DAVID D. LISITZA

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EDUCATION

University of Chicago, The Law School, J.D., 2002
- Honors

University of Chicago, The College, B.A., Philosophy, 1997
- General Honors, Departmental Honors

EMPLOYMENT

Securities and Exchange Commission, Office of General Counsel
Senior Litigation Counsel: 2007-current, Washington, DC
- Wrote and edited over 40 appellate briefs, orally argued 12 appeals.
- Insider trading:
  - Wrote the SEC's briefs in *Salman*, *Newman*, *Rajaratnam*, *Gupta*, *Obus*, and *Dorozhko*.
  - Point person for coordinating national litigation strategy.
- Virtual currencies and Initial Coin Offerings:
  - Analysis of securities-law issues in the Distributed Ledger Technology Working Group
  - Chairman's Award for Excellence, The DAO Report

Mayer Brown LLP
Associate Attorney: 2005-2007, Washington, DC
- Wrote briefs in the Supreme Court & Appellate practice group.

Judge Frank H. Easterbrook, U.S. Court of Appeals for the Seventh Circuit
Law Clerk: 2004-2005, Chicago, IL

Gibson Dunn LLP
Associate Attorney: 2002-2004, Los Angeles, CA
- Appellate and trial practice included the False Claims Act, Lanham Act, and class actions.

REFERENCES

John W. Avery, Securities and Exchange Commission, 202-551-5107
Hon. Frank H. Easterbrook, U.S. Court of Appeals, 312-435-5808
Kevin S. Ranlett, Mayer Brown, 202-263-3217

BAR MEMBERSHIPS

California, U.S. Supreme Court, various courts of appeals

BRIEFS AND ORAL ARGUMENTS

Supreme Court

Salman v. United States, 137 S.Ct. 420 (2016)
The Court unanimously upheld Salman's insider trading conviction, and in adherence to *Dirks v. SEC*, held that a tipper breaches a duty of trust and confidence for personal benefit where the tipper makes a gift of confidential information to a trading relative or friend.

Merck & Co., Inc. v. Reynolds, 559 U.S. 633 (2010)
The Court agreed with amicus curiae brief that the limitations period for a private securities fraud claim does not begin to run until a plaintiff has actually discovered, or in the exercise of reasonable diligence ought to have discovered, facts constituting a misrepresentation made with scienter.

Gabelli v. SEC, 568 U.S. 442 (2013)
The Court rejected the merits brief's position that the statute of limitations period to commence an action for civil penalties based on fraudulent conduct does not accrue until the SEC discovers, or reasonably could have discovered, the fraud.

Kircher v. Putnam Funds Trust, 547 U.S. 633 (2006)
Amicus curiae brief arguing that a district court's order refusing to remove investors' claims under the Securities Litigation Uniform Standards Act to federal court based on a finding that the claims were not precluded was appealable because the order would otherwise be immune from review. The Court disagreed.

Trainer Wortham v. Betz, *cert. granted*, 559 U.S. 1103 (2010)
Amicus curiae brief recommended denial of certiorari, and argued that a private plaintiff's claim for securities fraud was untimely based on when she actually discovered facts constituting the violation. The Court remanded the case for reconsideration in light of *Merck*.

Emulex Corp. v. Varjabedian, *cert. granted*, 139 S.Ct. 782 (Jan. 4, 2019), *cert. dismissed as improvidently granted*, 2019 WL 1768137 (April 23, 2019)
Amicus curiae brief argues (1) there is no implied private right of action under Exchange Act Section 14(e), and (2) a Commission action under the first clause of Section 14(e) for a material misstatement or omission in connection with a tender offer does not require scienter and can be based on negligence.

SEC v. Bartek, *cert. dismissed*, 569 U.S. 901 (2013)
This petition for writ of certiorari argued that injunctions against securities violations, and officer and director bars, are not fines, penalties, or forfeitures, and thus are not subject to the statute of limitations period in 28 U.S.C. § 2462.

ANR Pipeline Co. v. Louisiana Tax Comm'n, *cert. denied*, 549 U.S. 822 (2006)
Amicus curiae brief arguing that the remedy for a tax that discriminated against out-of-state natural gas pipelines was a refund. The Court denied cert.

