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The Sky is Not Falling, Todd Newman: The Ninth Circuit Endorses a Measured Reading of *Newman's* Definition of Personal Benefit for Insider Trading Liability in *United States v. Salman*

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THE SKY IS NOT FALLING, TODD NEWMAN: THE NINTH CIRCUIT ENDORSES A MEASURED READING OF *NEWMAN*'S DEFINITION OF PERSONAL BENEFIT FOR INSIDER TRADING LIABILITY IN *UNITED STATES v. SALMAN*

Abstract: On July 6, 2015, the U.S. Court of Appeals for the Ninth Circuit, in *United States v. Salman*, declined to adopt the novel definition of the personal-benefit element for insider trading, as articulated by the U.S. Court of Appeals for the Second Circuit in *United States v. Newman* in December 2014. In so doing, the court's decision presented the first significant resistance to the longevity of the *Newman* court's apparent holding that the personal-benefit element requires proof of a pecuniary exchange in all instances. This Comment argues that the court in *Salman* correctly declined to extend the *Newman* personal-benefit definition beyond its facts, that the two cases are reconcilable, and together illustrate the difference between "friends" and family for the purposes of establishing tipper-tippee, insider-trading liability.

INTRODUCTION

Insider trading is a type of securities fraud that inhabits a somewhat murky area of U.S. securities law.¹ Neither Congress nor the Securities and Exchange Commission (SEC) have been able to settle on one clear definition of insider trading.² With vague statutory guidance provided by section 10(b) of the Securities Exchange Act of 1934 ("the 1934 Act"), and SEC Rule 10b-5 promulgated thereunder ("Rule 10b-5"), the contours of insider-trading law

¹ See *United States v. Whitman*, 904 F. Supp. 2d 363, 367 & n.1 (S.D.N.Y. 2012). Many have opined on the difficulty created by Congress's reluctance to adopt a clear statutory definition of illegal insider trading, contending that the "judge-made law" on which the courts must rely can create potential coverage gaps, or, conversely, can reach actions believed to be lawful by those who commit them. See *id.*; Robert G. Morvillo & Robert J. Anello, *The Evolving Mystery of Illegal Insider Trading*, N.Y.L.J. (ONLINE), Aug. 3, 2010, http://www.maglaw.com/publications/articles/00225/_res/id=Attachments/index=0/070081001Morvillo.pdf [<https://perma.cc/VRB3-FR73>].

² E.g., John P. Anderson, *Greed, Envy, and the Criminalization of Insider Trading*, 2014 UTAH L. REV. 1, 3. Despite the current absence of clear statutory guidance, proposed legislation aimed at alleviating that lack of clarity is currently pending in both the U.S. Senate and U.S. House of Representatives. See Stop Illegal Insider Trading Act, S. 702, 114th Cong. (2015); Ban Insider Trading Act of 2015, H.R. 1173, 114th Cong. (2015).

have been predominantly defined by the courts.³ Although it may come in various forms, “insider trading” generally encompasses the buying or selling of a security on the basis of material nonpublic information, in breach of a duty to disclose that information or abstain from trading.⁴ With regards to a specific subspecies of insider trading—tipper-tippee liability—the test for determining whether there has been a breach of duty, and a triggering of liability, is whether the insider will “personally benefit” from the disclosure, either directly or indirectly.⁵ Courts have long held that a personal benefit may be inferred when “an insider makes a gift of confidential information to a trading relative or friend.”⁶ Many have argued that the 2014 holding by the U.S. Court of Appeals for the Second Circuit in *United States v. Newman* marked a meaningful departure from the established scope of the personal-

³ See 15 U.S.C. § 78j(b) (2012); *Whitman*, 904 F. Supp. 2d at 367 n.1 (noting that Congress and the SEC have long been opposed to comprehensive insider-trading legislation for fear that any clear definition would inevitably create exploitable “loopholes;” however, the alternative judge-made law that has developed has created many gaps); 17 C.F.R. § 240.10b-5 (2015); David T. Cohen, Note, *Old Rule, New Theory: Revising the Personal Benefit Requirement for Tipper/Tippee Liability Under the Misappropriation Theory of Insider Trading*, 47 B.C. L. REV. 547, 552 (2006) (noting that section 10(b) of the Securities Exchange Act of 1934 (“1934 Act”) and SEC Rule 10b-5 (“Rule 10b-5”) comprise the primary basis for the federal prohibition of insider trading). See generally *United States v. O’Hagan*, 521 U.S. 642, 652 (1997) (extending liability to “outsiders,” who owe no duty to disclose to the shareholders, but rather owe a duty to the source of the information); *Dirks v. SEC*, 463 U.S. 646, 659 (1983) (extending liability to situations in which the insider does not trade on the basis of material nonpublic information, but discloses or “tips” the information to “tippees” who then trade on the basis of the confidential information before it is publicly disclosed); *Chiarella v. United States*, 445 U.S. 222, 228–30 (1980) (announcing insider trading liability where a corporate insider had a duty to disclose arising from a relationship of trust and confidence between himself and the shareholders of the corporation). Section 10(b) of the 1934 Act has been codified as 15 U.S.C. § 78j(b), and Rule 10b-5 has been codified in the regulations as 17 C.F.R. § 240.10b-5. U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5.

