I. INTRODUCTION

In 1984, Congress enacted the Sentencing Reform Act of 19841 ("Reform Act") with the basic objective of forming a fair and effective sentencing system.2 The Reform Act empowered the United States Sentencing Commission ("Sentencing Commission") to develop detailed rules prescribing suitable sentences for those convicted of federal crimes.3 The Sentencing Commission promulgated the Federal Sentencing Guidelines4 ("Guidelines") pursuant to the Reform Act.5 The Guidelines establish categories of offender characteristics and offense behavior and set out appropriate sentencing ranges for an offender based on the coordination of these two categories.6 Section 2B1.4 of the Guidelines pertains to the sentencing of offenders convicted of insider trading.7 If an inside trader's "gain resulting from the offense" is greater than $5,000, the inside trader's offense level can be increased up to thirty levels.8 In United States v. Mooney,9 the United States Court of Appeals for the Eighth Circuit became the first federal appellate court to consider how to calculate an inside trader's

5. Id. ch. 1, pt. A(1)(2).
6. Id.
7. See id § 2B1.4 (pertaining to calculating the offense level of an insider trader). This section is applicable to convictions under 15 U.S.C. § 78j and 17 C.F.R. § 240.10b-5. Id. cmt. statutory provisions.
8. Id. Depending on the gain calculation, an offender's offense level is increased according to the table in Guidelines section 2B1.1. Id. A defendant's offense level and criminal history determine the sentence he or she receives. Id. § 1B1.1. For example, a defendant with no prior criminal history and an offense level of thirty would receive a sentencing range of 97 to 121 months imprisonment. See id. ch.5, pt. A (setting out the "Sentencing Table" for offense levels up to forty-three and Criminal History Categories I through VI).
9. 425 F.3d 1093 (8th Cir. 2005)(en banc).
The Eighth Circuit in *Mooney* concluded that the plain language of the Guidelines and sentencing policy considerations required an inside trader's gain be measured by the total profit resulting from the trades. The Eighth Circuit also specifically rejected using disgorgement, a remedy used in civil securities fraud cases, to measure a defendant inside trader's gain. The dissent by Judge Bright criticized the total profit method of calculating gain under the Guidelines, stating that the Eighth Circuit majority's interpretation was dependent upon the stock market's gyrations. Instead, Judge Bright recommended that the Guidelines gain calculation be more closely tailored to the deception involved with an inside trader's trades, and should reflect changes in the market unrelated to the inside trader's conduct. Judge Bright opined that the disgorgement remedy used in civil cases should be used to arrive at an appropriate calculation of gain under the Guidelines.

Recently, in *United States v. Nacchio*, the United States Court of Appeals for the Tenth Circuit picked up where Judge Bright left off by concluding that an inside trader's gain under the Guidelines should be calculated to reflect only the gain resulting from the defendant inside trader's deception, rather than using a simple total profit calculation. Further, the Tenth Circuit in *Nacchio* specifically concluded that the civil disgorgement remedy is an appropriate tool to measure an inside trader's gain under the Guidelines. In *Nacchio*, the Tenth Circuit remanded for resentencing the sentence of Joseph Nacchio ("Nacchio"), the former Chief Executive Officer of Qwest Communica-
tions International Inc. ("Qwest").\(^\text{19}\) Relying on the Guidelines' commentary and the en banc majority in \textit{Mooney}, the United States District Court for the District of Minnesota calculated Nacchio's gain under the Guidelines using Nacchio's total net profit.\(^\text{20}\) Nacchio appealed his sentence to the Tenth Circuit, claiming that the district court incorrectly calculated his "gain resulting from the offense."\(^\text{21}\) On appeal, the Tenth Circuit determined that the district court's gain analysis did not comport with the plain language of the Guidelines and its commentary, and held that Nacchio's gain should be calculated more narrowly to produce a figure that approximately reflected the proceeds related to Nacchio's trades on material, nonpublic information.\(^\text{22}\) Further, the Tenth Circuit noted that it is appropriate to look to civil jurisprudence for proper criminal sentencing approaches, and that the civil disgorgement remedy is a proper guide for courts sentencing criminal inside traders.\(^\text{23}\)

This Note will first review the facts and holding of \textit{Nacchio} and the Tenth Circuit's rationale employed to find that the district court erred in calculating Nacchio's gain under the Guidelines.\(^\text{24}\) This Note will then provide a brief discussion of the offense of insider trading and the purpose and operation of the Guidelines.\(^\text{25}\) Next, this Note will provide a summary of \textit{Mooney} and other federal case law that addressed the calculation of gain or loss in securities fraud cases.\(^\text{26}\) This Note will establish the following: (1) the plain language of the Guidelines and its commentary support the notion that the "gain resulting from the offense" must be the gain directly resulting from the deception from the trade on material, nonpublic information; (2) the disgorgement remedy used in civil insider trading cases is an appropriate measure of ill-gotten gains for purposes of sentencing under the Guidelines; and (3) the policy objectives of the Guidelines are best served by measuring ill-gotten gains using disgorgement.\(^\text{27}\) This Note will conclude that the Tenth Circuit in \textit{Nacchio} correctly deviated from the Eight Circuit's opinion in \textit{Mooney} when it determined that an inside trader's "gain resulting from the offense" should not be measured by net profit, but by using disgorgement to measure ill-gotten gains.\(^\text{28}\)

\(^{19}\) Id. at 1064.

\(^{20}\) Id. at 1068.

\(^{21}\) Id. at 1066.

\(^{22}\) Id. at 1069, 1072.

\(^{23}\) Id. at 1072.

\(^{24}\) See \textit{infra} notes 29-118 and accompanying text.

\(^{25}\) See \textit{infra} notes 119-75 and accompanying text.

\(^{26}\) See \textit{infra} notes 176-308 and accompanying text.

\(^{27}\) See \textit{infra} notes 309-471 and accompanying text.

\(^{28}\) See \textit{infra} notes 472-83 and accompanying text.
II. FACTS AND HOLDING

In July 2000, Qwest Communications International Inc. ("Qwest") merged with another large telecommunications company, U.S. West. After the merger, Joseph Nacchio ("Nacchio"), then-acting Chief Executive Officer of Qwest, told employees the five-year business plan was to expand, die, or sell. In September 2000, Nacchio set out the upcoming year's revenue, earnings, and growth targets. Nacchio publicly announced a prediction of $21.3 billion to $21.7 billion in revenue in 2001, and set Qwest's internal targets $500 million higher than the public prediction to encourage its employees to surpass public targets. Several Qwest employees, including financial analysts, expressed concern to Nacchio that the public and internal targets were too high and believed Qwest could only make $20.4 billion, $900 million less than its public target.

One of the reasons Qwest financial analysts believed Qwest's targets were too high was the company's reliance on long-term leases, or indefeasible rights of use ("IRU"), to generate revenue. Qwest collected money for the long-term leases up front, which created one-time revenue instead of a stream of income. To attain its 2001 public target, Qwest needed to make an aggressive shift to recurring revenue streams rather than IRUs. By December 2000, Qwest executives had informed Nacchio that Qwest needed to make the shift to recurring revenue streams by April 2001, otherwise its 2001 public target would have to be forced down. Because of IRU sales, Qwest met its internal targets in the first two quarters of 2001, but the executive vice-president of wholesale markets informed Nacchio that the IRU market was dissipating and that the recurring revenue was not going to be increased enough to reduce third and fourth quarter gaps in the budget. On April 24, 2001, Nacchio announced Qwest's first quarter

29. United States v. Nacchio, 519 F.3d 1140, 1144-45 (10th Cir. 2008), vacated in part, 555 F.3d 1234 (10th Cir. 2009).
30. Nacchio, 519 F.3d at 1145.
31. Id.
32. Id.
33. Id. The vice-president of financial planning at Qwest, Robin Szellig, had received a memo titled "risk estimate" from two financial analysts, forecasting problems with Qwest's revenue guidance; she shared the memo with Qwest's Chief Financial Officer, Robert Woodruff, and later with Nacchio. Id.
34. Id.
35. Id.
36. Id. The 2001 budget projection required Qwest to double its 2000 recurring revenue growth rate, despite its poor track record in growing recurring revenue. Id.
37. Id.
38. Id. at 1145-46.
NACCHIO PROFITS

earnings to the press, and indicated to investors that Qwest would meet its public targets.\textsuperscript{39} Meanwhile, Nacchio sold more than a million shares of his stock in Qwest.\textsuperscript{40} Qwest policy allowed officers to sell stock during trading windows each quarter directly after the company announced its quarterly earnings, and Nacchio exercised $7.4 million in options in the first-quarter trading window.\textsuperscript{41} During the second trading window beginning April 26, 2001 and ending May 15, 2001, Nacchio sold more than 1.25 million shares of Qwest at prices varying from $37 to $42 per share.\textsuperscript{42} After the second-quarter trading window closed in May, Qwest’s general counsel approved Nacchio entering into an automatic sales plan whereby Nacchio would sell ten thousand shares per day if the stock price remained at least $38 per share.\textsuperscript{43} Between May 15, 2001 and May 29, 2001, Nacchio sold another seventy-five thousand shares.\textsuperscript{44}

Qwest issued a press release on July 24, 2001, announcing its second-quarter financial results and informed its investors that it was lowering its expected revenue.\textsuperscript{45} Nacchio gave a slide-show presentation on August 7, 2001, which illustrated Qwest’s annual percentage of revenue from IRU sales.\textsuperscript{46} On August 14, 2001, Qwest filed with the United States Securities and Exchange Commission (“SEC”), disclosing the magnitude of its 2000 and 2001 IRU sales.\textsuperscript{47} Finally, on September 10, 2001, Nacchio issued a press release in which he lowered the 2001 and 2002 public revenue targets.\textsuperscript{48}

On December 20, 2005, the United States Government indicted Nacchio on forty-two counts of insider trading.\textsuperscript{49} On April 19, 2007, a jury in the United States District Court of Colorado convicted Nacchio on nineteen of these counts for trades of Qwest stock options he made between April 26, 2001 and May 29, 2001.\textsuperscript{50} Nacchio appealed his conviction, and a divided United States Court of Appeals for the Tenth

\textsuperscript{39} Id. at 1146.
\textsuperscript{40} Id.
\textsuperscript{41} Id. at 1147.
\textsuperscript{42} Id.
\textsuperscript{43} United States v. Nacchio, 573 F.3d 1062, 1065 (10th Cir. 2009), cert. denied, 130 S. Ct. 54 (2009).
\textsuperscript{44} Nacchio, 573 F.3d at 1065.
\textsuperscript{45} Id. at 1066.
\textsuperscript{46} Id. This slide show presentation was also filed publicly with the U.S. Securities and Exchange Commission. Id.
\textsuperscript{47} Id. The vice-president of investor relations at Qwest testified that the magnitude of Qwest’s one-time revenue was not discovered until the August 14, 2001 filing with the SEC. Id.
\textsuperscript{48} Id.
\textsuperscript{49} Indictment, 1:05-cr-00545-EWN, 2005 WL 3690544, United States v. Nacchio, 573 F.3d 1062 (No. 07-1311).
\textsuperscript{50} Nacchio, 519 F.3d at 1144, 1147, 1169.
Circuit held that the district court had improperly excluded certain expert testimony, but upon rehearing en banc, the Tenth Circuit changed course and held the district court properly excluded the expert testimony, thereby affirming Nacchio's conviction.\(^{51}\)

Before Nacchio was sentenced, the Government and Nacchio argued to the district court regarding the proper calculation of gain for purposes of enhancing Nacchio's offense level under Federal Sentencing Guidelines\(^{52}\) ("Guidelines") section 2F1.2(b)(1).\(^{53}\) The Government and Nacchio agreed that Nacchio's gross proceeds from the relevant stock trades were $52,007,545.47, exercising the options cost $7,315,000.00, the brokerage fees paid were $60,081.09, and $16,078,147.81 was paid in taxes.\(^{54}\) The Government maintained that Nacchio's gain was $44.6 million, the net profit Nacchio received from his stock sales from April 26, 2001 to May 29, 2001, which would increase Nacchio's base offense level under the Guidelines by seventeen, and set a sentence range between seventy and eighty-seven months.\(^{55}\) Nacchio maintained that his gain was closer to $1.8 million, based on an economic event study by Professor Daniel Fischel, which estimated the portion of proceeds Nacchio obtained from the sale of stock during the insider trading period.\(^{56}\) Nacchio's calculation equaled a twelve level increase and a Guidelines' sentence range of forty-one to fifty-one months.\(^{57}\)

The district court discarded both Nacchio and the Government's arguments, and calculated Nacchio's gain to be about $28 million.\(^{58}\)

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51. *Nacchio*, 573 F.3d at 1064.
53. *Id.* at 1068. In 2001, section 2F1.2 of the Federal Sentencing Guidelines was consolidated with section 2B1.4, but both have identical language. *Id.* at 1066 n.5. Section 2F1.1 was consolidated with the current section 2B1.1 in 2001 with some minor differences. Compare U.S.S.G § 2B1.1 (2009) (setting out a table providing increase in offense levels for fraud involving $5,000 to $400 million) with U.S.S.G § 2F1.1 (2000) (setting out a table providing increase in offense levels for fraud involving $2,000 to $80 million). Section 2F1.1 provided for a one level increase for offenses involving more than $2,000, and reached a maximum increase of 18 levels for offenses involving more than $80 million. *Id.* at § 2F1.1. The current section 2B1.4 provides for a two-level increase for offenses involving more than $5,000, a 24-level increase for offenses involving more than $50 million, and reaches a maximum of a 30-level increase for offenses involving more than $400 million. *Id.* at § 2B1.4.
54. *Nacchio* 573 F.3d at 1067-68.
55. *Id.* at 1068.
56. *Id.* Professor Fischel determined the effect of the disclosures taking place after May 2001 on the price of Qwest stock and found that only the August 2001 and September 2001 disclosures were statistically significant. *Id.* Professor Fischel therefore found that the maximum amount of Nacchio's profit attributable to inside information was $1,832,561. *Id.*
57. *Nacchio*, 573 F.3d at 1068.
58. *Id.* See also Amended Memorandum of Sentencing Hearing and Report of Statement of Reasons at 4, 05-cr-00545-EWN, 2007 WL 6689514 (No. 07-1311) (determining that Nacchio's "true gain" was about $28 million).
The district court relied on the commentary to section 2F1.2 of the Guidelines and on the en banc decision of United States v. Mooney, and rejected Nacchio's assertion that "gain resulting from the offense" should only comprise profits attributable to inside information. The district court also rejected the Government's view that the amount put toward paying the trade's taxes should be included in the gain. The district court calculated that Nacchio's net profit equaled $44,692,545.47, then subtracted $16,078,147.81, which was the amount withheld for taxes, to arrive at a net gain of $28 million. Nacchio's base offense level was then increased by sixteen under section 2F1.1(b)(1)(Q) of the Guidelines. The district court also increased Nacchio's offense level by two under section 3B1.3 of the Guidelines based on an abuse of a position of trust. The district court determined Nacchio's total offense level to be twenty-six, which equaled a Guidelines sentence range of sixty-three to seventy-eight months, and sentenced Nacchio to seventy-two months in prison and two years supervised release.

