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Introduction

This fall, the U.S. Supreme Court will hear argument in *Salman v. United States* to consider the scope of insider trading liability under the federal securities laws.[1] Specifically, the Court will consider the legal standard for tippee liability, a standard that it first articulated in its 1983 decision in *Dirks v. SEC*.[2]

Dirks considered whether a research analyst should be liable for insider trading in connection with trades that were based on material nonpublic information that he received about corporate fraudulent practices via a tip from an insider.[3] As the Court explained, the federal securities laws do not prohibit all trading on material nonpublic information.[4] Instead, the circumstances under which the tip occurred are critical in determining the tippee's liability for insider trading. Specifically, the Court in *Dirks* adopted a two-step analysis. For a tippee to be liable, the tipper/insider must breach a fiduciary duty and the tippee must "know[] or should know that there has been a breach."[5] *Dirks* further explained that an insider breaches a fiduciary duty by disclosing inside information only when "the insider personally will benefit, directly or indirectly, from his disclosure."[6] Such a personal benefit can arise when the

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1. United States v. Salman, 792 F.3d 1087 (9th Cir. 2015), *cert. granted*, 136 S. Ct. 899 (2016).
2. 463 U.S. 646 (1983).
3. *Id.* at 649.
4. *See id.* at 654 ("[T]here is no general duty to disclose before trading on material nonpublic information . . . .").
5. *Id.* at 660.
6. *Id.* at 662. Notably, the fact that the insider has acted for personal gain creates the breach of fiduciary duty that renders the insider's disclosure wrongful. It is well established that when an insider takes corporate information for personal use, he misappropriates the information. *See, e.g.*, United States v. O'Hagan, 521 U.S. 642, 654 (1997) ("The undisclosed misappropriation of [a company's confidential] information . . . constitutes fraud akin to embezzlement . . . ."). The misappropriation is no different when the insider intends to make a gift of the information rather than trading on it directly, in the same way that an

insider receives something tangible, such as money or services, in exchange for providing information, or "when an insider makes a gift of confidential information to a trading relative or friend."[7]

The government has applied the *Dirks* personal benefit test aggressively to bring insider trading charges against tippees in a variety of circumstances.[8] The facts of *Salman* are different, however, from cases in which the courts have struggled to determine the existence of a quid pro quo for the tip or the nature of the relationship between tipper and tippee.[9] *Salman* involves the gift of confidential information by an insider to a close family member.[10] The question presented for the Court is whether this close family relationship is sufficient to establish liability under the personal benefit test.[11]

This Essay argues that *Dirks* correctly concluded that, because of the close ties between family members, an insider who provides material nonpublic information to a family member for the purpose of securities trading receives a

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employee steals from his employer even if the thief is not keeping the property for himself but instead giving it away to his friends. *See, e.g.*, People v. Jensen, 654 N.E.2d 1237, 1239 (N.Y. 1995) ("A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself *or a third person*, he wrongfully takes, obtains or withholds such property from an owner thereof." (emphasis added) (quoting N.Y. PENAL LAW § 155.05(1) (McKinney 1995))).

7. *Dirks*, 463 U.S. at 663-64.

8. *See, e.g.*, Brian Neil Hoffman & Kevin C. McAdam, *Holland & Hart Discuss* Newman *Cert., a Potential Tipping Point for Insider Trading Liability*, CLS BLUE SKY BLOG (Aug. 25, 2015), http://clsbluesky.law.columbia.edu/2015/08/25/newman-cert-a-potential-tipping-point-for-insider-trading-liability ("For decades after *Dirks*, the DOJ and SEC employed the personal benefit test expansively to pursue tippees who had received inside information from friends, relatives, or even casual acquaintances in exchange for virtually nothing tangible in return. Indeed, in recent years, the DOJ's enforcement focused on long tipping chains, where supposed material nonpublic information passed through numerous individuals having only vague connections to each other before the alleged insider trading occurred.").

