IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

SECURITIES AND EXCHANGE COMMISSION,	)	
Plaintiff,	)	
v.	)	CIVIL ACTION FILE NO. 1:12-cv-00082-RWS
EARL C. ARROWOOD and PARKER H. PETIT,	)	
Defendants.	)	

PARKER H. PETIT'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant Parker H. Petit ("Mr. Petit") files this Memorandum of Law in Support of his Motion for Partial Summary Judgment pursuant to FRCP 56(f) and Local Rule 56.1, showing the Court as follows:

I. INTRODUCTION

The SEC alleges that Mr. Petit tipped material, non-public information to Earl Arrowood ("Mr. Arrowood"), causing Mr. Arrowood to make two purchases of stock[1] in Mr. Petit's company, Matria Healthcare, Inc. ("Matria"), at a time in which Matria had resolved to explore strategic alternatives. Mr. Petit did not tip Mr.

[1] Mr. Arrowood's two purchases of Matria stock were on October 25, 2007, and December 27, 2007. Both trades are discussed herein for context and completeness, but Mr. Petit is only moving for summary judgment with respect to the October 25, 2007 trade.

Arrowood. With respect to the first trade on October 25, 2007, the undisputed facts require that summary judgment be granted in favor of Mr. Petit.

This case contains none of the hallmark allegations of an insider trading case. There is no contact between Mr. Petit and Mr. Arrowood in the weeks preceding the October 25, 2007 trade, and there is no suspicious timing linking any alleged contact and the trade, as is standard in insider trading cases brought by the SEC. With respect to the December 27, 2007 trade, Mr. Petit and Mr. Arrowood's contact was plain, open, and frequent, and it had a legitimate and wholly innocent explanation that is fully corroborated by independent evidence. Neither purchase immediately followed a corporate event at Matria of any significance or import.

This case also differs from most because Mr. Petit is not alleged to have tipped anyone else—not his family, not his closer friends, not his business partners—and he is not alleged to have purchased Matria stock himself. Nor does the SEC allege that Mr. Petit received any payment, remuneration, or any direct, tangible benefit as a result of Mr. Arrowood's trades. Moreover, there are no tertiary tippees flowing from Mr. Arrowood's alleged receipt of inside information.

In addition, unlike most insider trading cases, Mr. Arrowood did not purchase puts, calls, or options, and did not leverage assets to make the purchases. Rather, for the first purchase, he simply moved his available cash in his IRA account into Matria,

and for the second, he exchanged his plummeting Delta stock with Matria because Matria was the only other company he really knew anything about. Although the purchases were large, they were not out of the ordinary considering their context. Plus, Mr. Arrowood did not enjoy any immediate or even noteworthy profit-taking, ultimately earning less than $10,000 on his investment.

The SEC's case is weak and offers only speculation, conjecture, and strained inferences. Mr. Petit recognizes, though, that this is not a case in which summary judgment can be granted in its entirety because the circumstantial evidence with respect to the December 27, 2007 trade raises a genuine issue of material fact. However, partial summary judgment is warranted on the October 25, 2007 trade. As of October 2007, *any* potential corporate event involving Matria was too nascent, speculative, and uncertain to be material as a matter of law. Moreover, it is not reasonable to infer that Mr. Petit tipped Mr. Arrowood in October because there is no evidence of contact between them in the two weeks preceding the trade, and, indeed, the evidence is clear and undisputed that Mr. Arrowood *tried* to contact Mr. Petit to see if he was doing the right thing, but *did not reach him*. For these reasons, Mr. Petit respectfully requests that the Court enter partial summary judgment in his favor as to the October 25, 2007 trade.[2]

[2] It is appropriate to assess each trade individually for purposes of summary judgment.

II. STATEMENT OF FACTS

For almost twenty years, Mr. Petit and Mr. Arrowood have been friends and flying buddies. (Statement of Material Facts ("SOMF") ¶¶ 7-8.) Mr. Arrowood has helped Mr. Petit find, purchase, and maintain his planes, while Mr. Petit funds the planes' expenses, pays for Mr. Arrowood's recurrent flight training, and lets Mr. Arrowood fly them. (*Id.* ¶¶ 9-10.) The two men travel together, often with their wives. (*Id.* ¶ 8.)