Nacchio once again appealed to the Tenth Circuit, this time with regards to his sentence, claiming that the district court committed procedural error by incorrectly calculating the "gain resulting from the offense." Nacchio argued that equating gain with the total profit he made from the stock sales punished him for regular appreciation in Qwest shares from 1997 to 2001, and asserted that a market absorption approach should be used instead. The Tenth Circuit disagreed with the district court's gain analysis, and held that Nacchio's gain should be calculated more narrowly to produce a figure that approximately reflects the proceeds related to Nacchio's trades on material, nonpublic information. First, the Tenth Circuit concluded that the district court's gain calculation was not in line with the plain language of section 2F1.2 of the Guidelines and its commentary. The Tenth

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59. 425 F.3d 1093 (8th Cir. 2005) (en banc).
60. Nacchio, 573 F.3d at 1068. See also Amended Memorandum of Sentencing, supra note 58, at 7 (stating that an inside trader pockets all revenue, not just a "hypothetical slice" based on inside information.).
61. Nacchio, 573 F.3d at 1068.
62. Amended Memorandum of Sentencing, supra note 58, at 3-4.
64. Amended Memorandum of Sentencing, supra note 58, at 10.
65. Id. at 10, 17.
66. Nacchio, 573 F.3d at 1066. Nacchio also appealed the district court's order that he forfeit $52 million. Id. at 1087. The Tenth Circuit determined that the district court applied the wrong legal framework and reversed. Id. at 1090.
67. Id. at 1069.
68. Id.
69. Id. at 1072.
Circuit next looked to *Mooney* in which the United States Court of Appeals for the Eighth Circuit en banc rejected a market absorption approach for "gain resulting from the offense." 70 The dissenting opinion in *Mooney* favored adopting a market absorption approach, and opined that the "offense" is the use of deception in connection with the purchase, and not the stock transaction itself. 71 The Tenth Circuit agreed with the *Mooney* dissent, and determined that the district court must adopt an approach that would take into consideration that Nacchio's offense inheres in the deception used in the sales, and not in the sale itself, so Nacchio's gain calculation should be based upon the gain resulting from his deception. 72 The Tenth Circuit then noted that it is appropriate to look to civil jurisprudence for criminal sentencing approaches, and that the civil disgorgement remedy is a proper guide for courts sentencing criminal inside traders. 73

First, the Tenth Circuit determined that the plain language of section 2F1.2 indicates that an inside trader's gain is limited to the gain resulting from trading with insider knowledge, and is not comprised of the total amount realized from the stock sales. 74 The offense of insider trading is in essence the trading on basis of inside information, not the trade alone. 75 The Tenth Circuit reasoned that both knowledge and deceptive action are required to commit the offense of insider trading. 76 Neither a person who trades without material, non-public knowledge, nor a person who does not trade although the person has material, nonpublic knowledge have committed the offense of insider trading. 77 The Tenth Circuit reasoned that since the mere act of trading does not amount to the criminal offense of insider trading, it followed that the gain associated with lawful trading is not included toward the gain when increasing a prison sentence. 78 The Tenth Circuit determined that the Guidelines' general application instructions supported its interpretation. 79 Further, a proper interpretation of the

70. *Id.* at 1070.
71. See *id.* at 1070-71 (discussing Judge Bright's dissenting opinion in *Mooney*).
72. *Id.* at 1072.
73. *Id.* "Disgorgement is an equitable remedy designed to deter future violations of the securities laws and to deprive defendants of the proceeds of their wrongful conduct." 69 Am. Jur. 2d Securities Regulation § 1616 (2009).
74. Nacchio, 573 F.3d at 1072.
75. *Id.* See also 15 U.S.C. § 78j(b)(2000) ("[I]t shall be unlawful for any person . . . to use or employ in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance.").
76. Nacchio, 573 F.3d at 1072.
77. *Id.* See also *Mooney*, 425 F.3d at 1105 n.9 (Bright, J., dissenting) ("[T]he offense inheres not in the purchase itself, but in any deception that may be entwined with the purchase.").
78. Nacchio, 573 F.3d. at 1072.
79. *Id.* at 1073. The commentary states "offense' means the offense of conviction and all relevant conduct." U.S.S.G § 1B1.1 cmt. 1(H). Specific offense characteristics are
commentary of the Insider Trading section of the Guidelines also supported the Tenth Circuit’s reasoning. The Guidelines’ commentary specifies how to determine the gain in the language of the Guideline itself, which explicitly limits gain for insider trading to that which results “from the offense.” Thus, the Tenth Circuit concluded that the entire appreciation in value realized from trading is the gain tabulated, but that tabulation is applicable only to “the gain resulting from the offense.”

Next, the Tenth Circuit looked to several criminal and civil securities fraud cases to address the need to exclude market factors from the gain calculation. The Tenth Circuit noted that contrary to the approach taken by the district court, there is a “tangle of factors affecting price” unrelated to Nacchio’s criminal fraud that may have factored into the securities’ increase in value. The Tenth Circuit looked to a civil securities fraud case, Dura Pharmaceuticals v. Broudo, in which the Supreme Court of the United States indicated that a private plaintiff does not incur fraud-related economic loss by stock market fluctuations. The Tenth Circuit also looked to United States v. Olis, a criminal securities fraud case in which the United States Court of Appeals for the Fifth Circuit recognized that stock price fluctuations based on causes unrelated to the inside trader defendant’s offense should not be included in a Guidelines’ loss determination. The Fifth Circuit in Olis concluded that calculation of loss cannot be based solely on stock price decline because a myriad of extrinsic factors unrelated to fraudulent conduct can result in the de-

determined on the basis of factors including “all acts and omissions committed . . . or willfully caused by the defendant . . . that occurred during the commission of the offense of conviction.” Id. § 1B1.3(a)(1).

80. Nacchio, 573 F.3d at 1073. The commentary defines gain as being “the total increase in value realized through trading.” U.S.S.G. § 2B1.4 background.
81. Nacchio, 573 F.3d at 1073.
82. Id.
84. Nacchio, 573 F.3d at 1074 (quoting Dura Pharmaceuticals, 544 U.S. at 343).
86. Nacchio, 573 F.3d at 1074. The greater the time between transactions, the more likely the loss was caused by other factors. Id. (quoting Dura Pharmaceuticals, 544 U.S. at 342-43). As a matter of logic, at the moment a transaction occurs, the misrepresentation causes no loss if the purchaser sells the shares before the truth leaks out. Id. (quoting Dura Pharmaceuticals, 544 U.S. at 342-43).
87. 429 F.3d 540 (5th Cir. 2005).
88. Nacchio, 573, F.3d at 1075.
cline of stock price. Additionally, in *United States v. Zolp*, a criminal securities fraud case, the United States Court of Appeals for the Ninth Circuit stated that a court must disentangle the base value of the stock, the inflation of the value resulting from fraud, and the inflation or deflation resulting from unrelated causes. The Tenth Circuit then concluded that Nacchio's gain for purposes of sentencing should not be attributable to legitimate price increases and inherent value of Qwest shares. The Tenth Circuit stated that the Guidelines' commentary language suggests that there is a baseline stock value from which gain is gauged. Further, the Tenth Circuit determined there was no indication that the deception of Nacchio left Qwest's stock worthless. Nacchio received a benefit from the illicit effect of material, nonpublic information on Qwest's stock value, and the nondisclosure of information allowed Nacchio to benefit from the artificially high value. Additionally, the Tenth Circuit concluded that disgorgement would better serve the objective of federal sentencing to impose a punishment that reflects a defendant inside trader's culpability for the offense. The Tenth Circuit noted that although the simple net profit approach adopted by the majority in *Mooney* will probably result in more definite outcomes in criminal sentencing proceedings, certainty in outcome is not a key objective of financial fraud in federal sentencing. The Guidelines consider that some element of imprecision may be involved in financial fraud cases.

Next the Tenth Circuit determined that just as in civil cases, it is just as important in criminal cases to study the fluctuation of a stock's price after public disclosure of relevant information to establish the proper measure of illegitimate profit. Nacchio adopted his market

89. *Id.* "There is no loss attributable to a misrepresentation unless and until the truth is subsequently revealed and the price of the stock accordingly declines. Where the value of a security declines for other reasons, however, such decline, or component of the decline, is not a loss attributable to the misrepresentation." *Id.* (quoting Olis, 429 F.3d at 549).
90. 479 F.3d 715, 719-20 (9th Cir. 2007).
91. *Nacchio*, 573 F.3d at 1076 (quoting Zolp, 479 F.3d at 719-20).
92. *Id.* at 1075.
94. *Nacchio*, 573 F.3d at 1076. Qwest's stock was $19 per share at closing on September 21, 2001. *Id.*
95. *Id.*
96. *Id.* at 1088. *See also* 18 U.S.C. § 3553(a)(2003) ("The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes" for criminal punishment.).
97. *Nacchio*, 573 F.3d at 1077.
98. *Id.* "The loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information." U.S.S.G § 2F1.1 cmt. n.9 (2009).
absorption theory from the civil disgorgement remedy used by the SEC in insider trading enforcement litigation. The Tenth Circuit agreed that generally it is not inappropriate for courts engaged in sentencing to use the civil sphere for guidance when creating a proper criminal sentence. The Tenth Circuit cited United States v. Rutkoske, which stated that there was no reason why factors relevant to loss causation in civil fraud litigation should not apply to sentencing schemes where the amount of loss directly caused by fraud is a crucial determinant of the offender's sentence.

Finally, the Tenth Circuit established that disgorgement is an appropriate civil analogue to calculate gain because it endeavors to strip the offending inside trader of ill-gotten gains and deter criminal conduct. The Tenth Circuit further reasoned that the disgorgement approach seeks to hold the defendant inside trader responsible for only the profits made corresponding to the defendant inside trader's criminally culpable conduct. Therefore, the Tenth Circuit concluded that similarly situated defendant inside traders will not be treated disparately under the Guidelines. The Tenth Circuit determined that if the impact of unrelated gyrations of the market is ignored when calculating a sentence, then a convicted inside trader will probably receive a sentence detached from his own individual circumstances and conduct. From a policy perspective, the Tenth Circuit decided that it made sense to adopt disgorgement. The Tenth Circuit then paraphrased the hypothetical used by the dissent in Mooney to illustrate how unrelated market forces can lead to sentencing disparities. The Tenth Circuit hypothesized that three corporate executives, A, B, and C, acting upon the same nonpublic information,

100. Id. at 1077-78. "In a civil insider trading case, the proper amount of disgorgement is generally the difference between the value of the shares when the insider sold them while in possession of the material, nonpublic information, and their market value 'a reasonable time after public dissemination of inside information.'" Id. at 1078 (quoting SEC v. Happ, 392 F.3d 12, 31 (1st Cir. 2001)).
101. Id. at 1078. See also Kevin F. McCormick, Untangling the Capricious Effects of Market Loss in Securities Fraud Sentencing, 82 Tul. L. Rev. 1145, 1153 (2008) ("Faced with a myriad of new issues never encountered before in the criminal context, the courts have turned to civil jurisprudence for answers.").
102. 506 F.3d 170, 179 (2d Cir. 2007).
103. Nacchio, 573 F.3d at 1078. The Second Circuit in Rutkoske also cited Dura Pharmaceuticals, 544 U.S. at 342-43. Id.
104. Nacchio, 573 F.3d at 1079.
105. Id. at 1080.
106. Id.
107. Id. at 1081. A sentencing regime that ignores factors contributing to gains or losses unrelated to criminal conduct "would be at odds with the individualized sentencing objective of federal sentencing and the related concern pertaining to unwarranted sentencing disparities." Id. at n.16.
108. Id.
109. Id. 1082.
simultaneously bought one-thousand shares of stock at a rate of $5 per share. The nonpublic information was disclosed four weeks after their purchases and was absorbed by the market after the fifth week, raising the stock prices to $15 per share. Officer A sold one-thousand shares on market-absorption day, making $10,000. Officer B sold his shares three months later when the stock price had risen to $50 per share, making a total gain of $45,000. Officer C sold his shares six months later for $2 per share after the market crashed, sustaining a loss. Each Officer committed the crime of insider trading, but under the district court’s interpretation, each officer’s gain is calculated differently. Both Officer A and B would receive dissimilar increases to their offense levels, and no increase would be given to Officer C. The Tenth Circuit used this hypothetical to illustrate the flaws in the district court’s method. Ultimately, the Tenth Circuit concluded that Nacchio was entitled to resentencing using disgorgement principles, and that on remand, the district court should attempt to find a figure that more closely reflects the gain resulting from the offense of Nacchio’s insider trading.

III. BACKGROUND
A. THE OFFENSE OF INSIDER TRADING

Congress enacted the Securities Exchange Act of 1934 ("Exchange Act") to regulate securities transactions, to prevent excessive use of credit for speculation, to prevent manipulation of the prices of

110. Id. See also Mooney, 425 F.3d at 1107 (Bright, J., dissenting)(posing an identical hypothetical involving Larry, Moe, and Curly).
111. Nacchio, 573 F.3d at 1082.
112. Id. All $10,000 is illicit gain because all of it arose entirely from exploitation of his insider knowledge. Id.
113. Id. $10,000 is attributable to his exploiting the insider knowledge, but $35,000 is a result of the "ordinary vagaries of the market." Id.
114. Id.
115. Id. at 1082-83.
116. Id.
117. Id. at 1084 n.20. The sentencing judge in the district court acknowledged that Judge Bright’s hypothetical involving Moe, Curly, and Larry was “troublesome,” but ignored it, stating, “I don’t need to deal with it, do I? Because that’s not this case.” Alexandra A.E. Shapiro & Nathan H. Seltzer, Measuring “Gain” Under the Insider Trading Sentencing Guideline Based on Culpability for the Deception, 20 Fed. Sent’g Rep. 194,197 (2008).
118. Nacchio, 573 F.3d at 1087. Nacchio further appealed to the United States Supreme Court, which denied certiorari on his petition to grant summary reversal of his conviction. Nacchio v. United States, 130 S. Ct. 54 (2009). Nacchio claimed the district court barred Nacchio’s entire substantive defense and that there is a circuit split over whether an in limine motion gives a defendant sufficient notice that his expert may be excluded without a hearing on an undeveloped record. Reply Brief of Petitioner at 1, 12, Nacchio, 130 S. Ct. 54 (2009).
securities, and to disclose sufficient information regarding the exchange of securities.120 Under the Exchange Act, a “security” is, inter alia, any stock, bond, or note.121 Under section 10(b) of the Exchange Act, a person commits the offense of insider trading by using any manipulative or deceptive device to purchase or sell any security.122 Under section 240.10b-5 of the Code of Federal Regulations,123 it is also unlawful for a person to engage in fraud in connection with purchasing or selling securities.124

The Supreme Court of the United States in United States v. O’Hagan125 identified two theories of liability for insider trading.126 First, the classical theory of liability for insider trading occurs when corporate insiders have material, nonpublic information upon which they trade their securities.127 Trading on material, nonpublic information is a “deceptive device” as used in the Exchange Act because a corporate insider has a duty to the uninformed corporation’s shareholders to abstain from trading on material, nonpublic information.128 This duty arises from the trusting and confidential relationship between the shareholders and corporate insiders.129 Second, the misappropriation theory of liability for insider trading occurs when a fiduciary misappropriates confidential information in order to trade securities.130 This theory provides that a fiduciary commits fraud by breaching the duty of confidentiality to the source of the confidential information.131 The classical theory focuses on the breach of duty a corporate insider owes to the shareholders with whom the insider deals with, whereas the misappropriation theory focuses on the breach of duty owed to the source of the information rather than to a trading party.132