9. *See, e.g.*, United States v. Newman, 773 F.3d 438, 452 (2d Cir. 2014), *cert. denied*, 136 S. Ct. 242 (2015) (rejecting the argument that "the Government may prove the receipt of a personal benefit by the mere fact of a friendship, particularly of a casual or social nature"); SEC v. Cuban, 620 F.3d 551, 555 (5th Cir. 2010) (descibing the court as "tasked" with determining whether Mark Cuban had a "relationship of 'trust and confidence'" with Mamma.com (quoting United States v. O'Hagan, 521 U.S. 642, 653 (1997)); Jon Eisenberg, *"Friends" Who Trade on Inside Information: How* United States v. Newman *Changes the Law*, K&L GATES (Apr. 20, 2015), http://www.klgates.com/friends-who-trade-on-inside-information-how-united-states-v-newman-changes-the-law-04-20-2015 (stating that the Government's position was that "virtually anyone who is an acquaintance can be labeled a friend" for purposes of the *Dirks* test).

10. United States v. Salman, 792 F.3d 1087, 1092 (9th Cir. 2015), *cert. granted*, 136 S. Ct. 899 (2016) ("Maher's disclosure of confidential information to Michael, knowing that he intended to trade on it, was precisely the 'gift of confidential information to a trading relative' that *Dirks* envisioned." (quoting Dirks v. SEC, 463 U.S. 646, 664 (1983))).

11. *See* Petition for Writ of Certiorari at i, Salman v. United States, No. 15-628 (U.S. Nov. 10, 2015), 2015 WL 7180648, at *i (raising this question).

personal benefit and has breached his or her fiduciary duty.[12] The facts of *Salman*, as a result, do not present a close legal question but instead fall within the core of the legal standard established by *Dirks*. Whatever parameters apply to information sharing among Wall Street analysts, investment professionals, or hedge fund managers, the *Salman* decision can be affirmed on the basis of a simple principle: family is different.

Additionally, policies underlying the family member cases are critically different from those involving information obtained by professional traders through a chain of Wall Street sources. Many of the informational advantages obtained by professional traders are legitimately obtained through research, and an ambiguous liability standard would have a chilling effect on their attempts to gather and use that information.[13] In contrast, there is no ambiguity created by a rule that imposes liability when an insider makes a gift of corporate information to his brother.

I. The *Salman* Case

Bassam Yacoub Salman was convicted of insider trading based on information he received from his fiancée's brother, Michael Kara, with whom he had become "fast friends."[14] Michael had received the information from his brother, Maher Kara, an insider at Citigroup's healthcare investment banking group. The evidence at trial established that Salman knew Maher was the source of the information.[15] The evidence further established that Michael and Maher enjoyed a close family relationship and that Salman knew of this relationship.[16]

Salman appealed his conviction, arguing that the evidence against him was insufficient under the legal standard applied by the Second Circuit in *United States v. Newman*.[17] Specifically, Salman argued that, under the *Newman* standard, "evidence of a friendship or familial relationship between tipper and tippee, standing alone, is insufficient to demonstrate that the tipper received a

12. This Essay does not address the issue of whether a defendant could rebut the Government's case by establishing an estranged or hostile family relationship; the question is not raised by the facts of *Salman*.

13. See *infra* notes 54-55 and accompanying text.

14. *Salman*, 792 F.3d at 1089.

15. *Id.*

16. *Id.* at 1089-90.

17. *Id.* at 1090 (citing United States v. Newman, 773 F.3d 438 (2d Cir. 2014), *cert. denied*, 136 S. Ct. 242 (2015)). *Newman* involved two portfolio managers at hedge funds who, according to the Government, received and traded on inside information traded by a cohort of analysts who, in turn, received that information from corporate insiders. 773 F.3d at 442. The Second Circuit issued its decision in *Newman* after Salman's initial conviction. *See Salman*, 792 F.3d at 1090 (describing Salman's effort to have the court apply *Newman*'s holding to his case).

benefit."[18] Instead, Salman argued that, as in *Newman*, the Government was required to prove that Maher received a tangible benefit in exchange for providing Michael with inside information.[19]

