Defendants publicly stated in their April 12, 2013 press release "[s]ales of the BlackBerry Z10 are meeting expectations and that ***data we have collected from our retailers and carrier partners demonstrates that customers are satisfied… Return rate statistics show that we are at or below our forecasts and right in line with the industry***." This statement demonstrates two things: 1) Defendants admittedly had the very data from retailers and partners concerning sales and returns of the Z10 that had been in the possession of Mr. Dunham and provided to Detwiler Fenton; and 2) Defendants' statements and omissions, including statements of opinion regarding customer satisfaction, return rates being at or below forecast and right in line with the industry were outright lies and known to be lies at the time the statements were made. Further demonstrating Defendants' active role in monitoring demand requirements, as noted in the Company's Fiscal 2013 Form 40-F, Defendants concede "***the Company performs an assessment of inventory*** during each reporting period, ***which includes a review of***, among other factors, ***demand requirements***, component part purchase commitments of the Company and certain key suppliers, product life cycle and development plans, component cost trends, product pricing and quality issues." (Emphasis added).

166. Defendants monitored and reviewed the very detailed negative financial data that formed the basis for Detwiler Fenton's revelations of unusually-high returns of the Z10 – as that data is the very same data (if not virtually identical in substance, if not format) that Defendants admitted they collected from retailers and partners and reviewed and monitored. Thus, Defendants made opinion statements and omissions that lacked a reasonable basis and omitted facts known to them concerning their stated opinions – *e.g.*, omitted that Detwiler Fenton obtained very specific, negative data about the Z10 that was real and material. Defendants – while simultaneously and aggressively denying the validity of the information reported by Detwiler Fenton – had no reasonable basis to issue this denial and did so with knowledge the denial was false or, at a minimum, recklessness. Such omitted facts conflict with what a reasonable investor would take from the statement itself.

167. The criminal proceedings in *United States v. James Dunham, Jr.*, 15MJ7051JCB (D. Mass.) demonstrate the veracity of the Detwiler Fenton research report and the fact that Defendants' denials of the report were lies. According to the Affidavit, the statements contained in the research report were based on confidential, real-time sales and return data relating to about 400 retailers of the wireless manufacturer's products that was in the hands of Dunham and which he allegedly sold to the Analyst. Exhibit A at ¶9.

168. The Affidavit states that Dunham had access to "***very specific***" confidential sales and return data that he learned through his employment at a wireless franchisor later identified by the *Boston Business Journal* as Connecticut-based Wireless Zone, one of six exclusive national Verizon retailers that sold BlackBerry's devices. *See Boston Business Journal* article "*Detwiler Fenton Facing Criminal Case Over BlackBerry Sales Data*"; *see also* 02/26/2015 *Bloomberg News* "*BlackBerry sales leak coincides with alleged fraud scheme*." According to the

Affidavit, between August 2009 and September 2013, Dunham served as the Chief Strategy Officer and then President and Chief Operating Officer of a wireless franchisor, which is a retailer for a major provider of wireless services. Exhibit A at ¶4. During at least some of that time, Dunham was a paid consultant to a Boston-based financial service firm that provided investment research to institutional clients. *Id.* Dunham shared with the analyst "information regarding the wireless industry, including ***sales, return and other confidential business information that he learned through his employment at the wireless franchisor.*** The information disclosed by Dunham then was included in research notes distributed by the Research Firm." *Id*. (emphasis added). The Affidavit also confirms that "[***t]he Wireless Franchisor has access to very specific information from the franchisees, including sales, compensation, service activating or upgrading information, product launch information, and cost information.***" *Id*. at ¶9 (emphasis added).

169. Dunham's access to the data in question was confirmed not only through the analyst firm Detwiler, but also through Dunham's boss at Wireless Zone, who confirmed "in Dunham's role as Chief Strategy Officer and later as the President and COO of the Wireless Franchisor, Dunham had access to certain business information, including… ***sales and return information for Wireless Franchisor franchisees.***" *Id*. at ¶10 (emphasis added). According to the Affidavit, Dunham "recalled the Analyst had told him Dunham's information was valuable and that the Analyst wanted to put him on a monthly retainer." *Id*. at ¶16. The Analyst explained "***Dunham's information was valuable because Dunham had real-time visibility into sales from the Wireless Franchisor's 400 locations***." *Id*. at ¶17 (emphasis added).

170. The Affidavit states that Dunham and the Analyst spoke by telephone on April 10, 2013, the day before the April 11, 2013 Research Note was released. *Id.* at ¶24. The call

took place at 2:00pm and lasted approximately eight minutes. *Id*. The Affidavit further states that the following language contained in the April 11, 2013 research note was information provided to the Analyst by Dunham: "We believe ***key retail partners*** have seen a significant increase in [Wireless Manufacturer] returns to the point where, in several cases, returns are now exceeding sales, a phenomenon we have never seen before." *Id*. at ¶26 (emphasis added).

171. Dunham was charged with mail and wire fraud because he allegedly received payments from Detwiler Fenton, which deprived his employer, Wireless Zone, of its right to his honest and faithful service through bribes and kickbacks that were mailed to him. The information supplied by Dunham was supplied in part by telephone and also distributed electronically to the analyst's clients, some of which were out of state. *Id* at ¶33. In other words, the criminal complaint alleged that *Dunham* defrauded his employer by providing the confidential real-time, confidential information and research data concerning BlackBerry's sales and returns of the Z10 to Detwiler Fenton.

172. Dunham pled guilty to these charges. During his plea hearing, the AUSA explained that "as a national indirect retailer, Mr. Dunham's employer supervised or maintained 400 franchisees which sold wireless services and wireless devices to the public" and therefore "Dunham had access to very specific confidential information from the wireless franchisor's franchisee. So, specific sales information, specific return information, compensation information, information regarding activating or upgrading, simply buying a new service plan, product launch information and other cost information." Exhibit B at 20:12-17. The AUSA asserted that the government had evidence that Mr. Dunham provided Detwiler Fenton "with confidential information belonging to [Wireless Zone] including specifically sales information, return information also a variety of information about sales numbers of upgrades and downgrades in

service, and he did this in exchange for $2,000 monthly payments." Exhibit B at 21:24-22:5. Moreover, "[a]s Mr. Dunham knew, the confidential information that was being disclosed by him was then included in research notes that were distributed by the research firm to its institutional clients for use in trading decisions." *Id*. at 22:14-17. More specifically, the AUSA asserted that Mr. Dunham disclosed Wireless Zone's specific sales and return information for BlackBerry Z10s to Detwiler Fenton, who "then drafted and the research firm released an April 11, 2013 research note on that smartphone, which note included the specific sales and return information that had been provided by Dunham." *Id*. at 22:24-23:2. When asked by the Court to confirm the AUSA's evidence, Mr. Dunham stated, under oath, "Yes, your Honor." *Id*. at 23:10.

Defendants Admitted They Possessed Data from Retailers and Partners and Actively Monitor this Data – Which Includes the Negative Z10 Sales and Returns Data Forming the Basis of the Detwiler Report

173. The criminal proceedings show that Dunham had this real-time data concerning sales and returns of the Wireless Manufacturer's product on April 10, 2015, in his possession and sold it to the Analyst. BlackBerry had the data as well, as the manufacturer working with a key retailer, Verizon, for which Wireless Zone served as a franchisor. As noted above, Defendants affirmatively admitted that they collect and monitor "data we have collected from our retailers and carrier partners" and that they not only looked at "return rate statistics" throughout the Class Period but also stated that those return rates were "at or below our forecasts and right in line with the industry" as of April 12, 2013. The April 11, 2013 Detwiler Report specifically refers to "key retail partners."

174. When Defendant Heins aggressively denied the report and asserted that the information was false and "absolutely without basis," he had in truth prior to that time actively reviewed the real-time sales data, that plainly showed the veracity of the statements by the

Detwiler Fenton, and reveal the falsity of his own aggressive denial and Defendants' later positive statements concerning sales, returns, customers, financials, and accounting judgments.

175. It has now been publicly revealed that the specific, negative financial information concerning the sales and returns of the Z10 revealed by Detwiler Fenton on April 11, 2013, was based on confidential, true and specific sales and return numbers relating to the Z10. The criminal complaint, notarized Affidavit, plea and sentencing transcripts and sentencing memorandum demonstrate that real-time data concerning the Wireless Manufacturer was true – it was specific, confidential, financial information that was sold to the Analyst. Exhibit A at ¶4, Exhibit B at 21:24-23:2; Exhibit C at 2-3; Exhibit D at 7:20-8:4. These new revelations come as no surprise as they strongly support BlackBerry's belated announcement of a $930-960 million restatement relating to the Z10 that occurred within weeks of repeated positive statements about sales and returns and customer acceptance of the Z10s during the Class Period.

Additional Scienter Allegations

176. Defendants acted with scienter in that each Defendant knew and/or recklessly disregarded facts available to them that demonstrated that the public documents and statements issued or disseminated in the name of the Company were materially false and misleading; knew or recklessly disregarded that such statements or documents would be issued or disseminated to the investing public; and, knowingly or recklessly disregarded, and/or substantially participated or acquiesced in the issuance or dissemination of such statements or documents as primary violations of the federal securities laws. Defendants participated in the fraudulent scheme alleged by virtue of their receipt of information reflecting the true facts regarding BlackBerry, their control over the Company's alleged materially misleading misstatements, and/or their

associations with the Company, which made them privy to confidential proprietary information concerning BlackBerry and the Company's recovery efforts.

177. BlackBerry, once the leading innovator in mobile technologies, fell behind other companies such Apple and Samsung as a result of its failure to enter the modern, application-driven smartphone market, which has since captured all mobile users, personal and business alike. The BlackBerry 10 line of smartphones represented a life or death situation for BlackBerry that would either return the Company as a meaningful competitor in the mobile arena, or relegate it to oblivion as a footnote in the annals of technology innovation as the company that invented a new form of technology and then ceased to innovate and disappeared from the market for its own invention.

178. Indeed, the stakes for BlackBerry and its senior management could not have been higher. When the BlackBerry 10s immediately failed to garner consumer interest or acceptance (and, thus, end-user sales), Defendants began a campaign to materially misrepresent the success of Blackberry 10 to the public, and, in particular, potential smartphone end users who would be deterred from purchasing BlackBerry 10s if they learned they were unpopular and might not continue to be supported by the large cell phone carriers and app developers. Also, as a consequence, Defendants materially misled the SEC and investors as to the true condition of BlackBerry and the true facts about the product's commercial failure.

179. Defendants effectuated this scheme by misrepresenting the Company's supposed return to profitability tied to the initial shipments of BlackBerry 10s, falsely asserting the broad acceptance and popularity of the product with distributors (carriers) and end-users and by vehemently denying any reports that entered the market from technology or investor reporting that questioned the success of the BlackBerry 10s or revealed the true, material unfavorable

consumer response to the device, which enabled Defendants to: (a) deceive the investing public regarding the Company's new BlackBerry 10 product line and re-emergence in the wireless communications industry; (b) deceive the investing public regarding BlackBerry's business, operations, performance, and prospects, and the true value of BlackBerry common stock; and (c) cause Plaintiffs and other members of the Class to purchase BlackBerry common stock at artificially inflated prices and to suffer substantial damages when the truth was revealed and the artificial inflation was removed from the stock price.

180. Defendants Heins and Bidulka also were motivated to misrepresent the purported success of the BlackBerry Z10 and the Company's overall performance and prospects because they profited personally from those misrepresentations, which artificially inflated the stock price and allowed them to retain their lucrative, high-level positions with the Company throughout the Class Period. In the first quarter of fiscal year 2014, Heins and the Company entered into an amended and restated employment agreement, effective May 21, 2013. According to the Company's 2014 Proxy Solicitation dated May 9, 2014, for fiscal year 2014 (the period from March 3, 2013 to March 1, 2014, inclusive) ("2014 Proxy"), Heins and Bidulka received compensation (cash and non-cash, and including salaries until termination and certain termination entitlements) totaling $49,701,796 and $5,630,730, respectively.[24] *See* 2014 Proxy at p. 40.

181. Pursuant to their employment agreements, Heins' base salary for the fiscal year 2014 was $1,458,425,[25] an increase of 50% over his Fiscal 2013 base salary of $972,290. *See id.*

[24] All dollars referred to in this pleading are U.S. Dollars unless otherwise noted.

[25] Pursuant to the 2014 Proxy, salaries were converted into U.S. dollars using the Bank of Canada average noon exchange rate of $1 = CDN $1.0323 on May 24, 2013.

at 30. Bidulka's base salary for fiscal year 2014 was $678,097, an increase of 12% over his fiscal year 2013 base salary of $608,653. *See id.*

182. In addition to their base salaries, pursuant to BlackBerry's Annual Incentive Plan ("AIP"), the Company's Executive Officers, including Heins and Bidulka, also were compensated "based on a combination of the Company's achievement of certain key financial and operational measures and individual performance relative to annual individual and Company objectives." *See id.* For the fiscal year 2014, the metrics used for the AIP were adjusted "to further focus" the Company's executives on "the most critical business outcomes for the year," and included revenue, EPS, liquidity position, ***and BlackBerry 10 success***. *Id.* at 31.

183. Furthermore, during the 2013 fiscal year (March 4, 2012 to March 2, 2013), prior to the Class Period, the Company's Board created the Special Achievement Bonus Program for the Executive Officers, including Heins and Bidulka, "focused on the most critical deliverables driving the overall success of the Company in Fiscal 2013 and Fiscal 2014." *Id.* at 32. In December 2012, the Board established two performance criteria for the program: (i) cash and liquidity maintenance above a $1.5 billion threshold and (ii) ***BlackBerry 10 launch success***, to be determined at the discretion of the Board. *Id.* In April 2013, the Board approved a bonus in the amount of CDN $3 million for Heins. *Id.* In May 2013, a bonus in the amount of CDN $700,000 for Bidulka was approved. *Id.*

184. Under the terms of his new employment agreement for the 2014 fiscal year, Heins was granted an up-front long-term incentive equity award, consisting of a time-based restricted share unit ("RSU") award valued at $22.5 million and a performance-based RSU award worth $11.25 million. *Id.* at 34. These awards were approved May 21, 2013 and granted July 3, 2013. *Id.* The time-based award did not vest until three years from May 21, 2013, the date of the

employment agreement. *Id.* In order for Heins' performance-based RSU award to vest, the Company had to achieve earnings per share of not less than a specified minimum target. *Id.*

185. As the recent Playbook episode showed, the failure of a key product at BlackBerry can lead (and did previously lead) to a change in management. Under pressure of this recent historical precedent at the Company, Heins and Bidulka engaged in the misconduct complained of herein, among other things, so they could continue to reap millions of dollars in personal financial benefits for as long as they could conceal and misrepresent the truth. Sure enough, when Defendants could no longer hide the failure of the BlackBerry Z10 and the truth was revealed, Heins and Bidulka were soon replaced.

186. Defendants' scienter is further supported by the *U.S. v. Dunham* criminal proceedings, which demonstrate the April 11, 2013 Detwiler Fenton analyst report was based on true, negative real-time data reflecting high returns of the Z10 and demonstrating Defendants' vigorous denial of the accuracy of the analyst report was a baseless lie. Defendants admit and affirmatively state that they had this very data from partners and retailers showing the sales and returns of the Z10 prior to April 11, 2013. Nevertheless, they publicly and aggressively denied the veracity of the data and analysis contained in the Detwiler Fenton report, knowing it was based on true, negative data that Defendants themselves had in hand at that time. At minimum, Defendants had no reasonable basis for making such statements and were reckless. The Class Period statements about the sales of the Z10 and customer satisfaction with the devices were untrue and known to be untrue at the time by Defendants because Defendants have conceded that they continuously monitored and reviewed the data demonstrating the Z10 was not in fact selling in line with guidance and expectations and which ultimately led to the announcement of the need for a $930-$960M write-off.

187. In sum, to protect and maximize their substantial salaries and bonuses, Defendants had powerful, personal financial incentives to engage in the wrongful conduct described herein.

188. Defendants' strong motives support a strong inference of knowing or, at a minimum, reckless misconduct.

LOSS CAUSATION/ECONOMIC LOSS

189. During the Class Period, Defendants engaged in a scheme to deceive the market, and a course of conduct that artificially inflated BlackBerry's stock price and operated as a fraud or deceit on Class Period purchasers of BlackBerry's stock by misrepresenting the success of the Company's BlackBerry 10 smartphone and BlackBerry's re-emergence in the wireless communication industry. Ultimately, however, when Defendants' prior misrepresentations and fraudulent conduct came to be revealed to investors, shares of BlackBerry declined precipitously—evidence that the prior artificial inflation in the price of BlackBerry's shares was eradicated—and, as a result of their purchases of BlackBerry stock during the Class Period at artificially inflated prices, Plaintiffs and other members of the Class suffered economic losses when the Company's true condition and the truth about the Company's failed recovery was finally and fully revealed and the artificial inflation was removed from price of the Company's stock, *i.e.*, damages under the federal securities laws.

190. Immediately upon the revelation of these previously undisclosed facts, BlackBerry stock plummeted, on heavy volume. First, on June 28, 2013, when, prior the opening of the market, BlackBerry filed its 1st quarter fiscal 2014 financial report revealing previously undisclosed facts, BlackBerry's stock fell from $14.48 per share at close on June 27, 2013, to $10.46 per share at close on June 28, 2013, a decline of approximately 28% on heavy

trading volume. Then, on September 20, 2013, the last day of the Class Period, the truth finally emerged when BlackBerry issued a press release announcing preliminary second quarter fiscal 2014 results. BlackBerry's stock price fell from a closing price of $10.52 per share on September 19, 2013 to close at $8.73 per share on September 20, 2013, after an intra-day low of $8.19. As investors digested the bad news over the next few days, the price of BlackBerry stock continued to slide on heavy trading volume and closed at $8.01 on September 25, 2013.

191. The news came as a shock to financial analysts. For example, UBS issued a report on September 20, 2013, which stated in part:

> BBRY negatively preannounces F2Q results now anticipating Revs of $1.6b (cons $3.1b) and EPS loss, prior to an inventory write-down charge of $930-960m, of -$0.47 to -$0.51 vs. cons at -$0.15. There were 2 main surprises in our opinion: a) the magnitude of the miss (50% in revenues); b) of the 3.7m phones for which revs were recognized, almost all were BB7, i.e., almost no revenue was recognized for the newer BB10 devices.

192. The declines in the price of BlackBerry securities after the truth came to light were a direct result of the nature and extent of Defendants' fraud finally being revealed to investors and the market. The timing and magnitude of BlackBerry's stock price declines negate any inference that the loss suffered by Plaintiffs and the other Class members was caused by changed market conditions, macroeconomic or industry factors or Company-specific facts unrelated to Defendants fraudulent conduct. The economic loss suffered by Plaintiffs and the other members of the Class was a direct result of Defendants' fraudulent scheme to artificially inflate the prices of BlackBerry's securities and the subsequent decline in the value of BlackBerry's securities when Defendants' prior misrepresentations and other fraudulent conduct were revealed.