⁴ See *United States v. Newman*, 773 F.3d 438, 445–47 (2d Cir. 2014), *cert. denied*, 136 S. Ct. 242 (2015) (mem.); *Insider Trading*, U.S. SEC, <http://www.sec.gov/answers/insider.htm> [<https://perma.cc/F7HK-VUPF>]. The U.S. Court of Appeals for the Ninth Circuit has held that “a statement is material [for the purposes of securities law] if there is a substantial likelihood that a reasonable investor would consider it important in making a decision.” *United States v. Tarallo*, 380 F.3d 1174, 1182 (9th Cir. 2004). An insider generally owes a duty to the shareholders of the insider’s corporation to not exploit his or her positioning within the company’s structure for personal gain. See *Chiarella*, 445 U.S. at 226–30.

⁵ See *Dirks*, 463 U.S. at 662; Max Stendahl, *Brother’s Keeper*, LAW360 (Mar. 4, 2016), <http://www.law360.com/articles/767599/brother-s-keeper-a-landmark-insider-trading-case-and-the-unraveling-of-a-family>. Tipper-tippee liability occurs in the context of a selective disclosure of confidential information by an insider to an outsider, the tippee, who then trades on the information. 2 BRENT A. OLSON, PUBLICLY TRADED CORPORATIONS HANDBOOK § 17:24 (West 2015). The idea behind the personal-benefit litmus test is that if the insider personally benefits from a disclosure, he or she is violating the duty owed to the shareholders to not exploit his or her position for personal gain. See Stendahl, *supra*.

⁶ See *Dirks*, 463 U.S. at 664; *United States v. Jiau*, 734 F.3d 147, 153 (2d Cir. 2013) (quoting *SEC v. Obus*, 693 F.3d 276, 285 (2d Cir. 2012)).

benefit element by narrowing the test to require proof of a pecuniary exchange.⁷

In July 2015, in *United States v. Salman*, the U.S. Court of Appeals for the Ninth Circuit declined to adopt the Second Circuit's so-called novel definition of personal benefit.⁸ *Salman* involved an appeal from a remote tippee, Bassam Salman, convicted for trading on confidential information that he had obtained indirectly from his insider brother-in-law.⁹ Salman urged the court to adopt the holding in *Newman*, which he argued had significantly changed the law on the personal-benefit element, by implementing a new, constricted definition.¹⁰ The Ninth Circuit declined to adopt such a reading of *Newman*, and rejected the assertion that it could be followed so broadly.¹¹ In distinguishing *Salman* from the facts in *Newman*, the Ninth Circuit concluded that the clear, fraternal relationship between the insider and his initial tippee, along with the insider's intent to help his brother by giving him confidential information, was all enough to infer that the insider received a personal benefit for his tips.¹² The relationship between the holdings in *Salman* and *Newman* has drawn significant attention to the uncertainty regarding the appropriate scope of the personal-benefit element.¹³ In the fall of 2016, the U.S. Su-

⁷ See Carlyle H. Dauenhauer, Note, *Justice in Equity: Newman and Egalitarian Reconciliation for Insider-Trading Theory*, 12 RUTGERS BUS. L.J. 39, 54–57 (2015); Matt Levine, *Justices Will Know Insider Trading When They See It*, THINKADVISOR.COM (Feb. 5, 2016), http://www.thinkadvisor.com/2016/02/05/justices-will-know-insider-trading-when-they-see-it?legal-compliance%3Fref%3Dchannel-blogs&page_all=1 [<https://perma.cc/NQ3V-CK83>] [hereinafter Levine, *Justices Will Know*]; see also *infra* notes 75–76 and accompanying text (discussing the view that the U.S. Court of Appeals for the Second Circuit's holding sharply narrows the definition of personal benefit by requiring a quid pro quo exchange in addition to proof of a friendship or familial relationship). The Second Circuit in 2014 in *United States v. Newman* declined to permit an inference of personal benefit on the basis of the “mere fact of friendship” alone in the absence of a “meaningfully close personal relationship” that generates an exchange that is objective, consequential and “represents at least a potential gain of a pecuniary or similarly valuable nature.” See 773 F.3d at 452.