124. Id.
128. Id. at 652. A corporate insider may be an officer, director, attorney, accountant, consultant, or other fiduciaries of a corporation. Id.
129. Id.
130. Id.
131. Id.
132. Id. at 652-53.
B. THE FEDERAL SENTENCING GUIDELINES

In 1984, Congress enacted The Sentencing Reform Act of 1984\(^\text{133}\) ("Reform Act") with the basic objective of forming a fair and effective sentencing system.\(^\text{134}\) The Reform Act empowered the United States Sentencing Commission ("Sentencing Commission") to develop detailed rules prescribing suitable sentences for those convicted of federal crimes.\(^\text{135}\) The Sentencing Commission promulgated the Federal Sentencing Guidelines\(^\text{136}\) ("Guidelines") pursuant to the Reform Act.\(^\text{137}\) The Guidelines took effect November 1, 1987.\(^\text{138}\) The Sentencing Commission is authorized to present Congress with amendments to the Guidelines each year.\(^\text{139}\) As a result of ongoing research, experience, and analysis, the Guidelines are evolutionary, and the Sentencing Commission is permanently established to scrutinize sentencing procedures in federal courts.\(^\text{140}\) The Guidelines establish categories of offender characteristics and offense behavior, and set out appropriate sentencing ranges for an offender based on the coordination of these two categories.\(^\text{141}\)

In enacting the Reform Act, Congress's central objective was to improve the criminal justice system's ability to combat crime effectively through a fair sentencing system.\(^\text{142}\) To carry out this objective, Congress first attempted to achieve honest sentencing.\(^\text{143}\) Before the Guidelines, confusion and deception arose because courts were required to impose indeterminate sentences of imprisonment, and parole commissions determined the length of time offenders would actually be in prison.\(^\text{144}\) This procedure often resulted in a considerable reduction in the length of the imposed sentence.\(^\text{145}\) Second, Congress sought to narrow the extensive disparity in sentences for similar offenders who committed similar offenses.\(^\text{146}\) Third, Congress at-

\(\text{135}\) U.S.S.G. ch. 1, pt. A(1)(2).
\(\text{136}\) U.S. SENTENCING GUIDELINES MANUAL (2009).
\(\text{137}\) Id. ch. 1, pt. A(1)(2). The Guidelines were initially submitted to Congress on April 13, 1987. Id.
\(\text{138}\) Id.
\(\text{139}\) Id. One-hundred and eighty days after submission to Congress, the Sentencing Commission's amendments take effect automatically unless another law is passed to the contrary. Id.
\(\text{140}\) Id.
\(\text{141}\) Id.
\(\text{142}\) Id. § A(1)(3).
\(\text{143}\) Id. Honesty is achieved by the abolition of parole; the sentence which the court imposes is the sentence the offender will actually serve, with a chance for fifteen percent reduction for good behavior. Id.
\(\text{144}\) Id.
\(\text{145}\) Id. Defendants often served just one-third of the court-imposed sentence. Id.
\(\text{146}\) Id.
tempted to attain proportionality in sentencing by creating a system that sets different sentences for criminal conduct of varying severity.\textsuperscript{147}

The Guidelines set out step-by-step instructions for applying its provisions.\textsuperscript{148} First, the sentencing court uses section 1B1.2 to determine which section in Chapter Two of the Guidelines applies to the offender.\textsuperscript{149} The sentencing court refers to the Statutory Index, located in Appendix A, which lists all the statutes under which offenders may be convicted, and specifies the section in Chapter Two applicable to each statute of conviction.\textsuperscript{150} Second, the sentencing court determines the base offense level under the applicable section of Chapter Two of the Guidelines, and applies any relevant specific offense characteristics contained in the applicable Guidelines section.\textsuperscript{151} Third, the sentencing court applies adjustments from Chapter Three, Parts A, B, and C, related to the victim, the offender's role in the offense, and the obstruction of justice.\textsuperscript{152} Fourth, the sentencing court repeats steps one through three if the offender has multiple counts of convictions.\textsuperscript{153} Fifth, the sentencing court applies appropriate adjustments from Part E of Chapter Three, based on the offender's acceptance of responsibility.\textsuperscript{154} Sixth, the offender's criminal history category is determined using Part A of Chapter Four.\textsuperscript{155} Seventh, using the Sentencing Table in Part A of Chapter Five, the sentencing court determines the range that corresponds to the criminal history category and offense level, which were determined through the first

\textsuperscript{147} Id.

\textsuperscript{148} See U.S.S.G. § 1B1.1 (giving instructions (a) through (i) for applying the Guidelines).

\textsuperscript{149} Id. § 1B1.1(a).

\textsuperscript{150} Id. § 1B1.2(a). See also Appendix A, Statutory Index, (specifying the offense guideline section(s) in Chapter Two applicable to the statute of conviction).

\textsuperscript{151} Id. § 1B1.1(b).

\textsuperscript{152} Id. § 1B1.1(c). For example, Chapter Three provides for increasing an offender's offense level for hate crimes, abusing of a position of trust, or obstructing the administration of justice, and provides for decreasing the offense level if the offender played a minimal or minor role in the offense. Id. § 3A1.1(increasing offense level for hate crimes or vulnerable victims); § 3B1.3 (increasing offense level if defendant abused a position of public or private trust); § 3C1.1 (increasing offense level if defendant willfully impeded the administration of justice); § 3B1.2 (decreasing offense level if defendant participated minimally).

\textsuperscript{153} Id. § 1B1.1(d). The steps are repeated for each count, and grouped according to Part D of Chapter Three. Id.

\textsuperscript{154} Id. § 1B1.1(e). The offense level may be decreased by two levels if the defendant demonstrates clear acceptance of responsibility for the offense. Id. at §3E1.1(a).

\textsuperscript{155} Id. § 1B1.1(f). A variety of factors determine the defendant's criminal history category, such as prior sentences of imprisonment and committing the offense while on parole. Id. at §4A1.1.
several steps. Eighth, the sentencing court determines sentencing options and requirements related to imprisonment, supervision conditions, probation, fines, and restitution. Ninth and finally, the sentencing court refers to Parts H and K of Chapter Five, and other commentary or policy statements in the Guidelines, which warrant consideration in the imposition of the sentence.

Individual sections of the Guidelines are accompanied by commentary, which serves a variety of purposes. First, the commentary may interpret or explain how a Guideline section should be applied so that sentencing courts do not misapply the Guidelines. Second, the commentary explains circumstances in which departures from the Guidelines may be appropriate. Third and finally, the commentary provides background information, such as the Sentencing Commission’s reasons for enacting a particular Guidelines section.

The Statutory Index, located in Appendix A, provides that the applicable Guidelines section for insider trading convictions under 15 U.S.C. §78j are sections 2B1.1 and 2B1.4. Section 2B1.4, the Insider Trading section of the Guidelines, sets a base offense level of eight, and specifies that if “the gain resulting from the offense” is greater than $5,000, the offense level is increased according to the table in section 2B1.1. The commentary to the Insider Trading section notes that because victim loss is difficult to identify, gain is used instead of victims’ losses. Victim loss is used for other economic offenses such as embezzlement, forgery, fraud, or theft. The commentary defines gain as the entire appreciation in value realized from

156. *Id.* § 1B1.1(g). *See also id.* ch.5, pt. A (setting out the “Sentencing Table” for offense levels up to forty-three and Criminal History Categories I through VI).

157. *Id.* § 1B1.1(h). These sentencing options are located in Parts B through G of Chapter Five. *Id.*

158. *Id.* § 1B1.1(i). Part H of Chapter Five provides for consideration of Specific Offender Characteristics. *See, e.g., id.* § 5H1.1 (addressing relevance of age); § 5H1.3 (addressing relevance of mental or emotional condition); § 5H1.10 (addressing relevance of socio-economic status); and § 5H1.11 (addressing relevance of public service). Part K of Chapter Five provides grounds for departures from the Guidelines sentencing ranges. *See, e.g., id.* § 5K1.1 (allowing departure for defendant’s substantial assistance to authorities); § 5K2.7 (allowing departure for defendant’s disruption of governmental function); § 5K2.13 (allowing departure for defendant’s diminished capacity); and § 5K2.16 (allowing departure for defendant’s voluntary disclosure of offense).

159. *Id.* § 1B1.7.

160. *Id.*

161. *Id.* Departure commentary should be regarded as a policy statement’s legal equivalent. *Id.*

162. *Id.*

163. *Id.* Appendix A.

164. *Id.* § 2B1.4.

165. *Id.* § 2B1.4 cmt. background.

166. *Id.* § 2B1.1 cmt.
trading securities.\textsuperscript{167} The table in section 2B1.1 sets out the increases in offense level based on the amount of money involved in the fraud.\textsuperscript{168} Once the offense level is determined, the sentencing court refers to the Sentencing Table in Chapter Five of the Guidelines to determine the appropriate sentence range based on the offense level and the offender's criminal history.\textsuperscript{169}

In \textit{United States v. Booker},\textsuperscript{170} the Supreme Court of the United States determined that the Guidelines are no longer mandatory, but merely advisory.\textsuperscript{171} Although sentencing courts are not required to apply the Guidelines, they must consult and take the Guidelines into account when sentencing.\textsuperscript{172} Sentencing courts still treat the Guidelines as mandatory and read them with a presumption in favor of retaining long-established sentencing principles.\textsuperscript{173} The Guidelines specify that the sentencing judge should take into consideration the nature and seriousness of the offense, the statutory intent of sentencing, and the offender's relevant characteristics.\textsuperscript{174} The sentencing court should impose a sufficient sentence that is not greater than necessary to comply with sentencing purposes.\textsuperscript{175}

C. \textit{United States v. Mooney: The Eighth Circuit Rejects the Civil Disgorgement Approach and Adopts the Net-Profit Approach Calculation for Gain in the Insider Trading Section of the Guidelines}

In \textit{United States v. Mooney},\textsuperscript{176} the United States Court of Appeals for the Eighth Circuit became the first appellate court to consider the appropriate interpretation of the Federal Sentencing Guidelines\textsuperscript{177}

\begin{itemize}
\item \textsuperscript{167} Id. § 2B1.4 cmt. background. Additionally, the term "pecuniary gain" in Chapter Eight for Sentencing Organizations is defined as, "the additional before-tax profit to the defendant resulting from the relevant conduct of the offense." Id. § 8A1.2 cmt. application n.3(h).
\item \textsuperscript{168} See id. § 2B1.1(b)(1)(setting out monetary losses from $5,000 to $4.0 million and corresponding increases in offense levels).
\item \textsuperscript{169} See id. ch.5, pt. A (setting out the "Sentencing Table" for offense levels up to forty-three and Criminal History Categories I through VI).
\item \textsuperscript{170} 543 U.S. 220 (2005).
\item \textsuperscript{171} United States v. Booker, 543 U.S. 220, 245 (2005).
\item \textsuperscript{172} \textit{Booker}, 543 U.S. at 264.
\item \textsuperscript{174} U.S.S.G ch. 5, pt. A, introductory cmt.
\item \textsuperscript{175} \textit{Id}.
\item \textsuperscript{176} 425 F.3d 1093 (8th Cir. 2005) (en banc).
\item \textsuperscript{177} U.S. Sentencing Guidelines Manual (2009).
\end{itemize}
A jury in the United States District Court for the District of Minnesota convicted Michael Alan Mooney ("Mooney"), the former vice president of underwriting for United Healthcare Corporation ("United"), of mail fraud, securities fraud, and money laundering, and the district court sentenced him to forty-two months imprisonment.

Early in 1995, United began negotiations to acquire MetraHealth ("Metra"), a private health insurance company. Mooney visited Metra's headquarters on May 11, 1995 for due diligence meetings on behalf of United, and was reminded by United not to trade in his stock during this period. On April 13, 1995, Mooney exercised his right to buy twenty thousand shares of United for $36,000. On May 17, 1995, during the due diligence period, Mooney contacted his stockbroker to sell twenty thousand of the shares he purchased in April, and used a portion of the $775,500 proceeds to buy call options in United for a total price of $258,283.03. These call options gave Mooney the right to purchase forty thousand shares of United stock for $35 per share in September, December, and January. Mooney sold these options for a total return of $532,482.49. On June 20, United's stock was trading at $40.125. The first media mention of the United-Metra acquisition appeared on June 21, 1995, and the stock price rose five percent. The next day, the Wall Street Journal reported on the rumor of the upcoming acquisition, and United's stock rose another six percent. By July 15, 1995, United's stock was $44.50 per share, and at $49.00 per share by October 5, 1995.

When sentencing Mooney after his conviction for insider trading, the district court added two levels to Mooney's base offense level after calculating his total amount gained from his offense at $274,199.46. On appeal to the Eighth Circuit, Mooney argued that...
his gain should be determined by using the market absorption approach and civil disgorgement principles because “gain resulting from the offense” in the Guidelines was not clear. Mooney claimed the market value would have adjusted on June 28, 1995, to reflect the public disclosure of United's acquisition of Metra, and therefore claimed his gain was $50,467.47, which would result in a sentencing range of twenty-four to thirty months.

In rejecting Mooney's argument, the Eighth Circuit began with the plain language of the Guidelines, and stated that the phrase “gain resulting from the offense” was straightforward. The Eighth Circuit determined that the Guidelines referenced the defendant inside trader's gain and not the market gain, and that the Guidelines spoke not of potential gain, but of gain which actually resulted. The Eighth Circuit cited further support in the official commentary to section 2B1.4 of the Guidelines, which rejected victim loss as a measure of calculation and stated that gain is the entire appreciation in value realized from trading securities. The Eighth Circuit determined that since the commentary explicitly rejected using victim losses, it thus rejected the civil securities laws, which are based upon victim losses and not defendant inside trader's gains. Additionally, the Eighth Circuit determined that the plain definition of the word “realize” in the context of securities transactions means to convert securities into cash, which makes it plain that “gain” means the actual total profit made from illegal securities transactions. Because Mooney received $532,482.49 for selling his call options he had purchased for $258,283.03, the Eighth Circuit concluded his actual gain was the amount realized by his trade, $274,199.46.

The Eighth Circuit further declared that good policy reasons supported a rejection of Mooney's argument because the guidance of Guidelines commentary should not be replaced by civil law theory.