193. The economic loss, *i.e.,* damages suffered by Plaintiffs and other members of the Class, was a direct result of Defendants' misrepresentations and omissions being revealed to

investors, and the subsequent significant decline in the value of the Company's shares was also the direct result of Defendants' prior misstatements and omissions being revealed.

APPLICABILITY OF PRESUMPTION OF RELIANCE: FRAUD-ON-THE-MARKET DOCTRINE

194. Throughout the Class Period, the market for BlackBerry stock was an efficient market for the following reasons, among others:

a. BlackBerry securities met the requirements for listing, and were listed and actively traded on the NASDAQ, a highly efficient market, throughout the Class Period;

b. As a regulated issuer, BlackBerry filed periodic public reports with the SEC and the NASDAQ;

c. BlackBerry securities were followed by securities analysts employed by major brokerage firms who wrote reports that were distributed to the sales force and certain customers of their respective brokerage firms. Each of these reports was publicly available and entered the public marketplace;

d. BlackBerry regularly issued press releases, which were carried by national newswires. Each of these releases was publicly available and entered the public marketplace.

STATUTORY SAFE HARBOR DOES NOT APPLY

195. The statutory safe harbor provided for forward-looking statements under certain circumstances does not apply to any of the allegedly false statements pleaded in this complaint. Many of the specific statements pleaded herein were not identified as "forward-looking statements" when made. To the extent there were any forward-looking statements, there were no meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the purportedly forward-looking statements. Alternatively, to the

extent that the statutory safe harbor does apply to any forward-looking statements pleaded herein, Defendants are liable for those false forward-looking statements because at the time each of those forward-looking statements was made, the particular speaker knew that the particular forward-looking statement was false, and/or the forward-looking statement was authorized and/or approved by an executive officer of BlackBerry who knew that those statements were false when made.

PLAINTIFFS' CLASS ACTION ALLEGATIONS

196. Plaintiffs bring this action as a class action pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3) on behalf of a Class, consisting of all those who purchased or otherwise acquired shares of BlackBerry common stock between March 28, 2013 and September 20, 2013, inclusive, in the United States or on a United States-based stock exchange and who were damaged when the truth regarding BlackBerry's recovery was revealed to the public by the decline in the value of BlackBerry common stock. Excluded from the Class are Defendants, the officers and directors of the Company at all relevant times, members of their immediate families and their legal representatives, heirs, successors, or assigns, and any entity in which Defendants have or had a controlling interest.

197. The members of the Class are so numerous that joinder is impracticable. Throughout the Class Period, BlackBerry common stock was actively traded on an American stock exchange, the NASDAQ. As of September 21, 2012, the Company had 524 million shares of common stock issued and outstanding. While the exact number of Class members is unknown to Plaintiffs at this time and can only be ascertained through appropriate discovery, Plaintiffs believe that there are thousands of members in the proposed Class. Record owners and other members of the Class may be identified from records maintained by BlackBerry or its transfer

agent and may be notified of the pendency of this action by mail and publication, using the forms of notice similar to those customarily used in securities class actions.

198. Plaintiffs' claims are typical of the claims of the members of the Class as Plaintiffs and all members of the Class were similarly affected by Defendants' conduct in violation of the federal securities laws that is complained of herein.

199. Plaintiffs will fairly and adequately represent and protect the interests of the members of the Class and have retained counsel competent and experienced in class action and securities litigation.

200. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members. A classwide proceeding will generate common answers to the following questions of law and fact common to the Class, among others:

(a) whether the federal securities laws were violated by Defendants' acts and omissions as alleged herein;

(b) whether Defendants made materially untrue and/or misleading statements/omissions during the Class Period; and

(c) whether the members of the Class have sustained damages and the proper measure of damages.

201. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy, as joinder of all members is impracticable. Furthermore, as the damages suffered by individual Class members may be relatively small, the expense and burden of individual litigation make it impossible for members of the Class to individually redress the wrongs done to them. There will be no difficulty in the management of this action as a class

action. Plaintiffs' allegations stem from Defendants' issuance of materially false and/or misleading statements and omissions during the Class Period contained in SEC filings, Company releases, and conference calls with analysts. These statements and omissions concealed true, adverse facts about, *inter alia*, the BlackBerry 10 smartphone driving the recovery and revitalization of BlackBerry.

CLAIMS FOR RELIEF

COUNT I

(For Violations of §10(b) of the Exchange Act and Rule 10b-5 Promulgated Thereunder Against All Defendants—BlackBerry, Heins, Bidulka and Zipperstein)

202. Plaintiffs repeat and reallege each and every allegation contained above as if fully set forth herein.

203. During the Class Period, Defendants carried out a plan, scheme and course of conduct which was intended to and, throughout the Class Period, did: (a) deceive the investing public regarding BlackBerry's business, operations, performance, and prospects, and the true value of BlackBerry stock; (b) enable Defendants to inflate and to maintain the artificial inflation in the price of Company stock throughout the Class Period; and (c) cause Plaintiffs and other members of the Class to purchase BlackBerry common stock at artificially inflated prices, resulting in damages after the truth was revealed and the artificial inflation was removed from the price of the stock. In furtherance of this unlawful scheme, plan, and course of conduct, Defendants, jointly and individually (and each of them) took the actions set forth herein.

204. Defendants (a) employed devices, schemes, and artifices to defraud; (b) made untrue statements of material fact and/or omitted to state material facts necessary to make the statements not misleading; and (c) engaged in acts, practices, and a course of business which

operated as a fraud and deceit upon the purchasers of the Company's stock in an effort to maintain an artificially high market price for BlackBerry stock in violation of Section 10(b) of the Exchange Act and Rule 10b-5. Defendants are sued as primary participants in the wrongful and illegal conduct charged herein and as controlling persons as alleged below.

205. Defendants, individually and in concert, directly and indirectly, by the use, means or instrumentalities of interstate commerce and/or of the mails, engaged and participated in a continuous course of conduct to conceal adverse material information about the business, operations and future prospects of BlackBerry as specified herein.

206. Defendants employed devices, schemes and artifices to defraud, while in possession of material adverse non-public information and engaged in acts, practices, and a course of conduct as alleged herein in an effort to assure investors of BlackBerry's value and performance and continued substantial growth, which included the making of, or the participation in the making of, untrue statements of material facts and omitting to state material facts necessary in order to make the statements made about BlackBerry and its business, operations, performance, and prospects in the light of the circumstances under which they were made, not misleading, as set forth more particularly herein, and engaged in transactions, practices and a course of business which operated as a fraud and deceit upon the purchasers of BlackBerry stock during the Class Period.

207. Defendants had actual knowledge of the misrepresentations and omissions of material facts set forth herein, or acted with reckless disregard for the truth in that they failed to ascertain and to disclose such facts. Such Defendants' material misrepresentations and/or omissions were done knowingly or with reckless disregard for the purpose and effect of concealing the truth regarding BlackBerry's business, operations, performance, and prospects

from the investing public and supporting the artificially inflated price of its stock. As demonstrated by Defendants' material misstatements and omissions concerning the Company's business, operations, performance, and prospects throughout the Class Period, Defendants, if they did not have actual knowledge of the misrepresentations and omissions alleged, were reckless in failing to obtain such knowledge by recklessly refraining from taking those steps necessary to discover whether those statements were false or misleading.

208. As a result of the dissemination of the materially false and misleading information and failure to disclose material facts, as set forth above, the market price of BlackBerry stock was artificially inflated during the Class Period. In ignorance of the fact that the market price of BlackBerry stock was artificially inflated, and relying directly or indirectly on the false and misleading statements made by Defendants, or upon the integrity of the market in which the stock trades, and/or on the absence of material adverse information that was known to or recklessly disregarded by Defendants but not disclosed in public statements by Defendants during the Class Period, Plaintiffs and the other members of the Class acquired BlackBerry stock during the Class Period at artificially high prices and were damaged after the truth regarding the Company was revealed, which removed the artificial inflation from BlackBerry's stock.

209. Defendants Heins, Bidulka and Zipperstein's primary liability arises from the following facts: (a) Defendants Heins, Bidulka and Zipperstein were high-level executives and a director at the Company during the Class Period and members of the Company's management team or had control thereof; (b) these Defendants, by virtue of their responsibilities and activities as a senior officer and director of the Company were privy to and participated in the creation, development and reporting of the Company's internal budgets, plans, projections and/or reports; (c) these Defendants enjoyed significant personal contact and familiarity with each other

and were advised of and had access to other members of the Company's management team, internal reports and other data and information about the Company's business, operations, performance, and prospects at all relevant times; and (d) these Defendants were aware of the Company's dissemination of information to the investing public which they knew or recklessly disregarded was materially false and misleading.

210. Plaintiffs and the Class have suffered damages in that, in reliance on the integrity of the market, they paid artificially inflated prices for BlackBerry stock. At the time of said misrepresentations and omissions, Plaintiffs and other members of the Class were ignorant of their falsity, and believed them to be true. Had Plaintiffs and the other members of the Class and the marketplace known the truth regarding the problems that BlackBerry was experiencing, which were not disclosed by Defendants, Plaintiffs and other members of the Class would not have purchased or otherwise acquired their BlackBerry stock, or, if they had acquired such stock during the Class Period, they would not have done so at the artificially inflated prices which they paid.

211. By virtue of the foregoing, Defendants have violated Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder.

212. As a direct and proximate result of Defendants' wrongful conduct, Plaintiffs and the other members of the Class suffered damages in connection with their respective purchases of the Company's stock during the Class Period.

COUNT II

(For Violations of §20(a) of the Exchange Act against Individual Defendants Heins and Bidulka)

213. Plaintiffs repeat and reallege each and every allegation contained above as if fully set forth herein.

214. Defendants Heins and Bidulka acted as controlling persons of BlackBerry within the meaning of Section 20(a) of the Exchange Act as alleged herein. By virtue of their high-level positions, and their ownership and contractual rights, participation in and/or awareness of the Company's operations and/or intimate knowledge of the false financial statements filed by the Company with the SEC and disseminated to the investing public, Defendants Heins and Bidulka had the power to influence and control and did influence and control, directly or indirectly, the decision-making of the Company, including the content and dissemination of the various statements which Plaintiffs contend are false and misleading. Defendants Heins and Bidulka were provided with or had unlimited access to copies of the Company's reports, press releases, public filings and other statements alleged by Plaintiffs to be misleading prior to and/or shortly after these statements were issued and had the ability to prevent the issuance of the statements or cause the statements to be corrected.

215. In particular, each of these Defendants had direct and supervisory involvement in the day-to-day operations of the Company and, therefore, is presumed to have had the power to control or influence the particular transactions giving rise to the securities violations as alleged herein, and exercised the same.

216. As set forth above, BlackBerry and Defendants Heins and Bidulka each violated Section 10(b) and Rule 10b-5 by their acts and omissions as alleged in this Complaint. By virtue of their positions as controlling persons, Defendants Heins and Bidulka also are liable pursuant to Section 20(a) of the Exchange Act. As a direct and proximate result of Defendants Heins and Bidulka's wrongful conduct, Plaintiffs and other members of the Class suffered damages in connection with their purchases of the Company's stock during the Class Period and the related

damages resulting after the true facts were revealed and the artificial inflation was removed from the price of the stock.

WHEREFORE, Plaintiffs pray for relief and judgment, as follows:

1. Determining that this action is a proper class action, certifying Plaintiffs as Class representatives under Rule 23 of the Federal Rules of Civil Procedure and Plaintiffs' counsel as Lead Counsel;

2. Awarding compensatory damages in favor of Plaintiffs and the other Class members against all Defendants, jointly and severally, for all damages sustained as a result of Defendants' wrongdoing, in an amount to be proven at trial, including interest thereon;

3. Awarding Plaintiffs and the Class their reasonable costs and expenses incurred in this action, including counsel fees and expert fees;

4. Awarding extraordinary, equitable and/or injunctive relief as permitted by law, equity and the federal statutory provisions sued hereunder; and

5. Such other and further relief as the Court may deem just and proper.

JURY TRIAL DEMANDED

Plaintiffs hereby demand a trial by jury.

Dated: September 29, 2017

Respectfully submitted,

KAHN SWICK & FOTI, LLC

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Counsel for Additional Plaintiffs Yong M. Cho and Batuhan Ulug and the Class

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), and paper copies will be sent to those indicated as non-registered participants on September 29, 2017.

/s/ Kim E. Miller
Kim E. Miller

EXHIBIT A

AO 91 (Rev. 11/11) Criminal Complaint

UNITED STATES DISTRICT COURT

for the

District of Massachusetts

United States of America
v.
James Dunham, Jr.

Case No. 15 mj 7051 JCB

Defendant(s)

CRIMINAL COMPLAINT

I, the complainant in this case, state that the following is true to the best of my knowledge and belief.

On or about the date(s) of May 2010-April 2013 in the county of Suffolk in the _____ District of Massachusetts, the defendant(s) violated:

Code Section	*Offense Description*
Title 18, United States Code, Sections 1341 and 1346	Mail Fraud
Title 18, United States Code, Sections 1343 and 1346	Wire Fraud

This criminal complaint is based on these facts:

Please see attached Exhibit A (Affidavit of David Makol).

☑ Continued on the attached sheet.

Complainant's signature

David Makol, Special Agent, FBI

Printed name and title

Sworn to before me and signed in my presence.

Date: February 24, 2015

Judge's signature

City and state: Boston, MA

Hon. Jennifer C. Boal U.S. Magistrate Judge

Printed name and title

AFFIDAVIT OF DAVID MAKOL

I, David Makol, being duly sworn, hereby depose and state as follows:

1. I am a Special Agent for the Federal Bureau of Investigation (FBI) currently assigned to the Boston, Massachusetts Field Office. I have been a Special Agent with the FBI for over 12 years and since joining the FBI I have been assigned to squads investigating economic crimes, including mail, wire and securities fraud.

2. I make this affidavit in support of a criminal complaint charging James Dunham, Jr. with mail and wire fraud in violation of 18 U.S.C. §§ 1341, 1343 and 1346. Specifically, as set forth further below, since at least 2010, Dunham provided confidential information about his employer's business to at least one outside financial services firm with which he had a paid consulting arrangement, all as part of a scheme to defraud his employer of money and property and deprive his employer of honest services in exchange for payments to himself.

3. The facts stated herein are based on my own personal involvement with this investigation, as well as my review of documents, publicly available information and information provided by others assisting with the investigation. In submitting this affidavit, I have not included each and every fact known to me about this investigation. Rather, I have only submitted those facts which I believe are sufficient to establish probable cause.

Background

4. Dunham is an individual who resides in Glastonbury, Connecticut. Between approximately August 2009 and September 2013, Dunham served as the Chief Strategy Officer ("CSO") and then the President and Chief Operating Officer ("COO") of a Wireless Franchisor, which is a retailer for a major provider of wireless services ("Major Wireless Provider"). During at least a portion of that time, Dunham was a paid consultant to a Boston-based financial services

firm that, among other things, provides investment research to institutional clients (the "Research Firm"). Pursuant to his consulting arrangement, Dunham shared with the Research Firm information regarding the wireless industry, including sales, return and other confidential business information that he learned through his employment at the Wireless Franchisor. The information disclosed by Dunham then was included in research notes distributed by the Research Firm.

5. For example, in April 2013, Dunham disclosed the Wireless Franchisor's confidential business information to an analyst at the Research Firm ("the Analyst"), including sales and return information for a smartphone ("Smartphone") that had been recently launched by a major smartphone manufacturer ("Major Smartphone Manufacturer"). The Analyst then drafted, and the Research Firm released, an April 11, 2013 research note regarding the Smartphone, which note included sales and return information provided by Dunham (the "April 11, 2013 Research Note"). Following the release of the April 11, 2013 Research Note, the stock price of the Major Smartphone Manufacturer, which is a publicly traded company, fell more than seven percent.

6. As Dunham told the FBI in an interview, he knew that if either the Major Wireless Provider or the Major Smartphone Manufacturer learned that Dunham was the source of the information in the April 11, 2013 Research Note, it could be potentially damaging to the Wireless Franchisor's relationship with those entities.

Dunham's Employment at the Wireless Franchisor

7. As noted above, the Wireless Franchisor is a retailer for the Major Wireless Provider. Specifically, the Wireless Franchisor is one of six exclusive national indirect retail franchisors through which the Major Wireless Provider's products and services are sold. According to publicly available information, as of April 2013, the Major Wireless Provider controlled more than 30 percent of the wireless market.

8. The Wireless Franchisor sells, among other things, devices manufactured by the Major Smartphone Manufacturer. As of April 10, 2013, the Major Smartphone Manufacturer had a market capitalization of $7.70 billion.

9. The Wireless Franchisor has approximately 400 retail locations that are owned and operated by franchisees. The Wireless Franchisor has access to very specific information from the franchisees, including sales, compensation, service activating or upgrading information, product launch information, and cost information.

10. During the course of this investigation, the FBI interviewed Dunham's boss, the "Managing Director" of the Wireless Franchisor. The Managing Director confirmed that, in Dunham's role as Chief Strategy Officer and later as the President and COO of the Wireless Franchisor, Dunham had access to certain business information, including, among other things, sales and return information for Wireless Franchisor franchisees. The Managing Director also advised that all such sales and return information is confidential to the Wireless Franchisor.

11. Moreover, according to the Managing Director and documents I have reviewed, the Wireless Franchisor had a non-disclosure agreement with the Major Smartphone Manufacturer. The Managing Director told the FBI that the disclosure of information regarding

sales of one of the Major Smartphone Manufacturer's products would violate the non-disclosure agreement.

12. I have reviewed the Wireless Franchisor's Employee Handbook for 2009 and also reviewed an Employment Agreement signed by Dunham in 2009, when he first began working at the Wireless Franchisor, as well as another version he signed in 2012. Pursuant to his 2009 Employment Agreement Dunham agreed, among other things, that he would:

> not at any time, whether during or after the termination of employment, for any reason whatsoever (whether voluntary or involuntary) other than to promote and advance the business of [the Wireless Franchisor] in accordance with the directions of the appropriate officers of [the Wireless Franchisor], disclose or use for [Dunham's] (or any other party's) purposes, or for an improper purpose, any of the trade secrets or confidential business information of [the Wireless Franchisor] . . .

In that same agreement, Dunham further agreed to "keep secret all matters entrusted to him . . . by [the Wireless Franchisor]" and agreed to "not use or disclose any information in any manner which may injure or cause (direct or indirect) loss to the [Wireless Franchisor] or damage to its business or reputation."