⁸ See *United States v. Salman (Salman II)*, 792 F.3d 1087, 1093 (9th Cir. 2015), *cert. granted*, (*Salman III*) 136 S. Ct. 899 (2016) (mem.).

⁹ See *id.* at 1088–89. A “remote tippee” is a person that receives confidential information indirectly, and the term generally refers to a person who is at least one degree removed from the original insider's tip. Kathleen Coles, *The Dilemma of the Remote Tippee*, 41 GONZ. L. REV. 181, 183 & n.18 (2006).

¹⁰ See Appellant's Reply Brief Concerning *United States v. Newman*, at 1–4, *Salman II*, 792 F.3d 1087 (May 4, 2015) [hereinafter Appellant's Reply Brief] (No. 14-10204), 2015 WL 2165460, at *1–4.

¹¹ See *Salman II*, 792 F.3d at 1093–94.

¹² See *id.*

¹³ William R. Baker III et al., *The Circuits Are Split: Are Tangible Benefits Required for Insider Trading Liability?*, LEXOLOGY (July 10, 2015), <http://www.lexology.com/library/detail.aspx?g=f2b3ad55-1e63-4d82-81f8-1945c3c6d2ab> [<https://perma.cc/598A-LKLL6>]; Levine, *Justices Will Know*, *supra* note 7; Matt Levine, *When Can Investors Talk to Companies?*, BLOOMBERGVIEW (July 31, 2015 3:47 PM), <http://www.bloomberglaw.com/articles/2015-07-31/when-can-investors-talk-to-companies-> [hereinafter Levine, *When Can Investors Talk*] [<https://perma.cc/CD4C-B36P>].

preme Court will review the Ninth Circuit's ruling in *Salman* on the issue of personal benefit.¹⁴

This Comment argues that the Ninth Circuit's holding was correct and that the two opinions should be reconciled by a Supreme Court affirmation of the *Salman* holding that recognizes the substantive difference between friendships and family relationships.¹⁵ Part I of this Comment reviews the current state of insider-trading jurisprudence, discusses the facts behind *Newman* and the Second Circuit's holding, and provides the facts and procedural posture of *Salman*.¹⁶ Part II explores the Ninth Circuit's reasoning in *Salman* and further discusses the relationship between the *Salman* and *Newman* opinions.¹⁷ Part III argues that the Ninth Circuit correctly declined to extend the *Newman* personal-benefit definition beyond its facts, and that the Ninth Circuit's measured reading of *Newman* illustrates that Second Circuit's holding was not a meaningful departure from existing doctrine, but rather an attempted clarification.¹⁸ Part III further argues that the two cases should be reconciled by the Supreme Court in an affirmation of the *Salman* holding and a clearer articulation of existing doctrine.¹⁹

I. MURKY WATERS: THE STATE OF INSIDER-TRADING LAW

Section 10(b) of the 1934 Act and Rule 10b-5 serve as the primary basis for the federal prohibition of insider trading.²⁰ Although insider trading is not

¹⁴ See *Salman III*, 136 S. Ct. at 899. The Court will consider the issue of whether the personal-benefit element of an insider-trading claim requires proof of an objective exchange or whether proof of a close family relationship is enough to support an inference that the insider received a benefit for the tip. See *id.* (limiting grant of certiorari to one question).

¹⁵ See *infra* notes 88–108 and accompanying text.

¹⁶ See *infra* notes 20–62 and accompanying text.

¹⁷ See *infra* notes 67–83 and accompanying text.

¹⁸ See *infra* notes 88–102 and accompanying text.

¹⁹ See *infra* notes 103–108 and accompanying text.