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191. Id.
192. Id. at 1098-99. Mooney subtracted his purchase price, $258,283.03, from the value of call options on June 28, $308,750. Id. at n.4.
193. Id. at 1099.
194. Id. The court went on to state that “the gain in market value that has resulted from the offense” may support Mooney's argument, but the Guideline does not use such language. Id.
195. Id.
196. Id. at 1100.
197. Id.
198. Id. at 1099-1100.
199. Id. at 1101.
The Eighth Circuit determined that calculating gain by using actual sales creates a coherent bright-line rule and eliminates the need for complicated fact-finding to determine when the market absorbed non-public information.\textsuperscript{200} The Eighth Circuit stated that imprecise standards are inappropriate in the criminal context, and that Mooney's suggested approach using market absorption and civil disgorgement principles is difficult because it is doubtful how quickly material information is absorbed into the stock market.\textsuperscript{201} Having rejected Mooney's arguments, the Eighth Circuit affirmed his sentence.\textsuperscript{202}

Judge Bright, joined by Judge Lay and Judge Bye, dissented from the majority's interpretation of section 2B1.4 of the Guidelines, stating that the majority's interpretation is dependent upon stock market gyrations.\textsuperscript{203} First, the dissent looked to the plain language of statutes and regulations describing the offense of insider trading, which is defined as employing a deceptive contrivance in the purchase of securities, not purchasing securities alone without any deception.\textsuperscript{204} Therefore, the "gain resulting from the offense" means "the gain resulting from the deception."\textsuperscript{205} The dissent further reasoned that the gain resulting from the deception ends when the deception ends, even though the stock market may continue to fluctuate without influence from deception.\textsuperscript{206}

The dissent also determined that the majority's interpretation of the Guidelines language was unreasonable because it did not promote uniformity in sentencing for equal crimes.\textsuperscript{207} Judge Bright set forth a hypothetical in which Larry, Moe, and Curly are executives who each purchase one-thousand shares of stock for $5 per share.\textsuperscript{208} After four weeks, the insider knowledge is publicly disclosed, and in the fifth week the stock price in the market, $15, reflects the absorption of the knowledge.\textsuperscript{209} Larry sells his shares on absorption day for a profit of $10,000, which is all illicit gain because it arose completely from his exploitation of inside knowledge.\textsuperscript{210} Three months later, Moe sells...
when the stock price has risen to $50 per share, making a total profit of $45,000.211 Curly waits for sixth months to sell, at which point the stock price was $2 per share.212 Under the dissent’s gain resulting from the deception approach, Larry, Moe, and Curly each would receive a two level increase to his individual base offense according to the Guidelines.213 Under the majority’s total gain approach, Larry’s offense level would be increased by two for his $10,000 gain, Moe would receive a six-level increase for his $45,000 gain, and Curly would receive no increase because he lost money.214 Assuming each individual did not have a criminal history, Larry would receive at least an additional six months in prison, Moe would receive at least an additional twenty-two months in prison, and Curly would not receive any additional months in prison.215 Judge Bright concluded that this clearly is unequal justice for equal crimes, which defeats the primary purpose of the Guidelines.216

Finally, the dissent criticized the majority’s blanket rejection of the application of civil securities fraud cases to criminal fraud cases.217 The dissent stated it is illogical that according to the majority, the quantity of gain disgorged in a civil case may be different than the gain in a criminal case.218 The dissent opined that “gain and loss” are terms with similar meanings whether used in criminal or civil contexts, and that Dura Pharmaceuticals v. Broudo219 and SEC v. MacDonald220 may be used as guidance when quantifying the profits wrongfully obtained by insider trading.221

211. Id. Moe makes $10,000 from exploiting insider knowledge, and $35,000 from the ordinary gyrations of the market without influence from the deception. Id.
212. Id.
213. Id. The district court applied the 1994 Guidelines because the Guidelines in effect in 2002 would have resulted in a higher sentencing range. Id. at 1097 (majority opinion).
214. Id. at 1107 (Bright, J., dissenting).
215. Id.
216. Id. Judge Bright also concluded that his hypothetical illustrated that, “The majority interpretation of the applicable guideline in effect is figuratively imposing sentence on the throw of the dice—the ups and downs of the stock market.” Id. at 1108 n.12.
217. See Mooney, 425 F.3d at 1108 (Bright, J., dissenting)(stating that the majority cited no case law to support its rejection of the application of civil securities fraud cases to the present case).
218. See id. at 1107 (“I do not understand how the gain or profits from a single act of insider trading could be, say, $1,000 when the Securities and Exchange Commission sues the perpetrator, but be $5,000 when the Department of Justice prosecutes the perpetrator. The difference between civil and criminal cases is not so great as that.”).
220. 699 F.2d 47 (1st Cir. 1983)(en banc).
221. Mooney, 425 F.3d at 1107-08.
D. Pertinent Civil Securities Fraud Cases Regarding Calculation of Economic Gain or Loss

1. Dura Pharmaceuticals, Inc. v. Broudo: The Supreme Court of the United States Recognizes a Tangle of Factors Affect Price Which are Not Causally Connected to a Defendant’s Misrepresentation

In *Dura Pharmaceuticals, Inc. v. Broudo*, the Supreme Court of the United States determined that private securities fraud plaintiffs cannot prove that a defendant’s fraud directly caused economic loss by only establishing that the price of the stock was inflated because of a defendant’s misrepresentation on the date of purchase. In *Dura Pharmaceuticals*, individuals who bought stock in Dura Pharmaceuticals, Inc. (“Dura”) brought a class action securities fraud suit against Dura and its directors, claiming that Dura and its directors had lied about its profits and pending approval of an asthmatic spray device by the Food and Drug Administration (“FDA”). The plaintiffs in *Dura Pharmaceuticals* alleged that as a result of Dura’s misrepresentations, the plaintiffs paid artificially high prices for Dura’s stock, and suffered damages when Dura’s stock fell after its misrepresentations were revealed. Initially, the United States District Court for the Southern District of California dismissed the plaintiffs’ complaint for failing to adequately allege loss causation. The United States Court of Appeals for the Ninth Circuit reversed the dismissal, finding that a plaintiff establishes loss causation if the plaintiff demonstrates that on the date of purchase, the stock’s price was artificially high because of the misrepresentation. The Supreme Court reversed the Ninth Circuit’s decision, stating that the Ninth Circuit’s statement of the law was “wrong” because in fraud-on-the-market cases, an inflated purchase price alone does not proximately cause or constitute relevant economic loss.

The Supreme Court explained that logically at the moment an individual purchases stocks with an inflated price, the purchaser does not suffer loss because at that instant the purchased stocks possess equivalent value. The Court continued that if the purchaser immediately sells the stock before any relevant misrepresentation is re-

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225. *Id.* at 339-40.
226. *Id.* at 340. The district court also held the plaintiffs failed to adequately allege in their complaint that the defendants had acted with knowledge. *Id.*
228. *Id.* at 342.
229. *Id.*
leased, the misrepresentation would not have caused any loss to that purchaser. Further, the Supreme Court continued, even if the purchaser waits until the misrepresentation is revealed and stock prices fall, the lower stock price does not necessarily represent only the revelation of the misrepresentation, but could also be caused by changed economic circumstances, new firm or industry specific facts or conditions, or changed investor expectations. The Court opined that the more time that passes between the purchase and sale of the security, the more probable it is that factors other than the misrepresentation caused the loss. The Supreme Court determined that a "tangle of factors" affects securities prices, and although an artificially inflated purchase price may indicate that the misrepresentation touched upon later economic loss, touching is not enough because the loss must be caused by the misrepresentation. The Supreme Court concluded that plaintiffs must prove their economic loss was proximately caused by a defendant’s misrepresentation or fraudulent conduct.

2. SEC v. MacDonald: The First Circuit Finds that a Defendant’s Wrongfully Obtained Profits Include Only the Amounts Obtained Before Sellers Could Reasonably Obtain Access to Material, Nonpublic Information

In SEC v. MacDonald, a civil securities fraud case, the United States Court of Appeals for the First Circuit considered how to quantify wrongfully obtained profits and interest from insider trading that a civil defendant inside trader must disgorge. In MacDonald, the United States District Court for the District of Rhode Island ordered James E. MacDonald, Jr. ("MacDonald") to disgorge $53,012 in profits he realized from the purchase and sale of 9,600 shares of stock from Realty Income Trust ("RIT"). The district court determined that MacDonald violated antifraud provisions of the Securities Exchange Act of 1934 ("Exchange Act") when MacDonald purchased RIT stock without disclosing material inside information he had learned while acting as the chairman of the board of trustees at RIT. MacDonald, 699 F.2d at 47-48. In particular, the district court found that MacDonald violated section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), SEC Rule 10b-5, and 17 C.F.R. § 240.10b-5. Id.
Donald appealed to the First Circuit, contending that the district court erred in measuring the amount of profits he must disgorge. The district court arrived at $53,012 by taking the total profits MacDonald realized by selling 9,600 shares of RIT stock at $10 per share early in 1977. Although the district court noted that MacDonald’s inside information was made public on December 24, 1975, and recognized that market changes took place after that date unrelated to MacDonald’s inside information, the district court nevertheless required MacDonald to disgorge all his profits because it would be “inequitable” to allow him to keep all the benefits of his illegal bargain. The First Circuit agreed with MacDonald’s contention, reversing the district court’s order that MacDonald disgorge $53,012, and concluded that upon remand, the district court must calculate MacDonald’s profits based on RIT’s stock price a reasonable time after the inside information was publically disseminated.

The First Circuit discussed the principle that defrauded sellers are only allowed to recover monies up to a reasonable time after they have discovered that publically traded securities were fraudulently obtained. The MacDonald court stated that the reason for this principle is that once sellers discover fraud, they can protect themselves against further damages by replacing the securities. The First Circuit explained that once sellers learn of undisclosed material facts, they either have to replace their securities, or bear the costs. The First Circuit further explained that fraudulent buyers achieve their maximum gain from the fraud a reasonable time subsequent to the publication of the undisclosed information. The Court recognized that once undisclosed information becomes public, any consequences arising from a shareholder’s subsequent decision to sell or retain stock are not causally related to the fraud.

The First Circuit opined that measuring ill-gotten gains without considering when the undisclosed information became public would depart from the “equal footing” principle, and would appraise a civil defendant inside trader’s gains by totally fortuitous circumstances. The Court explained that if two inside traders bought the same stock

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240. Id. MacDonald also argued that the district court erred in its materiality and scienter findings, and in its exclusion of certain evidence. Id.
241. Id. at 52.
242. Id.
243. Id. at 55.
244. Id. at 53.
245. Id.
246. MacDonald, 699 F.2d at 53.
247. Id. at 54.
248. Id.
249. Id.
at the same time and at the same price, but each trader sold at different times after public disclosure, each trader’s assessment would be measured by the date on which each trader sold stock, which is completely independent of their fraud.\textsuperscript{250} The First Circuit explained that disgorgement is remedial, not punitive, and a court may order a civil defendant inside trader to disgorge only the profits and interest that were obtained through the civil defendant inside trader’s wrongdoing.\textsuperscript{251} Thus, the First Circuit concluded, there should be a cut-off date for measuring the defendant’s wrongfully obtained profits.\textsuperscript{252} The First Circuit instructed the district court on remand to consider the price and volume of RIT shares once the inside information was disseminated and completely processed and used by investors when calculating the amount that MacDonald must disgorge.\textsuperscript{253}

E. Pertinent Criminal Securities Fraud Cases Borrowing Principles from Civil Securities Fraud Cases to Calculate Loss under the Federal Sentencing Guidelines

1. United States v. Olis: The Fifth Circuit Finds Useful Guidance in Principles for Recovery of Civil Damages for Securities Fraud to Determine the Loss Caused by a Defendant Under the Guidelines

In United States v. Olis,\textsuperscript{254} the United States Court of Appeals for the Fifth Circuit determined that it is appropriate to find guidance in civil securities fraud cases when calculating the actual loss caused by a criminal securities fraud defendant for purposes of sentencing.\textsuperscript{255} In Olis, Jamie Olis (“Olis”), the former Vice President of Finance and Senior Director of Tax Planning and International at Dynegy Corporation (“Dynegy”), was indicted on six counts of securities fraud, wire fraud, mail fraud, and conspiracy.\textsuperscript{256} The charges against Olis stemmed from work he did at Dynegy as a tax lawyer and accountant on a five-year natural gas transaction known as Project Alpha.\textsuperscript{257} The strategy behind Project Alpha was for Dynegy to borrow $300 million, but make it seem to Dynegy’s auditor and outside observers that

\textsuperscript{250} Id. The First Circuit stated that calling additional profits made by an insider who holds on to his stock until the price increased “ill-gotten gain” is “merely to give a dog a bad name and hang him.” Id.
\textsuperscript{251} Id.
\textsuperscript{252} Id.
\textsuperscript{253} Id. at 55.
\textsuperscript{254} 429 F.3d 540 (5th Cir. 2005).
\textsuperscript{255} See United States v. Olis, 429 F.3d 540, 546 (5th Cir. 2005) (discussing the usefulness of applying civil loss causation to the skeletal framework of the Guidelines).
\textsuperscript{256} Olis, 429 at 541-42.
\textsuperscript{257} Id. at 541.
Dynegy had generated the money from its business operations, rather than financing. After its review of Project Alpha, the United States Securities and Exchange Commission ("SEC") compelled Dynegy to reveal that its cash flow was derived from financing, not business operations, causing Dynegy's stock price to plummet. A jury convicted Olis in the United States District Court for the Southern District of Texas on all six counts of the indictment, and using section 2B1.1 of the Federal Sentencing Guidelines ("Guidelines"), the district court calculated Olis's offense level to be forty, including a twenty-six level enhancement based on the district court's finding that Olis's fraudulent scheme caused a loss of $105 million to one shareholder. The district court sentenced Olis to 292 months imprisonment plus three years supervised release, and ordered him to pay a $25,000 fine. Olis appealed his conviction and sentence to the Fifth Circuit, which remanded Olis's case for resentencing.

The Fifth Circuit provided the district court with an analytical framework to aid it in resentencing Olis. In particular, the Fifth Circuit addressed the district court's calculation of victim loss under the Guidelines. The Fifth Circuit explained that section 2B1.1 of the Guidelines measures criminal culpability in economic crimes based on the pecuniary impact on the offender's victims, and that the district court only needs to reasonably estimate the loss. In Olis, the actual loss from Olis's fraudulent scheme was at issue. The Fifth Circuit noted that actual loss, at a minimum, must include factual causation and legal causation. Thus, the Fifth Circuit concluded that at sentencing, a defendant is held responsible only for losses directly caused by the offense conduct, and that district courts must use a realistic and economic approach to calculate what losses were truly caused by the defendant.

258. Id.
259. Id. at 542.
261. Olis, 429 F.3d. at 543. The district court also enhanced Olis's offense level by two for using sophisticated means, two levels for using special skill which concealed the offense, and four levels for involving fifty or more victims. Id.
262. Id. at 542.
263. Id. at 544.
264. Id.
265. See id. at 545 (noting that the most important determinant in calculating Olis's sentence is the calculation of loss under the Guidelines).
266. Id. (quoting U.S. Sentencing Guidelines Manual§ 2B1.1 cmt. app. n.3C (2002)).
267. Id.
268. Id. (quoting U.S. Sentencing Guidelines Manual app. C amend. 617 (November 1, 2001)).
269. Id. at 546 (quoting United States v. West Coast Aluminum Heat Treating Co., 265 F.3d 986, 991 (9th Cir. 2001)).
The Olis court pointed out that the Guidelines only provide a skeletal framework for determining loss because dozens of federal crimes are covered by it. The Fifth Circuit stated that in securities fraud cases, some “flesh” can be added to the skeletal framework by using the guidance of principles derived from recovery of civil damages in civil securities fraud cases. The Fifth Circuit discussed two reasons why the civil damage measure is an appropriate backdrop for measuring criminal culpability in securities fraud cases. First, the Fifth Circuit stated that civil damage measure provides the standard of compensable injury for victims of securities fraud. Second, the Fifth Circuit opined that civil damage measure takes into account the complexities of the stock market. The Fifth Circuit noted that in civil securities fraud cases, no loss is attributable to a misrepresentation until the truth is revealed and the stock price declines. However, if the value of stock declines for other reasons, the Fifth Circuit stated, the decline is not considered a “loss” caused by the misrepresentation. The Fifth Circuit also looked at the Private Securities Litigation Reform Act (“PSLRA”), under which the method for determining loss is the difference between the plaintiff’s purchase price and the price once ameliorative information enters the market, less any loss that may be the result of other market factors existing during the period of loss.