The Ninth Circuit upheld Salman's conviction but suggested that Salman had plausibly identified a tension between its reading of *Dirks* and that of the Second Circuit in *United States v. Newman*,[20] a tension that may have contributed to the Supreme Court's subsequent decision to grant certiorari.[21] In fact, however, no such tension exists. The Supreme Court's holding in *Dirks* requires that the tipper receive a personal benefit. *Dirks* further explains that the personal benefit requirement can be met either through receipt of a tangible benefit or as the result of making a gift.[22]

In *Newman*, the court found the evidence as to personal benefit insufficient under both lines of analysis. First, although the court expressly noted that the requirement of a personal benefit was a "permissive" standard, it concluded that there was no evidence that the insiders had received any type of benefit from tipping.[23] Second, the court specifically rejected the claim that the evidence established a close relationship between tipper and tippee, and that, in fact, the evidence undermined the Government's claim that the tippers intended the information to consititute a gift.[24]

Importantly, *Newman*'s extensive inquiry into the nature of the relationship between tipper and tippee sought to determine whether the relationships involved were sufficiently close to infer that the tippers had intended the disclosures as gifts. The *Newman* court found that, because the relationships involved merely casual acquaintances, the Government had not introduced sufficient evidence from which the jury could make this inference.[25]

18. *Salman*, 792 F.3d at 1093.

19. *Id.*

20. *Id.*; 773 F.3d 438 (2d Cir. 2014), *cert. denied*, 136 S. Ct. 242 (2015).

21. Ironically, Judge Jed Rakoff, author of the *Salman* opinon, was a judge in the Southern District of New York sitting by designation who, had he been deciding a case in his own court, would have lacked the power to "decline to follow" the language in *Newman* with which he disagreed. *See Salman*, 792 F.3d at 1093 ("To the extent *Newman* can be read to go so far, we decline to follow it.").

22. Dirks v. SEC, 463 U.S. 646, 663-64 (1983). The language in *Dirks* does not appear to intend these examples to constitute an exhaustive list of ways to satisfy the personal benefit requirement. In theory, the Government may meet the personal benefit requirement in another way, but that issue was not before the Court.

23. *Newman*, 773 F.3d at 452. Although the Government argued that the Dell insider received "career advice" and that this consistuted a personal benefit, the court found that the so-called advice "was little more than the encouragement one would generally expect of a fellow alumnus or casual acquaintance." *Id.* at 453.

24. *See, e.g.*, *id.* at 453 (stating that the testimony "undermin[ed] any inference that Choi intended to make a 'gift'").

25. *Id.* at 452.

Accordingly, *Newman* does not address the issue whether making a gift confers a personal benefit on the tipper or constitutes a breach of fiduciary duty.

In contrast, the Government in *Salman* presented direct evidence both of the close family relationship between Maher and Michael and that Maher intended to make a gift of the information.[26] The evidence included testimony that "Michael helped pay for Maher's college, that he stood in for their deceased father at Maher's wedding, and . . . that Michael coached Maher in basic science to help him succeed at his job."[27] Maher "testified that he disclosed the material nonpublic information for the purpose of benefitting and providing for his brother Michael."[28] In light of this evidence, the only remaining question for the *Salman* court was whether Maher received a personal benefit as a result of making a gift to his brother. On this point, *Dirks* is clear. A tipper receives a personal benefit when he discloses inside information as a gift to a close friend or family member.[29] As the next Part explains, there are sound reasons for this conclusion.

II. Gifts and the Personal Benefit Test

Dirks identified two possible sources of a personal benefit for an insider who discloses material nonpublic information: an exchange and a gift.[30] This analysis reflects a more general legal distinction between a commercial exchange and a gift.[31] Critically, both confer a personal benefit on the tipper, but they do so in different ways. The critical component of an exchange is reciprocity: the benefit to the tipper from an exchange is the money or property that he receives.[32] For example, in the insider trading trial of Zvi Goffer, the tipper testified that he provided information about upcoming acquisitions in exchange for envelopes of cash.[33]

The motivation for gifts is more complex. Scholars have identified a variety of reasons for gift-giving. One is implicit reciprocity—the expectation that the

26. *See Salman*, 792 F.3d at 1089, 1094 ("[T]he Government presented direct evidence that the disclosure was intended as a gift of market-sensitive information.").