²⁰ 15 U.S.C. § 78j(b); *VanCook v. SEC*, 653 F.3d 130, 137–38 (2d Cir. 2011); 17 C.F.R. § 240.10b-5. Insider trading cases are typically, but not exclusively, brought under section 10(b). See 15 U.S.C. § 78j(b); Cohen, *supra* note 3, at 552; Morvillo & Anello, *supra* note 1. Both criminal and civil actions can be brought against insider-trading violators under rule 10b-5. See Coles, *supra* note 9, at 186 n.27. Criminal enforcement is handled by the U.S. Department of Justice, and civil actions may be brought by the SEC. 15 U.S.C. § 78ff(a) (criminal enforcement); *id.* § 78u(d) (civil enforcement); see Coles, *supra* note 9, at 186 n.27. Liability under any theory of insider trading requires proof of scienter, which is defined as “a mental state embracing intent to deceive, manipulate or defraud.” *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193–94 n.12 (1976); *Obus*, 693 F.3d at 286. For civil violations of section 10(b), recklessness has largely been accepted as the minimally sufficient culpable mental state to satisfy the scienter requirement. See, e.g., *In re K-tel Intern., Inc. Sec. Litig.*, 300 F.3d 881, 893 (8th Cir. 2002) (noting that the scienter requirement under section 10(b) and Rule 10b-5 may be satisfied by a showing of “severe recklessness”); *Novak v. Kasaks*, 216 F.3d 300, 312 (2d Cir. 2000) (noting that the scienter requirement may be satisfied by pleading “conscious recklessness”); *Phillips v. LCI Intern., Inc.*, 190 F.3d 609, 620 (4th Cir. 1999) (same). In con-

expressly proscribed by either section 10(b) or Rule 10b-5, its prohibition has been crafted out of the statutory scheme.²¹ Section 10(b) was designed as a catch-all clause to prevent fraudulent practices, and it grants broad authority to the SEC to promulgate rules and regulations in furtherance of that objective.²² Among other things, it prohibits the use of “any manipulative or deceptive device or contrivance” “in connection with the purchase or sale of any security” in violation of SEC rules or regulations.²³ Rule 10b-5 implements section 10(b) by forbidding the use of “any device, scheme, or artifice to defraud . . . in connection with the purchase or sale of any security.”²⁴ The act of trading on nonpublic information has generally been considered a “deceptive device” under these provisions.²⁵

A. Insiders, Tips, and Trades, Oh My: Theories of Insider Trading Liability

The U.S. Supreme Court has shaped the scope of insider-trading liability under section 10(b) and Rule 10b-5 by carving out several complementary theories of liability from the statutory framework: classical theory, misappropriation theory, and tipper-tippee liability.²⁶ Under the classical theory, corporate insiders are prohibited from trading in the securities of their own corpora-

trast, willfulness is required in order to establish a criminal violation. 15 U.S.C. § 78ff(a); see *O'Hagan*, 521 U.S. at 665–66.

²¹ See *Newman*, 773 F.3d at 445 (noting that the federal of prohibition on insider trading is based on the notion that it is a type of securities fraud and discussing the framework that has been crafted by the U.S. Supreme Court to deal with specific instances of unlawful trading); see also *SEC v. Zandford*, 535 U.S. 813, 819 (2002) (noting that congressional intent to promote investor confidence has influenced the U.S. Supreme Court to direct that section 10(b) be construed with flexibility in order to “effectuate its remedial purposes”). Three seminal U.S. Supreme Court decisions have shaped the contours of insider trading law: *Chiarella v. United States* from 1980, *Dirks v. SEC* from 1983, and *United States v. O'Hagan* from 1997. See *O'Hagan*, 521 U.S. at 652; *Dirks*, 463 U.S. at 659; *Chiarella*, 445 U.S. at 228–30.

²² See 15 U.S.C. § 78j(b); *Chiarella*, 445 U.S. at 226; *VanCook*, 653 F.3d at 138; see also *Hochfelder*, 425 U.S. at 206 (finding an overall congressional intent to prevent “manipulative and deceptive practices” and to create civil liability for business practices conducted “other than in good faith”).

²³ 15 U.S.C. § 78j(b).

²⁴ 17 C.F.R. § 240.10b-5; see Laura D. Mruk, *The Proverbial Axe to the Judicial Oak: The Impact of Stoneridge on Plaintiff's Actions Under § 10(b)*, 29 N. ILL. U. L. REV. 281, 284 (2009); see also *O'Hagan*, 521 U.S. at 651 (“[L]iability under Rule 10b-5 does not extend beyond conduct encompassed by section 10(b)'s prohibition.”).

²⁵ See *O'Hagan*, 521 U.S. at 652; *United States v. McGee*, 763 F.3d 304, 310–11 (3d Cir. 2014).