13. Likewise, in the 2012 Employment Agreement, Dunham agreed not to disclose, among other things:

> lists, databases, financial statements, contracts, agreements, personnel records, documents, materials and other information, all of which pertain to the business of [Wireless Franchisor], including its financial affairs . . .

Dunham further agreed not to "use such information for any unauthorized purpose without the prior written consent of [the Wireless Franchisor.]" Finally, pursuant to the 2012 Employment

Agreement, Dunham agreed to "devote substantially all of [his] business time and effort to the performance of [his] duties" as President and COO of the Wireless Franchisor. As required under the Agreement, Dunham received authorization to engage in one outside civic activity, specifically, the Wireless Franchisor's charitable foundation. As he told the FBI, however, Dunham never sought, nor did he receive, permission to act as a consultant to the Research Firm, or any other person or entity.

14. The Managing Director did not learn of Dunham's consulting arrangement with the Research Firm until after the FBI visited the Wireless Franchisor's offices and spoke to Dunham in September 2013. Specifically, the Managing Director, who had been away from the office when the FBI arrived, learned from his assistant that the FBI had met with Dunham. When the Managing Director asked Dunham about the visit, Dunham said that the FBI was investigating something that Dunham had said about the Major Smartphone Manufacturer. Dunham did not initially tell the Managing Director about his consulting agreement with the Research Firm. The next day, the Managing Director met with Dunham again. During that meeting, Dunham said that he had an agreement to talk to companies generally about the industry. Dunham told the Managing Director that he did not discuss the Wireless Franchisor. It was not until the following week that Dunham disclosed to the Managing Director that he was a paid consultant for the Research Firm. Thereafter, the Managing Director accepted Dunham's resignation.

Dunham's Consulting Arrangement with the Research Firm

15. In May 2010, Dunham entered into a formal consulting agreement with the Research Firm, pursuant to which he was paid $2,000 per month to consult with the Research Firm's Capital Markets Research Department or with the Research Firm's clients. In that same Agreement, Dunham further agreed that he was "solely responsible for ensuring that [his] consultations provided to or on behalf of [the Reseearch Firm were] consistent with any obligations he may have with [his] employer" and also promised that he would not "disclose to [the Research Firm or any Research Firm client] information that [he had] a duty to keep confidential (e.g., by agreement, employer policy, fiduciary duty, etc.)." Between May 2010 and June 2013, the Research Firm paid Dunham approximately $61,000 for his consulting services. Each $2,000 payment was made by check and was mailed via U.S. Postal Service from the Research Firm's Boston office to Dunham in Connecticut.

16. Dunham told the FBI that, in accordance with his consulting arrangement with the Research Firm, he spoke to the Analyst, who was Dunham's primary contact at the Research Firm, by telephone approximately, on average, once per week for approximately 45 minutes to one hour. Dunham told the FBI that he spoke to the Analyst on personal time using his personal e-mail and cell phone. Dunham told the FBI that, even before he became a paid consultant for the Research Firm, he shared his opinions on the wireless industry with the Analyst. Dunham recalled that the Analyst had told him that Dunham's information was valuable and that the Analyst wanted to put him on a monthly retainer.

17. When the FBI interviewed the Analyst, he advised that, during their telephone calls, Dunham provided insight into the wireless communications industry. The Analyst explained that Dunham's information was valuable because Dunham had real-time visibility into sales from the Wireless Franchisor's 400 locations. The Analyst confirmed that the two usually spoke by cell phone and that the information Dunham provided was included in research notes written by the Analyst and distributed by the Research Firm.

18. For example, the Analyst confirmed that Dunham was the source of the following information included in an October 6, 2010 research note written by the Analyst and distributed by the Research Firm: "We are told that [Major Wireless Provider] national indirect retailers (exclusive to [the Major Wireless Provider]) are seeing a 15% year-over-year gain in gross adds for the months of August and September." "Gross adds" are the total of new subscribers to a particular wireless provider. Telephone records confirm that, on October 5, 2010 (the day before the Research Firm issued the above-referenced research note), Dunham spoke to the Analyst for approximately 21 minutes.

19. The Analyst also confirmed that Dunham was the source of the following information included in a January 20, 2011 research note written by the Analyst and distributed by the Research Firm: "The gross add weakness at [Major Wireless Provider] national indirect retailers that we saw in Q4 has apparently extended into the first half of January." Telephone records confirm that, on January 19, 2011, Dunham spoke to the Analyst for approximately 30 minutes.

20. The Analyst also confirmed that Dunham was the source of the following information included in a February 3, 2011 research note written by the Analyst and distributed by the Research Firm: "Checks indicate that gross adds at major [Major Wireless Provider]

indirect national retailers came in 10% below plan for the month of January and, for the first time in well over a year, they fell short of their handset upgrade plan for the month." Telephone records confirm that, on February 2, 2011, Dunham spoke to the Analyst for approximately 27 minutes.

21. The Analyst also confirmed that Dunham was the source of the following information included in a November 3, 2011 research note written by the Analyst and distributed by the Research Firm: "At [the Major Wireless Provider] ["Specific Smartphone Manufacturer's"] total share appears to be running in the 40% range reflecting significant pent up demand . . . There is no clear indication when supply will catch up with demand and we note that there are a number of tier one [Major Wireless Provider] indirect retail agents that have yet to receive any additional ["Specific Smartphones"].[1] Telephone records confirm that, on November 2, 2011, Dunham spoke to the Analyst for approximately 14 minutes

22. The Analyst also confirmed that Dunham was the source of the following information included in a research note written by the Analyst and distributed by the Research Firm on Monday, September 10, 2012: "Our latest checks on [the Major Wireless Provider] indicate the carrier continues to see very impressive gross add strength as we believe its gross adds were up over 20% on a y/y basis, consistent with checks for the month of July." Telephone records confirm that, on September 7, 2012, which was a Friday, Dunham spoke to the Analyst for approximately 45 minutes.

[1] The Specific Smartphone and the Specific Smartphone Manufacturer identified in this note, and in the note set forth in paragraph 23 below, are different than the Smartphone and Major Smartphone Manufacturer identified elsewhere in this affidavit.

23. The Analyst also confirmed that Dunham was the source of the following information included in a November 27, 2012 research note written by the Analyst and distributed by the Research Firm: "Supply of [Specific Smartphone] continues to improve with carrier indirect retail channels beginning to receive shipments last week, roughly five weeks sooner than originally expected. With the supply situation improving, [the Specific Smartphone Manufacturer's] November [Specific Smartphone] share at [the Major Wireless Provider] increased by approximately 10% over October and we now believe it is hovering in the high 40% range of total device sales." Telephone records confirm that, on November 26, 2012, Dunham spoke to the Analyst for approximately 18 minutes.

April 11, 2013 Research Note

24. Both Dunham and the Analyst have confirmed that they spoke by telephone on April 10, 2013—the day before the April 11, 2013 Research Note was released. The Analyst estimated that the telephone call lasted approximately ten minutes, and telephone records confirm that, on April 10, 2013 (a Wednesday), at approximately 2:00 pm, Dunham spoke to the Analyst from Dunham's personal cell phone. The telephone call lasted approximately eight minutes.

25. According to the Analyst, during that call, Dunham provided the Analyst with real- time information regarding the sales of the Smartphone at the Wireless Franchisor's 400 retail stores, which information included sales and return data. The Analyst told the FBI that the information Dunham provided came at an important time.[2]

[2] According to documents I have reviewed, the Major Wireless Provider and the Major Smartphone Manufacturer launched the Smartphone on March 28, 2013.

26. The Analyst told the FBI that, after speaking with Dunham, the Analyst began drafting the April 11, 2013 Research Note, which note was released by the Research Firm on April 11, 2013. In the April 11, 2013 Research Note, the Analyst wrote, among other things:

> We believe key retail partners have seen a significant increase in [Smartphone] returns to the point where, in several cases, returns are now exceeding sales, a phenomenon we have never seen before. . . .

27. According to the Analyst, the information cited above in the April 11, 2013 Research Note was information provided by Dunham in their April 10, 2013 telephone call.

28. According to representatives of the Research Firm, the April 11, 2013 Research Note, like all of the Research Firm's research notes, was distributed to the Research Firm's clients, including clients outside of Massachusetts, electronically through the Research Firm's servers in Boston.

29. Following the release of the April 11, 2013 Research Note, the Major Smartphone Manufacturer's share price dropped more than seven percent in one day.

30. According to the Analyst, after the Analyst learned that the government was investigating the April 11, 2013 Research Note, the Analyst had a conversation with Dunham in which the Analyst advised Dunham that the Analyst was going to provide Dunham's name to the government. The Analyst recalls that Dunham did not want his name to be provided to the government and was concerned about his name being associated with the April 11, 2013 Research Note.

Conclusion

31. Based on my knowledge, training and experience and the facts set forth in this affidavit, I have probable cause to believe that, beginning in May 2010 and continuing through at least April 2013, James Dunham, Jr. committed mail and wire fraud, in violation of Title 18, United States Code, Sections 1341, 1343 and 1346.

32. Specifically, I have probable cause to believe that, on various dates between May 2010 and April 2013, James Dunham, Jr. knowingly and willfully devised and intended to devised a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises, and to defraud and deprive his employer, the Wireless Franchisor, of its right to his honest and faithful services through bribes and kickbacks, specifically the receipt of payments for consulting services provided to the Research Firm, and did knowingly cause a thing to be sent and to be delivered by the United States Postal Service and by private and commercial interstate carrier, according to the directions thereon, to wit: checks sent from the Research Firm's Boston office to Dunham in Connecticut.

33. I also have probable cause to believe that, on various dates between October 2010 and April 2013, James Dunham, Jr. having devised and intending to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises, and to defraud and deprive his employer, the Wireless Franchisor, of its right to his honest and faithful services through bribes and kickbacks, specifically the receipt of payments for consulting services provided to the Research Firm, did knowingly transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce, writings, signs, signals, pictures, and sounds for the purpose of executing the scheme

to defraud; to wit, research notes based, at least in part, on information supplied by Dunham, which research notes were distributed electronically from the Research Firm's servers in Boston to its clients, some of which are outside of Massachusetts.

Sworn to under the pains and penalties of perjury.

David Makol, Special Agent
Federal Bureau of Investigation

Sworn to and subscribed before me February 24th, 2015

Jennifer C. Boal
U.S. Magistrate Judge

JS 45 (5/97) - (Revised U.S.D.C. MA 3/25/2011)

Criminal Case Cover Sheet **U.S. District Court - District of Massachusetts**

Place of Offense: **Category No.** II **Investigating Agency** FBI

City Boston **Related Case Information:**

County Suffolk Superseding Ind./ Inf. _____ Case No. _____

Same Defendant _____ New Defendant _____

Magistrate Judge Case Number _____

Search Warrant Case Number _____

R 20/R 40 from District of _____

Defendant Information:

Defendant Name James Dunham, Jr. Juvenile: ☐ Yes ☑ No

Is this person an attorney and/or a member of any state/federal bar: ☐ Yes ☑ No

Alias Name _____

Address (City & State) Glastonbury, CT

Birth date (Yr only): 1955 SSN (last4#): 0350 Sex M Race: White Nationality: U.S.

Defense Counsel if known: Conrad Bletzer Address Bletzer & Bletzer

Bar Number _____ 300 Market Street

Boston, MA

U.S. Attorney Information:

AUSA Sarah Walters Bar Number if applicable 638378

Interpreter: ☐ Yes ☑ No List language and/or dialect: _____

Victims: ☑ Yes ☐ No If yes, are there multiple crime victims under 18 USC§3771(d)(2) ☐ Yes ☑ No

Matter to be SEALED: ☑ Yes ☐ No

☑ Warrant Requested ☐ Regular Process ☐ In Custody

Location Status:

Arrest Date _____

☐ Already in Federal Custody as of _____ in _____.

☐ Already in State Custody at _____ ☐ Serving Sentence ☐ Awaiting Trial

☐ On Pretrial Release: Ordered by: _____ on _____

Charging Document: ☑ Complaint ☐ Information ☐ Indictment

Total # of Counts: ☐ Petty _____ ☐ Misdemeanor _____ ☑ Felony 2

Continue on Page 2 for Entry of U.S.C. Citations

☑ **I hereby certify that the case numbers of any prior proceedings before a Magistrate Judge are accurately set forth above.**

Date: February, 24, 2015 Signature of AUSA: _____

District Court Case Number (To be filled in by deputy clerk): _____

Name of Defendant James Dunham, Jr.

U.S.C. Citations

	Index Key/Code	Description of Offense Charged	Count Numbers
Set 1	18 U.S.C. §§ 1341 and 1346	Mail Fraud	1
Set 2	18 U.S.C. §§ 1343 and 1346	Wire Fraud	2
Set 3			
Set 4			
Set 5			
Set 6			
Set 7			
Set 8			
Set 9			
Set 10			
Set 11			
Set 12			
Set 13			
Set 14			
Set 15			

ADDITIONAL INFORMATION:

EXHIBIT B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITES STATES OF AMERICA)
)
vs.)
)
) No. 1:15-cr-10110-DPW
JAMES DUNHAM, JR.,)
)
Defendant.)
)

BEFORE: THE HONORABLE DOUGLAS P. WOODLOCK

RULE 11/PLEA HEARING

John Joseph Moakley United States Courthouse
Courtroom No. 1
One Courthouse Way
Boston, MA 02210
Thursday, June 4, 2015
9:35 a.m.

Brenda K. Hancock, RMR, CRR
Official Court Reporter
John Joseph Moakley United States Courthouse
One Courthouse Way
Boston, MA 02210
(617)439-3214

APPEARANCES:

UNITED STATES ATTORNEY'S OFFICE MA
By: AUSA Sarah E. Walters
Suite 9200
1 Courthouse Way
Boston, MA 02210
On behalf of the United States of America.

BLETZER AND BLETZER, PC
By: Conrad J. Bletzer , Jr., Esq.
300 Market Street
Brighton, MA 02135
On behalf of the Defendant.

(The following proceedings were held in open court before the Honorable Douglas P. Woodlock, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, One Courthouse Way, Courtroom 1, Boston, Massachusetts, on Thursday, June 4, 2015):

THE CLERK: All rise.

(The Honorable Court entered the courtroom at 9:35 a.m.)

THE CLERK: This Honorable Court is now in session. You may be seated.

This is Criminal Action 15-10110, The United States v. James Dunham, Jr.

THE COURT: Well, I have a copy of the signed Plea Agreement here and proposed Waiver of Indictment. As a preliminary matter, I guess I am interested in this question of sealing the identification of non-individual victims.

So, maybe you can explain, Ms. Walters, what is going on.

MS. WALTERS: It has been a great deal of discussion in our office, and the consensus is that it is still, even though they are not individuals, are actually institutional victims, that it's our obligation to move to seal their identities at this stage of the proceedings. Obviously, if a case like this were to proceed to trial, there would be testimony from witnesses representing those entities, the same

way individual victims might testify at a trial. But it's our position that it should be sealed. If the Court disagrees --

THE COURT: Why?

MS. WALTERS: Well, I mean --

THE COURT: Let me just pause for a second. I can see the balance with respect to individuals. That is something that we all have to be attentive to. But institutional purported victims have no privacy rights, at least I am not aware of any privacy rights, that attach to institutional victims. I suppose there may be some practical concerns on the part of the Government that it would be harder to get institutional victims to cooperate in investigations. Maybe that is something.

But I am not certain I agree at all with that, and, in fact, it seems to me to be an affront to transparency, particularly with respect to institutions which are simply aggregations that we find convenient for various ways, including now political contributions.

MS. WALTERS: Right. No. I agree the Supreme Court has made that determination, that that they stand in those shoes. So, really, the position would be that the institutional victims, in addition to obviously the Government always has -- we have to have cooperation from all types of victims, whatever shape or size or form they come in, but a lot more of it would be in this instance we are dealing with

publicly traded companies that one argument would be the investors need to know that they have been victimized. The other argument would be --

THE COURT: If I may interrupt, I would not like to be the General Counsel of a publicly traded counsel that is not disclosing this encounter, and so it does not seem to me that the United States Attorney's Office ought be the stalking horse for enabling a company to provide some pretextual justification for a failure to disclose to its shareholders it has been victimized, because the victimization suggests lack of internal controls as well.

MS. WALTERS: Agreed, your Honor, and our position would be that's not our place. The General Counsel absolutely has responsibilities and should be disclosing this as the General Counsel sees fit, consistent with his or her and the company's legal obligations to its shareholders, but it's not the Government's position to make those disclosures to decide what and when is disclosed, that that falls on the company.

THE COURT: Have you been asked to keep the names non-public?

MS. WALTERS: We have not.

THE COURT: Well, I am going to deny the Motion to Seal. You can communicate to the victims that, if they wish to have me revisit this, they can ask, and we will have a hearing on it.

MS. WALTERS: Absolutely.

THE COURT: But I am concerned about the United States Attorney's Office's institutional view with respect to it, and so I guess I would like briefing on it, that is, the sources of authority to do that and the reasons for doing that, particularly in the context of publicly traded corporations. This seems to me to be a kind of, perhaps I overstate it, institutional conceit that ought not to be condoned in a system that depends, to a large degree, for its consensus or consent by the community on transparency.

MS. WALTERS: Understood, your Honor. Would you like us to address more specifically the issue of just institutional victims or keeping victims' named across the board --

THE COURT: Certainly, institutional victims. I do not have before me the question of personal victims, and there have been a variety of different approaches for institutional, for personal victims as a question of extortion and a whole series of other matters. I am taking a bite at this, but I think it should be enough that I can chew and not more than I can swallow.

MS. WALTERS: Fair enough.

THE COURT: So, I think I will leave that to institutional victims, and here, as I understand the circumstances, those institutional victims are publicly traded?

MS. WALTERS: Yes.

THE COURT: So, it is limited to publicly traded institutional victims.

MS. WALTERS: Thanks.

THE COURT: So, having gone through that process, and having, as indicated -- and you tell me what is a reasonable amount of time to respond, given the institutional discussions that attend even the smallest act by the United States Attorney's Office.

MS. WALTERS: Thank you, your Honor. And, actually, more because of a number of personal obligations I have coming up in the next month, if I could have 30 days?

THE COURT: Sure. I will not make it the 4th of July, but let's say July 10.

MS. WALTERS: Thank you, your Honor.

THE COURT: So, I am going to ask Mr. Lovett to swear the defendant, and I will ask him some questions.

DEFENDANT JAMES DUNHAM, JR., DULY SWORN BY THE CLERK

THE COURT: Mr. Dunham, the purpose of this hearing is to satisfy me that what appears to be your intention to plead guilty to what is called an "Information" that alleges a very serious federal felony is a knowing and voluntary act on your part. In order for me to make that determination, I have to ask you some questions. Some of those questions are personal in nature. You will understand that I am not trying to delve into your personal life, except as it makes it possible for me

to make a judgment about whether or not you know what you are doing and what you are doing is voluntary.

