New York Law Journal

NEW YORK LAW JOURNAL SPECIAL REPORT

Litigation

ALM.

WWW.NYLJ.COM

VOLUME 267—NO. 48

MONDAY, MARCH 14, 2022

'U.S. v. Trovias': Lessons From the First Dark Web Insider Trading Case

BY IAN MCGINLEY

In *United States v. Trovias*, in a first of its kind prosecution, the Southern District of New York (SDNY) brought an insider trading case against Apostolos Trovias for selling inside information on the Dark Web. Unsurprisingly, the SEC also brought a civil regulatory action against Trovias for the same conduct. In a rare move, however, SDNY and SEC charged this same conduct under different insider trading statutes. This difference underscores the legal complexities involved when the origin of inside information in the digital world is unknown. It also highlights the desire of both agencies to be aggressive in applying insider trading laws to crimes involving modern technologies. Ultimately, these cases show that the government will be active in policing the use of technology for insider trading, including through messaging apps and social media.

IAN MCGINLEY *is a partner in Akin Gump's white-collar defense group. Before joining the firm, he served as a prosecutor in the Southern District of New York, where he was Co-Chief of the Complex Frauds and Cybercrime Unit, and a member of the Securities and Commodities Fraud Task Force.*

The Allegations Against Trovias

According to SDNY's indictment, Trovias, who went by the alias "The Bull," used websites on the Dark Web and encrypted messaging services to sell inside business information about publicly traded companies that Trovias had misappropriated. The Dark Web refers to websites on the Internet that cannot be accessed through traditional search engines. To access the Dark Web, one simply downloads an anonymizing web browser.

The Indictment alleges, among other things, that Trovias sold tips based on inside information about public companies that could be purchased for a fee, often paid in Bitcoin. Trovias is also alleged to have sold inside information directly to purchasers using encrypted messaging and email services. The Indictment does not identify

Gorodenkoff Productions OU via AdobeStock

where or how Trovias obtained the alleged inside information.

The SEC's complaint provides some additional details about the scheme—and one wrinkle. Trovias claimed he obtained the inside information from an insider at a trading firm, but the SEC suggests that he could have lied about the source of his information and defrauded his customers.

Trovias was arrested in Peru and is apparently still in extradition proceedings.

Theories Used by the SEC and SDNY

The SEC Action. The SEC charged Trovias under SEC Rule 10b-5 and the traditional statute for insider trading, 15 U.S.C. §78j(b). Under these laws, the elements of insider trading as applied to someone who was not privy to the information himself (i.e., a downstream tippee) generally require, among other things, that tippee knew the insider (i.e., the tipper) (1) breached a duty to his or her employer in disclosing the information; and (2) received a personal benefit in exchange for providing the tip.

The Complaint highlights the difficulty the SEC faced in proving these elements. While Trovias claimed he obtained the information from a firm insider, neither that person nor the firm is identified in the Complaint. The Complaint also does not specify the exact duty the insider breached, or the personal benefit the insider received. Instead, the SEC relies on a series of inferences based on the deceptive nature of the conduct to establish that Trovias "knew, recklessly disregarded, or had reason to know that the tips were obtained in violation of a duty of trust and confidence for personal benefit." Remarkably, the SEC ultimately charged two contradictory theories—either Trovias actually got inside information and committed insider trading, or, he made up the inside information, and engaged in securities fraud by deceiving his subscribers.

The SDNY Prosecution. SDNY chose not to charge Trovias under Title 15, perhaps because of issues in proving that Trovias knew the inside information was obtained in breach of a specific duty and in exchange for a personal benefit. Instead, SDNY charged under Title 18 U.S.C. §1348, which prohibits fraud in connection with the purchase and sale of securities. Specifically, SDNY alleges that Trovias defrauded the public companies by misappropriating (i.e., embezzling) confidential business information for his own profit. While there is support in the case law that Title 18 insider trading does not require a showing of the specific manner of the breach or a personal benefit, the law is not settled on this topic.

The 'Trovias' case shows that the government is willing to use **creative legal theories** to pursue the **inappropriate trafficking of inside information** through these mediums.

Future Insider Trading Cases

As we have seen, both SDNY and SEC utilized non-traditional theories to charge Trovias's conduct. These theories carry litigation risk, suggesting that both agencies believed the conduct was sufficiently serious and important to justify the risk.

In addition, while *Trovias* concerned information on the Dark Web, the case suggests both agencies are interested in policing insider trading through technological means. The SEC and SDNY both highlighted this interest in press releases issued at the time charges were announced. This focus reflects the reality of modern communications. Increasingly, people and market participants receive information through messaging apps, chat rooms, and social media, where, like on the Dark Web, the ultimate source of the information may be unclear. Insider trading will increasingly happen through electronic communications, not through in person meetings or by phone.

The *Trovias* case shows that the government is willing to use creative legal theories to pursue the inappropriate trafficking of inside information through these mediums. This is especially the case with respect to mediums such as the Dark Web, which appear to be designed to hide the identities the parties involved or otherwise cover their tracks. The charges in *Trovias* have yet to be litigated, but the case provides insight into how the government will aggressively apply insider trading law in the modern information age.