In 2004, Mr. Arrowood retired from Delta Airlines ("Delta"), and found himself with about $210,000 in cash in an IRA rollover account that he needed to invest (the "IRA Account"). (*Id.* ¶¶ 11-12.) Mr. Arrowood asked Mr. Petit, the most successful man he knows, for help placing the money in the stock market. (*Id.* ¶ 12.) Mr. Petit, who had provided similar assistance to his mother-in-law and sister-in-law, agreed to help. (*Id.* ¶ 13.) Mr. Petit executed a small number of trades in the IRA Account, purchasing a handful of stocks he also owned, including Matria. (*Id.* ¶ 15.) From late 2005 to mid-2007, Mr. Petit made no trades in the account, which, at that time, held just Matria and one other stock. (*See id.*) In May 2007, Mr. Petit sold all of the Matria in the IRA Account and

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See SEC v. Truong, 98 F. Supp. 2d 1086, (N.D. Cal. 2000) (granting summary judgment to alleged tipper (and tippees) on all trading preceding a specific date, and requiring trial as to subsequent trades).

decided to let Mr. Arrowood handle his own investments. (*Id.* ¶ 17.)

Shortly thereafter, and unbeknownst to Mr. Petit, Mr. Arrowood opened another brokerage account (the "Personal Account") to hold a large quantity of Delta stock that Mr. Arrowood had received as a settlement of his retirement benefits from the Delta bankruptcy. (*Id.* ¶¶ 77-79.) Mr. Petit did not have access to this account and had no trading authorization over it. (*Id.* ¶ 78.) From June 1 to the end of August 2007, the value of Mr. Arrowood's Delta stock went from $280,930.27 down to $240,715.88. Delta enjoyed a brief rebound during the fall of 2007 before plummeting again dramatically in December 2007. (*See id.* ¶ 80.)

Arrowood's October 25, 2007 Trade

In the fall of 2007, Mr. Arrowood and his wife, Tatumn ("Mrs. Arrowood"), wanted to invest the cash in the IRA Account. (*Id.* ¶ 56.) They knew relatively little about the stock market, but were comfortable with and trusted Matria. (*Id.* ¶¶ 57-58.) Mrs. Arrowood's niece, who was born prematurely, had actually used the infant monitor first invented by Mr. Petit for at-risk infants. (*Id.* ¶¶ 1, 59.) Mrs. Arrowood had seen a reference to Matria on a television show, and had watched Mr. Petit ring the opening bell at NASDAQ. (*Id.* ¶ 60.) Mrs. Arrowood, who had previously purchased Matria on her own, monitored Matria's website and other news about Mr. Petit. (*Id.* ¶ 62.) Perhaps most central to the Arrowoods' decision

to reinvest in Matria, however, was that it was headed by their good friend, the wealthiest and most successful man they knew, and they could see that he was doing well. (*Id.* ¶¶ 57-58.)

By October 2007, the Arrowoods were on the verge of purchasing Matria stock with the cash in the IRA Account. (*Id.* ¶ 56.) Mrs. Arrowood saw a press release stating that Matria's quarterly earnings would be announced on the 25th. (*Id.* ¶ 63.) The day before the earnings' call, she saw an online article touting Matria as the "bull buy of the day" pending earnings results. (*Id.* ¶ 64.) On the morning of the 25th, Mr. Arrowood tried to call Mr. Petit to gain some confidence in his decision to buy, but *Mr. Arrowood did not reach Mr. Petit*, who was busy preparing for the investor call. (*Id.* ¶ 71.) So, from their condominium in Florida, the Arrowoods logged onto the call and heard their friend announce that Matria's earnings had been within guidance and that certain business prospects were looking up; and Mrs. Arrowood looked at the third quarter earnings report. (*Id.* ¶¶ 66-67.) Partially into the call, Mr. Arrowood purchased 8,452 shares of Matria in his IRA Account. (*Id.* ¶ 69.) He made the purchase on his own accord and without the benefit of any inside information from Mr. Petit.

The telephone records confirm that Mr. Arrowood called Mr. Petit on the morning of the 25th, and the two never connected. (*Id.* ¶ 71.) In addition, there

were no calls between Mr. Arrowood and Mr. Petit on October 24 or on any day during the two-week period preceding Mr. Arrowood's purchase. (*Id.* ¶ 72.) Notably, there is no evidence of any contact whatsoever between Mr. Petit and Mr. Arrowood in the two weeks preceding the trade. (*Id.* ¶¶ 72-73.)[3]

Arrowood's December 27, 2007 Trade

On October 31, 2007, the Delta stock in Mr. Arrowood's Personal Account had rebounded up to $296,616.73, its apex just before a rapid and precipitous decline. Indeed, from November 30 to December 26th, Mr. Arrowood's Delta holdings lost at least 25% of its value. (*Id.* ¶ 80.) Rather than suffer additional losses, Mr. Arrowood liquidated his Delta holdings on December 27th for $208,695.95 and exchanged it all for Matria, unbeknownst to Mr. Petit. (*Id.* ¶¶ 83.) As with the October purchase, Mr. Arrowood bought the stock independently and without any information from Mr. Petit, who did not even know of the Personal Account or the purchase until much later. (*Id.* ¶ 79.)