Do you understand?

THE DEFENDANT: I do, your Honor.

THE COURT: I made reference to a Plea Agreement during my colloquy with Ms. Walters. It appears to be embodied in a letter dated April 13th from the United States Attorney's Office to your attorney, Mr. Bletzer. The copy that I have appears to have been signed on April 21st by both you and by Mr. Bletzer.

Is this your Plea Agreement with the Government?

THE DEFENDANT: Yes, your Honor.

THE COURT: Did anybody threaten you in any way to get you to plead guilty?

THE DEFENDANT: No, your Honor.

THE COURT: Did anybody promise you something that is not in this Plea Agreement to get you to plead guilty?

THE DEFENDANT: No, your Honor.

THE COURT: Now, I need to know, I guess, whether or not you have ever had any problem with substance abuse.

THE DEFENDANT: No, your Honor.

THE COURT: Are you taking any prescription drugs?

THE DEFENDANT: I am, your Honor.

THE COURT: What is it?

THE DEFENDANT: I take Livalo statin for my

cholesterol.

THE COURT: Are you seeing a physician for any kind of physical ailment?

THE DEFENDANT: No, your Honor.

THE COURT: Have you ever had occasion to consult with a mental-health professional, a psychiatrist, a psychologist, a psychiatric social worker or anyone like that?

THE DEFENDANT: Only on behalf of my brother, your Honor.

THE COURT: Again, I am not interested in delving into personal matters, but it is important for me to understand what kinds of mental-health issues you have had to address in a general sort of way. So, maybe you can explain it a little bit more.

THE DEFENDANT: Yeah. My brother had a serious bipolar disorder, and on his behalf I went to speak to mental-health professionals, psychologists, psychiatrists, over a period of about 15 years.

THE COURT: But that was not something that you were addressing; it was as an advocate or someone who could provide information concerning your brother's difficulties?

THE DEFENDANT: That is correct, your Honor.

THE COURT: Can you tell me how old a man you are?

THE DEFENDANT: I'm 59 years old.

THE COURT: How far did you get in school?

THE DEFENDANT: I finished two years of college, your Honor.

THE COURT: And what course of study there?

THE DEFENDANT: Primarily, English.

THE COURT: What have you been doing for the last, say, 10 years for a living?

THE DEFENDANT: Well, I was working in a career in wireless industry.

THE COURT: Doing what? Just give me a sense.

THE DEFENDANT: Sales management, senior management, Chief Operating Officer.

THE COURT: Have you had any difficulty understanding what this case is about, what it is that the Government is accusing you of?

THE DEFENDANT: No, your Honor.

THE COURT: Have you had an adequate opportunity to discuss this case with Mr. Bletzer, your attorney?

THE DEFENDANT: Yes, your Honor.

THE COURT: Are you satisfied you have received from him the kind of legal advice that you need to make your own determination about whether or not to plead guilty?

THE DEFENDANT: Yes, your Honor.

THE COURT: And are you satisfied?

THE DEFENDANT: Yes, your Honor.

THE COURT: Now, you understand you do not have to

plead guilty at all? Under our system of justice a person who is accused of a crime is presumed innocent, unless and until the Government can prove beyond a reasonable doubt each essential element of the offense charged against him. What that means is you do not have to do anything at all. You can sit right there, look the Government straight in the eye, and say, "Prove it," and unless and until they do, you cannot be found guilty. So, by pleading guilty, you are giving up those very valuable Constitutional rights.

Do you understand that?

THE DEFENDANT: I do, your Honor.

THE COURT: Now, in the Plea Agreement it outlines various considerations here. One of them is that the maximum penalty for the one count of the Information to which you are pleading guilty is incarceration for 20 years in prison. There could be supervised release for 3 years, a fine of $250,000, or twice the gross gain or loss, and there is a mandatory Special Assessment of $100. There is restitution that may be available. There is forfeiture of property, to the extent that is charged in this Information.

And, in addition, I must tell you -- I have no idea what your immigration status is, if any -- but I want to tell you that this is such a serious matter that, if you have a vulnerable immigration status, this may result in your being deported or excluded from the United States. It is that

serious a matter.

Do you understand that?

THE DEFENDANT: I do, your Honor.

THE COURT: Now, with respect to the question of sentencing, the parties have taken some positions with respect to what are called the *Sentencing Guidelines*. Those are a series of directives to me that tell me what considerations I should have in mind and how, at least, the Sentencing Commission would weigh them. And so, the parties have gone through here and tell me what they think the base Offense Level is and how much money is involved and that sort of thing. I assume, on the basis of trying to figure out what they negotiate, that is, you and the Government negotiate, as the proper range for sentencing here, and in this connection the Government has indicated that it will, assuming that the other provisions of the Plea Agreement are carried out, that the Government is going to recommend incarceration at the low end of the guideline as calculated by the parties in Paragraph 3.

I want to be clear about something. I am not bound by that. I will make my own determinations about it. I will listen, obviously, to the recommendations of the parties, but I am going to make my own calculations, assisted by the Probation Office and, obviously, considering the arguments that are made by the parties, of what those *Sentencing Guidelines* are before I move on in the sentencing.

And so, something that I want to emphasize here now is you are pleading guilty in the face of uncertainty about what I am going to do, and what I am going to do is what governs in this case. Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Now, have you had an adequate opportunity, nevertheless, to discuss with Mr. Bletzer how the *Sentencing Guidelines* work and the factors that should be considered?

THE DEFENDANT: Yes, your Honor.

THE COURT: And do you think you know enough about the *Sentencing Guidelines* to make a reasonable judgment about pleading guilty here?

THE DEFENDANT: Yes, your Honor.

THE COURT: You know that I am not bound by the *Guidelines* themselves, even as they are calculated? I have to test those *Guidelines* against some larger principles of sentencing to come to whatever I perceive to be a reasonable sentence in this case, and that involves a level of judgment about the facts and circumstances of the case. I do not know very much about this case at this point. I will learn a lot more when I get the benefit of a Presentence Report.

But I want you to understand that at this stage you are pleading guilty in the face of uncertainty about what the sentence is going to be here, and that, if you do not like the sentence, you do not get to withdraw your plea. You are stuck

with it. Do you understand that?

THE DEFENDANT: I do, your Honor.

THE COURT: Now, in the Plea Agreement there are a variety of other provisions. I do not mean to take very much time with you on those, unless you have questions of me, except with respect to the provision for the protection of assets, which puts restraints on the amount of money that you can expend during the period before the sentence in this case, and principally it is no more than $5,000 a month for ordinary living expenses. And there are attorney's fees as well that are exempted from limitation. But it also limits your ability to transfer assets during this time period.

You understand that you are under those kinds of restraints, and if you fail to adhere to those kinds of restraints it may mean that the Plea Agreement disappears? Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Now, do you have any questions, any other questions of me, regarding the Plea Agreement in this case?

THE DEFENDANT: No, your Honor.

THE COURT: So, I started by saying there is an overall Constitutional framework for the resolution of criminal cases, and it requires the Government to prove beyond a reasonable doubt each essential element of the claim against that individual. But there is another Constitutional dimension

that I do want to talk about, because you have indicated that you are going to plead guilty to an Information.

Under our Constitution, for a serious crime like this the matter must be brought before the grand jury, unless, of course, there is some agreement about it. The grand jury consists of 23 individuals, a majority of whom have to vote in favor of a charge. If they do not, the Government cannot proceed on a serious charge like this, unless, of course, the defendant says he will plead to the Information. An "Information" is essentially a direct charging document by the Government. They bypass the grand jury in the case.

Now, what you are giving up is the right of other citizens to provide a second look at what the Government has alleged. It is not frequent, but it happens, that grand juries will say, "No, we are not going to let you go forward," and if they say, "No, we are not going to let you go forward," the Government cannot go forward with the charge.

Now, you understand that, by pleading guilty to the Information, you are giving up the right to force the Government to at least have a group of citizens, the grand jury, make an evaluation of whether or not this is a proper exercise of their power? You are giving that right up. Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Now, have you fully discussed that with

Mr. Bletzer?

THE DEFENDANT: I have, your Honor.

THE COURT: And you are satisfied that you are willing to let the Government go directly at you through an Information?

THE DEFENDANT: I am, your Honor.

THE COURT: Now, once the Government does that, and you have agreed to let them proceed by Information, you still have the right to force the Government to its proof; you do not merely have to sit back and say, "Okay, let's see if you can prove it."

Mr. Bletzer can cross-examine the Government's witnesses. He could bring in witnesses on your behalf. If those witnesses would not come in here voluntarily, I would give him Court process to force them to come in here.

You could take the witness stand yourself and tell your side of the story, or you could choose not to, and if you chose not to, I would tell the jury, and, of course, I would observe this principle myself, that we cannot hold that against you. That is another valuable Constitutional right that you have. It is the right to remain silent in the face of criminal accusation, and we cannot burden it in any way. I would tell the jury to just put it out of the case. It is not to be weighed in any way. You weigh the evidence according to what has properly been adduced by the Government and by you without

any consideration of whether or not you testified.

Now, you are giving up all of those rights by pleading guilty. Do you understand that?

THE DEFENDANT: I do, your Honor.

THE COURT: Now, one of the things that I have to do is satisfy myself that there is sufficient evidence from which a finder of fact could find you guilty of the offense charged. The offense charged is one of Wire Fraud and what we call Honest Services Wire Fraud. The Government has to prove that there is a scheme or was a scheme as substantially as alleged in the Indictment to obtain money and property, and specifically confidential business information belonging to what is identified as the "Wireless Franchiser" by means of false and fraudulent pretenses. They have to show that the scheme was one to defraud and obtain money and property through a misrepresentation or concealment of a material fact or a false statement of some sort, and they have to prove that you knowingly, that is, you knew what you were doing, and willfully, that is, you intended to do what you did, participated in the scheme with the intent to defraud; and the Government must also prove that, for the purpose of executing the fraud, you caused or someone involved in the scheme caused an interstate or foreign wire communication to be used to transmit materials.

Now, in the Information the allegation is that there

was a transmission of research notes concerning a "major smartphone manufacturer," which I guess is a Homeric epithet for the actual name of the major smartphone manufacturer, as defined in the Information itself.

They have to prove all of those things, and they have to prove them beyond a reasonable doubt.

Have you discussed fully with Mr. Bletzer the various kinds of initiatives that you might have or defenses that you might have in responding to those allegations and attempting to demonstrate that the Government cannot meet its burden of proof?

THE DEFENDANT: I have, your Honor.

THE COURT: And are you satisfied that you know enough about what is available to you that the best course for you is to plead guilty under these circumstances?

THE DEFENDANT: Yes, your Honor.

THE COURT: Now, I have to satisfy myself that there is sufficient evidence from which a finder of fact could find you guilty of the offense charged, and so I am going to ask Ms. Walters to tell us, briefly, what the evidence would be in this case if it went to trial. When she is through, I am going to turn to you and say, "Is that what happened?", to be sure that you understand the premises upon which I will be making a determination in this case.

I should add one other thing. There is a forfeiture

count in the case. I am not sure what precisely is subject to the forfeiture here, Ms. Walters. Maybe you can address that before turning to the question of what, roughly speaking, the evidence would be in the case.

MS. WALTERS: Yes, your Honor. The defendant, in serving as a consultant, receiving a series of $2,000 monthly payments for providing this confidential information, over the course of time obtained approximately $61,000. So, that would be the subject of the forfeiture.

THE COURT: And that money is fungible, I take it, and the Government's forfeiture would be traceable or derived from proceeds?

MS. WALTERS: Exactly, your Honor.

THE COURT: So, you understand they will be looking for that money as well in this case by your plea?

THE DEFENDANT: Yes, your Honor.

THE COURT: Ms. Walters.

MS. WALTERS: Thank you, your Honor. If this case were to proceed to trial, the Government would present evidence establishing the following:

Between approximately August of 2009 and September of 2013, Mr. Dunham served as the Chief Strategy Officer and then the President and Chief Operating Officer of a wireless franchisor which is an exclusive national indirect retailer for a major provider of wireless services.

And so, how this would work is the major wireless providers have agency relationships with a series of indirect retailers throughout the country. This particular one had relationships with, I believe, six. Mr. Dunham's employer was one of those six. Those six were exclusive to this particular service provider and sold products and services provided by that specific wireless provider. Examples of wireless providers are T-Mobile, Verizon, Sprint.

Those wireless providers then, obviously, sell various devices, Blackberry devices, Apple devices, Samsung devices, through each of the wireless providers. So, as a national indirect retailer, Mr. Dunham's employer supervised or maintained 400 franchisees which sold wireless services and wireless devices to the public.

In his roles at the wireless franchisor Dunham had access to very specific confidential information from the wireless franchisor's franchisee. So, specific sales information, specific return information, compensation information, information regarding activating or upgrading, simply buying a new service plan, product launch information and other cost information. Again, all of that information was confidential, as witnesses would testify, and as set forth in his employment agreements.

Again, in light of his position at the wireless franchisor, and pursuant to his employment agreements,

Mr. Dunham had a duty not to disclose wireless franchisor confidential information, and he certainly had a duty not to disclose it without permission, specific permission from the wireless franchisor. As Dunham knew, disclosure of such information could jeopardize key business relationships with business providers, with his business partners, including the service provider, including the manufacturers of the smartphones and other devices that were sold through the franchisees.

Beginning in May 2010 and continuing through at least April 2013 --

THE COURT: If you could just, because you are reading --

MS. WALTERS: I get too fast. I apologize.

THE COURT: Not that you are not fast when you are not reading as well.

MS. WALTERS: I know. It's a long-standing problem. I apologize.

Beginning in May 2010 and continuing through at least April 2013, and unbeknownst to Mr. Dunham's employer, the wireless franchisor, Dunham acted as a paid consultant to a Boston-based financial services firm that provides investment research to institutional clients who then use that research for the purposes of trading. Pursuant to that consulting agreement, Mr. Dunham provided that research firm with

confidential information belonging to the wireless franchisor, including specifically sales information, return information, also a variety of information about sales numbers of upgrades and downgrades in service, and he did this in exchange for $2,000 monthly payments.

Again, he wasn't permitted to disclose the information at all from the wireless franchisor without permission. He was not permitted to disclose it for his own personal purposes, which is what he was doing in this instance. The wireless franchisor was, in fact, unaware that he had this consulting relationship, and the CEO of the wireless franchisor would testify at trial he would not have given such permission, given the potential disastrous effect on business relationships.

As Mr. Dunham knew, the confidential information that was being disclosed by him was then included in research notes that were distributed by the research firm to its institutional clients for use in trading decisions.

In particular, in April, 2002, Mr. Dunham disclosed the wireless franchisor's confidential business information regarding sales and return information for a specific smartphone that had been recently launched by a major smartphone manufacturer and had just recently become offered by the major wireless provider with whom Mr. Dunham's employer had a relationship. The analyst then drafted and the research firm released an April 11, 2013 research note on that smartphone,

which note included the specific sales and return information that had been provided by Dunham. That research note, as well as the others that were identified in the Information, were distributed electronically from the research firm's servers in Boston to its clients, some of which were outside of Massachusetts.

THE COURT: All right.

You have heard what Ms. Walters tells me the evidence would be in this case. Is that what happened?

THE DEFENDANT: Yes, your Honor.

THE COURT: You did what was recited there?

THE DEFENDANT: Yes, your Honor.

THE COURT: Let me ask another question, which is one having to do with whether or not there is a cooperation agreement in this case. Is there?

MS. WALTERS: With regard to Mr. Dunham, no.

THE COURT: Is that the case, Mr. Dunham, there is no cooperation agreement that you have --

THE DEFENDANT: That's correct, your Honor.

THE COURT: -- with respect to the potential criminal liability of other entities here?

THE DEFENDANT: Yes, your Honor.

THE COURT: Ms. Walters, do you know of any reason I should not accept the plea?

MS. WALTERS: No, your Honor.

THE COURT: Mr. Bletzer, do you know of any reason I should not accept the plea?

MR. BLETZER: No, I do not, your Honor.

THE COURT: Well, based on the discussion that we have had this morning, I am satisfied that the decision to waive an indictment and proceed by information is a knowing and a voluntary act on the part of Mr. Dunham, and that he has, after full consideration, determined that he may be proceeded against by means of an information, and, consequently, I will permit him to be inquired of by Mr. Lovett regarding the Information.

This is, in effect, an initial appearance, is it not?

MS. WALTERS: Yes, your Honor, on the information. He appeared on a complaint and conditions were established previously.

THE COURT: All right. And I assume, Mr. Bletzer, there is no need to read the entire Information to the defendant.

MR. BLETZER: That's correct, your Honor.

THE COURT: So, I will ask Mr. Lovett to inquire of Mr. Dunham.

THE CLERK: Mr. Dunham, will you please rise.

Mr. Dunham, Jr., on Criminal No. 15-10110, Count One of the Information charges you with Wire Fraud and Honest Services Wire Fraud, in violation of Title 18, United States Code, 1343, 1346 and 2.

What say you as to Count One, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: You may be seated. The result of this conversation this morning is that I am satisfied that there is sufficient evidence to support a finding of guilt on the one count of the Information. As a consequence, you are now adjudged guilty of that offense.

The next formal event in this court will be sentencing. That will take place on September 3rd at 2:30 p.m.

What is going to happen is that the Probation Office of the court will prepare a Presentence Report. It is a document I rely on very heavily in making my own judgment about what the proper sentence should be. It is very much in your best interests but also an obligation that you have to cooperate fully with the Probation Office, and you and Mr. Bletzer will have an opportunity to do that.

You will get a chance to see the Presentence Report in its draft form. If you are not satisfied with the draft, you can ask the Probation Office to make changes or corrections. If they do not make the changes and corrections to your satisfaction, then you can bring the matter up to me at the time of sentencing, and at the time of sentencing both you and Mr. Bletzer will have an opportunity to address me orally in open court about the factors that I should have in mind before I actually impose sentence in this case.

Do you understand?

THE DEFENDANT: Yes, your Honor.

THE COURT: Now, I assume that there is no need for any change in conditions here.

MS. WALTERS: No, your Honor.

THE COURT: And let me clarify with respect to the briefing on the question of sealing the identity of the victims. I would like you to communicate to the victims the opportunity that they will have to submit something on the July 9th basis, and I will hear them if they choose to raise the issues at that time, but you will communicate to them that they have the opportunity as well to address me. But, on the present basis, I have denied the Motion to Seal.

The nature of the materials I think in the case now are such that a wink is as good as a nod to a blind horse in the sense that there is nothing here that discloses the identity of these entities, am I right?