²⁶ See *O'Hagan*, 521 U.S. at 652–53 (discussing the misappropriation theory of insider trading); *Dirks*, 463 U.S. at 659 (shaping the tipper-tippee subset of insider trading law); *Chiarella*, 445 U.S. at 228–30 (shaping the classical theory of insider trading); see also *Newman*, 773 F.3d at 445–47 (discussing the history of insider trading liability, specifically addressing classical theory, misappropriation theory, and tipper-tippee liability).

tions on the basis of material, nonpublic information without first disclosing that information.²⁷ Liability under the classical theory is based on a breach of this duty to “disclose or abstain” that the insider owes to the shareholders.²⁸ Courts have held that a breach of this duty constitutes a “deceptive device” under section 10(b), as the insider is essentially taking unfair advantage of the uninformed shareholders.²⁹ Under misappropriation theory, liability extends to “outsiders” who misappropriate and trade on confidential information in breach of a duty owed to the source of the information, rather than one owed directly to the shareholders.³⁰

²⁷ See *O'Hagan*, 521 U.S. at 651–52; *Chiarella*, 445 U.S. at 228–30; *SEC v. Cuban*, 620 F.3d 551, 553–54 (5th Cir. 2010). The term “corporate insiders” traditionally refers to officers, directors, majority shareholders, and other persons or employees “who have access to confidential corporate information.” See *Moss v. Morgan Stanley*, 719 F.2d 5, 10 (2d Cir. 1983). It may also refer to “attorneys, accountants, consultants, and others who temporarily become fiduciaries of a corporation.” *O'Hagan*, 521 U.S. at 652; see *Cuban*, 620 F.3d at 554. The general test to determine insider status is “whether the person has access to confidential information intended to be available only for a corporate purpose and not for the personal benefit of anyone.” *Feldman v. Simkins Indus., Inc.*, 679 F.2d 1299, 1304 (9th Cir. 1982); see *Dirks*, 463 U.S. at 655 n.14.

²⁸ See *Chiarella*, 445 U.S. at 226–30 (citing *In re Cady & Roberts & Co.*, 40 SEC 907, 911 (1961)). The duty to disclose or abstain arises from a special “relationship of trust and confidence between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position within that corporation.” *Chiarella*, 445 U.S. at 226–27; see *Cuban*, 620 F.3d at 553–54.

²⁹ See, e.g., *Chiarella*, 445 U.S. at 228–29 (noting that such practice is an unfair advantage, because the insider is using material information to which minority shareholders do not have access for his or her own personal benefit); *McGee*, 763 F.3d at 300–11; *Morvillo & Anello*, *supra* note 1; see also 15 U.S.C. § 78j(b). Courts have stressed that simply possessing material, nonpublic information is not enough in itself to invoke the duty to disclose, thus the offense is predicated on some breach of trust or deception. See *United States v. Evans*, 486 F.3d 315, 321 (7th Cir. 2007) (citing *Chiarella*, 445 U.S. at 235). Therefore, if the insider refrains from trading, then there is no breach. See *id.*

³⁰ See *O'Hagan*, 521 U.S. at 652; *McGee*, 763 F.3d at 311; *Anderson*, *supra* note 2, at 20–21. “Source” refers to the third-party source of the confidential information who has a fiduciary relationship, or one of similar trust and confidence, to the outsider, and entrusts the information to the outsider with the confidence that it will not be exploited. See *McGee*, 763 F.3d at 311; *Anderson*, *supra* note 2, at 21–22. For example, misappropriation could occur where a lawyer trades in a company’s securities after learning that his or her firm’s client was planning a takeover of that company. See *O'Hagan*, 521 U.S. at 647–48, 659; *McGee*, 763 F.3d at 311. It is unlikely that the government would be able to prosecute the lawyer under the classical theory in this scenario because the lawyer is not an insider of the company that had its stock traded. See *O'Hagan*, 521 U.S. at 653 n.5; see also *Dirks*, 463 U.S. at 654–55 (noting that, under classical theory, there can be no duty to disclose where the person was not an agent of the corporation, fiduciary, or a person in whom the sellers of the securities had placed their trust and confidence). Nevertheless, the U.S. Supreme Court has recognized that a fiduciary relationship with a principal insider, such as one between a lawyer and his or her firm’s client involved in outside transactions, creates a duty of confidentiality and loyalty to the principal. See *O'Hagan*, 521 U.S. at 652–53. By “secretly converting the principal’s information for personal gain,” such an outsider “defrauds the principal of the exclusive use of that information.” See *id.* The Court has held that such conduct is a “deceptive device” under section 10(b). See *id.* at 653; *SEC v. Bauer*, 723 F.3d 758, 769 (7th Cir. 2013) (quoting *O'Hagan*, 521 U.S. at 654). Thus, the duty “runs to the source of the information” rather than