BRIEFS AND ORAL ARGUMENTS (continued)

Courts of appeals

United States v. Newman, 773 F.3d 438 (2d Cir. 2014), *petition for reh'g denied,* 2015 WL 1954058 (2015), *cert. denied*, 136 S.Ct. 242 (2015)
Wrote the SEC's amicus brief in support of rehearing. The amicus brief argued that the panel erroneously concluded that a friendship between the insider and the person to whom he disclosed inside information is insufficient to demonstrate the insider's personal benefit. *Newman* has been abrogated in part by *Salman v. United States*.

SEC v. Rajaratnam (civil penalty), 918 F.3d. 36 (2d Cir. 2019)
Court agreed with opposition brief that the district court did not abuse its discretion in ordering a $92.8 million treble civil penalty against Raj Rajaratnam, and that the district court properly calculated the base amount of Rajaratnam's civil penalty subject to trebling according to the profit gained and loss avoided as a result of the unlawful trades he executed in others' accounts. Orally argued.

SEC v. Rajaratnam (wiretap), 622 F.3d 159 (2d Cir. 2010)
The Court agreed with the opposition brief that where the U.S. Attorney's Office gives wiretap recordings to insider trading defendants, those defendants can produce the recordings to the SEC in civil discovery after a court has upheld the legality of the wiretaps.

SEC v. Gupta, 569 Fed.Appx. 45 (2d Cir. 2014), *cert. denied*, 135 S.Ct. 976 (2015)
Court agreed with opposition's position that the district court did not abuse its discretion by permanently enjoining Gupta from serving as an officer or director of a public company where he was criminally convicted for tipping inside information, or by imposing the maximum civil penalty without offsetting Gupta's criminal penalties. Orally argued.

SEC v. Obus, 693 F.3d 276 (2d Cir. 2012)
In reversing order granting summary judgment to three defendants, the Court agreed with opening and reply briefs about the civil liability standard for tippers and tippees. Orally argued.

SEC v. Dorozhko, 574 F.3d 42 (2d Cir. 2009)
The Court agreed with position taken in opening and reply briefs, that hacking into a computer system in order to obtain material nonpublic information used to trade securities may be a "deceptive device or contrivance" within the meaning of Exchange Act Section 10(b).

SEC v. Payton, 726 Fed.Appx.832 (2d Cir. 2018)
The Second Circuit affirmed the judgment and verdict against two successive tippees, notably concluding that in a civil case, a successive tippee's knowledge of the initial tipper's breach of duty for personal benefit can be based on conscious avoidance or recklessness. Wrote opposition brief and orally argued the case.

BRIEFS AND ORAL ARGUMENTS (continued)

SEC v. Huang, 684 Fed.Appx. 167 (3d Cir. 2017)
Supervised and edited brief that successfully argued that sufficient evidence supported the jury's finding of materiality regarding the information that Huang misappropriated about credit card sales at over 200 retailers, used to predict those retailers' total revenue, and traded on for a profit of over $4 million.

SEC v. Conradt, 696 Fed.Appx. 46 (2d Cir. 2017)
The Second Circuit affirmed the district court's: denial of Conradt's Rule 60(b) motion because the civil judgment against him was based on his consent, not his criminal judgment that was vacated in light of *Newman*; determination that Conradt materially breached his cooperation agreement; order imposing a $980,000 civil penalty. Supervised and edited opposition brief, and orally argued the case.

Whitley v. BP, P.L.C., 838 F.3d 523 (5th Cir. 2015)
In this private action under the Employee Retirement Income Security Act, the Department of Labor filed an amicus brief describing ways that managers of an employee stock ownership plan who are aware that the employer's publicly traded securities are materially overvalued due to an undisclosed fraud can satisfy their obligations under ERISA. The Commission's complementary amicus brief confirmed that such ESOP managers can carry out the alternatives DoL urges in a manner that is not inconsistent with the securities laws. For example, the ESOP manager can disclose the fraud, or refrain from effecting both purchases and sales on behalf of ESOP participants. The court of appeals decision did not reach any of these issues.