27. *Id.* at 1089.

28. *Id.* at 1094.

29. *See* Dirks v. SEC, 463 U.S. 646, 663-64 (1983).

30. *Id.* at 664.

31. *See* Eric A. Posner, *Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises*, 1997 WIS. L. REV. 567, 567 (identifying the legal distinction between gifts and commercial exchanges).

32. *Cf. id.* at 569-70 (arguing that, because the degree of reciprocation "varies considerably," it is useful to recognize "two conceptual categories, gifts and exchanges").

33. *See* Bob Van Voris, *Ex-Lawyer Tells* Goffer *Jury He Traded 3Com Merger Tips for Cash*, BLOOMBERG (May 19, 2011, 9:01 PM PDT), http://www.bloomberg.com/news/articles/2011-05-19/goffer-trial-witness-says-he-traded-merger-tips-for-cash-filled-envelopes.

donee will make a gift in return.[34] But people make gifts for many other reasons. As Eric Posner explains, gifting may be motivated by the giftor's desire to increase his reputation or status.[35] Giving gifts may increase the donor's power or influence; expensive gifts, in particular, may create a sense of obligation in the giftee.[36] Exchanging gifts can also create or enhance trust relationships between giver and recipient.[37]

The mixed motivation behind gifting complicates the analysis of personal benefit. Perhaps most problematic for purposes of insider trading analysis is altruistic giving. To the extent that gifts are motivated by altruism, it seems difficult to argue that they confer a personal benefit on the giftor. Altruism, however, has a variety of possible meanings,[38] and the literature on gifts recognizes that even gifts that are ostensibly motivated by altruism may increase the donor's personal utility.[39] Gifts may, for example, satisfy the donor's sense of moral obligation or give the donor a "warm glow" from his conduct.[40] While some "pure" altruism may be motivated by a wholly unselfish desire to benefit the recipient without regard to the giftor's personal utility, "impure" altruism results in the giftor "gain[ing] utility from the act of giving."[41]

To the extent that an insider's disclosure reflects a selfish gift in the sense that it increases the insider's personal utility, such a gift is properly understood as conferring a personal benefit on the tipper within the meaning of *Dirks*. Notably, the language in *Dirks* might also be understood to address the potential for pure altruism by limiting the scope of gifts that trigger potential liability to those that are made to close friends and family members.[42] Essentially, *Dirks* can be read to imply that gifts to close friends and family constitute, at least partially, selfish gifting.

34. *See, e.g.*, Donald Cox, *Motives for Private Income Transfers*, 95 J. POL. ECON. 508, 510 (1987) (using modeling to conclude that most gifts are motivated by the exchange hypothesis).

35. Posner, *supra* note 31, at 574-76.

36. *See id.* at 577.

37. *Id.* ("[C]ommon sense suggests that the main reason for exchanging gifts is to create, enhance, or reaffirm relations of trust.").

38. *See, e.g.*, Barbara H. Fried, *Who Gets Utility from Bequests?: The Distributive and Welfare Implications for a Consumption Tax*, 51 STAN. L. REV. 641, 665-66 (1999) (discussing various forms of altruism).

39. *See, e.g.*, Mark A. Hall & John D. Colombo, *The Donative Theory of the Charitable Tax Exemption*, 52 OHIO ST. L.J. 1379, 1406 (1991) (arguing that "all gifts partake of some form of self-interest").

40. Fried, *supra* note 38, at 665. *See also* James Andreoni, *Impure Altruism and Donations to Public Goods: A Theory of Warm-Glow Giving*, 100 ECON. J. 464, 465-68 (1990) (modeling a warm-glow theory of chariable giving).