Mr. Petit and Mr. Arrowood were in frequent contact in December, and there is no denying that they spoke on the 27th, or that they spoke every day in the five days leading up to the 27th, and for many days thereafter. (*Id.* ¶ 84.) Mr.

[3] Any attempt by the SEC to attribute the lack of communications between Messrs. Petit and Arrowood prior to the October trade to an effort to be secretive is belied by their conduct prior to the December trade when there were many conversations.

Arrowood assisted Mr. Petit in locating, vetting, and purchasing a new, Cessna Citation II airplane ("CJ-II"), to replace his CJ-I. (*Id.*) Mr. Petit's calls with Mr. Arrowood during this timeframe often immediately precede or follow calls with the owner of the CJ-II, its pilot, various Cessna Citation service centers all over the country, and the lawyer who helped finalize the CJ-II purchase. Indeed, on December 27th, Mr. Petit and the lawyer finalized a first draft of the offer and purchase agreement for the CJ-II, and the next day, Mr. Petit and Mr. Arrowood flew to Natchez, Mississippi to look at the plane. (*Id.* ¶ 85.)

Prior to both of Mr. Arrowood's purchases, on September 27, 2007, Matria's Board of Directors resolved to explore strategic alternatives, including options to sell or refinance the company or stay the course. (*Id.* ¶¶ 18-22.) As Chairman and CEO of Matria, Mr. Petit was aware of and involved in this decision. There were no offers on the table, however, until mid-December 2007, and a final deal was not struck until late January 2008. (*Id.* ¶¶ 37, 53.)

On January 15, 2008, Matria issued a press release announcing that it was engaged in ongoing negotiations related to strategic initiatives. (*Id.* ¶ 51.) About two weeks later, Matria issued a joint press release with Inverness Medical Innovations ("Inverness") announcing a merger. (*Id.* ¶ 53.)

In May 2008, Matria stock was exchanged for Inverness preferred shares, and in July 2008, Mr. Petit decided to sell. (*Id.* ¶¶ 86-87.) He sold his Inverness in small, even-numbered blocks so as not to move the market, and he assisted Mr. Arrowood in doing the same in his IRA Account.[4] (*Id.* ¶ 88.) By contrast, Mr. Arrowood, who sold the Inverness shares in his Personal Account on his own and without Mr. Petit's knowledge, sold those shares in one single, unsophisticated transaction, which further supports the fact that Mr. Petit knew nothing about this second account or Mr. Arrowood's second purchase of shares. (*Id.* ¶ 89.)

III. STANDARD OF REVIEW

Summary judgment should be granted when the record evidence "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" Fed. R. Civ. P. 56(c). In a circumstantial evidence insider trading case, the SEC must offer more than speculation, conjecture, and strained inferences. *SEC v. Gonzalez de Castilla*, 184 F. Supp. 2d 365, 376 (S.D.N.Y. 2002); *see also SEC v. Goldinger*, No. 95-56092, 1997 U.S. App. LEXIS 730, at *7, 9 (9th Cir. Jan. 14, 1997). In such cases, summary judgment is proper where the evidence is insufficient to support a judgment in

[4] It makes no sense that Mr. Petit would have *anything* to do with Mr. Arrowood's IRA Account and Inverness shares in July 2008 if he had done something improper with respect to those shares such as tip Mr. Arrowood.

favor of the SEC. *Gonzalez*, 184 F. Supp. 2d at 376, 378-79.

Moreover, where the ultimate decision is vested with the court and not with a jury, as it is here with respect to Mr. Petit, the court is permitted to draw reasonable inferences from the undisputed facts presented by affidavits, depositions, and stipulations. *Nunez v. Superior Oil*, 572 F.2d 1119, 1124 (5th Cir. 1978).[5] Thus, in bench trials:

> [t]he judge, as trier of fact, is in a position to and ought to draw his inferences without resort to the expense of trial. . . .[I]f *the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at but one verdict, . . . the court may bypass the jury* . . . . Thus, where, as here, the evidentiary facts are not disputed, a court in a non-jury case may grant summary judgment if trial would not enhance its ability to draw inferences and conclusions.