Under the tipper-tippee theory, first articulated by the U.S. Supreme Court in *Dirks v. SEC* in 1983, liability can extend to encompass persons that receive “tips” of confidential information from either insiders or misappropriators and then trades on that information.³¹ Tipper-tippee liability is based on the assumption that the person receiving the tip, “the tippee,” assumes a duty that is “derivative from that of the insider’s.”³² Liability attaches when (1) the insider has breached his duty to the issuer, shareholder, or source of the information by disclosing it to the tippee, and (2) the tippee knew or had reason to know of the insider’s breach of duty.³³ In *Dirks*, the Court announced that the test for determining whether there has been a breach of duty by the insider “is whether the insider personally will benefit, directly or indirectly, from his disclosure.”³⁴

The initial step in determining whether the insider has breached his duty requires courts to focus on objective criteria that would indicate a direct or indirect benefit to the insider, “such as a pecuniary gain or reputational benefit that may translate into future earnings.”³⁵ The *Dirks* Court identified two

the trading counterparty, and an outsider entrusted with confidential information must either refrain from trading or disclose his or her plans to trade on the information to the principal. *See Bauer*, 723 F.3d at 769 (quoting *O’Hagan*, 521 U.S. at 655 n.6); *see also O’Hagan*, 521 U.S. at 653 (discussing the idea that misappropriation theory protects the integrity of the securities market from abuses by those who owe no fiduciary duty to shareholders).

³¹ *See Dirks*, 463 U.S. at 659. The underlying charges in *Dirks* involved the liability of a financial analyst who received a confidential tip from a former officer of an insurance company that the insurance company had been involved in fraudulent practices. *See id.* at 648–49. The former officer urged the analyst to verify the fraud and disclose it publicly. *Id.* at 649. During the course of his investigation, the analyst openly discussed the information with some of his clients who were investors in the company, and some of them later sold their shares based on the analyst’s tip. *Id.*

³² *Id.* at 659. (“Not only are insiders forbidden by their fiduciary relationship from personally using undisclosed information to their advantage, but they also may not give such information to an outsider for the same improper purpose of exploiting the information for their personal gain.”) In formulating this new theory of liability for insider trading, the Court relied on 15 U.S.C. § 78t(b), which makes it unlawful to indirectly commit any act made unlawful by the federal securities laws “by means of any other person.” *See id.* (citing 15 U.S.C. § 78t(b)).

³³ *See id.* at 660; *Evans*, 486 F.3d at 321–22.

³⁴ 463 U.S. at 662. The Court noted the importance of the “purpose of the disclosure,” in its analysis as to whether disclosure constitutes a breach, recognizing that in some situations an insider will act consistently with his fiduciary duties yet release of the information may affect the market. *See id.* For example, individuals may mistakenly think that the information has already been disclosed or that it is not material enough to affect the market, in which case no breach of trust or confidence may be present. *See id.* The Court quoted the SEC Commissioner’s discussion in *Cady & Roberts*, noting that “the purpose of securities laws was to eliminate ‘use of inside information for personal advantage.’” *See id.* (quoting *Cady & Roberts*, 40 SEC at 912 n.15). The Court further noted that absent some personal gain by the insider, there is no breach of duty to stockholders; thus, if there is no breach by the insider, there is no derivative breach by the tippee. *Id.*

³⁵ *See id.* at 663; *Evans*, 486 F.3d at 321.

specific situations likely to contain “objective facts and circumstances that often justify such an inference.”³⁶

First, a personal benefit may be inferred from “a relationship between the insider and the recipient that suggests a quid pro quo from the latter, or an intention to benefit the particular recipient.”³⁷ Second, a personal benefit may be inferred “when an insider makes a gift of confidential information to a trading relative or friend.”³⁸ Courts use these two examples as a litmus test when conducting personal-benefit analysis.³⁹

B. Enter Chaos: The Personal-Benefit Element in United States v. Newman

In December 2014, the U.S. Court of Appeals for the Second Circuit, in *United States v. Newman* articulated a unique formulation of the personal-benefit element, as it pertains to “gifts” from tippees to friends.⁴⁰ *Newman* involved two investment portfolio managers, Todd Newman and Anthony Chiasson, who were both charged under section 10(b) and Rule 10b-5 for trading on confidential information regarding two companies: Dell and NVIDIA.⁴¹ Newman and Chiasson were “remote tippees,” as they both obtained the information via two distinct tipping chains several tips removed from the original disclosure, which originated from insiders within each company.⁴² For example, the Dell tipping chain originated with Tipper A, an in-

³⁶ *Dirks*, 463 U.S. at 664; *see also id.* (“The theory . . . is that the insider, by giving the information out selectively, is in effect selling the information to its recipient for cash, reciprocal information, or other things of value for himself” (alteration in original) (quoting Victor Brudney, *Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws*, 93 HARV. L. REV. 322, 348 (1979))).