The Fifth Circuit determined the district court neglected economic analysis and overemphasized its discretion as factfinder when it relied exclusively on testimony that did not take into account extrinsic factors when determining the loss caused by Olis’s fraudulent scheme. Olis pointed out that two-thirds of the decline in Dynegy’s price took place either before Project Alpha’s problems were revealed or over a week after Project Alpha restated its earnings publically. Further, the district court rejected an expert report offered by Olis, which delved into multiple factors affecting Dynegy’s stock price. The Fifth Circuit concluded that attributing $105 million in stock de-
cline to Olis greatly overemphasized his personal culpability, and that on remand, the district court must account for extrinsic factors that affected Dynegy's stock price.\textsuperscript{282}

2. United States v. Rutkoske: The Second Circuit Sees No Reason Why Relevant Considerations to Loss in Civil Fraud Cases Should Not Apply To Sentencing Under the Guidelines

In United States v. Rutkoske,\textsuperscript{283} the United States Court of Appeals for the Second Circuit concluded that loss causation considerations in civil fraud cases should apply to sentencing determinations in which the loss caused by a defendant's fraud is an important factor in the sentence length.\textsuperscript{284} In Rutkoske, David Rutkoske ("Rutkoske") was convicted of securities fraud and conspiracy to commit securities fraud by a jury in the United States District Court for the Southern District of New York.\textsuperscript{285} Rutkoske's conviction arose from the involvement of his brokerage firm, Lloyd Wade Securities ("Lloyd Wade") in a scheme to artificially increase the stock price of a start-up internet company, NetBet.\textsuperscript{286} After NetBet’s shares plummeted, more than $12 million was lost by its investors.\textsuperscript{287} Using the Federal Sentencing Guidelines\textsuperscript{288} ("Guidelines"), the district court determined that Rutkoske's total offense level was thirty-one, including a fifteen-level enhancement for causing a loss of $12,057,928.\textsuperscript{289} The Guidelines range for a total offense level of thirty-one is 108 to 135 months in prison, and the district court judge sentenced Rutkoske to 108 months' imprisonment.\textsuperscript{290}

Rutkoske appealed his conviction and the reasonableness of his sentence to the Second Circuit.\textsuperscript{291} The Second Circuit affirmed Rutkoske's conviction, but remanded for resentencing because the district court failed to consider other factors affecting the decline of

\begin{itemize}
\item \textsuperscript{282} Id. at 548-49.
\item \textsuperscript{283} 506 F.3d 170 (2d Cir. 2007).
\item \textsuperscript{284} United States v. Rutkoske, 506 F.3d 170, 178-79 (2d Cir. 2007).
\item \textsuperscript{285} Rutkoske, 506 F.3d at 171. Rutkoske was charged in the indictment with violation of 15 U.S.C. § 78j (b), among others. Id. at 172.
\item \textsuperscript{286} See id. at 172-73 (explaining how brokers in Rutkoske's brokerage firm used high pressure sales pitches to induce purchases of NetBet stock and the nondisclosure of large commissions to brokers selling NetBet stock).
\item \textsuperscript{287} Id. at 173.
\item \textsuperscript{288} U.S. SENTENCING GUIDELINES MANUAL (2009).
\item \textsuperscript{289} Rutkoske, 506 F.3d at 174. The district court used the 1998 version of the Guidelines. Id. at n.1. Rutkoske's base offense level was set at six, and various other enhancements to his offense level were added for scheming to defraud multiple victims, using mass marketing, taking a leadership role, and abusing a position of trust. Id. at 174.
\item \textsuperscript{290} Id. Rutkoske also was ordered to pay restitution in the amount of $12,057,928. Id. at 178.
\item \textsuperscript{291} Id. at 171, 178.
\end{itemize}
NetBet's stock price when the district court approximated the loss caused by Rutkoske's fraud. The Second Circuit noted that for securities fraud offenses, the amount of loss caused by the fraud is a key component in the calculation of a sentence under the Guidelines. In Rutkoske's case, the district court's determination that his fraud caused a loss of $12,057,928 increased his minimum sentence by eighty-seven months. The Second Circuit, recognizing that the Guidelines require a sentencing court to only reasonably estimate the loss, nevertheless determined that an appeals court must at least decide whether the method employed by the sentencing court to calculate loss was legally acceptable. The district court calculated Rutkoske's loss by using Lloyd Wade customers' losses in NetBet stock, plus, for unsold shares, the difference between NetBet purchase price and the value of NetBet stock three months after the charged conspiracy ended. The Second Circuit noted that the district court's calculation of loss implicitly attributed the entire amount of decline of NetBet's stock to Rutkoske's fraudulent scheme.

In Rutkoske, the Second Circuit looked to its previous decision in a criminal stock fraud case, United States v. Ebbers, in which the Second Circuit acknowledged the inherent complexities in calculating loss under the Guidelines, but underscored the importance that loss must result directly from an offender's fraud. The Second Circuit stated that numerous factors may bring about declines in stock prices between the time of the fraud and the fraud's revelation, and such losses unrelated to the fraud have to be excluded from the loss attributable to the defendant. The Second Circuit also looked to United States v. Olis, in which the United States Court of Appeals for the Fifth Circuit used guidance in calculating loss under the Guidelines by borrowing principles from civil securities fraud cases for recovery of damages. The Second Circuit also used guidance from the civil se-

292. Id. at 180-81.
293. Id. at 178.
294. Id.
295. Id. (quoting United States v. Olis, 429 F.3d 540, 545 (5th Cir. 2005)).
296. Id. at 178. The date used for unsold shares was the latest date for which there were reporting forms, but had "no particular relevance to the offense conduct." Id.
297. Id.
298. 458 F.3d 110 (2nd Cir. 2006).
299. Rutkoske, 506 F.3d at 178 (quoting United States v. Ebbers, 458 F.3d 110 (2nd Cir. 2006)).
300. Id. The Second Circuit in Ebbers maintained that the defendant's enhancement for loss would have been the same even if the district court had factored in other causes of the decline in price because the loss was so enormous. Id. at 179.
301. 429 F.3d 540, 545 (5th Cir. 2005).
302. Rutkoske, 506 F.3d at 179.
securities fraud case, Dura Pharmaceuticals, Inc. v. Broudo,\(^{303}\) in which the Supreme Court of the United States rejected a theory of loss causation which allowed plaintiffs to establish loss causation just by showing the defendants' misrepresentation inflated the purchase price.\(^ {304}\) The Second Circuit, using the Supreme Court's rationale in Dura Pharmaceuticals, noted that other factors besides misrepresentation can contribute to the decline in stock prices, and that plaintiffs must demonstrate that the misrepresentation proximately caused their economic loss.\(^ {305}\) In Rutkoske, the Government argued that the principles contained in the civil case, Dura Pharmaceuticals, should not apply in criminal cases to loss calculation.\(^ {306}\) The Second Circuit responded that its dicta in Ebbers firmly undermined the Government's contention, and further, the Second Circuit saw no reason why considerations in civil fraud cases pertaining to loss causation should not be applicable to sentencing procedures where loss is a critical factor in determining the length of an offender's sentence.\(^ {307}\) The Second Circuit concluded by remanding Rutkoske's sentence to the district court to determine the amount of loss caused by Rutkoske's fraud with consideration of other factors relevant to the decline in NetBet's stock price.\(^ {308}\)

IV. ANALYSIS

In United States v. Nacchio,\(^ {309}\) the United States Court of Appeals for the Tenth Circuit concluded that the "gain resulting from the offense" in the Federal Sentencing Guidelines\(^ {310}\) ("Guidelines") is limited to the gain produced from the trade on inside knowledge, rather than the total amount which the inside trader realized from selling stock.\(^ {311}\) The Tenth Circuit reached this conclusion by determining that the plain language of the Guidelines and its commentary do not support a reading that equates gain with the total amount realized from stock sales.\(^ {312}\) The Tenth Circuit departed from the Guidelines' interpretation of the United States Court of Appeals for the Eighth


\(^{304}\) Rutkoske, 506 F.3d at 179.

\(^{305}\) See id. (discussing Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336, 342-43 (2005)).

\(^{306}\) Id.

\(^{307}\) Id.

\(^{308}\) Id. at 180.

\(^{309}\) 573 F.3d 1062 (10th Cir. 2009), cert. denied, 130 S. Ct. 54 (2009).


\(^{311}\) United States v. Nacchio, 573 F.3d 1062, 1067 (10th Cir. 2009), cert. denied, 130 S. Ct. 54 (2009).

\(^{312}\) Id. at 1072.
Circuit in *United States v. Mooney* and determined that the offense of insider trading adheres to the deception used to trade securities, and therefore the "gain" as used in the Guidelines must be connected to the trade on material, nonpublic information. Having determined the plain language of the Guidelines does not dictate that total gains be used, the Tenth Circuit concluded the disgorgement remedy used by the United States Securities Exchange Commission ("SEC") in civil insider trading cases is an appropriate analogue to measure ill-gotten gains in criminal insider trading cases. Finally, the Tenth Circuit concluded that the policy objectives of the Guidelines are best served by using disgorgement to measure gains by inside traders.

In *Nacchio*, the Tenth Circuit's decision resulted in a federal circuit split on the interpretation of "gain resulting from the offense" in the Insider Trading section of the Guidelines when the court rejected the Eighth Circuit en banc majority's net gain approach in favor of a market gain approach. This Note's Analysis will demonstrate that the Tenth Circuit in *Nacchio* correctly deviated from the Eight Circuit's opinion in *Mooney*. First, this Analysis will demonstrate that the plain language of the Guidelines and its commentary support the notion that the "gain resulting from the offense" must be the gain directly resulting from the deception used in the trade on material, nonpublic information. Further, this Analysis will show that the disgorgement remedy used in civil insider trading cases is an appropriate measure of ill-gotten gains for purposes of sentencing under the Guidelines. Finally, this Analysis will show that the policy objectives of the Guidelines are best served by measuring ill-gotten gains using disgorgement.

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313. 425 U.S. 1093 (8th Cir. 2005) (en banc).
314. See *Nacchio*, 573 F.3d at 1072-73 (following the reasoning of the dissent in *Mooney*).
315. Id. at 1077, 1079-80. The equitable remedy of disgorgement is used to deprive defendants of the profits of their wrongful behavior, and because it is not punitive, only the defendants' profits are disgorged. 29 Am. Jur. 2d Securities Regulation § 1616 (2009).
316. Id. at 1082.
317. Compare *Nacchio*, 573 F.3d at 1080 (opining that in interpreting "gain resulting from the offense," a court's focus should be on excluding market factors unrelated to defendant's criminal conduct) with *Mooney*, 425 F.3d at 1101 (opining that in interpreting "gain resulting from the offense," the civil law remedy of disgorgement is inappropriate and that the use of actual sales creates a bright-line rule).
318. See infra notes 322-471 and accompanying text.
319. See infra notes 322-55 and accompanying text.
320. See infra notes 356-422 and accompanying text.
321. See infra notes 423-71 and accompanying text.
A. The Plain Language of the Federal Sentencing Guidelines and Its Commentary Indicate An Inside Trader's Gain Is Limited to the Gain Directly Resulting from Trading on Material, Nonpublic Information

A review of the plain language of the Federal Sentencing Guidelines322 ("Guidelines") and its commentary, the statutes governing insider trading, and Judge Bright's dissenting opinion in United States v. Mooney323 indicates that the United States Court of Appeals for the Tenth Circuit in United States v. Nacchio324 correctly determined that the gain attributable to an insider trading defendant is limited to the gain realized from the trade on material, nonpublic information, rather than the total amount the defendant inside trader received from stock sales.325 In doing so, the Tenth Circuit explicitly rejected the en banc majority opinion of the United States Court of Appeals for the Eighth Circuit in Mooney, in which the Eighth Circuit determined that the plain language and commentary of the Insider Trading section of the Guidelines indicated that "gain" refers to a defendant inside trader's net profit.326

Defendants convicted of insider trading under section 240.10b-5 of the Code of Federal Regulations327 or section 10(b) of the Securities Exchange Act of 1934328 ("Exchange Act") are sentenced under section 2B1.4 of the Guidelines.329 Section 2B1.4 of the Guidelines provides for a base offense level of eight, and if the defendant inside trader's "gain resulting from the offense" was greater than $5,000, the defendant inside trader's offense level is increased according to the table in section 2B1.1.330 The commentary to section 2B1.4 states

323. 425 F.3d 1093 (8th Cir. 2005)(en banc).
324. 573 F.3d 1062 (10th Cir. 2009), cert. denied, 130 S. Ct. 54 (2009).
325. See infra notes 333-353 and accompanying text.
326. Compare United States v. Nacchio, 573 F.3d 1086 (10th Cir. 2009)("We conclude that the ... net-profit sentencing approach does not square with the plain language of the relevant guideline ... therefore, we reject it.") with United States v. Mooney, 425 F.3d 1093, 1099 (8th Cir. 2005)(en banc) ("In interpreting the guidelines, we start with the plain language of the guideline itself ... The guideline refers to the defendant's gain, not to market gain.").
329. U.S.S.G § 2B1.4 cmt. STATUTORY PROVISIONS. The Nacchio court used the 2000 version of the Guidelines, at which time the Insider Trading section was located in § 2F1.2. Nacchio, 573 F.3d at 1066 n.5. In 2001, § 2F1.2 of the Guidelines was deleted by consolidation with § 2B1.4. Id. However, § 2F1.2 of the 2000 Guidelines and § 2B1.4 of the 2009 Guidelines have identical language. Id.
330. Id. at § 2B1.4. A defendant's offense level and criminal history determine the sentence he or she receives. Id. at § 1B1.1(g-h). For example, a defendant with no prior criminal history and an offense level of thirty would receive a sentencing range of 97 to 121 months imprisonment. See id. at ch.5, pt. A (setting out the "Sentencing Table" for offense levels up to forty-three and Criminal History Categories I through VI).
that because victims’ losses are impossible to identify, gain is used instead.\textsuperscript{331} The commentary defines gain as the total appreciation in value from trading securities.\textsuperscript{332}

The Eighth Circuit in \textit{Mooney} determined that the plain language of section 2B1.4 and its commentary are straightforward.\textsuperscript{333} In \textit{Mooney}, the Eighth Circuit interpreted the phrase, “gain resulting from the offense,” as referring to a defendant inside trader’s total gain because had the Guidelines intended to mean “the gain in market value that has resulted from the offense,” the Guidelines would have used that language specifically.\textsuperscript{334} The Eighth Circuit used further support in the commentary to section 2B1.4, which defined gain as the entire appreciation in value realized from trading securities.\textsuperscript{335} The \textit{Mooney} court stated that the commentary used ordinary words with commonly understood meanings, and that there was nothing ambiguous about the commentary language, and that “realize” in the context of securities transactions means to convert securities into cash.\textsuperscript{336} Therefore, the Eighth Circuit concluded that the “gain resulting from the offense” is the total amount actually realized by a defendant trading with material inside information.\textsuperscript{337}