MS. WALTERS: Within the Information.

THE COURT: Right. Or any materials that are present.

MS. WALTERS: The only one was the Victim Disclosure Statement. That was the only one that we had moved to seal.

THE COURT: Well, I think, then, I will modify that simply to say that, pending further briefing, I will keep that document sealed on the record.

MS. WALTERS: I'm sorry. Just so I'm clear, your

Honor, the concern, what the Office should be addressing is the mouthful, the way we described all of the entities involved.

THE COURT: The bite-sized portion, I believe.

MS. WALTERS: Oh, no, I'm sorry. But the fact that Information does not identify the wireless franchisor or the wireless provider or any of those by name as well.

THE COURT: The Government is free to allege as it chooses to allege.

MS. WALTERS: Indeed.

THE COURT: But what it has asked is that the identification of the victims, which is required, the specific identification of the victims be sealed.

MS. WALTERS: Right.

THE COURT: Similarly, during the course of sentencing there would be a discussion, I assume, in which I might be prepared to refer to the entities by their specific names.

MS. WALTERS: Right.

THE COURT: And I do not know at this point any reason why I should not, and I can think of some fairly substantial reasons why I should. So, before I do something that is not fully informed, or as informed as I can be, I would like to have the United States Attorney's Office offer briefing regarding its policy. And I understand this to be a policy. I do not understand it to be generated by any statute, but maybe you will explain that to me. And I am not even sure that it is

something that is a policy of the Department of Justice generally as opposed to *ad hoc* determinations that some victims can be shielded from identification and some cannot. But that will all become much clearer to me as of July 9th, and then we will go from there.

MS. WALTERS: I agree. And I appreciate it, your Honor. This definitely -- I will almost be eight years in the U.S. Attorney's Office, and it has been a more recent shift.

THE COURT: I encountered it myself I think relatively -- well, everything is relatively recent to me now; it could be 10 years ago -- involving corporate defendants, and I denied the Motion to Seal after hearing from the corporate defendants there. So, there have been occasions on which this had been done within the memory of at least this man, and I guess I need my understanding refreshed regarding what the policy, as opposed to just idiosyncratic choices, is of the Office and perhaps the Department itself.

MS. WALTERS: Understood. And I will address that, as I will note in the papers when we file them as well. This case did receive press and, not surprisingly, Bloomberg and *The Wall Street Journal* and everybody else put the names in the paper. So, we have not identified them, but they're out there.

THE COURT: But the Government has neither confirmed nor denied that the names that were used in the financial press were the actual names of the actual victims?

MS. WALTERS: That's exactly right.

THE COURT: All right. So, if there is nothing further, then we will just move on to the next matter.

MS. WALTERS: Thank you, your Honor.

MR. BLETZER: Thank you, your Honor.

(WHEREUPON, the proceedings adjourned at 10:10 a.m.)

C E R T I F I C A T E

I, Brenda K. Hancock, RMR, CRR and Official Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of *United States v. James Dunham, Jr.*, No. 1:15-cr-10110-DPW.

Date: September 14, 2105

s/ *Brenda K. Hancock*
Brenda K. Hancock, RMR, CRR
Official Court Reporter

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, vs. JAMES DUNHAM, JR. Defendant.	15-CR-10110-DPW

GOVERNMENT'S SENTENCING MEMORANDUM

For years, the defendant, James Dunham, Jr., sold confidential business information, stolen from his employer, to a Wall Street analyst. The analyst used Dunham's information—which included sales, return and other data concerning publicly traded companies—in research reports distributed to a select group of investors. Dunham pleaded guilty to one count of wire fraud in relation to a single instance of passing such information in April 2013. But as is clear from both the Information and the Pre-Sentence Report ("PSR"), this was not a one-time slip up, but rather part of a pattern of providing valuable, confidential business secrets that were not otherwise available, in exchange for payments.

The PSR calculates Dunham's Guidelines sentencing range—with the loss adjustment based on the value of the payments Dunham received—as 12-18 months in prison. In light of Dunham's extraordinarily prompt acceptance of responsibility, the government recommends a sentence of 10 months of confinement, to include 5 months incarceration and 5 months of home confinement. A term of incarceration is both reasonable and appropriate in this case not simply as punishment for a serious crime, but also to send a strong general deterrent message. Unless the gatekeepers of business secrets—like Dunham—are held accountable when they leak that

confidential information—in violation of their duties to employers, clients and, in some cases, shareholders—the black market for inside information will continue to flourish.

Background

As set forth in the PSR, James Dunham is the former Chief Operating Officer of the Wireless Franchisor, which is one of a handful of "indirect agents" for a Major Wireless Provider.[1] As an indirect agent, the Wireless Franchisor operates 400 retail outlets that sell services and products offered by the Major Wireless Provider. The Wireless Franchisor, and specifically its retail outlets, also sell smartphones and other devices manufactured by various smartphone manufacturers, including the Major Smartphone Manufacturer. As Dunham was very much aware, the Wireless Franchisor's relationships with the Major Wireless Provider and the Major Smartphone Manufacturer (both of which are publicly traded companies), as well as other smart phone manufacturers, are critical to its existence. In his position at the Wireless Franchisor, Dunham had access to confidential business information regarding the Wireless Franchisor, the Major Wireless Provider and the Major Smartphone Manufacturer, including but not limited to sales, return and other data.

The charges arise out of Dunham's secret consulting relationship with a Boston-based firm that provides investment research to institutional clients, including hedge funds (the "Research Firm"). In May 2010, Dunham entered into a consulting agreement with the Research Firm, pursuant to which Dunham provided the Research Firm, and a specific analyst at the Firm, with information and insight into the wireless industry. Dunham did not disclose the Research Firm relationship to the Wireless Franchisor, nor did he seek authorization to enter into the agreement, as he was required to do. According to the analyst, Dunham's information was

[1] The Wireless Franchisor, Major Wireless Provider and the Major Smartphone Manufacturer are identified in the PSR.

valuable because he provided "real time" information based on what was happening in the Wireless Franchisor's 400 retail stores, which information then was the basis for research reports authored by the analyst and distributed to the Research Firm's investor clients. In exchange for his consulting services, the Research Firm paid Dunham $2,000 per month.

The scheme came to light in April 2013 in connection with information Dunham provided to the analyst about sales and returns of a newly released smartphone. Specifically, at the end of March 2013, the Major Smartphone Manufacturer released its much anticipated smartphone—the success or failure of which was widely considered critical to the troubled company's prospects. By early April, reports had been circulating that the smartphone's sales had been lagging and so the analyst reached out to Dunham to see if he could obtain more specific information on sales. In an April 10, 2013 telephone call, Dunham told the analyst that some Wireless Franchisor stores were seeing returns of the smartphone exceeding sales. This information was not publicly available and was highly confidential to the Wireless Franchisor, as well as to the Wireless Franchisor's business partners. The analyst used that information in a research report that his Firm published the next day. That same day, the share price of the Major Smartphone Manufacturer's stock dropped more than seven percent and the Major Smartphone Manufacturer publicly disputed the accuracy of the information. In fact, the information was accurate, in-so-far as it reflected what was happening in the Wireless Franchisor's stores, although it may not have been accurate with respect to the Major Smartphone Manufacturer's overall sales and returns.

Dunham's April 2013 disclosure was not an isolated event. Rather, as set forth in the Information and the PSR, Dunham regularly disclosed confidential business information to the analyst, including data concerning "gross adds" (the total of new subscribers to the Major

Wireless Provider's network) as well as product launch and supply information for various smartphones offered by the Major Wireless Provider and sold through the Wireless Franchisor's stores. As the analyst has explained, Dunham's value was in providing information that was not publicly, or otherwise, available.

The Government's Sentencing Recommendation

The government recommends a sentence of 10 months confinement, to include 5 months incarceration and 5 months home confinement, to be followed by 12 months supervised release, and a fine of $3,000. The government also asks the Court to order forfeiture in the amount of $61,000, which represents the payments Dunham received over the course of the scheme. As set forth further below, the recommended sentence reflects the seriousness of the offense, the history and characteristics of this defendant and will deter other insiders tempted to sell confidential business information.

I. The Seriousness of the Offense

Regulations concerning the disclosure of material information exist to guarantee that the owners of confidential business information—the public companies and the entities with which they do business—disclose accurate information to the entire investing public at the same time. Insiders, like Dunham who take it upon themselves to selectively share confidential information, for their own gain, can undermine the integrity of the markets. Indeed, Dunham's disclosures to a Wall Street analyst who, as Dunham knew, distributed the information to his clients arguably caused more harm to the markets than the company insider who simply tips his buddy so that the two can make a little extra money by insider trading.

To be clear, the government has not taken the position that Dunham's disclosure in April 2013 regarding the Major Smartphone Manufacturer, alone, caused the seven percent drop in

stock price. And the government does not contend that Dunham should be held accountable for such a significant loss. That said, the fact that the stock price dropped so dramatically, not because of information disclosed by the Major Smartphone Manufacturer itself, but rather based on rumors in a series of analyst reports—including the one issued by the Research Firm containing Dunham's information—demonstrates why selective disclosure of confidential business information can be disruptive to the markets.

The selective disclosure of inside information, when done deceitfully and for one's own gain, is a serious crime, with serious consequences. In this case, where Dunham's gain was relatively modest—just over $60,000 over a period of years—Dunham is not facing a significant jail sentence. But the offense itself *is* serious, and his sentence should reflect that.

II. The History and Characteristics of the Defendant

Dunham was the second most senior executive at the Wireless Franchisor when he entered into the secret consulting agreement with the Research Firm. Dunham reported directly to the chief executive officer (whose official title was Managing Director). As Chief Operating Officer, Dunham was entrusted with virtually all forms of the Wireless Franchisor's confidential business information, including information regarding sales of various products. Dunham also was intimately involved with the Wireless Franchisor's relationships with the Major Wireless Provider, the Major Smartphone Manufacturer and other business relationships and, as he has admitted, understood the importance of those relationships to the Wireless Franchisor's business.

Notwithstanding his high rank and access, Dunham never mentioned his consulting relationship to anyone at the Wireless Franchisor. Despite signing agreements that specifically addressed the appropriate use of confidential business information, and the need to disclose outside business activities, Dunham never sought permission to consult. Even if Dunham had

limited his "consulting" to providing high-level insight into the wireless industry—which he did not—providing such consulting services, without any notice to his employer, would have been a significant breach of trust. But of course, Dunham went much further and actually disclosed the confidential information with which he had been entrusted. He did so repeatedly, for years disclosing confidential sales and other information that formed the basis of report after report issued by the Research Firm. And he was paid to disclose that information.

Dunham's high-level role at the Wireless Franchisor and his repeated breaches of trust, breaches that had the potential to cause detriment not just his own employer, but also to the companies with which it did business—further demonstrating the need for a significant sentence.

III. The Need for General Deterrence

While general deterrence is always an important factor, it is particularly critical here. Despite the recent crackdown on insider trading, the market for inside information continues to flourish. Indeed, Dunham was not the only "consultant" retained by the Research Firm and so-called "expert networks" designed to connect "experts" in various industries with investors still exist. Many of these networks appear specifically designed to create a buffer between the traders and insiders. But the end game is often the same, no matter how many layers are put in place: to get inside information into the hands of select traders who can profit based on an unfair advantage. As set forth above, this selective disclosure undermines the integrity of the securities markets.

The sentence imposed must deter others who are doing, or inclined to do, the same.

Conclusion

For the foregoing reasons, the government respectfully recommends a sentence of 10 months confinement, to include 5 months incarceration and 5 months home confinement, to be followed by 12 months supervised release, and a fine of $3,000.

Respectfully submitted,

CARMEN M. ORTIZ
United States Attorney

By: /s/ Sarah E. Walters
Sarah E. Walters
Assistant U.S. Attorney

Dated: September 11, 2015

CERTIFICATE OF SERVICE

I hereby certify that this document, filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

Dated: September 11, 2015

/s/ Sarah E. Walters
Sarah E. Walters
Assistant U.S. Attorney

EXHIBIT D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITES STATES OF AMERICA)
)
vs.)
)
) No. 1:15-cr-10110-DPW
JAMES DUNHAM, JR.,)
)
Defendant.)
)

BEFORE: THE HONORABLE DOUGLAS P. WOODLOCK

SENTENCING HEARING AND MOTION HEARING

John Joseph Moakley United States Courthouse
Courtroom No. 1
One Courthouse Way
Boston, MA 02210
Thursday, September 15, 2015
10:00 a.m.

Brenda K. Hancock, RMR, CRR
Official Court Reporter
John Joseph Moakley United States Courthouse
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(The following proceedings were held in open court before the Honorable Douglas P. Woodlock, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, One Courthouse Way, Courtroom 1, Boston, Massachusetts, on Tuesday, September 15, 2015):

THE CLERK: All rise.

(The Honorable Court entered the courtroom at 10:00 a.m.)

THE CLERK: This Honorable Court is now in session. You may be seated. This is Criminal Action 15-10110, The United States v. James Dunham, Jr.

THE COURT: Well, I have a number of materials here, starting with the Presentence Report, the Government's Sentencing Memorandum and Defendant's Sentencing Memorandum with attachments. I have, in addition, a letter from Mark Howell that was separately filed on behalf of Mr. Dunham, I have a Motion for Money Judgment Order of Forfeiture, and then I have the Government's response on my inquiry about public identification of third parties, and I have the Motion to Intervene and the Memorandum on behalf of Company A, a victim of the defendant's conduct in the case.

Are there any other materials I should have here?

MS. WALTERS: Not that the Government's aware of, your Honor.

MR. BLETZER: Not that the defendant's aware of, your

Honor.

THE COURT: So, what I think I would like to do is look at the objections to the Presentence Report, because they frame, I think, the resolution of all of these matters to some degree. I am not sure that the objections really are material to the Presentence Report in the sense that the Presentence Report ultimately follows the view of the parties or at least of the United States Attorney with respect to the proper sentence.

There is, however, raised this question of whether or not persons in the market were somehow victims in this case, and I am not exactly sure how best to approach it from the perspective of the Government. There is always this tension between the Court's desire to have full and complete information on which to base its decision and the sentencing negotiations that the Government enters into, particularly in light of United States v. Canada in which the First Circuit made a decision that I have never thought was fully thought through, has suggested that if there has been, directly or indirectly, an undermining of the agreement by the Government, then some new judge should be involved as a sanction in doing the sentencing itself. The First Circuit was following, "guidance" perhaps is too much to say, of Chief Justice Burger in dealing with Plea Agreements. But there we are, and it poses something of a problem.

The issue for me, I guess, is I am not sure that one can fairly say that the market is a victim in this sense. The market would be a victim, I suppose, if there were trading by others of undisclosed information, but here we are dealing with the peculiar circumstance in which the analyst or analyst firm or advisory firm is making a public disclosure of nonpublic information, and I am not sure how I could say under those circumstances that the market itself is a victim, putting to one side the question of how you monetize that.

But I am interested in any views of the parties about that conceptual position. I do not believe that the Government has backed away from its agreement here. I think Probation has candidly indicated its view that it is very hard to monetize if the market was a victim or people who participate in the market in some fashion purchasing at a time when a factor might be the public disclosure of this information.

But I want to be sure that conceptually I have got this right, and so maybe, Ms. Walters, you want to speak to that. I just do not see it as an insider-trading case, I guess.

MS. WALTERS: Very simply, I agree with you, your Honor, it's not an insider trading case. It was not charged as such. Mr. Bletzer and I have had long discussions about this issue, and the Government laid out its position I think quite clearly, or attempted to do so, in the Sentencing Memorandum,

which is that really what happened to the stock price and what happened in the market is more just to educate and give context to this criminal conduct and to educate all of us on this why it matters, this is why selective disclosure of confidential information shouldn't happen.

THE COURT: Well, but why is that the case? It should not happen because there is a victim. The victim is his employer.

MS. WALTERS: Right.

THE COURT: But one could say that transparency in the markets is advanced by information coming from a variety of different sources, even those sources as to which the disclosure has some obligation of confidentiality.

MS. WALTERS: I guess one could make that argument, but the regulators have taken the position that there are certain disclosure obligations at certain times. Leaking of information --

THE COURT: Let's just assume that this was done in an 8-K.

MS. WALTERS: If it was viewed as a material event and that the owners of the information, whether it would have been Mr. Dunham, his employer, or the business partner whose business information is --

THE COURT: Well, then, let's take it another step further. Let's assume that this was just dogged legwork -- I

think that is not a mixed metaphor -- by the investment advisory firm. They just went out, left somebody at the door of one of these stores or one of the several stores that the victim here had, and they counted the people coming in returning and the people going out and disclosing. Well, there is nothing wrong with that, is there?

MS. WALTERS: No, I don't think there's anything wrong with that.

THE COURT: So, when we talk about "selective disclosure," I am not sure that is actionable by the regulators. I am trying to figure out how it would be actionable by the regulators.

MS. WALTERS: Well, obviously it depends on who is making the selective disclosure and how it happened, as to your point, your Honor. If you have the analyst hiring a fleet of college students who count the number of people who are going in and out of stores and asking if they have returned a phone or just bought a phone, to your point, that's just dogged investigatory work.

But here, of course, we are talking about leaking information that is confidential, and in this case, at least from the public reports and in terms of how the major Smartphone manufacturer responded to it, they said, "That's not accurate information." Now the market is reacting to inaccurate information about --

THE COURT: But it was accurate information, wasn't it?

MS. WALTERS: It was accurate as to Mr. Dunham's employer. According to the major Smartphone manufacturer, it was not accurate as it was portrayed in the analyst's report.

THE COURT: Well, but that is the usual process of a publicly held company saying that analyst reports do not provide the full context and all of that.

MS. WALTERS: Right.

THE COURT: But what I guess I am getting at is, I understand a duty to disclose --

MS. WALTERS: Right.

THE COURT: -- and, to the degree that that can be compromised by failure consistently not to disclose, I guess I understand that, by the party with the duty to disclose.

MS. WALTERS: Right.

THE COURT: But what duty not to disclose did the victim here have? Let's assume that the victim decides that in an efflorescence of transparency it will go up in flames in its relationships with its business partners, but it thinks the market needs what it has by way of information, and it dumps it into the market publicly, and there is no trading by the principals. Is there any legal prohibition to doing that? Well, there is a practical prohibition.

MS. WALTERS: There's practical, and then there's

probably a contractual dispute, a civil contractual dispute.

THE COURT: But that is not the gist of federal criminal prosecution.

MS. WALTERS: Exactly. No, absolutely not, and that's not why we're here today, obviously. But this sort of market for inside information and having people who are willing to steal information and pay for it, I think the stark fluctuations in the stock price sort of show that you have the haves and the have nots.

I think one other piece that should be considered is this analyst report, while it ended up getting a lot of widespread press attention, is only available to those who are clients of the research firm.