Coats & Clark, Inc. v. Gay, 755 F.2d 1506, 1509-10 (11th Cir. 1985) (*quoting Nunez*, 572 F.2d at 1123-24) (emphasis added).

IV. ARGUMENT AND CITATION OF AUTHORITIES

Mr. Petit is entitled to partial summary judgment as to the October 25th purchase because any information about a potential merger by that date was immaterial as a matter of law. In addition, Mr. Petit is entitled to summary judgment

[5] Opinions of the Fifth Circuit Court of Appeals dated prior to 1981 are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981).

because the facts simply cannot support the inference that Mr. Petit tipped Mr. Arrowood before the October 25, 2007 trade.

A. As of October 25, any Inside Information was Immaterial as a Matter of Law.

Information is material "if its disclosure would alter the total mix of facts available to an investor and 'if there is a substantial likelihood that a reasonable shareholder would consider it important' to the investment decision." *In re Miller Indus., Inc. Sec. Litig.*, 120 F. Supp. 2d 1371, 1380 (N.D. Ga. 2000) (citation omitted) (*quoting Basic v. Levinson*, 485 U.S. 224, 246-47 (1988)).[6] To be material, the information "must be reasonably certain to have a substantial effect on the market price of the security." *Elkind v. Liggett & Myers, Inc.*, 635 F.2d 156, 166 (2d Cir. 1980) (internal quotation omitted). While the issue is a mixed question of fact and law, in appropriate cases, summary judgment is proper on the issue of materiality as a matter of law. *In re Miller*, 120 F. Supp. 2d at 1380 (citation omitted); *see also Hartford Fire Ins. Co. v. Federated Dep't Stores, Inc.*, 723 F. Supp. 976, 989 (S.D.N.Y. 1989) (noting that *Basic* implicitly recognized the propriety of summary judgment in cases where a "prospective merger is to inchoate to be material").

While a corporate merger, in and of itself, is certainly a material event, not all merger talks meet the definition of materiality because mergers are, by their nature,

[6] The standard of materiality is the same in all Section 10(b) cases. *See SEC v. Hoover*,

fickle, precarious, often drawn-out events with a high mortality rate. Accordingly, there is no bright line test or specific point in time as to when merger negotiations will become material, and each case must be assessed on its own facts. *SEC v. Geon Indus., Inc.*, 531 F.2d 39, 47 (2d Cir. 1976); *Radiation Dynamics, Inc. v. Goldmuntz*, 464 F.2d 876, 888 (2d Cir. 1972). Assessing whether a remote and uncertain future event, like a merger, is material at a given point in time, requires "balancing of both the indicated probability that an event will occur and the anticipated magnitude of the event in light of the totality of the company activity.'" *SEC v. Ginsburg*, 362 F.3d 1292, 1302 (11th Cir. 2004) (*quoting Basic*, 485 U.S. at 238). Relevant probability factors include "'indicia of interest in the transaction at the highest corporate levels, . . . board resolutions, instructions to investment bankers, and actual negotiations between principals or their intermediaries.'" *Id.* (*quoting Basic*, 485 U.S. at 239). Actual negotiations indicate "an increasing possibility of a merger occurring." *Id.* A finding of materiality is justified when the prospect of a merger is concrete and not a mere possibility. *See Taylor v. First Union Corp.*, 857 F.2d 240, 244-45 (4th Cir. 1988). In making the materiality assessment, the Court must look at the probability of a transaction on the date of the purchase (*i.e.*, October 25, 2007), and may not consider the fact that a deal was ultimately reached. *See In re Gen. Motors Class E*

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903 F. Supp. 1135, 1140, 1148 (S.D. Tex. 1995) (citations omitted).

Stock Buyout Sec. Litig., 694 F. Supp. 1119 (D. Del. 1988).

Any information about Matria's activities in October 2007 was immaterial as a matter of law because the prospect of a merger or sale of the company was remote. By October 25, 2007, no merger negotiations—even preliminary ones—had commenced between Matria and any party. Not only were there no bids or negotiations of any kind, but no party had begun any due diligence into Matria. Before October 25th, Matria had done just four things: (1) resolved to explore strategic initiatives, including a possible sale of the company or other transaction; (2) engaged an investment banker to advise the Company in connection with a possible sale or other transaction; (3) entered confidentiality agreements with three parties; and (4) given one management presentation. None of these acts, however, tip the scales from possible to probable or from immaterial to material.