The language of section 2B1.4 is straightforward, but as Judge Bright in his dissenting opinion in \textit{Mooney} and the Tenth Circuit in \textit{Nacchio} pointed out, the Eighth Circuit en banc majority in \textit{Mooney} omitted a critical element: defining the offense.\textsuperscript{338} Unlike the majority in \textit{Mooney}, the \textit{Nacchio} court considered the nature of the offense of insider trading when looking at the plain language of section 2B1.4.\textsuperscript{339} To determine what the offense of insider trading is, the statutes and regulations governing insider trading must be consulted.\textsuperscript{340} Under section 10(b) of the Exchange Act, a person commits

\textsuperscript{331} \textit{Id.} at § 2B1.4 CMT. BACKGROUND.
\textsuperscript{332} \textit{Id.}
\textsuperscript{333} \textit{Mooney}, 425 F.3d at 1099.
\textsuperscript{334} \textit{Id.}
\textsuperscript{335} \textit{Id.}
\textsuperscript{336} \textit{Id.} at 1100 (citing \textit{OXFORD ENGLISH DICTIONARY} (2d ed.1989)).
\textsuperscript{337} \textit{Id.} The Eighth Circuit calculated Mooney's gain as the profit he realized when he acquired $532,482.49 for sale of his call options which he had bought for $258,283.03. \textit{Id.}
\textsuperscript{338} \textit{See Mooney}, 425 F.3d at 1106 (Bright, J., dissenting)(noting that the majority correctly recognized that gain is defined in the commentary to section 2B1.4, but that the offense must also be defined) \textit{and Nacchio}, 573 F.3d at 1071-72 (noting that after considering the contrasting interpretations in \textit{Mooney}, the gain computation of the district court, relying on \textit{Mooney}, “does not square with the plain language” of section 2B1.4 and its commentary).
\textsuperscript{339} \textit{Nacchio}, 573 F.3d at 1072-73 (quoting \textit{Mooney}, 425 F.3d at 1105 (Bright, J., dissenting)(concluding that it is not sufficient to only define gain without also defining the offense).
\textsuperscript{340} \textit{Mooney}, 425 F.3d at 1105 (Bright, J., dissenting).
the offense of insider trading by using any manipulative or deceptive device to purchase or sell securities.\textsuperscript{341} Under section 240.10b-5 of the Code of Federal Regulations,\textsuperscript{342} it is unlawful for a person to engage in fraud in connection with purchasing or selling securities.\textsuperscript{343} According to the plain language of the statutes and regulations, the offense is not trading the stock itself, but rather, it is the use of any manipulative or deceptive device in connection with the trading of securities.\textsuperscript{344} An insider to a corporation who trades securities without possessing material, nonpublic information does not commit the offense of insider trading.\textsuperscript{345} Likewise, a corporate insider who possesses material, nonpublic information, but does not trade securities while in possession of it, does not commit the offense of insider trading.\textsuperscript{346} Because the offense lies in the deception, the gain, which section 2B1.4 measures, is the gain resulting from the deception.\textsuperscript{347} As the Tenth Circuit in \textit{Nacchio} noted, the commentary to section 2B1.4 does not contradict a reading that equates offense with deception.\textsuperscript{348} The commentary describes gain as the entire increase in worth obtained from securities trading, but this calculation is only applicable to the narrow definition of gain that results from the offense, that is, the deception.\textsuperscript{349}

Similar to the Eighth Circuit in \textit{Mooney}, the Tenth Circuit in \textit{Nacchio} began with an analysis of the plain language of the Insider Trading section of the Guidelines and its commentary to determine the appropriate sentence for an inside trader.\textsuperscript{350} In \textit{Mooney}, the

\begin{thebibliography}{99}
\bibitem{341} \textit{15 U.S.C. § 78j(b)(2000)}.
\bibitem{342} \textit{17 C.F.R. § 240.10b-5 (2007)}.
\bibitem{343} \textit{17 C.F.R. § 240.10b-5 (2007)}.
\bibitem{344} \textit{15 U.S.C. § 78j(b)(2000)}. \textit{See also} \textit{Mooney}, \textit{425 F.3d at 1106} (Bright, J., dissenting)\textsuperscript{\textendash}\textsuperscript{\textendash}("The offense" is not the purchase of stock itself, but the use of a manipulative or deceptive contrivance in connection with the purchase.")\textsuperscript{\textendash}\textsuperscript{\textendash}(emphasis in original), \textit{and} \textit{Nacchio}, \textit{573 F.3d at 1072} ("The essence of the offense of insider trading is not the trading itselfstanding alone, a lawful act-but trading \textit{on the basis of insider information.}"\textsuperscript{\textendash}\textsuperscript{\textendash}(emphasis in original)).
\bibitem{345} \textit{Nacchio}, \textit{573 F.3d at 1072}.
\bibitem{346} \textit{Id}.
\bibitem{347} \textit{Mooney}, \textit{425 F.3d at 1106} (Bright, J., dissenting)(emphasis added). \textit{See also} \textit{Nacchio}, \textit{573 F.3d at 1073} (determining that the gain computed is the result of the deceptive nature of the action).
\bibitem{348} \textit{Nacchio}, \textit{573 F.3d at 1073}.
\bibitem{349} \textit{Id}. \textit{See also} \textit{Mooney}, \textit{425 F.3d at 1105} (Bright, J., dissenting) (stating that gain must be limited to that resulting from the offense because it would be absurd for the gain to include all the lifetime stock gains of the defendant). \textit{But see} \textit{Mooney}, \textit{425 F.3d at 1100} (majority opinion)(stating that the commentary's use of the word realized clearly means that gain is the total profit actually produced from the illegal securities transactions of the defendant).
\bibitem{350} \textit{See} \textit{Nacchio}, \textit{573 F.3d. at 1072} (considering first the plain language meaning of the insider trading section of the Guidelines); \textit{and} \textit{Mooney}, \textit{425 F.3d at 1099} (beginning with the plain language of the guidelines).
\end{thebibliography}
Eighth Circuit's en banc majority concluded that the plain language of the Guidelines indicated that a defendant insider trader's “gain resulting from the offense” is the total amount actually realized by the defendant trading with material inside information. However, in its examination of the plain language of section 2B1.4 of the Guidelines, the Tenth Circuit in Nacchio arrived at a different reading and concluded that the defendant inside trader's gain must be measured with regards to the deception rather than the total profits received. Essential to the different conclusions regarding the plain language of section 2B1.4 of the Guidelines reached by the Tenth Circuit in Nacchio and the Eighth Circuit in Mooney was the Tenth Circuit's consideration of what constitutes the offense of insider trading. Because the offense of insider trading lies in the deception in connection with the trading of securities, the gain that section 2B1.4 of the Guidelines endeavors to measure is the gain resulting from the deception, rather than the gain resulting from the trade. Thus, in considering the essence of the offense of insider trading, the Tenth Circuit in Nacchio properly diverged from the Eighth Circuit in Mooney when it rejected the Mooney court's reading of section 2B1.4 of the Guidelines, which equated the defendant's “gain resulting from the offense” with the defendant's net profit.

351. Mooney, 425 F.3d at 1100.
352. See Nacchio, 573 F.3d at 1072 (concluding that any gain connected to lawful trading should not be taken into account when increasing a prison sentence). See also Mooney, 425 F.3d at 1106 (Bright, J., dissenting) (noting that the majority correctly recognized that gain is defined in the commentary to section 2B1.4, but that the offense must also be defined).
353. Compare Nacchio, 573 F.3d at 1072 (noting that a corporate insider does not commit the offense of insider trading if he or she does not have material, nonpublic information because knowledge and deception are necessary elements to commit the offense), with Mooney, 425 F.3d at 1106 (Bright, J., dissenting) (noting that the majority opinion neglected to define the offense of insider trading).
354. See Mooney, 425 F.3d at 1106 (Bright, J., dissenting) (“The offense” is not the purchase of stock itself, but the use of a manipulative or deceptive contrivance in connection with the purchase.”) (emphasis in original); Nacchio, 573 F.3d at 1072 (“The essence of the offense of insider trading is not the trading itself—standing alone, a lawful act—but trading on the basis of insider information.”) (emphasis in original); and Nacchio, 573 F.3d at 1073 (concluding that the gain computed are the results of the deceptive nature of the action)(emphasis added).
355. See supra notes 333-54.
B. THE CIVIL REMEDY OF DISGORGEMENT IS AN APPROPRIATE TOOL TO MEASURE THE “GAIN RESULTING FROM THE OFFENSE” FOR PURPOSES OF SENTENCING UNDER THE INSIDER TRADING SECTION OF THE GUIDELINES

In United States v. Nacchio, the United States Court of Appeals for the Tenth Circuit determined that a defendant inside trader’s “gain” under section 2B1.4 of the Federal Sentencing Guidelines should reflect only the gain resulting from the defendant inside trader’s deception, rather than the defendant inside trader’s net profit from trading securities. To measure the gain resulting from an inside trader’s deception, the Tenth Circuit concluded that the civil remedy of disgorgement is a suitable guidepost for sentencing courts to use because it excludes external factors which are not related to the defendant inside trader’s culpable conduct. Previously, the United States Court of Appeals for the Eighth Circuit in United States v. Mooney rejected the use of disgorgement to measure a defendant inside trader’s gain under the Guidelines because it determined there was no support in other judicial decisions or the Guidelines for using a civil law standard. However, a review of civil securities fraud cases discussing the importance of excluding external market factors which affect securities prices, and criminal securities fraud cases borrowing principles from civil securities fraud cases when sentencing securities fraud defendants under the Guidelines, demonstrates that the Nacchio court correctly departed from the Mooney court’s erroneous conclusion discarding disgorgement.

1. The Tenth Circuit Correctly Recognized that there is a Myriad of Factors Not Related to Nacchio’s Criminal Fraud That May Have Contributed to the Increase in the Price of Securities.

The United States Court of Appeals for the Tenth Circuit in United States v. Nacchio determined that the United States District Court for the District of Colorado’s use of Joseph Nacchio’s (“Nacchio”) net profits did not take into account the myriad of factors not related to his criminal conduct which may have contributed to the

356. 573 F.3d 1062 (10th Cir. 2009), cert. denied, 130 S. Ct. 54 (2009).
359. Nacchio, 573 F.3d at 1072, 1080.
360. 425 F.3d 1093 (8th Cir. 2005)(en banc).
362. See infra notes 363-421 and accompanying text.
363. 573 F.3d 1062 (10th Cir. 2009), cert. denied, 130 S. Ct. 54 (2009).
higher price of the securities.\textsuperscript{364} Previously, in \textit{United States v. Mooney},\textsuperscript{365} the United States Court of Appeals for the Eighth Circuit ignored the presence of external market factors when calculating a civil defendant inside trader’s gain.\textsuperscript{366} A review of the market principles set out by the Supreme Court of the United States in \textit{Dura Pharmaceuticals, Inc. v. Broudo},\textsuperscript{367} and by the United States Court of Appeals for the First Circuit in \textit{SEC v. MacDonald},\textsuperscript{368} indicates that the Tenth Circuit in \textit{Nacchio} correctly recognized that factors unrelated to Nacchio’s misrepresentations may have affected the price of Qwest Communications International, Inc.’s (“Qwest”) stock.\textsuperscript{369}

In \textit{Dura Pharmaceuticals}, the Court recognized that a “tangle of factors” affects securities prices.\textsuperscript{370} The Supreme Court declared that an inflated purchase price alone does not proximately cause or constitute relevant economic loss.\textsuperscript{371} The Court explained that if the purchaser immediately sells the stock before any relevant nonpublic information is released, the misrepresentation would not have caused any loss to that purchaser.\textsuperscript{372} Further, the Court continued, even if the purchaser waits until the misrepresentation is revealed and stock prices fall, the lower stock price does not necessarily represent only the revelation of the misrepresentation, but could also be caused by changed economic circumstances.\textsuperscript{373} The more time which passes between the stock transactions, the more probable it is that factors other than the misrepresentation caused the loss.\textsuperscript{374}

Similarly, in the civil securities fraud case \textit{SEC v. MacDonald},\textsuperscript{375} the United States Court of Appeals for the First Circuit recognized that once undisclosed information becomes public, any consequences arising from a shareholder’s subsequent decision to sell or retain stock are not causally related to the fraud.\textsuperscript{376} In \textit{MacDonald}, the First Circuit determined that an inside trader must disgorge ill-gotten gains as measured a reasonable time after the inside information was publi-

\begin{itemize}
  \item \textsuperscript{364} United States v. Nacchio, 573 F.3d 1062, 1074 (10th Cir. 2009), \textit{cert. denied}, 130 S. Ct. 54 (2009).
  \item \textsuperscript{365} 425 F.3d 1093 (8th Cir. 2005)(en banc).
  \item \textsuperscript{366} \textit{See} United States v. Mooney, 425 F.3d 1093, 1108 n.12 (8th Cir. 2005) (en banc) (Bright, J., dissenting) (stating that the majority’s approach depends on the stock market’s ups and downs).
  \item \textsuperscript{367} 544 U.S. 336 (2005).
  \item \textsuperscript{368} 699 F.2d 47 (1st Cir. 1983)(en banc).
  \item \textsuperscript{369} \textit{See infra} notes 370-92 and accompanying text.
  \item \textsuperscript{370} \textit{Dura Pharmaceuticals, Inc. v. Broudo}, 544 U.S. 336, 343 (2005).
  \item \textsuperscript{371} \textit{Dura Pharmaceuticals}, 544 U.S. at 342.
  \item \textsuperscript{372} \textit{Id.}
  \item \textsuperscript{373} \textit{Id.} at 342-43.
  \item \textsuperscript{374} \textit{Id.} at 343.
  \item \textsuperscript{375} 699 F.2d 47 (1st Cir. 1983)(en banc).
  \item \textsuperscript{376} \textit{SEC v. MacDonald}, 699 F.2d 47, 54 (1st Cir. 1983)(en banc).
\end{itemize}
cally disseminated. The First Circuit opined that measuring ill-gotten gains without considering when the undisclosed information became public would appraise a defendant inside trader's gains by totally fortuitous circumstances. The First Circuit explained that if two inside traders simultaneously bought identical stock at the same price, but sold it at different times after public disclosure, the gain of each inside trader would be measured only by the date on which each sold stock, which is completely independent of their fraud. Thus, the First Circuit concluded, there should be a cut-off date for measuring the civil defendant inside trader's wrongfully obtained profits.

Both *Dura Pharmaceuticals* and *MacDonald* stand for the general proposition that other factors besides the defendant inside trader's fraud may affect market prices of securities, and a defendant inside trader should not be held accountable for these factors. Causation is a critical consideration in both *Dura Pharmaceuticals* and in *MacDonald*. Although the *Dura Pharmaceuticals* and *MacDonald* decisions dealt with civil penalties, the Tenth Circuit in *Nacchio* recognized that the same “tangle of factors” affects stock prices in criminal cases. Just as the *MacDonald* court recognized that a civil defendant inside trader's ill-gotten gains should be measured by using the stock price a reasonable time after the inside information was publicly disseminated, the *Nacchio* court concluded that it is equally important to scrutinize the stock price's fluctuation once the relevant inside information is publicized to determine the criminal defendant.