41. Andreoni, *supra* note 40, at 473 (concluding that a model of impure altruism leads to predictions that are more consistent with actual giving behavior); *see also* Richard A. Posner, *Reply to Critics of* The Problematics of Moral and Legal Theory, 111 HARV. L. REV. 1796, 1815 (1998) (distinguishing between "selfish altruism" and "selfless altruism").

42. Dirks v. SEC, 463 U.S. 646, 664 (1983).

Salman is a good example. Maher's disclosures to his brother were motivated by love, a desire to help his brother, and a desire to build a relationship of trust and closeness. Michael in turn reciprocated by publicly conveying to Maher his gratitude, thereby enhancing Maher's status and reputation. For example, the *Salman* opinion recounts how Michael gave a toast at Maher's wedding, describing Maher as "one of the most generous human beings he knows."[43] Maher wept.[44]

The *Dirks* rule reflects the facts that gifting is a common component of close relationships and that, among close relationships, families are distinctive.[45] Scholars have written about the close ties supplied by kinship.[46] Evidence suggests that people give more to family members than to strangers and that the motivation for such gifts is complex but motivated, at least in part, by a perceived personal benefit on the part of the giftor.[47] The rule announced in *Dirks* for tippee liability correctly recognizes both the frequency of such gifts and the role the giftor's self interest plays in the scope of the personal benefit requirement.

III. Policy Considerations

The conduct in *Salman* falls within the core of illegal tipping as defined by the Court in *Dirks*. Like *Dirks*, *Salman* leaves the outer limits of when a gift involves a personal benefit unclear, recognizing merely that an insider receives a personal benefit when he gives confidential information to a trading friend or relative.[48] Cases involving family members are the easy insider trading cases because, for the reasons set out above, a court can reasonably infer the insider's personal benefit from the mere fact of the family relationship.

43. United States v. Salman, 792 F.3d 1087, 1090 (9th Cir. 2015), *cert. granted*, 136 S. Ct. 899 (2016).

44. *Id.*

45. *See, e.g.*, Robert A. Prentice, *"Law &" Gratuitous Promises*, 2007 U. ILL. L. REV. 881, 935 (noting that most gifts are among family members).

46. *See, e.g.*, Steven L. Del Sesto, Book Review, 65 J. CRIM L. & CRIMINOLOGY 132, 132-33 (1974) (reviewing FRANCIS A.J. IANNI & ELIZABETH REUSS-IANNI, A FAMILY BUSINESS: KINSHIP AND SOCIAL CONTROL IN ORGANIZED CRIME (1972) (describing the importance of kinship in organized crime)).

47. *See, e.g.*, Cox, *supra* note 34, at 537-39 (identifying gifts by parents to their children as motivated by an exchange-based expectation of future support); Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. REV. 551, 570-86 (1999) (exploring the role of trust and reciprocity in family gifts made through bequests); Maria Porter & Abi Adams, *For Love or Reward?: Characterising Preferences for Giving to Parents in an Experimental Setting*, ECON. J. EARLY VIEW 19-20 (Oct. 7, 2015), http://onlinelibrary.wiley.com/doi/10.1111/ecoj.12248/epdf (summarizing results of experimental studies suggesting that people give more to parents than strangers, but that the motivation for such gifts is not pure altruism).

48. *See Salman*, 792 F.3d at 1094.

How far does that principle extend? In *Newman*, the legal question was whether the corporate insiders had disclosed nonpublic information for personal benefit.[49] The Government argued that personal benefit could be inferred because of the relationship between the insiders and the tippees.[50] The court in *Newman* did not reject this argument but applied a practical constraint: a personal benefit can only be presumed when the insider's relationship to the friend or relative is "meaningfully close."[51] As the *Newman* court recognized, friends and acquaintances can vary in closeness, and there is no reason to presume that an insider receives a personal benefit from making a gift to a casual acquaintance any more than from making a gift to a complete stranger.[52] Imposing liability for disclosures to casual acquaintances would make *Dirks*' personal benefit requirement meaningless.[53]