THE COURT: Well, that brings me to a second level of question which Mr. Bletzer has raised, which is the idea that this involves two people, at least, and you have got somebody who is profiting by the disclosure of confidential information, profiting in the sense that he gets paid on a monthly basis, I guess it was, $2,000, amounting to $61,000, if I recall this correctly, but then you have the other side.

MS. WALTERS: Yes.

THE COURT: And so, what is the duty or what is the culpability, I guess, under these circumstances of the analyst? And that is a general question. It is also a specific question, because the specific question focuses me on degree of

culpability and also unwarranted disparity.

MS. WALTERS: Understood, your Honor, and obviously it's something that we spent a lot of time looking at before bringing these charges. Mr. Dunham was the insider. He was the one with the duty. He was the one with the control over the confidential business information. And, as the Government has laid out, gatekeepers of inside information, of confidential business secrets, need to be held accountable for maintaining those confidential business secrets, maintaining the trust that has been placed in them by their employers. So there's a very high-level, I will say heightened level of culpability with regard to an insider inclined to sell their information. That does not in the proper case, where it is demonstrated that the outsider who is paying for the information, when it can be established that that person had the requisite degree of intent, understood what the duties were to the employer, understood what the limitations were very clearly, and that in the proper case that can be established, that person certainly -- well, I guess, let me just back up.

Looking at it theoretically, without specifics of the case, that person absolutely shares the culpability, from the Government's perspective. It takes two to tango, obviously. You have to have the insider willing to sell the information, and you have to have the person willing to bribe or pay the kickback to get the information. Both of those people in the

theoretical scenario certainly share culpability. When it comes to the specifics, obviously, this is an intent crime, and you have to be able to show intent on both parties.

THE COURT: So, let me unpack that a bit with respect to this specific case. I understand the position of the Government -- I will not put words in your mouth, or at least you will take them out when I do -- is that you have somebody who is trafficking in confidential information. He is trafficking to someone else as to whom it is unclear that that person knows that it is confidential information or at least not sufficiently clear to found a prosecution on it. Is that a fair way of characterizing what is going on?

MS. WALTERS: I think it is a very fair way of characterizing it, your Honor.

THE COURT: Let's just assume that, quite apart from Mail Fraud or Wire Fraud or Honest Services, the way in which you have charged it, that this person, the analyst, cannot be -- or the Government chooses not to pursue for purposes of those charges. I want to get back to the larger issue, which is an analyst who receives information from a company goes around, calls around, does not have the requisite intent or does not know that it is confidential information that he is getting, he is just being much more diligent in the pursuit of the information, and he gets the information, as he did here, he or she did. I guess it is he. Is there any criminal

violation there? The analyst is not a regulated entity? Or maybe they are. Are they investment advisers?

MS. WALTERS: Yes.

THE COURT: So, are they subject to some control by the Investment Advisers Act for trafficking in information that is not publicly available until they disclose it to their clients?

MS. WALTERS: Right. They may be. I will say that we've looked at it quite carefully from a variety of different angles. This is something, obviously, that the Office is very focused on. This is not the only case that we have charged in this way, and it's something that we will be continuing to look at. It's certainly a possibility. In this particular case, absent the requisite intent, we just didn't see that charges were going to lie.

THE COURT: Now, this starts to come back to something I will go to in a minute, which is the question of disclosure. An Investment Advisers Act entity, which I gather the analyst worked for or worked with and presumably had some registration through --

MS. WALTERS: Yes.

THE COURT: -- is subject to some SEC disclosures, and the question arises, I suppose, about whether or not there should be public disclosure of the analyst or analyst's firm. I am making a determination under 3553 of unwarranted

disparity. I am not really making a decision about selective prosecution. That is not, I do not think, within my writ under Article III, but I do think I am charged with the responsibility of figuring out where do I put this person, the person before me, as against someone else who has some degree of culpability, and making that determination seems to me to be something that is core to my function and, consequently, justifies disclosure of the identity of the investment adviser firm, doesn't it?

MS. WALTERS: Not to parrot DOJ policy, but, obviously, you sit in a different position than I do --

THE COURT: Yes.

MS. WALTERS: -- and can certainly make those decisions as you are being asked to impose sentence in this case. It is not a decision that the Office felt that the Government should be making in light of case law that talks about potentially culpable third parties and unindicted co-conspirators, and that there is no legitimate Government interest in publicly identifying those entities.

Now, I think reasonable minds could debate whether there is a legitimate Government interest in that disclosure, but --

THE COURT: Let's pause with that. There is a Government agency that is charged with the responsibility of administering the Investment Advisers Act.

MS. WALTERS: There is.

THE COURT: And while I assume, without knowing, and you do not have to confirm or deny one way or the other, that there have been discussions with that agency, I would like to know, I think, for purposes of whether or not there should be disclosure, at least as to them, whether or not they have a position on this. That is to say, when someone is accused of trafficking in confidential information to an investment adviser, whether that should be a matter of disclosure in the criminal case, the name and identity of the investment adviser, or not. They may take a different view about it. But it seems to me that I probably would want that. I understand that we have different hats on, but doesn't that strike you as reasonable?

MS. WALTERS: I don't think that's unreasonable, your Honor. Again, given our different hats, you sit in a different position and can make these decisions that, frankly, others before me in the Department of Justice have, in a way, made for me.

THE COURT: So, what we have is this tension, I suppose, between indiscriminate disclosure or disclosure that is relevant to someone in a highly regulated area, like an investment adviser, that is implicated by a criminal prosecution in which an evaluation is why didn't they do the other guy, and it seems to me that this is something that, at

least arguably, justifies disclosure on the record of those matters, so people can say, "Well, the judge made this determination about relative disparity. He was in the tank. The Government made this determination not to disclose. They just wanted to find a target as quickly as possible, and they gave up prosecution of somebody else." Now, is that justified? I do not think so. On the other hand, the whole purpose of disclosure of public records, court records, is to permit the public as a whole to make those determinations, at least with respect to the analyst, and that is, I suppose, the argument.

Now, I will tell you where I am going on this so that there will be no surprises, and perhaps I can be diverted, which is to ask the SEC and also ask the news agencies to provide a statement of position with respect to the question of the disclosure in this case of the non-disclosed entities that are involved.

But that brings me back to this larger issue of, first, what I will call the objections that Mr. Bletzer has raised, and they are really kind of cautionary more than anything else, because it does not change the guideline calculation. I just do not view this as a case in which market fraud or the trading of insider information is involved, either specifically under the statutory constrictions regarding it or more generally -- this was information that was making its way into the market through a market disclosure -- unless what was

involved here was a violation of some special obligation that an investment adviser has in the distribution of information. I simply do not know enough about that to be able to make the judgment.

It does not affect Mr. Dunham's calculation, I think. It would be a different matter if Mr. Dunham was trading on this information himself, knowing that this was going to have some effect, if it did, on the market itself. But it is simply impossible to calculate this. I have thought about it from the perspective of a Securities Act case or a 10b-5 case, and there just would not be any calculable damage here that I could identify on this basis. Maybe market fraud victims would be able to get some disgorgement of the monies that were paid to Mr. Dunham, but probably not. In any event, I think I have said enough about that.

I am making these statements, because I am going to turn at the end to the question of what else I do about unsealing or disclosing so that the parties know what I am dealing with. Part of this is I do think the touchstone has to be that the judge does not simply say, "I would like you to rewrite this paragraph because I am kind of interested, but it has nothing do with my judging responsibilities." It has to be tethered to judging responsibilities, that is, official acts of the Court, and maybe official acts of the Government too in choosing to act in a way in which it did in its charging

decisions.

I am less certain about that latter part than I am about my part, which is, at the end of day here I am going to impose a sentence on Mr. Dunham. The public is entitled to make a judgment about whether they think that is well-founded or questionable. And the only way they can make that determination is if they know what it is that I relied on in making that determination, and the role of the investment adviser is something I am relying on, at least for purposes of disparate treatment or unwarranted disparity, which is distinguishable from but hard for the naked eye to see as a distinction between disparity and prosecutorial selection.

So, I am inclined here simply to overrule the objections to the extent that I have before me in the objections and the responses by the Probation Office additional information that is helpful for me to understand the broader context, but it does affect the guidelines in this case.

Any dispute about that, Mr. Bletzer?

MR. BLETZER: No, your Honor.

THE COURT: So, I assume that you have shared fully with Mr. Dunham the Presentence Report, and we have nothing further to talk about with the Presentence Report.

MR. BLETZER: I have, your Honor.

THE COURT: So, we then are dealing with a total Offense Level of 13, a Criminal History Category of I. That

generates a guideline of 12 to 18 months in prison, a supervised release guideline of one to three years, a fine of $3,000 to $30,000, and a Special Assessment of $100, and we have, of course, the forfeiture of the monies received as part of the arrangement with the investment adviser. So, are we dealing with the same set of numbers?

MR. BLETZER: I'm sorry, your Honor?

THE COURT: Are we dealing with the same set of numbers?

MR. BLETZER: Yes, your Honor.

THE COURT: So, let me, then, Ms. Walters, perhaps start with you, although I think one of the things that I want to have you address is the particular circumstances of Mr. Lawson --

MS. WALTERS: I'm sorry?

THE COURT: Mr. Lawson, I believe is his name, the individual who Mr. Dunham has accepted some responsibility for who suffered a brain injury.

MS. WALTERS: Yes, your Honor, I will start there. Obviously, that is a significant relatively new development in Mr. Dunham's circumstances.

Two responses to that: One, this isn't a situation where Mr. Lawson is completely without help. The sister, obviously, is very involved. While she wrote a very compelling letter to the Court as to Mr. Dunham's role and how important

he is to this, at the same time, if Mr. Dunham were, for example, confined to the home for some period of time, it seems that Mr. Dunham could serve a similar role in helping the Lawson family. Second of all --

THE COURT: I am not sure I understand that. Let me phrase it a little bit differently. The suggestion is that, for good or ill, this will be resolved, that is, the uncertainties about Mr. Lawson -- and, of course, I will hear from Mr. Bletzer; maybe he has an update on the circumstances -- but in three to six months, and what we might, in other contexts, call "end medical result" is reached in three to six months, and medical result is not resolution, it is simply this is what we are faced with in the future and what it means for Mr. Lawson and his care.

So, a way of looking at this, a variety of ways of looking at this, and practicality is important as well as logistics, is to implement the Government's proposal by saying that for a period of time the defendant will be on conditions and then will start the sentence two months out, six months out. That is one way of doing it. I do not think I can start with supervised release when he is out and then say, "Now you go to jail for a period of time." So, that is just a practical way of dealing with it.

So, why isn't that a way to deal with this?

MS. WALTERS: That was actually going to be my second

suggestion, your Honor. So, maybe I should have started with that, first.

THE COURT: I should learn to listen before I talk.

MS. WALTERS: No. That was going to be my other suggestion, which is essentially -- I don't know the technicalities -- but it would be to stay imposition of sentence, if you will, until, to your point, what appears to be a relatively temporary, albeit terrible, situation is resolved, to your point, one way or another and could -- and, again, he has been complying on conditions -- have him remain on the conditions, begin imposition of the sentence on a specific date between three and six months out of a period of, as the Government's recommendation, of 10 months of confinement, five months which is to be served as an incarcerative sentence and five months of home confinement. That would be the other suggestion to deal with Mr. Lawson's situation and Mr. Dunham's, obviously, importance in resolving that.

The Government, obviously, is asking for a below-guideline sentence, even --

THE COURT: So, let me pause with this a bit, and this goes to larger questions we have been discussing. But for the market, which is, I suppose, like saying, "Except for the fire, Mrs. O'Leary, how is Chicago?", but, but for the market, doesn't this suggest that the Government is now going to enforce contractual obligations of confidentiality through

criminal prosecution?

MS. WALTERS: I don't think you can say completely "but for the market." When confidential business -- and, I guess, and perhaps that's a little too tongue in cheek, but I have spent a lot of time reading all the Honest Services Fraud case law, obviously, in preparing this case, and Congress has made the decision that in specific circumstances -- not every employment dispute or contractual dispute would the Honest Services Fraud statute apply, but in the circumstance where there has been a breach of trust and duty and actual stealing of confidential information and, once again, in exchange for a kickback, the Skilling requirement still exists there, you have got to have that actual payment.

THE COURT: So, it is a commercial bribery case?

MS. WALTERS: Yes.

THE COURT: All right. So, why does the employment case in which someone jumped ship, goes to another company in breach of a confidentiality agreement or nondisclosure agreement, and gets paid for it fall within the same category?

MS. WALTERS: Well, if they have stolen trade secrets, it's something that the Government very much looks at, and in some instances it becomes criminal. In this case it wasn't trade secrets. It was confidential business information.

THE COURT: So, let's say that it is information having to do with the identity of customers and special needs

of customers.

MS. WALTERS: Well, I think in the proper circumstances -- each case you have to look at very specifically, but if this is a --

THE COURT: I understand that, but I just want to be sure that I understand fully the range of things that the Government could do or thinks is within the scope of a potential prosecution, and I understand you to be saying, "We can do that. We may not have enough time or money or resources, or maybe the victims will be able successfully themselves to recover for that." But Honest Services Fraud can be read so broadly -- that imparts some normative judgment on my part -- Honest Services is broad enough to permit a prosecution, if the Government chooses it, of the fellow who leaves the company for a better paying job somewhere else and takes with him not just trade secrets but confidential information?

MS. WALTERS: If the purpose of employing that person was, "We're only employing you if you take that customer list," so the purpose of that payment wasn't just, "We want your expertise, and, oh, look you happened to bring the customer list with you, great," but if it is, "We are going to pay you this salary or this series of payments for you to take the customer list --"

THE COURT: Implicit in the hypothetical, of course,

is precisely that. Why would they want him? Because he is good looking and clean cut? No. They want him because he has got some commercial value that is transferrable, and the issue is that that is confidential information, but that can become a federal criminal prosecution.

MS. WALTERS: Like you said, if the point is, "We are only hiring you for the point of we need you -- "

THE COURT: Only hiring?

MS. WALTERS: Sorry?

THE COURT: Or would it be a substantial factor in the hiring?

MS. WALTERS: You're going to have to look at the purpose of the payments. That's the overlay that Skilling puts on the Honest Services Fraud, actually, which does rein it in quite a bit, which is, "Are we paying you to steal the customer list and come and work for us," and that that is the sole purpose? Then, yes, in those circumstances --

THE COURT: Let's say, just for hypothetical purposes, it is a person of color who also has confidential information. And so, you have got two purposes, one, to increase your diversity, and the other to get the confidential information. I suspect I know which is the predominant, but for the hypothetical I have offered two bases.

MS. WALTERS: Then I think there is going to be a problem of proof, with proving those payments --

THE COURT: Proving what? Proving that it was multipurpose, or proving that -- because, as I understand the theory, it is if there is a confidentiality dimension to it, they are paying for confidentiality, they are going to be paying for some other things too, but they are paying for confidentiality, that is enough to justify an Honest Services prosecution. Whether you choose to do it or not is another matter.

MS. WALTERS: Understood, your Honor. Understood, your Honor. Really, again, I think the Government in bringing its cases and the Courts in adjudicating them are going to have to -- again the kickback/bribe element is what raises the bar here and protects against federal prosecution and employment disputes.

THE COURT: Why? Because what we are dealing with in the hypothetical that I have just discussed, what we are dealing with is somebody getting paid for the disclosure of confidential information. I assume that the Government would not take the position that someone who is not in breach of confidentiality obligations is not engaged in Honest Services Fraud if they get paid to be a consultant.

MS. WALTERS: I'm sorry. The breach of duty is an element, so obviously there has to be the existence of the duty there, whether it's contractual or otherwise. I'm sorry. Maybe I just misunderstood.

THE COURT: I am trying to figure out whether it is just confidentiality or if this extends, for example, to someone who is not supposed to work for somebody else, but nevertheless does, but is not disclosing confidential information. Now, one could characterize that as compensation or a bribe or a kickback.

MS. WALTERS: And actually, then, again, maybe you get to were you breaching a duty to your former employer that existed.

THE COURT: You have got a contractual duty not to work for somebody else while you are working for the employer.

MS. WALTERS: Well, I'm not sure. And, I'm sorry, your Honor, I'm thinking on my feet here, obviously, but I am not sure that a mere contractual obligation in certain circumstances it would rise to the level of the breach of duty. But, again --

THE COURT: Contractual obligation is not a breach of duty?

MS. WALTERS: I guess every contract imposes some type of duty between the contracting party, so I suppose that there is a circumstance in which that would --

THE COURT: We can, as you know, go on and on with this, but I am raising it for this purpose, which is to say, where do I put the relevant culpability, and why is it that this is something I should be concerned about? I suppose I

should be concerned about it because it touches on securities markets. While I have not found the securities markets to be victims in this case, it does touch on it. It does involve essential commercial bribery, not just departure from some general obligation, but the trading on confidential information. I am not sure how you cabin that. I am not sure that Honest Services has been cabined, or, at least, if it has, it is a pretty big cabin. And so, I look at this case trying to figure out, well, where do I place the actions of Mr. Dunham, understanding, as I do, or I think I do, or believe, that Congress has authorized this? And there is a pretty broad spectrum, I think, that is hard to control in Honest Services Fraud, although this falls above the red line, from my perspective, for that.

So, we take Mr. Dunham and say he did a little bit of disclosure and a little bit of violation of his obligations to his employer, not as much as other people do, it was only $61,000. Is that how we come to this judgment about what the proper sentence should be?

MS. WALTERS: Well, obviously, we all have to start with the *Guidelines* as some measure of culpability here, and we look at this person and make our recommendations based on that, and the Government, obviously, has freed itself from the *Guidelines*, at least to a certain extent. We cannot not have tied, and I don't believe we can tie, the disclosures to any

type of market loss, as we've been discussing. There may be an instance where an Honest Services Fraud violation is directly tied to some much larger loss, and we would be having a very different conversation in that circumstance. This is not that case.

But in this case you have a high-level executive, the number two in the company, who had an ongoing, undisclosed, secret consulting arrangement, where, in the grand scheme of things, frankly, compared to his salary he was receiving relatively nominal payments, but he was disclosing not once but repeatedly, repeatedly disclosing confidential information that he had access to. This was a company that gave him access to everything. He was the CEOO. There was nothing that was kept from him, and he used that access to get himself a consulting arrangement. Whether it was for the money or for the ego, in this case he was paid to disclose those secrets. So, in this case, to your point, your Honor, it's very much about the red line and his stature in the company.

And then, as your Honor put it, and as the Government argued in its Sentencing Memorandum, the fact that it does touch the securities markets and has the potential for broader implications I think also is a relevant factor to consider when imposing sentence.