³⁷ *Dirks*, 463 U.S. at 664.

³⁸ *Id.* Under that framework, the Court held that there was no actionable violation by *Dirks* because there was no fiduciary breach to the shareholders by those insiders who tipped *Dirks* the confidential information. *See id.* at 665–67. The Court concluded that the purpose of the tipper’s disclosure was to expose the fraud rather than to reap any pecuniary gain or to make a gift of information to the initial tippee. *See id.* at 667.

³⁹ *See, e.g., Jiau*, 734 F.3d at 153 (applying the *Dirks* formulation); *Obus*, 693 F.3d at 285 (same); *United States v. Rajaratnam*, 802 F. Supp. 2d 491, 498 (S.D.N.Y. 2011) (same); Stendahl, *supra*, note 5.

⁴⁰ *See Newman*, 773 F.3d at 452 (“[W]e hold that such an inference is impermissible in the absence of proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature.”); Dauenhauer, *supra* note 7, at 56–57 (discussing one critical view of the holding in *Newman* as erroneously redefining the personal-benefit element, and the difficulties that definition poses for prosecutors).

⁴¹ *Newman*, 773 F.3d at 442–43.

⁴² *See id.* at 443.

sider analyst with Dell's investor relations department.⁴³ Tipper A tipped information regarding Dell's unannounced earning numbers to Tippee A, an analyst at another firm, who then indirectly relayed the information to Newman and Chiasson through two and three additional levels of tips.⁴⁴ Tipper A and Tippee A attended business school together, but aside from some career advice and résumé assistance that Tippee A had provided to Tipper A prior to the original tip, evidence suggested that the two were not "close."⁴⁵ The NVIDIA tipping chain had a similar structure, where the original tipper and tippee knew each other from church.⁴⁶

In reversing the defendants' convictions, the Second Circuit found that there was insufficient evidence to establish that either tipper had received a personal benefit in exchange for their tips.⁴⁷ The court held that although the personal-benefit element is "permissive" under the *Dirks* framework, "the mere fact of friendship, particularly of a casual or social nature" is an insufficient basis to infer that a personal benefit was received for the tip.⁴⁸ The court acknowledged that *Dirks* suggested that such an inference can be made from evidence of a friendship or familial relationship, but ultimately determined that an inference of personal benefit to the insider is impermissible in the absence of other factors.⁴⁹ Additional proof of a "meaningfully close personal relationship, that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature"

⁴³ See *id.* Rob Ray, of Dell's investor relations department was the original insider tipper in the Dell tipping chain. See *id.* He will be referred to as "Tipper A" throughout this Comment for the sake of clarity.

⁴⁴ See *id.* (noting that Newman and Chiasson were four and five levels removed from the original tipper, respectively). Sandy Goyal, an analyst at Neuberger Berman, was the original tippee. See *id.* He will be referred to as "Tippee A" throughout this Comment for the sake of clarity.

⁴⁵ See *id.* at 452.

⁴⁶ See *id.* at 443. The NVIDIA tipping chain originated with Chris Choi ("Tipper B"), a member of NVIDIA's finance unit, who tipped similar information regarding the company to Hyung Lim ("Tippee B"), a former executive of a technology company whom Tipper B knew from church. See *id.* at 443, 452. The information eventually circulated from Tippee B to Newman and Chiasson in similar fashion, several levels removed through a distinct tipping chain of analyst friends. See *id.* at 443.

⁴⁷ See *id.* at 442, 451–53 (concluding that evidence was too thin to support an inference that the insider received any personal benefit in exchange for his tip and thus holding that the government failed to establish the first prong of the personal benefit test announced in *Dirks*). The court further held that the government failed to establish that "Newman and Chiasson knew that they were trading on information obtained from insiders, or that those insiders received any benefit in exchange for such disclosures." See *id.* at 453.