SEC v. Holley, No. 15-3457 (3d Cir. Oct. 15, 2015)
Supervised and edited brief arguing that the district court acted within its discretion in denying George H. Holley's motion to vacate his consent judgment under Fed. R. Civ. P. 60(b) based on *United States v. Newman*.

SEC v. Teo, 746 F.3d 90 (3d Cir. 2014), *cert. denied*, 135 S.Ct. 675 (2014)
The Court affirmed the jury's verdict that the defendants violated antifraud and shareholder reporting provisions by intentionally misrepresenting the extent and purpose of their beneficial ownership of shares, and an order requiring the defendants to disgorge the profits they obtained from selling those shares in a tender offer. The Court held that, even if that tender offer was the most direct cause of the profits, those profits were also attributable to defendants' securities-law violations. Orally argued.

SEC v. Pentagon Capital Mgmt., 725 F.3d 279 (2d Cir. 2013), *cert. denied*, 134 S.Ct. 2896 (2014)
The Court agreed that *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011), does not apply to claims under Securities Act Section 17(a), or Exchange Act Rule 10b-5(a) & (c).

BRIEFS AND ORAL ARGUMENTS (continued)

Finnerty v. Stiefel Labs, Inc., 756 F.3d 1310 (11th Cir. 2014), *cert. denied*, 135 S.Ct. 1549 (2015)
Court agreed with the amicus brief that a privately held company and its CEO violated Section 10(b) by failing to update their prior statements that became materially misleading to the investors who relied on them. The Court did not reach the amicus brief's argument that a privately-held company has a duty to disclose or abstain when repurchasing its shares from its stockholder-employees on the basis of material, nonpublic information. Orally argued.

SEC v. Todd, 642 F.3d 1207 (9th Cir. 2011)
Agreeing with opening and reply briefs, the Court reversed the order setting aside jury verdicts against the CFO and controller of Gateway computers for fraudulently inflating revenues, and reversed the order granting the CEO's motion for summary judgment for direct and control person liability.

SEC v. Collyard, 861 F.3d 760 (8th Cir. 2017)
Edited brief that successfully argued that Paul D. Crawford acted as an unregistered broker, *SEC v. Kramer*, 778 F. Supp. 2d 1320 (M.D. Fla. 2011) is inapposite, there is no "finder" exception or defense, and that 28 U.S.C. § 2462 does not apply to an injunction against violations.

SEC v. Sierra Brokerage, Inc., 712 F.3d 321 (6th Cir. 2013)
The Court accepted opposition brief's urging that summary judgment and relief ordered against defendant be affirmed, where the defendant converted a privately-held shell company into a publicly-held company without registration and failed to disclose his beneficial ownership in violation of Section 5, Section 13(d) and Section 16(a) of the Securities Act.

SEC v. Koenig, 557 F.3d 736 (7th Cir. 2009)
Affirming jury's verdict that the CFO of Waste Management violated the antifraud provisions, and agreeing that motive is irrelevant where the SEC shows intentional deceit; jurors can ask questions of witnesses; and the SEC can use testimony from the defendant's expert without listing him as a witness.

SEC v. Byers, 609 F.3d 87 (2d Cir. 2010)
Second Circuit endorsed the opposition brief's argument that the district court had discretion to enjoin involuntary bankruptcy petitions against entities in an SEC-instituted receivership. Orally argued.

CFTC & SEC v. Walsh, 712 F.3d 735 (2d Cir. 2013)
The Court quoted the SEC's opposition brief twice when affirming a *pro rata* distribution of receivership assets, and refusing to give preferential treatment to investors in a registered and audited broker-dealer compared to investors in an unregistered and unaudited company.

SEC v. Graham, 823 F.3d 1357 (11th Cir. 2016)
The Court held that statute of limitations in 28 U.S.C. § 2462 does not apply to injunctions against securities law violations. Supervised and edited opening and reply briefs, and orally argued the case.