THE COURT: So, if someone were thinking about *Guidelines* in this case, it might be that there is an

enhancement, not that there is, but that there is an enhancement if the disclosure is in connection with the purchase and sale of securities?

MS. WALTERS: Well, then we are getting into insider trading and securities fraud, anyway, and potential --

THE COURT: We are, although that does not end the discussion of what "insider trading" is.

MS. WALTERS: No.

THE COURT: But it provides some reason for making distinctions among the employee who is paid by somebody else but is not disclosing confidential information and Mr. Dunham.

MS. WALTERS: Yes. I think this sort of broader range, and then also when looking at the general deterrent factor in this case. This is a case where we know there is a market for insider information, there are these expert networks, there is an insider-trading crackdown that has been going on for some time, and we see the cases. Again, this isn't insider trading, very clear, but the general deterrent factor of you can't going around making selective disclosure of information about publicly traded companies is important.

THE COURT: I think we have dealt with this, except that I want to be sure that selective disclosure is not in and of itself violative of any law.

MS. WALTERS: That's right.

THE COURT: Selective disclosure, by any other name,

is called the exercise of the editing function, I suppose, by those who are engaged in the disclosure of information in newspapers and in investment advisory firms.

MS. WALTERS: And if it was just selective disclosure in and of itself, without the other factors here, obviously we wouldn't be sitting here, but I think there are a variety of things that, while not violative of criminal law, can have disruptive effects on the community at large and in this case the securities markets.

THE COURT: Anything else with respect to your proposal?

MS. WALTERS: No, your Honor. We would add, obviously, we think forfeiture is appropriate as well as a fine at the low end of the guideline range, as calculated by the Probation Office.

THE COURT: Why is the low end of the *Guidelines* the appropriate one here? We are talking about a financial gain. So, he disgorges what he improperly should not have had. That is forfeiture. And we look at it and say what is the interest rate on this? If it is a fine, the interest rate is -- it is higher than the fed rate, I suppose, but it is not particularly punitive. He has had the time value of the money for this period of time. Think of it as a loan that he received from the United States, which he only has to pay back at the rate of $3,000 for $61,000 worth of activity, 5 percent a year.

MS. WALTERS: Your Honor, this is, again, a lot of what goes into the Government's sentencing recommendation here, is the conduct, and then in terms of where we come out on the lower end of things is that this is a man who also very quickly accepted responsibility for his actions. He was arrested on a complaint and pre-indictment agreed to plead guilty to an information. So, from the Government's perspective, tailoring the fine to acknowledge that prompt acceptance -- he has obviously -- he agreed to forfeit the ill-gotten gains here, and that, while an additional financial penalty is appropriate, a relatively modest one sends the same message of punishment and yet acknowledges his prompt acceptance of responsibility here.

THE COURT: All right. Thank you.

Mr. Bletzer, I guess where I want to start first is with Mr. Lawson's condition and what I am supposed to make of that.

MR. BLETZER: Well, your Honor, first of all, we just found out about Mr. Lawson's condition a couple of days before our Sentencing Memorandum was due, and the reason for that is Mr. Dunham didn't want to bring it to your attention.

THE COURT: I understand the background, but now I have it brought to my attention. I think it is relevant, I think it is important, and so now I guess I want to know is there anything more that we have? Is he out of the hospital?

MR. BLETZER: No, he's still in the hospital.

THE COURT: Is he still in ICU?

MR. BLETZER: Yes, your Honor. He's still in the same situation that he was in when we wrote the Memorandum. There's been no change that I'm aware of. I'll ask Jim.

THE DEFENDANT: No, your Honor.

MR. BLETZER: There has been no change since the Memorandum was written, your Honor. He's still in the ICU. They are still looking to figure out what to do with him. He's eligible to be moved from there in just a few days. I think that they are waiting to see what happens here in terms of what's going to happen with --

THE COURT: Who is the "they"?

MR. BLETZER: The people at the hospital, Judge. They're trying to figure out what to do with Mr. Lawson at this point. Judy Lawson lives 3 1/2, 4 hours away. She has indicated to the hospital that she can't take care of him. Her home would not be appropriate, and she's not able to care for him at her home or able to come to his home to take care of him. So, the option that the hospital has is either to send him to an out-of-state medical facility somewhere --

THE COURT: Out of state or out of the county? When I read it, it was "county."

THE DEFENDANT: That is correct, your Honor.

MR. BLETZER: I apologize, your Honor. Out-of-county

facility, or to send him home with a particular caretaker. So, it's in the same position that it was in at the time the Memorandum was written. There's been no change that we are aware of.

THE COURT: So, am I presented, then, with a circumstance in which we are not dealing with a short-term transition, we are dealing with a long-term problem?

MR. BLETZER: Correct.

THE COURT: And I am not sure that I can do anything about that. Transition I can think about. The question of long-term problem is not -- this puts too sharp a point on it, but Mr. Lawson cannot become a hostage to the proper imposition of a sentence in a case.

The idea that I have is -- this has come up relatively recently, as you say -- imposing a sentence but staying it is a way of dealing with that, but it simply forestalls the ultimate problem, which is that, because of the conduct of Mr. Dunham, he is going to have to do some time outside of the home. So, I guess I want you to know what I have in my mind. I tend to think that the Government's recommendation is a humane one. More broadly, it is inflected by this difficulty that arises because of Mr. Lawson's medical condition. It can be put off for a while but not forever.

MR. BLETZER: I understand, your Honor. That's, in fact, the case. The only suggestion that I would make -- and I

don't disagree. I don't think that Ms. Walters is unreasonable at all with her recommendation for sentencing, Judge, but I would suggest to the Court that, based on all of the circumstances of this case, more specifically, as set forth in our Memorandum, we have recommended that the Court consider probation as opposed to some type of out-of-home confinement, and I would suggest that under those circumstances, Judge, we would be able to resolve all of these issues.

And the reason that we suggested this probation as opposed to a term of imprisonment or even a term of at-home confinement is based on the circumstances of this particular case, and I am not going to repeat what's contained in the Memorandum, but there are just a couple of factors that I would like to focus on, if I may very briefly, Judge.

THE COURT: Sure.

MR. BLETZER: The first is the issue that you raised, which is the different treatment of the analyst, and I would suggest to the Court that I know in the Government's Memorandum there was a lot of effort put into the theory of deterrence. But who do we really deter with this prosecution, and who do we encourage? Because, if I look at this fairly from the point of view of the analyst, the analyst was not prosecuted, the name was not made public.

THE COURT: Yet.

MR. BLETZER: The firm's name has --

THE COURT: The answer is yet.

MR. BLETZER: I'm sorry?

THE COURT: The analyst's name has not been published yet.

MR. BLETZER: Agreed.

THE COURT: If it is appropriate under these circumstances, it will be. So, I will put that to one side.

Let me maybe help to focus your response on this issue. The Government has to make important decisions about prosecution and proceeding with prosecution, and those are highly nuanced, and they really do go to questions of intent or the provability of intent, and it goes to what the analyst knew at the time and what they can prove the analyst knew at the time. Hard to believe the analyst did not know he was getting confidential information, hard to believe that the analyst did not know that he was paying someone who was not supposed to be paid by other people, as a general proposition. But the person who really did know that was Mr. Dunham, and so we are faced for deterrent purposes with a circumstance in which a Mr. Dunham, who has access to confidential information which is saleable, put to one side the relationship that he had with the analyst, takes money for it.

There was a former United States Attorney, who was actually a judge of this court, who used to describe cooperation agreements and disparate treatment like this as,

"We do not punish our enemies. We reward our friends." So, they have someone who they believe is more valuable in various ways without being prosecuted and who is hard to prosecute, but there is no question that Mr. Dunham did something wrong, and, except in thinking in terms of disparate treatment, he does not get a special benefit because someone else who might have been prosecuted under appropriate circumstances, or at least appropriately assessed circumstances, which I have no reason to believe this is not, gets a pass.

So, I guess this argument is a kind of argument of, I guess I will use a childhood homily of two little kids saying, "Why are you disciplining me? He did something too," and that "something too" is something to be taken up at some point and considered, but Mr. Dunham did something wrong, and the question is, is this proposal so out of line with what Mr. Dunham did, which is, he sold his job?

MR. BLETZER: I guess the issue that I have is this, Judge: I don't look at it as quite as black and white as that. I agree with you on two things: First, Mr. Dunham did something wrong and immediately accepted responsibility for doing something wrong, immediately went to the Government and said, "I'm not going to put you to the burden of proof, and we agree we will do a plea." He stepped up immediately and took responsibility for his actions.

But, more importantly, Judge, what happened here was

the analyst and my client were friends, had been friends for a number of years. They swapped information within the industry and had done it for years. There's no problem with that, and there's no illegal conduct there.

THE COURT: Well, I am not sure that the Government would take that position. I do not know, but I have had some taste, about how broadly they view Honest Services Fraud. What gives this a hook is that he got money for it. Trading in confidential information in breach of a duty is trading in confidential information in breach of a duty, irrespective of whether or not you get paid for it.

MR. BLETZER: But what they did, Judge, was they talked about general industry trends, general industry knowledge, things that were going on in the industry. They did that for years, Judge. They were friends. Like everybody else in the industry does, when they get together at meetings they talk about who's doing what, whose company is doing what. Everybody in America does it. Everybody in America trades information back and forth with other people in their industry. It's what happens every day of the week. It is not actionable, and nobody ever gets charged for it.

And then one day the analyst said to my client, "You know, I can pay you to do this," and my client initially was resistant to it. "I don't need to be paid. There's no reason for it." He ultimately was convinced and did agree to accept

payment for their conversations. They went through a training program, they signed a contract, and the contract was very specific: "You can't give me confidential information, and I can't accept from you confidential information." That was the agreement, nothing confidential. And over a period of, this is a six-and-a-half year relationship, he was paid for some three years during this relationship, and the Government has gone through every note that the analyst wrote in that period of time and came up with a handful of times when there was information that arguably was confidential.

This is not somebody, as is characterized by the Government's Memo --

THE COURT: There is no question it was confidential, is there? Certainly, the employer would view it as confidential. The business entities whose sales information or return information were being trafficked would consider it confidential. I do not think there is any dispute that this is confidential information, and he knew it was.

MR. BLETZER: Certainly, on April 11 the information was confidential, and on a handful, a *handful* of other occasions over 3 1/2 years it was confidential information. That's it. This is not a repeated regular pattern of conduct. And, remember, my client never had access to the analyst's notes.

I'm not here to suggest that my client's conduct is

not criminal. That's not my approach. And, as I said, my client stepped up to the plate immediately to take responsibility for his actions.

What I'm suggesting, Judge, is that my client was actively recruited by the analyst. He was somebody that the analyst engaged a lot of time and effort in recruiting a friendship with. My client, based on his background, was particularly vulnerable to that kind of an approach, and the analyst essentially took advantage of my client. My client participated. He was paid, as the Government has described it, a relatively very modest sum of money, and on a handful of occasions my client overstepped the bounds of what he was supposed to do. If my client had either reported this to his employer or simply not on those handful of occasions released confidential information, we wouldn't be here today, Judge.

THE COURT: But he did, so we are.

MR. BLETZER: He did, and so we are.

THE COURT: The question is what do we do about it?

MR. BLETZER: But the issue with regard to the disparate treatment to the other is that the Government's Memorandum talks about sending a message of general deterrence, and they send one to the Jim Dunhams of the world, but they send the opposite message to the analysts of the world, that it's okay to engage in this type of conduct.

And the statement that the analyst didn't know or

there wasn't intent on the analyst's part is extraordinary, Judge, because the analyst knew that there was a contract that allowed Mr. Dunham to only give nonconfidential information. He knew that he could only accept nonconfidential information. He probed and got what turned out to be confidential information, and if Mr. Dunham knew it was confidential, then the analyst had to know it was confidential, and he then published it throughout his network and then it was republished throughout the marketplace. I would suggest to the Court that, if you are looking at the balance of harms here, who was more at fault, who had conduct that was more criminal --

THE COURT: But I am not sure I understand this argument fully, because it seems to me to be an argument that it is exculpatory for Mr. Dunham that someone else involved in this is not getting sanctioned, at least through criminal prosecution.

MR. BLETZER: I'm not suggesting it's exculpatory, Judge. I'm just simply saying there is disparate treatment of what I would consider an unindicted co-conspirator, and, as a result, that is a factor that you can consider in terms of the appropriate sentence for Mr. Dunham. That's all I'm suggesting to the Court. And I would suggest to the Court that, based on everything that's happened to Mr. Dunham, as laid out in my Sentencing Memorandum, versus what hasn't happened to the analyst, that our sentencing recommendation -- I agree with

you, Judge, the Government's sentencing recommendation is reasonable. I think the defendant's sentencing recommendation is reasonable as well, and I'm simply trying to convince you to come more to our side of the equation than theirs. That's really the only point for making these statements. I'm not trying to say it's exculpatory. It's not. It doesn't excuse my client's conduct in any way. My client hasn't asked that it excuse his conduct. I'm simply arguing that this disparate treatment could be considered by you in terms of the sentencing. That's all I'm doing, Judge.

THE COURT: All right. Thank you.

MR. BLETZER: And the only other thing that I would like to address briefly, Judge, we've talked about Mr. Lawson. And with regard to Mr. Lawson, also both of his parents, his father has Alzheimer's, his mom has Parkinson's and bipolar disease. He would be more in a position to help them based on the defendant's sentencing recommendation.

But the last thing that I wanted to address before the Court today, Judge, is this sort of the red herring, the issue of the 7 percent. I know I've briefed it in my Memorandum.

THE COURT: You mean the drop in the market?

MR. BLETZER: The drop in the stock price, Judge. I would simply suggest to the Court a couple of things. Number one, there was no 7-percent drop. It didn't happen. The drop the day that this article was released was 4.3 percent, and

this is one of a tsunami of articles that were published about this particular Smartphone which caused that particular major Smartphone manufacturer that at its peak sold at $148 and just a month or so ago sold for $7 and some odd cents. This company lost 95 percent of its value over a period of time. None of that loss in value is attributable to anything that Mr. Dunham said or anything the analyst did. It's attributable to the fact that their Smartphone could not stand up to the competition from Apple and from Android operating systems. And if you look at the stock prices as set forth in my Memorandum, there was a 61-cent drop in stock price that day, and 49 cents of it was made up the very next day. Within six days it was trading above that price, and within two weeks it was trading at $2.43 above that price.

This is a very volatile stock that traded all over the place based on all kinds of information that was available to the public, not merely this information, and I would suggest to the Court that Mr. Dunham's statement to the analyst and the publication by the analyst had absolutely nothing to do with that stock price.

I would suggest further, Judge, that in this case one thing is crystal clear. No one suffered a loss based on what Mr. Dunham did.

THE COURT: No shareholder suffered a loss. His employer suffered a loss; that is, $61,000 worth of value as a

consultant is transferred from the employer to Mr. Dunham.

MR. BLETZER: We don't know that, Judge. We don't know whether, if Mr. Dunham had come to the employer, they would have let him have this outside contract --

THE COURT: Why didn't he?

MR. BLETZER: We just don't know what the answer is.

THE COURT: Why didn't he go to the employer and say, "I have got this opportunity"?

MR. BLETZER: You know what? Mr. Dunham has been torturing himself over that since this whole thing started. He has no explanation for why he didn't do it. Just, to him, it was an outside contract, continuing something that he had been doing for years that was beneficial to his employer because he was getting regular information from an analyst in the market which was used to the benefit of his employer. He just never thought to check with the employer. It was a very bad decision on his part. He wishes that he had gone to his employer.

But we don't know that his employer wouldn't have allowed him to continue this relationship and earn that money. We just don't know the answer to that question. In fact, the relationship was also good for his employer. But that's neither here nor there, Judge. Other than the potential loss of that $61,000, there is no harm to anybody in this case.

And I will simply suggest to the Court that, for all of the factors as set in the Sentencing Memorandum, I would ask

you to consider the adoption of a term of straight probation for the defendant in this matter. I am in agreement with everything else that the Government has suggested, that one year of supervised release is certainly agreeable, the forfeiture of the $61,000 is certainly agreeable, the fine of what the Government has recommended at the low end of $3,000, or if this Court increases the fine, is certainly agreeable to my client, Judge.

My client stands before you deeply remorseful and very repentant for his actions. He's brought shame to himself. He's brought shame to the woman that he was supposed to be married to and her children. He brought shame to his family, and he's very deeply remorseful for his actions in this case.

THE COURT: Mr. Dunham, I will hear from you, if there is something you would like to say at this point.

THE DEFENDANT: No, your Honor. I will defer to my attorney. Thank you.

THE COURT: Well, let me go to the result before turning to the reasons for it. I have outlined the *Guidelines* in this area. I am generally skeptical about the loss *Guidelines*, not because the Sentencing Commission has not done the best it can under the circumstances, but loss is like quicksilver, and it is very hard to contain in a meaningful way.

That being said, in this case it has not been hard,

because we can look at the gain to the defendant as a measure of loss, and I do, and the *Guidelines* do, and the range of sentence that is generated by the *Guidelines* seems to me to be not unreasonable. I guess that is litotes. It is the linguistic formulation for saying that something is not unreasonable. I am not quite saying it is reasonable, because I am going to impose a different sentence, and the different sentence is the one that the Government is proposing here, that is, a period of incarceration for five months, followed by a period of five months of home confinement.

I am concerned about the financial dimension to this, that is, the fine dimension to this, because I view it as a financial crime, and, having looked at the question of time value of money, a $3,000 fine, which is at the low end of the *Guidelines*, it seems to me, is too low. It makes it, from a fine point of view, not a bad financial maneuver. I will impose a fine of $15,000 here.

I am imposing a period of supervised release of three years. This is not to hassle Mr. Dunham for that extended period of time but because I think that there is some value in keeping supervision over Mr. Dunham in the wake of what I firmly believe and understand to be a profoundly destabilizing set of circumstances for Mr. Dunham.

But let me turn now to the reasons for imposing this sentence in this fashion. We have talked about it at some

length this morning, and I have tried to explore with the parties the relevant factors, both the choice of prosecution and the choice of not prosecuting the compatriot, to explore fully what the culpability is.

I start with the idea that it is a serious business for someone to compromise the confidential information that they are bound to protect, and I take as having some force Mr. Bletzer's commentary that it was not that and it was not done that frequently as minimizing the culpability here, but it was enough and it was done enough that it comes within the scope of the criminal law, if the criminal law is going to be used for this sort of thing.

Now, how is this ordinarily dealt with? Well, it is ordinarily dealt with by civil lawsuits by parties without the intervention the Government. But there looms over this the concept of Honest Services Fraud, and why should Honest Services Fraud get invoked here and not elsewhere? Well, the reason is that it touches on the securities markets, a matter of significant concern to the Federal Government. It touches, but it does not or has not, to my mind, been demonstrated to have actually affected the securities market. It was a rivulet of information in the midst of a tsunami of disclosures and understandings about a company that simply was being overcome by its competitors.