A simple board resolution to explore the possibility of a sale, among other alternatives, is not material information, particularly where there are no negotiations, no party clearly interested in a merger, and no expectation of price terms or favorable negotiations. *See List v. Fashion Park, Inc.*, 227 F. Supp. 906, 909 (1964) (holding that board resolution to seek to negotiate sale or merger was not material where there was no possible price, terms of sale, knowledge of identity of interested party, and where there was no expectation that a sale or merger could be negotiated on

favorable terms); *see also Hartford*, 723 F. Supp. at 984-85 (collecting cases holding transaction too incipient to be material even where company had resolved to undertake merger or sale of company). In addition, simply hiring a preliminary investment banker to advise the Company and send out feelers,[7] especially where a second investment banker is contemplated, is not a material step in the life of a merger. *See Berreman v. West Publ'g Co.*, 615 N.W.2d 362, 372 (Minn. Ct. App. 2000) (holding immaterial as a matter of law fact that directors had decided to explore options for future of company, including possible sale, and had hired investment banker to investigate company's options where there was no decision to solicit bids and no discussions with any potential buyers). Also immaterial are steps Matria took to enable *future* due diligence by potentially interested parties, such as giving the management presentation and entering into confidentiality agreements. *See Mill Bridge V, Inc. v. Benton*, No. 08-2806, 2010 U.S. Dist. LEXIS 135375, at *47-48 (E.D. Pa. Dec. 21, 2010) ("Given that due diligence is simply the exploration of *the propriety* of doing a business deal, plain reason intimates that a confidentiality agreement entered into in anticipation of such due diligence would not reflect the start of material negotiations.") (emphasis in original). At this time and even for

[7] In the beginning, it was nothing more than a fishing expedition. Matria contacted (or was contacted) by a total of seventeen potentially interested parties between October and January 2008. (SOMF ¶ 33; *see also* Compl. ¶ 15.) No single party was interested in Matria at that time.

some time thereafter, it was just as likely that Matria's Board would decide to "stay the course" as it would pursue a merger. (*See* SOMF ¶ 40.) A potential merger at that time was still too speculative, too contingent, and too uncertain. *See Gay v. Axline*, 23 F.3d 394, 1994 U.S. App. LEXIS 8989, at *20-22 (1st Cir. 1994) (affirming trial judge's finding of immateriality where probability of a business deal was small as of particular date); *Berkowitz v. Conrail*, No. 97-1214, 1997 U.S. Dist. LEXIS 14951, at *26-28 (E.D. Pa. Sept. 25, 1997) (holding that allegations of materiality failed as a matter of law where likelihood of merger interest was not probable). Therefore any information about Matria's pre-October 25th activities was immaterial as a matter of law.

Indeed, what had not occurred by October 25, 2007 is far more telling. Matria had not yet opened its virtual data room. In fact, no parties had begun due diligence to even determine if a transaction was even feasible.[8] *See Mill Bridge*, 2010 U.S. Dist. LEXIS 135375, at *50 (concluding that parties were not engaged in "material" negotiations where due diligence had not begun and no substantive talks about possible terms had taken place); *see also Levie v. Sears Roebuck & Co.*, 676 F. Supp.

[8] The SEC alleges that "[b]y late October 2007, each of the five potential acquirers had begun formal due diligence on Matria." (Compl. ¶ 17.) Although the SEC's definition of "formal due diligence" is unclear, the allegation is misleading. No party had begun due diligence in the virtual data room before *the* relevant date—October 25th. (SOMF ¶ 28.) Moreover, only one party was allowed to access the data room in October (on the 29th), and three others, including Inverness, did not access the room until mid- to late-November. (*Id.* ¶¶ 28, 30.)

2d 680, 687-88 (N.D. Ill. 2009) (holding merger negotiations were preliminary and immaterial where no structure reached and no due diligence begun). Matria had not requested or received any bids or offers from any potential party, and had not even prepared a bid process letter. *See Hartford*, 723 F. Supp. at 989-90 (discussing findings of immateriality in cases where there were no firm offers). Moreover, Matria was not focused on reaching any sort of deal with any particular party at that point. There were no negotiations, no draft agreements, and no substantive discussions of price or deal terms with anyone. *Cf. Ginsburg*, 362 F.3d at 1299 (materiality found where company was engaged in negotiations with a single other company and where executives of both companies discussed a possible acquisition at a specific share price). Inverness, the ultimate acquirer, had not even entered the picture yet, and was actually unknown to Mr. Petit. (Petit Dep. at 89.) Matria had also not yet retained its second, independent financial advisor, which the Board had resolved to do, if and when merger talks progressed beyond a mere possibility.