BRIEFS AND ORAL ARGUMENTS (continued)

SEC v. Malek, 397 Fed.Appx. 711 (2d Cir. 2010)
The Court agreed with opposition brief's position that the district court had discretion to liquidate and distribute receivership assets outside of bankruptcy. Orally argued.

SEC v. Colonial Inv. Mgmt. LLC, 381 Fed.Appx. 27 (2d Cir. 2010)
The Court agreed with opposition brief and affirmed judgment and all ordered relief against Colonial and its president for manipulatively covering short positions with secondary offerings in violation of Exchange Act Rule 105. Orally argued.

SEC v. ING USA Annuity and Life Ins. Co., 360 Fed.Appx. 826 (9th Cir. 2009)
The Court agreed with the opposition brief that a district court can stay all actions brought by non-parties against receivership entities, including foreclosure and bankruptcy proceedings sought by secured creditors. Orally argued.

SEC v. Farkas, 557 Fed.Appx. 204 (4th Cir. 2014)
Supervised and edited brief that successfully argued that summary judgment and relief based on civil fraud claims should be affirmed where the defendant was convicted of a multibillion dollar fraud in connection with mortgage-backed securities.

SEC v. Aletheia Research Mgmt., 689 Fed.Appx. 512 (9th Cir. 2017)
Supervised and edited brief arguing that the district court acted within its discretion in calculating the disgorgement and civil penalty based on Peter J. Eichler's ill-gotten gains from his cherry-picking scheme.

SEC v. Gillespie, 349 Fed.Appx. 129 (9th Cir. 2009)
Opposition brief supporting summary judgment in favor of the SEC on Section 10(b) and Section 5 claims, and relief ordered against CEO and firm. Affirmed.

SEC v. Wilde, 669 Fed.Appx. 423 (9th Cir. 2013)
Supervised and edited opposition brief successfully supporting summary judgment against multiple defendants who engaged in an $11 million prime bank scheme in violation of antifraud and various other provisions of the federal securities laws.

SEC v. Imperiali, Inc., 594 Fed.Appx. 957 (11th Cir. 2014), *cert. denied*, 136 S.Ct. 346 (2015)
Supervised and edited opposition brief that successfully argued that summary judgment on the SEC's numerous securities law claims should be affirmed.

Imperato v. SEC, 693 Fed.Appx. 870 (11th Cir. 2017)
Supervised and edited brief that successfully defended the Commission's discretion in restricting Imperato's participation in various aspects of the securities industry and any offering of penny stock.

BRIEFS AND ORAL ARGUMENTS (continued)

SEC v. Bartek, 484 Fed.Appx. 949 (5th Cir. 2012), *cert. dismissed*, 569 U.S. 901 (2013)
In rejecting the SEC's positions in its brief, the Court held that an injunction against future violations and an officer and director bar were subject to the limitations period in 28 U.S.C. § 2462.

Troszak v. SEC, No. 15-3729 (6th Cir. June 29, 2016)
Supervised and edited brief that successfully defended the Commission's finding that Troszak, a registered representative, violated FINRA Rule 8210 where he refused to provide information about loans he obtained from his brokerage customers, even though the loans were not securities, because FINRA's authority is broad enough to encompass such business-related conduct.

SEC v. Sky Way Global LLC, No. 11-12510 (11th Cir. 2011)
Opening brief argued that *SEC v. Kramer*, 778 F. Supp. 2d 1320 (M.D. Fla. 2011), erroneously concluded that defendant was not a "broker." The Court dismissed the appeal because of outstanding relief determinations with regard to other defendants, despite certification under Fed. R. Civ. P. 54(b). When those relief determinations were made two years later, the SEC did not pursue an appeal.

SEC v. Wyly, *appeal docketed*, No. 15-2821 (2d Cir. Sept. 4, 2015)
Opposition brief arguing that the district court acted within its discretion in ordering the Wylys to disgorge over $275 million from their securities fraud.

State appellate courts

Martinez v. Enterprise Rent-A-Car Co., 119 Cal.App.4th 46 (2004), *review denied,* Aug. 18, 2004
Amicus curiae brief convinced the Court that dealer-to-dealer vehicle sales were exempt from complying with the California vehicle code.