That having been said, I view it as a serious matter

that should justify the criminal sanction; the question is to what degree of the criminal sanction?

I turn, then, really to the nature and circumstances of the defendant as it affects the crime here. I have read all of the letters. They are affecting. They indicate an individual who has sought throughout his life to deal fairly and humanely with others in the work environment, and I do not think they are phony, these letters, but they are real. And I can project, without having more information, but I can project the relationship between the analyst and Mr. Dunham, the kind of insidious way in which the analyst takes a friendship and turns it into a commercial transaction for which Mr. Dunham is now being held responsible, if the analyst is not. That is all a reason to reduce the sentence or at least mitigate the sentence, and that is what the Government's recommendation is, but it does not mean that it is without the bite of a sanction in the form of incarceration and limitation of home confinement.

I do not believe that the raising of Mr. Lawson's circumstances is in any way improper or some effort to take advantage of the misfortune of another person in order to gain some momentary advantage before the Court, and I treat and credit Mr. Bletzer's report that Mr. Dunham did not want this to be brought to the attention of the Court because it would be something that he would feel uncomfortable using to inflect the

relationship.

I have read the letter from the defendant's significant other whose relationship was affected by this, and, while I may not think that the proper decision was made to end the relationship, I recognize that this is a man who takes very seriously his responsibilities, thinks seriously about how he affects others and tries to guide his life in that way.

But he also made this mistake. He also took money for something that he knew was in breach of his employer's trust, and it is, as I say, in this area that is something of a third rail, I suppose, in federal concern: securities markets.

So, then I turn to the question of specific deterrence: What do I have to do to stop Mr. Dunham from doing something like this again? Well, I do not think I have to do anything else. The prosecution did it. The fact of the prosecution did it. The fact that Mr. Dunham immediately responded and accepted responsibility and was forthcoming, that suggests to me that putting Mr. Dunham in a sanction that restricts his liberty is not necessary to serve the purposes of specific deterrence under Section 3553.

But then I turn to the question of general deterrence, which is different, and it is the question of what do you tell people who are in Mr. Dunham's circumstances will be the consequences of disclosing your employer's confidential information in this context? And it is there that, it seems to

me, the argument for incarceration becomes strongest.

There are two sides to these kinds of arrangements, as Mr. Bletzer has pointed out. There is someone who discloses confidential information, and there is someone who makes use of it, and while the circumstances in which the confidential information was extracted, if that is the right word, or at least unfolded to the analyst, suggests that Mr. Dunham is not somebody who is out in the market saying, "I have got this, what are you going to pay for it?", to various people, it does tell us that Mr. Dunham was prepared to accept money for breach of trust in this area. Others in Mr. Dunham's position have to understand that that has consequences. It can have criminal consequences, particularly criminal consequences when you touch on the securities markets, which are the kind of thing that would attract, I think, federal prosecutorial attention.

We spent a little bit of time talking about the near-infinite, in my view, elasticity of Honest Services Fraud for purposes of criminal prosecution. There will come days, I am sure, in which Government prosecutors choose to apply it to areas that seem much more attenuated and the law will develop. But this seems to me to be in the heartland of what the Government should be dealing with if we have an Honest Services Fraud like this that permits the prosecution of a breach of confidentiality through compensation, which can be characterized fairly, I think, as bribery or payoff, and that

has to be known to people who are in vulnerable positions, so that to someone who has a long-term relationship with a friend and they share information -- if Mr. Bletzer is right, I assume is right, and common sense tells me he is -- share information on a daily basis will understand that you cannot get yourself into the sharing of confidential information for which you are compensated without facing the prospect of prosecution, not just losing your job with your employer, but prosecution.

Now, it is ironic to say that the employer might have been a beneficiary of this ongoing back and forth of information. Perhaps, but I do not think so. This is something that could undermine the employer's ability to function effectively in the marketplace. That is a reason why the employer is interested, even though it would not take much for someone to pull things together and figure out who the employer was, in not having their name identified publicly.

But the short of it is, there has to be a message that general deterrence provides to people in Mr. Dunham's circumstances who have probably the most appealing kinds of cases for purposes of sentencing that if you do something like this, you will pay a price, and the price that I have imposed here seems to me to be necessary for purposes of general deterrence of the, not to use language that has a term of art in insider trading, but of tippers like Mr. Dunham. There will be time enough to deal with tippees in the proper case.

I then turn to the question of incarceration, what we call "penological benefit" or, at least, "penological effect." I do not think that much is gained for restricting Mr. Dunham's life for a period of five months in prison, except in service of other values.

I am very concerned about transition for Mr. Lawson for a period of time, but that is an issue that is going to have to be faced at some point, and, as a consequence, I am going to stay the execution of the sentence for three months, subject to modification, if circumstances suggest it. But I want to be clear that I will be very concerned about extending it any further. This is time to deal with an immediate problem. It should be dealt with so that Mr. Dunham is in a position to serve his sentence, because he is going to have to serve his sentence.

But putting Mr. Dunham in jail does not do anything for Mr. Dunham, and so I view it as a kind of neutral factor, I suppose, in this case, except that it serves the larger purposes of deterrence.

I then turn to the question of disparity. For the most part, the concepts of Honest Services Fraud or bribery have been more salient in prosecutions for political corruption, but as insidious is commercial bribery, breach of trust to an employer, and breach of trust to an employer that, as I have said, comes close to the third rail that our

securities markets create for those who come near them or are exposed to them.

I have thought a great deal about what commercial bribery cases have been, what they would be in comparable circumstances. There is not a lot of comparability out there, but I am satisfied that this sentence for this crime is not disparate in an unwarrantable way from other kinds of sentences for similar kinds of activity by other persons. We tend to get very excited about political corruption because we all pay taxes, but as important is a fair and honest dealing in our commercial life, and that may properly be prosecuted when it is in connection with, as I keep saying, something so important to our larger commercial and economic life as our securities markets. So, I do not view it as disparate. I view it, that is, the recommendation that the Government has made, to be, as I have said, a humane one and consistent with the larger purposes of sentencing as expressed through my discussion of the factors under 3553.

So, I turn, first, to the question of the sentence itself. As I indicated, it will be five months of incarceration followed by five months of home confinement, with the usual understanding that the defendant will be able to attend to medical appointments and other related obligations, viewed broadly.

I impose a fine of $15,000. I must impose a mandatory

Special Assessment of $100. I will sign a Money Judgment of Forfeiture in the amount of $61,000 here.

The defendant is subject to the customary terms and conditions of supervision, that he may not commit another federal, state or local crime.

I am going to suspend drug testing here. It seems to me that the defendant has shown no propensity in that area.

He is obligated to submit to the collection of a DNA sample.

He is prohibited from possessing a firearm or other dangerous weapon.

The question of home detention, I want to be sure I have got this right, Ms. Marcy, but this is a Bureau of Prisons responsibility, not the responsibility of the Probation Offices. Am I right about that?

THE PROBATION OFFICER: No, your Honor. The *Guidelines* -- the Bureau of Prisons would not honor that sentence, so he would be confined for ten months. So, in order to meet what I believe your Honor wants to happen, it would have to be a five-month custodial sentence to be followed by three years of supervised release with five months to be served in-home confinement.

THE COURT: All right. So, with that understanding, I am imposing a five-month period of incarceration to be followed by supervised release of three years, the first five months of

which involve home detention, and the defendant is going to be subject to location-monitoring equipment during that time period. He is responsible for the equipment, returning it in good condition, and can be charged for the repair or replacement of that equipment, and shall pay the costs of the program as is determined under the national contract that is involved in this.

My expectation is that without further conditions the defendant relatively quickly will be put on a relatively modest supervision regimen, but I have imposed that extended period of time, Mr. Dunham, to ensure that there is no backsliding, I guess is one way of saying it. That is, that there is, as a result of the activity that you have been involved in, an obligation to monitor your activities. I think, as I think about it most carefully, that this is something of a one-off, that you were vulnerable and you were taken advantage of, but ultimately it was your free-will act, and you are responsible for it, and, as best I can, I have tried to fashion an appropriate sentence for that.

If there are not other conditions of the parties, I have indicated that I will suspend the execution of the sentence for three months. You will be expected to report to the Bureau of Prisons facility -- I am going to make that something more than three months -- by January 8, 2016. I urge you to do everything you can to get your affairs and Mr.

Lawson's affairs in order and structured so that it can be dealt with during your absence there.

I think it is fair to say, Mr. Dunham, nobody in this room, certainly not me, enjoys this process of imposing a sentence on someone, but it is the part of the various obligations that we all have as a community here. Less important to me at this point, having done what I am supposed to do in imposing a sentence, is that sentence itself. What is most important is the future for you. I talked a bit about what I thought about your character, and I believe it; that you are someone who has throughout your life given to other people, been sensitive to other people, tried to help out, tried to support under difficult circumstances, family circumstances and work circumstances. My hope and expectation is that you will continue to do that. If you do, we will all be better off. You certainly will be, and then this becomes you paying your price and moving on with your life.

You should understand that in this session you have a right of appeal. You will want to discuss with Mr. Bletzer whether or not that makes any sense under these circumstances.

Are there any other matters with respect to sentencing you wish to take up? Because I want to come back to the question of disclosure.

MS. WALTERS: Nothing from the Government, your Honor.

MR. BLETZER: One issue, Judge.

THE COURT: Sure.

MR. BLETZER: Mr. Dunham will be living with Mr. Lawson in the meantime.

THE COURT: Right.

MR. BLETZER: But he will, for the home confinement, live with his brother at his brother's address in Portland Oregon. And I would ask that we could use as his home address at this time -- I don't know how to do it, but I want to use the Portland, Oregon address, which is the one that he would go to after he is released from the facility, and I would ask the Court to consider making a recommendation to the Bureau of Prisons that the Sheridan, Oregon facility would be the facility that would be most suited for my client. I believe it's a minimum security facility in Sheridan. It is a half-an-hour-or-so drive to his brother's house. It would give his brother access to see him at the facility.

THE COURT: I will make that recommendation here, and we will use, provisionally, the Oregon address here. Things move quickly, change quickly, and they may change now.

But, Ms. Marcy, did you have something you wanted to add?

THE PROBATION OFFICER: So, you're asking me to change the address in the Presentence Report to this Oregon address of his brother's?

THE COURT: I am not sure that you need to do it. I

think that what we will do is, we will use the Oregon address in the judgment itself saying that he should be as close as possible to that address, which we anticipate will be the address to which he will be released.

THE PROBATION OFFICER: Great. Thank you.

MR. BLETZER: Thank you, your Honor.

THE COURT: All right.

Now, let's go back to the question of disclosure. I guess I have these views: I have indicated that I want to have further briefing on this from parties that have I think an interest, entities that have an interest. One is the SEC. The other is -- I will tell Mr. Lovett to notify Mr. Albano, who represents the *Globe* in these matters.

Now, the problem, and I will hear you on it, but the problem is that that raises the question of disclosure, ups the ante on the question of disclosure, leads a party that has not been active so far to think maybe they should be active in this area. But I know of no other way to get to the bottom of these questions in an adversarial sort of way.

It is the case that the ultimate manufacturer victim has been identified publicly. It is the case that the entity victim, I think, has been identified publicly. It is the case that it does not take much to figure out who the wireless franchisor victim is and that the parties that deal with the wireless franchisor victim, I cannot imagine, are unaware of

this. Maybe they are, maybe they are not. I do have the submission from the wireless franchisor victim seeking to have the seal left in place.

So, I will hear anything else you want to say about that. And I guess it is, I'm sorry, Mr. Jantzen?

MR. JANTZEN: Yes. Thank you, your Honor. Thank you for the opportunity to be heard in front of this august Court.

Anything that has been said in the press and so forth is just pure speculation. Certainly, the *imprimatur* of this Court revealing my client's name would resolve the issue against confidentiality, and it would certainly have a pernicious effect on my client's future business.

During the course of this approximately hour and 45 minutes of judicial hearing I had some notes, but I wanted to harken to your actual comments. Two themes were general deterrence. General deterrence favors nondisclosure of the major wireless franchisor, who is my client here. Secondarily, with respect to relative culpability, it is a term that you used as well as that respects the various victims. Well, my client is dissimilarly situated than the stock analyst, as both the U.S. Attorney and defense counsel have presciently pointed out. My client has no culpability here. They had no scienter. And I say that they have no culpability because the actions taken by the former president were done on a private computer. We had no idea that this was going on.

And I ask the Court to perhaps reflect at Page 4 of our brief where we cited the wisdom of the United States District Court for the District of Massachusetts in the Robinson case, and that was the famous *Globe* disclosure case involving sex for money, if you will. And at Page 4, I can't emphasize enough what the Court said there and their interpretation of whether or not the Court itself had the right to disclose the identity. "Unless and until the decision not to reveal to the court the victim's identity interferes with the rights of the defendant" -- let me stop right there. The defendant has assented to this motion -- "or the victim's identity becomes relevant to the Court's decision-making" -- well, you have already made your prescient decision with respect to the sentencing -- "the Court lacks the authority to compel the government to make the information public."

Now, the Government, through its wisdom, decided throughout to not disclose my client's identity in order to enhance cooperation and serve the purpose of general deterrence, which is another theme here. So, we suggest that this Honorable Court might be guided by the Robinson decision.

We also bring to the Court's attention, and I'm parsing my words here, but to make it clear, our largest, if not only, contract, my client's only contract, exists with the major wireless provider, and that has already been injured by the circumstances at bar. We ask that it not be complicated

any further.

So, in summary, this is not a TJX case. Public information was not disclosed. My client has suffered substantial harm, but it has survived, it has persevered. We ask the Court to consider being guided by precedent in this very same court in the Robinson decision, and not disclose. And particularly with respect to the relative culpability as between the victims, we are not the analyst. We are the provider. The major wireless provider had no idea -- the franchisor had no idea that this was going on.

And, finally, with respect to 18 U.S.C. 3771(a)(8), we believe we do qualify as a victim, entitled to the same dignity and fairness as any other individual that comes before this august Court. So, for those reasons we implore the Court not to reveal the name of my client to the press or otherwise.

THE COURT: Thank you.

Well, I think, as I have been, I am going to be going step by step, and so I am satisfied, at least provisionally, by that argument to deal next with the SEC and with the analyst and the analyst's company, and not to raise the ante by soliciting the views of the *Globe* as a representative of the media in this area.

I do not entirely endorse the analysis of Robinson, but I think the touchstone is right, which is that the Court's interest is, to the degree that the identities of the

unidentified parties are material to making a judgment, they are presumptively to be disclosed. I need to know more about the analyst to make that determination in a balancing sense, but it is clear from our discussion that the role of the analyst has been critical to my evaluation of this case, because it goes right to the core of the question of culpability.

Different, however, is the actual victim, the franchisor, the wireless franchisor, and there is this perverse quality of someone who is injured by the disclosure of confidential information if, for no other reason, than it compromises their ability to work in the marketplace, being further injured by the events themselves, unless it is absolutely necessary for the Court, in fairness in disclosing why it has done what it has done, needs to bring that to the public's attention. I do not think it is necessary here.

What is the case is that, irrespective of the identity of the victim, I would have done the same thing. The victim has an arrangement, an understanding and agreement with its employee, the defendant here, not to disclose confidential information and not to be certainly paid for it. That does not depend on the actual identity of the victim itself.

Similarly, the larger connection with the principal entity with which the victim deals becomes a kind of collateral damage in this disclosure process, at least I think so at this

point, and the larger role of that client is something that did not inflect my judgment at all.

But it was affected by the identity or the particulars of the analyst and the analyst's company, and so the next step, I think, is to solicit from the SEC a view with respect to whether or not that should be disclosed and, more particularly, what the degree of control is of the SEC over these entities. I cannot go any further than that, I think.

So, perhaps, Ms. Walters, I could ask you to contact the SEC --

MS. WALTERS: Yes.

THE COURT: -- to, A, provide me with information with respect to the regulatory environment under which the analyst and its company dealt. We have both been dealing, you are more informed, I am sure, about what the Investment Advisers Act means under these circumstances, if, in fact, it is applicable, but I want to understand what obligations of both to disclose and not to disclose and not to solicit the development of information an investment adviser has. I do not want to leave it at this, because that has been a major factor in my judgment about this case.

Second, the very specific question of whether or not the SEC has a position that it wishes to express about the disclosure of the identity of the analyst and/or the analyst's company by the issuance of a redacted version of the

information at some point. If I intend anything further, I will make it clear to the parties here, but I think that this has helped me, and I think the submission on behalf of Company A has been helpful to focus my attention on what the real issues are for purposes of disclosure. Not everything gets disclosed, nor should it. There is a danger of drawing people in who should not otherwise be drawn in, but when someone is in a regulated area like investment advice, that seems to me to be different.

MS. WALTERS: Yes. Thank you, your Honor. Certainly I will be in contact with representatives from the SEC.

Also, both the research firm and the analyst are represented. In contact with them --

THE COURT: They chose not to appear here today.

MS. WALTERS: Right. I notified them the first time and let them know that there's going to be another round.

THE COURT: Right. And just tell them there will be another round. They are welcome, or they can choose not to.

MS. WALTERS: Thank you, your Honor.

MR. JANTZEN: Let there be no ill visited upon my client by the lack of interest of the other victims. We are extraordinarily interested. Thank you, your Honor.

THE COURT: Right. Well, in any event, I will receive that. I would hope that I could have that within a month, so we are really talking about October 15, if I have not chosen a

weekend.

MS. WALTERS: Thank you, your Honor.

THE COURT: Mr. Bletzer?

MR. BLETZER: Judge, if there is another hearing on the disclosure issue, may I be excused from that hearing?

THE COURT: Sure. The parties can make their own choices about that. I think I have indicated what the most likely ultimate outcome is going to be -- not most likely -- but the outcome most adverse to any of the party's interests here, which will be redacted information identifying the research firm and the analyst. I am not contemplating anything else. If I were, or contemplating inviting anybody else in to consider it, you will be among the first to know.

MR. JANTZEN: Thank you, your Honor.

THE COURT: All right. We will be in recess.

MS. WALTERS: Thank you, your Honor.

THE CLERK: All rise.

(The Honorable Court exited the courtroom at 12:00 p.m.)

(WHEREUPON, the proceedings adjourned at 12:00 p.m.)

C E R T I F I C A T E

I, Brenda K. Hancock, RMR, CRR and Official Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of *United States v. James Dunham, Jr.*, No. 1:15-cr-10110-DPW.

Date: September 30, 2105

s/ Brenda K. Hancock
Brenda K. Hancock, RMR, CRR
Official Court Reporter