Even as late as mid-December—almost two months *after* Mr. Arrowood's first purchase—Matria's Board was still uncertain about selling the Company and had not yet determined what would be a fair offer should one be presented or whether it should do nothing and "stay the course." (*Id.* ¶¶ 39-40.) Also, in December, a number of interested parties dropped out of or put the brakes on the process, including

Inverness, making the likelihood of any potential transaction even more remote.

While Matria had taken some general steps to evaluate a potential transaction for the company, Matria's Board had not decided whether to sell the Company prior to October 25, 2007. Because the likelihood of a sale was still remote and speculative in October, regardless of its preliminary testing of the waters, any information about Matria was immaterial as a matter of law. Mr. Petit is therefore entitled to partial summary judgment as to the October 25th trade.

B. The Undisputed Evidence Does Not Support a Reasonable Inference that Mr. Petit Tipped Mr. Arrowood in October 2007.

Mr. Petit is further entitled to partial summary judgment as to the October 25, 2007 trade because the SEC's circumstantial evidence is so attenuated and speculative that no reasonable fact-finder would draw the inference that Mr. Petit tipped Mr. Arrowood. Permissible inferences that may be drawn from the record evidence must "be within the range of reasonable probability, . . . and it is the duty of the court to withdraw the case from the jury when the necessary inference is so tenuous that it rests merely upon speculation and conjecture.'" *Radiation Dynamics*, 464 F.2d at 887 (*quoting Ford Motor Co. v. McDavid*, 259 F.2d 261, 266 (4th Cir. 1958)); *see also Gonzalez*, 184 F. Supp. 2d at 379 ("[T]he SEC may not base insider trading actions on strained inferences and speculation."). It is not enough for the SEC's circumstantial case to show the "*possibility* of insider trading," *Goldinger*,

1997 U.S. App. LEXIS 730, at *9-10; rather, the SEC's evidence must be able to support a verdict by the preponderance of the evidence or else summary judgment is appropriate. *Id.* at *9; *SEC v. Horn*, No. 10-cv-955, 2010 U.S. Dist. LEXIS 135000, at *19-20 (E.D. Ill. Dec. 16, 2010) (granting summary judgment where successful trades and access to inside information required factfinder to speculate that defendant possessed inside information and did not support reasonable inference of violation where only defendant traded and where it was unknown what specific inside information he allegedly had); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("[T]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.").

With respect to the October 25, 2007 purchase, the SEC has shown nothing more than the (unlikely) *possibility* of a tip, but the more logical and reasonable inference to be drawn from the undisputed facts is that Mr. Arrowood bought the stock on his own.

First, there is no temporal proximity between Mr. Arrowood's October purchase and any contact with Mr. Petit. *See Ginsburg*, 362 F.3d at 1299 ("The temporal proximity of a phone conversation between the trade and one with insider knowledge provides a reasonable basis for inferring that the basis of the trader's

belief [that the stock price is going to go up] was the inside information."). There is certainly no suspicious timing between a phone call, trip, or other contact and an immediate trade, as there is in virtually every other insider trading case brought by the SEC. *See, e.g.*, *id.* at 1296-97 (holding that inference was justified where, in separate years, CEO's brother bought stock across multiple accounts, in two different companies that CEO's company was trying to acquire, the next business day or the same day after calls with CEO, all of which immediately followed significant points in potential acquisition, and where father also purchased stock in one target company); *SEC v. Adler*, 137 F.3d 1325, 1341-42 (11th Cir. 1998) (holding that call from insider to outsider followed by immediate call from outsider to wife, who then immediately called broker to sell stock, coupled with substantial loss avoidance supported reasonable inference of improper disclosure); *SEC v. Roszak*, 495 F. Supp. 2d 875, 877-79, 887 (N.D. Ill. 2007) (holding that circumstantial evidence supported inference where tippee purchased stock within two hours of flight with insider and then, after subsequent contact with insider, tippee contacted four people, all of whom purchased large quantities of the stock, and one of whom then tipped four others).