And there are good reasons for retaining the *Dirks* limitation. *Dirks* was concerned with providing sufficient predictability to allow participants in the securities markets to gather and trade on information without undue concern about liability exposure. The *Dirks* court adopted the personal benefit test "because it worried that a vague and uncertain standard of liability would inhibit the work of investment analysts like Mr. Dirks."[54] As the Court recognized in *Dirks*, a legal rule that imposes liability on the basis of an information disparity would chill socially valuable efforts by investors to gather information and use it. These efforts are socially valuable because they lead to better informed prices, enhancing market efficiency and discipline.[55]

The *Dirks* personal benefit rule is practical because it prohibits tippees from using information in situations where the circumstances of the tip are inherently problematic, either because the tippee has induced the tip through an exchange or because of the tippee's relationship with the tipper. In neither of the *Dirks* scenarios, then, is the tippee likely to confuse the disclosure with information obtained through legitimate research.[56]

49. *See* United States v. Newman, 773 F.3d 438, 451-52 (2d Cir. 2014), *cert. denied*, 136 S. Ct. 242 (2015) ("The circumstantial evidence in this case was simply too thin to warrant the inference that the corporate insiders received any personal benefit in exchange for their tips.").

50. *Id.* at 452.

51. *Id.*

52. *See id.*

53. *See id.* ("If this was a 'benefit,' practically anything would qualify.").

54. Michael Perino, *The Gift of Inside Information*, N.Y. TIMES DEALBOOK (Dec. 12, 2014, 2:56 PM), http://dealbook.nytimes.com/2014/12/12/the-gift-of-inside-information.

55. *See, e.g.*, Daniel R. Fischel, *Insider Trading and Investment Analysts: An Economic Analysis of* Dirks v. Securities and Exchange Commission, 13 HOFSTRA L. REV. 127, 140-46 (1984) (arguing against applying insider trading regulation to analysts because of their role in enhancing market efficiency).

56. *Cf.* United States v. Salman, 792 F.3d 1087, 1091 (9th Cir. 2015), *cert. granted*, 136 S. Ct. 899 (2016) ("[C]orporate insiders, in the many conversations they typically have with stock

Moreover, *Dirks'* limitations do not result in a regulatory void. Although professional traders may obtain information advantages that are unfair—such as when a corporate official selectively discloses material non-public information—corporate officials are in the best position to prevent these situations by avoiding the selective disclosures that give professional traders advantages over other investors.[57] As a result, regulatory efforts in this context are better directed at the source of the information, as reflected in Regulation Fair Disclosure, which, importantly, does not impose liability on downstream recipients of selectively-disclosed information.[58]

Conclusion

Developments in the securities markets raise difficult questions about the circumstances under which investor efforts to obtain and use information to gain trading advantages are appropriate. Professional traders have systematic advantages over small investors, and their trading may raise concerns about fairness and equal access. In an environment in which some investors, such as hedge funds, have high-powered incentives to develop and exploit informational advantages, the stakes are high and the lines between legitimate and illegitmate trading activity are blurred.

The complexity of regulating insider trading appropriately in this market environment should not be confused with an easy case like *Salman*. *Salman* is about a family member stealing corporate information by making a gift of that information to his brother. Simply put, family is different.

analysts, often accidentally or mistakenly disclose material information that is not immediately available to the public.").

57. *See* Jill E. Fisch, *Start Making Sense: An Analysis and Proposal for Insider Trading Regulation*, 26 GA. L. REV. 179, 246-51 (1991) (arguing that insider trading regulation should impose liability on corporate officials for the insider trading profits earned by their tippees to deter sources from revealing material nonpublic information).

58. *See* Jill E. Fisch, Newman *Reins in Criminal Prosecution of Remote Tippees for Insider Trading*, CLS BLUE SKY BLOG (Jan. 28, 2015), http://clsbluesky.law.columbia.edu/2015/01/28/newman-reins-in-criminal-prosecution-of-remote-tippees-for-insider-trading (arguing that the government could make greater use of Regulation Fair Disclosure to address selective disclosure by corporate insiders).