378. Id. at 54.
379. Id. The First Circuit stated that calling additional profits made by an insider who holds on to his stock until the price increased “ill-gotten gain” is “merely to give a dog a bad name and hang him.” Id.
380. Id.
381. *See Dura Pharmaceuticals*, 544 U.S. at 343 (stating that the more time which passes between the purchase and sale of the security, the more probable it is that factors other than the misrepresentation caused the loss), and *MacDonald*, 699 F.2d at 55 (stating that measuring ill-gotten gains without considering when the undisclosed information became public would appraise a defendant's gains by totally fortuitous circumstances).
382. *See Dura Pharmaceuticals*, 544 U.S. at 343 (determining that the loss must be caused by the misrepresentation), and *MacDonald*, 699 F.2d at 52 (stating that once undisclosed information becomes public, any consequences arising from a shareholder's subsequent decision to sell or retain stock are not causally related to the fraud).
383. *Compare Dura Pharmaceuticals*, 544 U.S. at 338 (considering private plaintiffs' claim that they incurred economic loss caused by defendant's fraud), and *MacDonald*, 699 F.2d at 48 (considering the S.E.C.'s civil disgorgement proceeding against defendant), with *Nacchio*, 573 F.3d at 1064, 1078-79 (considering criminal defendant's gain calculation under the Guidelines while recognizing that market factors present in civil cases are also present in criminal cases).
inside trader’s illegal profit. However, in Mooney, the Eighth Circuit came to the exact opposite conclusion as the Nacchio court did, stating that its net profit approach eliminates the extensive factfinding required to determine when nonpublic information has been absorbed by the market.

Further, although it was a civil case which did not interpret the “gain resulting from the offense” as used in section 2B1.4 of the Federal Sentencing Guidelines ("Guidelines"), the MacDonald decision is also instructive because it quantified the wrongfully obtained profits and interest from insider trading, which is clearly similar to the Guidelines language. In MacDonald, the First Circuit recognized that using a civil defendant inside trader’s total profits would appraise the civil defendant inside trader’s gains by totally fortuitous circumstances. Likewise, the Nacchio court opined that using the criminal defendant inside trader’s net profit to measure his gain under the Guidelines would appraise the defendant inside trader’s gain by external market factors unrelated to the offense.

Contrary to the Nacchio court’s consideration of MacDonald and Dura Pharmaceuticals, the Eighth Circuit in Mooney rejected the idea that these cases may be instructive when determining an inside trader’s gain for purposes of sentencing. However, as the Nacchio court recognized, the same “tangle of factors” present in civil securities cases such as MacDonald and Dura Pharmaceuticals are also present in criminal cases. Unlike the Nacchio court’s approach, the

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384. See MacDonald, 699 F.2d at 55 (instructing the district court to measure defendant’s ill-gotten gains by using the stock price a reasonable time after the inside information was publically disseminated), and Nacchio, 573 F.3d at 1078-79 (concluding it is equally important in criminal cases to look at the movement of prices of stock once the relevant information is publicized).

385. Compare Nacchio, 573 F.3d at 1078-79 (determining that it is important to look at the movement of prices of stock once the relevant information is made public), with Mooney, 425 F.3d at 1101 (determining that the extensive fact-finding required to determine when nonpublic information is absorbed by the market sets an imprecise standard).


387. Compare MacDonald, 699 F.2d at 54 (considering the amount the defendant needed to disgorge using his "profits and interest wrongfully obtained"), with U.S.S.G. § 2B1.4 (measuring the defendant’s "gain resulting from the offense").

388. MacDonald, 699 F.2d at 55.

389. See MacDonald, 699 F.2d at 55 (concluding that requiring a defendant to disgorge his total profits would appraise his gains by totally fortuitous circumstances), and Nacchio, 573 F.3d at 1074 (concluding that the net profit approach ignored external factors which could have increased the price of the security in a criminal case).

390. Compare Nacchio, 573 F.3d at 1074 (opining that the net profit approach ignored external factors which could have increased the price of the security in a criminal case), with Mooney, 425 F.3d at 1100, 1100 n.6 (opining the Guidelines commentary rejects the MacDonald remedy and makes it clear total profit should be used, and also determining that Dura Pharmaceuticals is inapposite).

391. Nacchio, 573 F.3d at 1078.
Mooney court’s refusal to consider external market factors is not grounded in economic reality, and therefore was erroneous.\textsuperscript{392} Thus, Tenth Circuit correctly recognized that just as in civil securities fraud cases such as \textit{Dura Pharmaceuticals} and \textit{MacDonald}, a criminal defendant inside trader should only be held accountable for the gain directly resulting from the fraud, and not external market factors.\textsuperscript{393}

2. \textbf{The Tenth Circuit Correctly Determined that it is Appropriate to Borrow the Disgorgement Remedy from Civil Securities Fraud Cases to Calculate Nacchio’s Gain Under the Federal Sentencing Guidelines}

Once the United States Court of Appeals for the Tenth Circuit in \textit{United States v. Nacchio}\textsuperscript{394} concluded that external market factors should be excluded from a defendant inside trader’s gain calculation under the Federal Sentencing Guidelines\textsuperscript{395} ("Guidelines"), the court determined that the civil remedy of disgorgement is an appropriate way to measure this gain.\textsuperscript{396} In adopting disgorgement, the Tenth Circuit correctly departed from the United States Court of Appeals for the Eighth Circuit in \textit{United States v. Mooney},\textsuperscript{397} in which the Eighth Circuit rejected the use of a civil law standard to interpret the Guidelines.\textsuperscript{398} The Tenth Circuit’s incorporation of a civil standard into a criminal case is supported by the United States Court of Appeals for the Fifth Circuit’s decision in \textit{United States v. Olis},\textsuperscript{399} and by the United States Court of Appeals for the Second Circuit’s decision in \textit{United States v. Rutkoske},\textsuperscript{400} in which the Fifth and Second Circuits used guidance from the civil sphere to calculate criminal securities fraud defendants’ losses for purposes of sentencing.\textsuperscript{401}

\textsuperscript{392} Compare \textit{Nacchio}, 573 F.3d at 1086 (concluding that a sentencing court must make an analysis based on economic reality, and that it is appropriate to find guidance in the civil sphere to make this analysis) with \textit{Mooney}, 425 F.3d at 1101 (concluding that civil law theory has no place in interpreting the Guidelines and would require extensive fact-finding and imprecise standards).

\textsuperscript{393} See supra notes 370-92 and accompanying text.

\textsuperscript{394} 573 F.3d 1062 (10th Cir. 2009), cert. denied, 130 S. Ct. 54 (2009).


\textsuperscript{396} United States v. Nacchio, 573 F.3d 1062, 1079 (10th Cir. 2009), cert. denied, 130 S. Ct. 54 (2009).

\textsuperscript{397} 425 F.3d 1093 (8th Cir. 2005)(en banc).

\textsuperscript{398} See infra notes 402-22 and accompanying text. See also \textit{United States v. Mooney}, 425 F.3d 1093, 1101 (8th Cir. 2005)(en banc) (concluding that civil law theory should not replace the commentary of the Guidelines).

\textsuperscript{399} 429 F.3d 540 (5th Cir. 2005).

\textsuperscript{400} 506 F.3d 170 (2d Cir. 2007).

\textsuperscript{401} See \textit{United States v. Olis}, 429 F.3d 540, 546-47 (5th Cir. 2005) (discussing the usefulness of applying civil loss causation to the skeletal framework of the Guidelines), \textit{and United States v. Rutkoske}, 506 F.3d 170, 179 (2d Cir. 2007) (finding no reason why factors relevant to civil fraud loss causation should not apply to a sentencing scheme in...
In *Olis*, the Fifth Circuit considered how to determine the amount of victim loss caused by the defendant’s fraudulent scheme for purposes of determining his sentence length under the Guidelines.\(^{402}\) The *Olis* court pointed out that the Guidelines only provide a skeletal framework for determining loss because they apply to dozens of federal crimes, and that in securities fraud cases, some “flesh” can be added to the skeletal framework by using the guidance of principles derived from recovery of civil damages in civil securities fraud cases.\(^{403}\) The Fifth Circuit determined that the civil damage measure is an appropriate backdrop for measuring criminal culpability in securities fraud cases because it both provides the standard of compensable injury for victims of securities fraud and because it takes into account the complexities of the stock market.\(^{404}\) The Fifth Circuit noted that in civil securities fraud cases, no loss is attributable to a misrepresentation until the truth is revealed and the stock price declines.\(^{405}\) However, if the value of stock declines for other reasons, the Fifth Circuit stated, the decline is not considered a loss caused by the misrepresentation.\(^{406}\) The Fifth Circuit concluded that because these same market factors are present in criminal cases as in civil cases, a defendant inside trader’s loss calculation under the Guidelines should comport with civil principles.\(^{407}\)

As in *Olis*, the Second Circuit in *Rutkoske* concluded that loss causation considerations in civil fraud cases should apply to sentencing determinations in which the loss caused by a defendant’s fraud is an important factor in the sentence length.\(^{408}\) The Second Circuit noted that for securities fraud offenses, the amount of loss caused by the fraud is a key component in the calculation of a sentence under the Guidelines.\(^{409}\) The Second Circuit acknowledged the inherent complexities in calculating loss under the Guidelines, but underscored the importance that loss must result directly from the defendant’s fraud.\(^{410}\) The Second Circuit approvingly cited *Olis*, and also used guidance from the civil securities fraud case, *Dura Pharmaceuticals*.
Inc. v. Broudo,411 in which the Supreme Court of the United States rejected a theory of loss causation that allowed plaintiffs to establish loss causation just by showing the defendants' misrepresentation inflated the purchase price.412 The Second Circuit, using the Supreme Court's rationale in Dura Pharmaceuticals, noted that other factors besides misrepresentation can contribute to the decline in stock prices, and that plaintiffs must demonstrate that their economic loss was proximately caused by the misrepresentation.413 In Rutkoske, the Government argued that the principles contained in a civil case such as Dura Pharmaceuticals should not apply in criminal cases to loss calculation, but the Second Circuit responded that it saw no reason why considerations in civil fraud cases pertaining to loss causation should not be applicable to sentencing procedures where loss is a critical factor in determining the length of a defendant's sentence.414

The Olis and Rutkoske cases were both criminal cases in which the Fifth and Second Circuits concluded that it is logical and appropriate to find guidance in the civil sphere when making loss calculations under the Guidelines when determining a defendant inside trader's sentence.415 However, the Olis and Rutkoske courts were considering how to calculate a defendant inside trader's loss under the Guidelines, whereas the Nacchio and Mooney courts were considering how to calculate a defendant inside trader's gain under the Guidelines.416 Thus, the Olis and Rutkoske courts needed only to look at analogous civil methodologies for assessing civil plaintiffs' loss, rather than at analogous civil methodologies for assessing gain.417 However, more broadly construed, the Olis and Rutkoske decisions are still helpful because they indicate that sentencing courts may look to the civil sphere for help in interpreting the Guidelines.418 Just as a Guidelines loss cal-

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412. Rutkoske, 506 F.3d at 179.
413. See id. (discussing how other factors outside of a defendant's misrepresentation may contribute to the stock price's decline).
414. Id.
415. See Olis, 429 F.3d at 546 (finding useful guidance in principles for civil damages for securities fraud to supplement the Guidelines), and Rutkoske, 506 F.3d at 179 (finding no reason why relevant considerations in civil fraud cases should not apply to the Guidelines sentencing regime).
416. Compare Olis, 429 F.3d at 545 (discussing defendant's loss calculation), and Rutkoske, 506 F.3d at 178 (discussing defendant's loss calculation), with Nacchio, 573 F.3d at 1079 (discussing defendant's gain calculation), and Mooney, 425 F.3d at 1099 (discussing defendant's gain calculation).
417. See Olis, 429 F.3d at 548 (discussing loss calculation using analogous principles from civil cases for calculating plaintiffs' loss), and Rutkoske, 506 F.3d at 179-80 (discussing appropriateness of using civil loss calculation principles for loss calculation in criminal cases).
418. See Olis, 429 F.3d at 546 (noting that the Guideline is skeletal because it covers dozens of crimes and that the civil damage measure is an appropriate backdrop partly
calculation has the civil analogue of plaintiffs' loss, a Guidelines gain calculation has the civil analogue of disgorgement.\textsuperscript{419} In \textit{Mooney}, the Eighth Circuit rejected the use of disgorgement, whereas in \textit{Nacchio}, the Tenth Circuit concluded that the civil remedy of disgorgement provides a close analogue to calculate an inside trader's gain under the Guidelines because it endeavors to strip the defendant inside trader of ill-gotten gains.\textsuperscript{420} As the \textit{Olis} and \textit{Rutkoske} decisions demonstrate, the \textit{Nacchio} court correctly borrowed guidance from in the civil sphere.\textsuperscript{421} Thus, the Tenth Circuit in \textit{Nacchio} appropriately adopted disgorgement as a close analogue to measure an inside trader's ill-gotten gains under the Guidelines.\textsuperscript{422}

C. THE POLICY OBJECTIVES OF THE FEDERAL SENTENCING GUIDELINES ARE BEST SERVED BY MEASURING ILL-GOTTEN GAINS USING DISGORGEMENT

In \textit{United States v. Nacchio},\textsuperscript{423} the United States Court of Appeals for the Tenth Circuit concluded that it is appropriate for sentencing courts to use the civil remedy of disgorgement to measure ill-gotten gains of a defendant inside trader.\textsuperscript{424} The Tenth Circuit determined that using a disgorgement approach best serves the central purposes of federal sentencing policy.\textsuperscript{425} This conclusion by the \textit{Nacchio} court was in direct opposition to the United States Court of Appeals for the Eighth Circuit's decision in \textit{United States v. Mooney},\textsuperscript{426} in which the Eighth Circuit concluded that a disgorgement approach would create imprecise standards and require extensive fact-finding.\textsuperscript{427} Unlike the Eighth Circuit's blanket rejection of the

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\item \textsuperscript{419} Compare \textit{Olis}, 429 F.3d at 546 (stating that the Guidelines loss determinations may be supplemented with principles for civil damages recovery for security fraud), with \textit{Mooney}, 425 F.3d at 1107 n.11 (Bright, J., dissenting) (stating that wrongfully obtained profits in civil securities fraud cases where a defendant must disgorge his ill-gotten gains have a close relationship to the "gain resulting from the offense" under the Guidelines).
\item \textsuperscript{420} Compare \textit{Mooney}, 425 F.3d at 1098-99 (stating that criminal sentences serve policy concerns which are not fulfilled by the civil sanction of disgorgement), with \textit{Nacchio}, 573 F.3d at 1079-80 (stating that a defendant's gain should be the same whether utilized to calculate a sentence in a criminal case or disgorged in a civil case).
\item \textsuperscript{421} \textit{See supra} notes 401-19 and accompanying text.
\item \textsuperscript{422} \textit{See supra} notes 394-421 and accompanying text.
\item \textsuperscript{423} 573 F.3d 1062 (10th Cir. 2009), \textit{cert. denied}, 130 S. Ct. 54 (2009).
\item \textsuperscript{424} United States v. Nacchio, 573 F.3d 1062, 1079 (10th Cir. 2009), \textit{cert. denied}, 130 S. Ct. 54 (2009).
\item \textsuperscript{425} \textit{Nacchio}, 573 F.3d at 1080.
\item \textsuperscript{426} 425 F.3d 1093 (8th Cir. 2005)(en banc).
\item \textsuperscript{427} \textit{See Nacchio}, 573 F.3d at 1080 (determining that disgorgement approach comports with essential objectives of federal sentencing policy); and \textit{United States v.}
disgorgement approach, the Tenth Circuit's approach better achieves the objective of individualized sentencing and militates against unfair sentencing disparities.428