Not only was there no call between Mr. Petit and Mr. Arrowood immediately preceding Mr. Arrowood's purchase, there were no phone calls between them in the entire *two weeks* before the trade. The last known contact between the men was on

October 11, 2007. (SOMF ¶ 84.) Under the SEC's theory, Mr. Petit tipped Mr. Arrowood—at the latest on October 11, 2007—and Mr. Arrowood *sat* on a tip from the *CEO of Matria* for *14 days* while the cash in his IRA Account collected dust.[9] The absence of any suspicious timing between a contact with Mr. Petit and Mr. Arrowood's trade makes any inference of tipping unreasonable as a matter of law. *Cf. Sawant*, 742 F. Supp. 2d at 234 ("[E]vidence of mere contact with an insider followed by a trade is not enough to create a genuine issue of material fact that illegal trading occurred.").

Second, Mr. Arrowood candidly testified and the record evidence establishes that *he tried* to contact Mr. Petit for assurance that he was making the right move investing in Matria. (SOMF ¶ 71.) Why would Mr. Arrowood need to call Mr. Petit for assurance if he had been tipped to buy Matria? Mr. Arrowood's call and his explanation for it are far more consistent with independent (and innocent) trading than with trading based on inside information. In any event, the evidence establishes that Mr. Arrowood did not reach Mr. Petit that morning.[10] (*Id.*)

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[9] Speculation by the SEC that there *could have been* some other contact between Mr. Petit and Mr. Arrowood carries no weight. *See Truong*, 98 F. Supp. 2d at 1098-99; *Horn*, 2010 U.S. Dist. LEXIS 135000, at *19-20 (holding that weak circumstantial evidence of successful trades and access to inside information would require a jury to impermissibly speculate that trade was because of possession of inside information).

[10] The SEC has no evidence that Mr. Arrowood spoke with Mr. Petit. Indeed, the circumstantial evidence—including the brevity of the call and the fact that Mr. Petit was busy preparing for the third-quarter earnings call—suggest that, at most, Mr. Arrowood reached Mr.

The SEC's speculation that the alleged tip may have come not from Mr. Petit, but rather others who are not named in the Complaint and from whom the SEC has not obtained any formal testimony, is entirely unsubstantiated. For example, the Complaint alleges that on the morning of October 25, 2007, Bill Petit, Mr. Petit's son, called Mr. Arrowood, and that Mr. Arrowood also tried unsuccessfully to call Todd Campbell, Mr. Petit's son-in-law. (*See* Compl. ¶ 32.) However, neither of these individuals could have tipped Mr. Arrowood because there is absolutely no evidence that they were aware that Matria was exploring strategic alternatives in October 2007 or at any time before the information was released to the public in January 2008. (SOMF ¶¶ 74-76.) Furthermore, it is undisputed that Mr. Arrowood did not reach Todd, and that Bill and Mr. Arrowood's conversation pertained to the new FAA chart updates that became effective on October 25, 2007. (*Id.*)

Third, the October 25th trade did not follow any significant event in the life of the exploration of strategic alternatives, and, unlike the vast majority of insider trading cases, the trade did not occur on the eve of or within days of the merger or public announcement. *See, e.g.*, *SEC v. Euro Sec. Fund*, No. 98 CIV 7347, 2000 U.S. Dist. LEXIS 13847, at *1-2 (S.D.N.Y. Sept. 25, 2000) (purchase of stock throughout negotiations of sale and day before public announcement of deal). While

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Petit's voicemail. (*See* SOMF ¶¶ 65, 70-71; *see also* Ex. 2 to Shelfer Decl. (showing no

Matria had a regularly scheduled Board meeting on October 24th, at which an update on the status of the exploration was provided, everything was still very much preliminary at that point. (SOMF ¶ 26.) The actual public announcement was almost three months out, indicating how embryonic a potential deal was in October. Given that nothing had really happened by October 24th, and certainly nothing substantive had happened just before October 11—the last known contact between Mr. Petit and Mr. Arrowood—there is no reasonable basis for inferring that Mr. Arrowood purchased Matria stock because of inside information.

Fourth, Mr. Arrowood has explained why he bought the stock on the 25th. He did not want his IRA Account sitting in cash. Just before resuming active control over his investments, the entire IRA Account had been invested in Matria and just one other stock. Plus, Matria was the only company—other than Delta—that Mr. Arrowood knew and felt comfortable with as an investment. He knew Mr. Petit was a wealthy, successful businessman. In addition, Mr. Arrowood's wife had a personal interest in Matria and in Mr. Petit due to her niece's use of the monitor invented by Mr. Petit. She followed news about them, and she learned of the third-quarter earnings call and the fact that pending earnings, at least one analyst deemed Matria to be the "bull buy of the day." From their Florida condominium, Mr. and Mrs.

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incoming call from Mr. Arrowood's cell phone to the number dialed.)

Arrowood logged onto and listened to the Matria investor call, and heard Mr. Petit state that Matria's earnings had been within the guidance range. The circumstantial evidence surrounding the trade is much more consistent with the innocent rationale offered by Mr. Arrowood than it is with the SEC's theory of an unlawful tip, particularly given the absence of suspicious behavior. *See Adler*, 137 F.3d at 1341 ("Where an inference of insider information arises from the suspicious timing of the sale, a credible and wholly innocent explanation for said sale and timing tends to rebut the inference."); *cf. Sawant v. Ramsey*, 742 F. Supp. 2d 219, 230 (D. Conn. 2010) (noting that incredible reasons for trades coupled with suspicious timing of trades and contacts between tippees provide an adequate basis for inferring tipping).

Fifth, and also unlike most insider trading cases, the SEC does not allege a pattern of suspicious calls between Mr. Petit and Mr. Arrowood or suspicious calls with or trading by any other person. That is, the SEC does not allege that Mr. Petit tipped others at this time, that he traded himself, or that Mr. Arrowood passed the tip on to third parties. *See Adler*, 137 F.3d at 1341-42 (suspicious pattern of calls involving insider, outsider, outsider's spouse, and broker); *Roszak*, 495 F. Supp. 2d at 877-79, 887 (suspicious contact with insider and pattern of contact between tippee and four others who purchased stock, one of whom then tipped four more people).

Sixth, Mr. Petit has not been evasive and has not attempted to conceal his

relationship with Mr. Arrowood, his previous investment guidance to him, or their contact. *See Sawant*, 742 F. Supp. 2d at 232 (considering fact that defendant did not attempt to conceal trade or provide misinformation in holding that circumstantial evidence was insufficient to support a reasonable jury finding of insider trading); *cf. Euro Fund*, 2000 U.S. Dist. LEXIS 13847, at *4 (evidence showed evasive conduct both with respect to trade *and* during SEC's investigation, including purchasing shares in outside account kept in violation of company policy, refusing to produce account records to company and resigning instead of producing same, concealing name of insider, and potentially destroying telephone records); *see also SEC v. Hollier*, No. 6:09-cv-0928, 2011 U.S. Dist. LEXIS 4963, at *11 (W.D. La. Jan. 18, 2011) (noting that attempts to conceal trades or relationship between tipper and tippee is circumstantial evidence that may be used to support inference of tip) (citation omitted). Mr. Petit has been forthright and cooperative with the SEC during its almost three-year investigation. Mr. Petit testified before the SEC and offered to provide additional testimony. His family, including his current wife, his former wife, his children, and his son-in-law have either testified or were interviewed by the SEC. Mr. Petit made at least seven document productions to the SEC during its investigation, and answered every follow-up question presented to him formally and informally. In addition, Mr. Petit took a polygraph exam from a polygrapher that the

SEC itself has used, and he passed with flying colors. Mr. Petit also agreed to take another polygraph conducted by the SEC, but instead the SEC never followed up on its request and chose instead to file this action.

The SEC's theory of wrongdoing as to the October 25, 2007 trade rests on pure speculation and is insufficient to support an inference that Mr. Petit tipped Mr. Arrowood. There is no suspicious phone call followed by an immediate trade. There is no suspicious behavior of any kind. There were no significant events at Matria just before the trade or the last known contact between the men. Mr. Arrowood's rationale for his trade is, unlike the SEC's theory, supported by independent, corroborating evidence. Mr. Petit is entitled to summary judgment on the October trade.

V. CONCLUSION

For the foregoing reasons, Mr. Petit respectfully requests this Court to enter partial judgment in his favor as to Count I with respect to the October 25, 2007 trade.

Respectfully submitted this 7th day of May, 2013.

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CERTIFICATE OF COMPLIANCE

This is to certify that the foregoing was prepared using Times New Roman 14 point font in accordance with Local Rule 5.1(B).

This the 7th day of May, 2013.

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CERTIFICATE OF SERVICE

The attorney whose name appears below certifies that he has this day served Plaintiff with this **MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT** by filing with the Clerk of Court using the CM/ECF system, which will automatically send email notification of filing to:

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