Congress's central objective in enacting the Sentencing Reform Act of 1984429 ("Reform Act"), by which the Federal Sentencing Guidelines430 ("Guidelines") were promulgated, was to improve the criminal justice system's ability to combat crime effectively through a fair sentencing system.431 To carry out this objective, Congress attempted to achieve honest sentencing.432 Congress also sought to narrow the extensive disparity in sentences for similar offenders who committed similar offenses, and attempted to attain proportionality in sentencing by creating a system that sets different sentences for criminal conduct of varying severity.433

In Mooney, the Eighth Circuit rejected Michael Alan Mooney's ("Mooney") argument that disgorgement principles should be used to calculate his gain from insider trading for purposes of sentencing under section 2B1.4 of the Guidelines.434 The Mooney court explained that there are good policy considerations for using a defendant inside trader's net gain rather than using disgorgement as a civil analogue.435 For example, the Eighth Circuit concluded that using actual sales to calculate a defendant inside trader's gain supplies a clear, bright-line rule which eliminates the extensive factfinding required to ascertain when nonpublic information was absorbed by the market.436 Further, the Eight Circuit opined that imprecise standards are especially inappropriate in criminal contexts and that its predictable and simple rule is easily applied by sentencing judges and complies with Congress's instructions that the seriousness of an offense should be reflected in the defendant's sentence.437

Contrary to the Eighth Circuit in Mooney, the Tenth Circuit in Nacchio concluded that a disgorgement approach best serves federal sentencing policies.438 As the Nacchio court noted, disgorgement takes into account the inherent value of a stock, which is separate

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428. See infra notes 429-71 and accompanying text.
433. Id.
434. Mooney, 425 F.3d at 1101.
435. Id.
436. Id.
437. Id.
438. Compare Mooney, 425 F.3d at 1101 (stating that good policy reasons support a bright-line rule which does not require extensive fact-finding involved with the civil
from the inside trader's criminal conduct, and seeks to eliminate value unrelated to the offense when calculating a defendant's gain.\textsuperscript{439} Further, because it assesses when the material, nonpublic information is absorbed by the market, disgorgement creates a logical temporal cut-off when assessing the defendant inside trader's gain from his deception.\textsuperscript{440} As a result, disgorgement helps arrive at a gain figure which reflects the inside trader's criminally culpable conduct, the harm it caused, and the personal circumstances of the defendant.\textsuperscript{441} The Tenth Circuit opined that if twists and turns of the market are ignored when calculating a defendant inside trader's gain, the result is a sentence detached from the defendant inside trader's individual criminally culpable conduct.\textsuperscript{442} A detached sentence would defeat one of Congress's main objectives behind enacting the Reform Act: to narrow extensive disparities in sentences for similar offenders who committed similar offenses.\textsuperscript{443}

To further illustrate how the Eighth Circuit's rejection of the disgorgement approach would undermine sentencing goals, the Tenth Circuit adopted the hypothetical Judge Bright offered in his dissent in \textit{Mooney}.\textsuperscript{444} Three corporate executives, \textit{A}, \textit{B}, and \textit{C}, acting upon the same nonpublic information, simultaneously bought one-thousand shares of stock at a rate of \$5 per share.\textsuperscript{445} The nonpublic information was disclosed four weeks after their purchases and was absorbed by the market after the fifth week, raising the stock prices to \$15 per share.\textsuperscript{446} Officer \textit{A} sold one-thousand shares on market-absorption day, making \$10,000.\textsuperscript{447} Officer \textit{B} sold his shares three months later when the stock price had risen to \$50 per share, making a total gain of

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\item \textit{Nacchio}, 573 F.3d at 1080 (stating that disgorgement is completely consonant with fundamental principles of sentencing policy).
\item Id.
\item Id. at 1080-81.
\item Id. at 1081.
\item Id.
\item See also U.S.S.G ch. 1, pt. A(3)(stating that Congress sought to narrow the wide disparity and achieve reasonable uniformity in sentences for similar offenders committing similar offenses), \textit{and Mooney}, 425 F.3d at 1107 (Bright, J., dissenting)(concluding it is unreasonable to use the Guidelines in a method which would result in similarly situated defendants receiving disparate sentences for the same conduct), \textit{and Mooney}, 425 F.3d at 1104 (Bye, J., concurring in part and dissenting in part) (concluding that Judge Bright's reasoning more effectively protects against disparate sentences of defendants convicted of the same offense).
\item Id.
\item Id.
\item Id. See also \textit{Mooney}, 425 F.3d at 1107 (Bright, J., dissenting) (posing an identical hypothetical involving Larry, Moe, and Curly).
\item \textit{Nacchio}, 573 F.3d at 1082.
\item Id. All \$10,000 is illicit gain because all of it arose entirely from exploitation of his insider knowledge. Id.
$45,000. Officer C sold his shares six months later for $2 per share after the market crashed, sustaining a loss. Each Officer committed the crime of insider trading, but under the Mooney court’s approach, each officer’s gain is calculated differently under the Guidelines. Under current section 2B1.1 of the Guidelines, Officer A would receive a two-level increase to his base offense level of eight, equaling a prison sentence between six and twelve months. Officer B would receive a six-level increase to his base offense level of eight under current section 2B1.1 of the Guidelines, equaling a sentence of fifteen to twenty-one months in prison. Officer C would receive no additional levels to his base level of eight because he lost money on his sale, which equals zero to eight months imprisonment.

Officers A, B, and C all committed identical crimes of insider trading with the same impact on the market, yet under the Eighth Circuit’s approach in Mooney, each Officer would receive different sentences. As the hypothetical demonstrates, the Eighth Circuit’s approach would create sentences divorced from an individual’s criminally culpable conduct. In this hypothetical, the sentences of Officers B and C do not reflect their individual culpability because the gain attributed to them did not include the inherent value of their stock or the significance of the disclosure of the nonpublic information. As a result, Officers B and C received sentences that were produced by the regular gyrations of the market rather than by their criminal conduct. Sentences divorced from individual criminal culpability do not comport with the objective of Congress to impose sentences that completely reflect the criminally culpable conduct of

448. Id. §10,000 is attributable to his exploiting the insider knowledge, but $35,000 is a result of the “ordinary vagaries of the market.” Id.
449. Id.
450. Id. at 1082-83.
452. See id. at § 2B1.1(b)(1)(B) (adding two levels for offenses involving more than $5,000) and Id. at ch.5, pt. A (providing six to twelve months in prison for a defendant with a criminal history category of I and an offense level of ten).
453. See id. at § 2B1.1(b)(1)(D) (adding six levels for offenses involving more than $30,000) and Id. at ch.5, pt. A (providing fifteen to twenty-one months in prison for a defendant with a criminal history category of I and an offense level of fourteen).
454. See id. at § 2B1.1(b)(1)(A) (2009) (providing no increase for offenses involving $5,000 or less) and Id. at ch.5, pt. A (2009) (providing zero to six months in prison for a defendant with a criminal history category of I and an offense level of eight).
455. See supra notes 451-54.
456. Nacchio, 573 F.3d at 1083.
457. Nacchio, 573 F.3d at 1083.
458. Id. Officer B received $10,000 from his exploitation of the insider knowledge, but $35,000 is a result of the “ordinary vagaries of the market.” Officer C lucked out in terms of sentencing when the market crashed because he lost money on his sale. Id. at 1082.
Thus, the Eighth Circuit's approach undermines a central goal of the Guidelines. Further, this hypothetical illustrates how the Eighth Circuit's approach creates unwarranted sentencing disparities for similarly situated defendants. Officers A, B, and C each committed the crime of insider trading on the basis of the same nonpublic information, but under the Mooney court's approach, each officer's gain is calculated differently under the Guidelines. Despite doing the same crime, Officer A would be sentenced to six to twelve months in prison, Officer B would be sentenced to fifteen to twenty-one months in prison, and Officer C would be sentenced to zero to eight months in prison. These disparate sentences imposed on the Officers for identical criminal conduct do not comport with the objective of Congress to achieve reasonable uniformity in sentencing for similarly situated defendants. This result demonstrates that the Mooney court's approach undermines the goal of the Guidelines to achieve uniformity and fairness in sentencing.

Although the Eighth Circuit in Mooney maintained that its bright-line rule upheld the policy considerations of the Guidelines, the Tenth Circuit in Nacchio demonstrated the Eighth Circuit's flawed reasoning. As the officer hypothetical demonstrates, application of the Eighth Circuit's bright-line rule actually undermines federal sentencing policy. The Mooney court's approach creates sentences divorced from an individual's criminally culpable conduct and results in disparate sentences for similarly situated defendants, which directly frustrates the purposes of the Guidelines. In contrast, the Tenth Circuit's disgorgement approach in Nacchio endeavors to eliminate

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459. See U.S.S.G ch. 1, pt. A(3) (stating that Congress tried to attain proportionality in sentencing by creating a system that sets different sentences for criminal conduct of varying severity and that a sentencing court should endeavor to create a sentence that completely reflects the criminally culpable conduct of a defendant).

460. See supra notes 429-59 and accompanying text.

461. Nacchio, 573 F.3d at 1083

462. See id. at 1082-83 (discussing the district court's reliance on the Mooney court's approach).

463. See supra notes 451-54.

464. See U.S.S.G ch. 1, pt. A(3) (stating that Congress sought to narrow the wide disparity and achieve reasonable uniformity in sentences for similar offenders committing similar offenses).

465. See supra notes 461-64 and accompanying text.

466. Compare Mooney, 425 F.3d at 1101 (determining that good policy reasons support the use of a bright-line rule because imprecise standards are inappropriate in criminal cases), with Nacchio, 573 F.3d at 1080 (determining that good policy reasons support the use of disgorgement because it protects against creating unwarranted disparities in sentencing for similarly situated defendants).

467. See supra notes 444-64 and accompanying text.

468. Compare Mooney, 425 F.3d at 1099 n.5 (quantifying inside trader defendants' gain under the Guidelines as their total profit without regard to market factors) with
factors unrelated to the defendant inside trader’s offense.\textsuperscript{469} The \textit{Nacchio} court’s approach factors out the inherent value of stock and assesses when the relevant nonpublic information is absorbed by the market so that market factors unrelated to the defendant inside trader’s conduct are not included in the gain calculation.\textsuperscript{470} As a result, the Tenth Circuit correctly concluded that the disgorgement approach better serves the policy objectives of the Guidelines to have sentences reflect an individual inside trader’s criminally culpable conduct and avoid unwarranted sentencing disparities.\textsuperscript{471}

V. CONCLUSION

In \textit{United States v. Nacchio},\textsuperscript{472} the United States Court of Appeals for the Tenth Circuit concluded that the “gain resulting from the offense” under the Insider Trading section of the Federal Sentencing Guidelines\textsuperscript{473} (“Guidelines”) is limited to the gain produced from the trade on inside knowledge, rather than the total amount which the inside trader realized from selling stock.\textsuperscript{474} The Tenth Circuit reached this conclusion by determining that the plain language of the Guidelines and its commentary do not support a reading that equates gain with the total amount realized from stock sales.\textsuperscript{475} The Tenth Circuit departed from the Guidelines’ interpretation of the United States Court of Appeals for the Eighth Circuit in \textit{United States v. Mooney}\textsuperscript{476} and determined that the offense of insider trading adheres to the deception used to trade securities, and therefore the “gain” as used in the Guidelines must be connected to the trade on material, nonpublic information.\textsuperscript{477} Having determined the plain language of the Guidelines does not dictate that total gains be used, the Tenth Circuit concluded the disgorgement remedy used by the United States Securities Exchange Commission (“SEC”) in civil insider trading cases

\textsuperscript{469} Compare \textit{Nacchio}, 573 F.3d at 1080-81 (stating that the disgorgement approach will reflect a defendant’s criminally culpable conduct and help create a sentence which does not ignore the market’s twists and turns), with \textit{Mooney}, 425 F.3d at 1099 n.5 (quantifying inside trader defendants’ gain under the Guidelines as their total profit without regard to market factors).

\textsuperscript{470} \textit{Nacchio}, 573 F.3d at 1082.

\textsuperscript{471} \textit{See supra} notes 423-70 and accompanying text.

\textsuperscript{472} 573 F.3d 1062 (10th Cir. 2009), cert. denied, 130 S. Ct. 54 (2009).


\textsuperscript{474} \textit{United States v. Nacchio}, 573 F.3d 1062, 1067 (10th Cir. 2009), cert. denied, 130 S. Ct. 54 (2009).

\textsuperscript{475} \textit{Id.} at 1072.

\textsuperscript{476} 425 U.S. 1093 (8th Cir. 2005)(en banc).

\textsuperscript{477} \textit{See Nacchio}, 573 F.3d at 1072-73 (following the reasoning of the dissent in \textit{Mooney}).
is an appropriate analogue to measure ill-gotten gains in criminal insider trading cases.\textsuperscript{478} Finally, the Tenth Circuit concluded that the policy objectives of the Guidelines are best served by using disgorgement to measure gains by inside traders.\textsuperscript{479}

In \textit{Nacchio}, the Tenth Circuit correctly rejected the Eighth Circuit en banc majority’s net gain approach in favor of a disgorgement approach.\textsuperscript{480} As opposed to the Eighth Circuit’s limited reading of the Guidelines, the Tenth Circuit’s reading of the plain language of the Guidelines and its commentary clearly demonstrated that the “gain resulting from the offense” must be the gain directly resulting from the deception used in the trade on material, nonpublic information because the offense of insider trading adheres in the deceptive or manipulative device used in a stock transaction.\textsuperscript{481} In order to measure the gain resulting from the inside trader’s deception, the civil remedy of disgorgement is a suitable guidepost for sentencing courts to use because it excludes external factors which are not related to the defendant’s culpable conduct.\textsuperscript{482} Disgorgement best serves the policies of federal sentencing objectives, which the Guidelines were designed to carry out because it creates sentences that reflect the criminally culpable conduct of defendants and is not divorced from individual criminal culpability.\textsuperscript{483}

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\item \textsuperscript{478} \textit{Id.} at 1077, 1079-80.
\item \textsuperscript{479} \textit{Id.} at 1082.
\item \textsuperscript{480} See \textit{supra} notes 322-471 and accompanying text.
\item \textsuperscript{481} See \textit{supra} notes 322-54 and accompanying text.
\item \textsuperscript{482} See \textit{supra} notes 356-422 and accompanying text.
\item \textsuperscript{483} See \textit{supra} notes 423-71 and accompanying text.
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