⁴⁸ *Id.* at 452. The court further noted that although case law has emphasized the gain received by the insider need not be "immediately pecuniary," it is still critical that any benefit received is one "of some consequence" to establish a fraudulent breach. See *id.*

⁴⁹ *Id.* These other factors must establish evidence of "a relationship between the insider and the recipient that suggests a quid pro quo from the [recipient], or an intention to benefit the [recipient]." *Id.* (quoting *Jiau*, 734 F.3d at 153).

was required by the court before it could infer personal benefit and find a breach by the insider.⁵⁰ *Newman*'s holding was received with some controversy, as many have interpreted the court's articulation of the personal-benefit element as more constrictive than the standard announced in *Dirks*.⁵¹

C. United States v. Salman in the District Court

In 2002, Bassam Salman's future brother-in-law, Maher Kara joined Citigroup's healthcare investment banking group.⁵² Over the next few years Maher began seeking help understanding scientific concepts relevant to the healthcare and biotechnology industries from his brother Mounir ("Michael") Kara, who held an undergraduate degree in chemistry.⁵³ In 2004, the Kara brothers' discussions began to focus on companies that were active in the areas of oncology and pain management, and Maher eventually began to suspect that Michael was trading on the information they discussed, although Michael denied it.⁵⁴ As time went on, Michael became more persistent about eliciting confidential information from Maher, and Maher knowingly obliged.⁵⁵ From late 2004 through early 2007, Maher regularly provided Michael with material nonpublic information relating to a number of companies for which Citigroup was providing important advice in the context of potential acquisitions, and Michael traded on that information.⁵⁶

⁵⁰ See *id.* The court further concluded that the absence of any additional proof in the underlying prosecution precluded the government from establishing that the insiders breached any duty through their disclosures. See *id.* at 453.

⁵¹ See Dauenhauer, *supra* note 7, at 56–57; Peter J. Henning, *Court Strikes on Insider Trading, and Congress Lobs Back*, N.Y. TIMES (Mar. 16, 2015), http://www.nytimes.com/2015/03/17/business/dealbook/court-strikes-on-insider-trading-and-congress-lob-back.html?_r=0 [https://perma.cc/EV34-QFPL]; see also Patricia Hurtado, *Hedge Fund Insider Verdicts Tossed in Blow to U.S. Probe*, BLOOMBERGBUSINESS (Dec. 10, 2014), <http://www.bloomberg.com/news/articles/2014-12-10/hedge-fund-insider-verdicts-tossed-in-blow-to-us-investigation> [https://perma.cc/47E7-BPWJ] (discussing the practical consequences of a higher evidentiary bar for inferences of personal benefit under the tipper-tippee theory of insider-trading liability, which may lead to more rampant insider trading and fewer prosecutions). On October 5, 2015, the U.S. Supreme Court denied U.S. Solicitor General Donald Verrilli's petition for a writ of certiorari for *Newman* without comment. *Newman*, 136 S. Ct. at 242; see Ed Beeson, *Supreme Court Rejects Newman Insider Trading Appeal*, LAW360 (Oct. 5, 2015, 9:40 AM ET), <http://www.law360.com/articles/708238/supreme-court-rejects-newman-insider-trading-appeal> [https://perma.cc/4MFF-NCMH].

⁵² See *Salman II*, 792 F.3d at 1088; Indictment ¶ 2, United States v. Salman (*Salman I*), No. CR-11-0625 EMC, 2013 WL 6655176, at *1 (N.D. Cal. Dec. 17, 2013) [hereinafter Indictment], *aff'd*, 792 F.3d 1087, *cert. granted*, 136 S. Ct. 899.

⁵³ See *Salman II*, 792 F.3d at 1089; Indictment, *supra* note 52, ¶¶ 4, 16(b).

⁵⁴ See *Salman II*, 792 F.3d at 1089; Indictment, *supra* note 52, ¶¶ 4, 11, 16.

⁵⁵ See *Salman II*, 792 F.3d at 1089.

⁵⁶ *Id.*; *Salman I*, 2013 WL 6655176, at *1; Indictment, *supra* note 52, ¶¶ 11, 12, 16 (a)–(c). Meanwhile, in 2003, Salman's sister and Maher Kara got engaged, and the Salman and Kara families grew increasingly close over the next few months. See *Salman II*, 792 F.3d at 1089; Indictment, *supra* note 52, ¶ 6. Salman and Michael became fast friends. *Salman II*, 792 F.3d at 1089.

In the fall of 2004, Michael began to share the inside information that he had learned from Maher with their brother-in-law, Salman, and encouraged Salman to “mirror” his trading activity.⁵⁷ On September 1, 2011, Salman was indicted for several counts of securities fraud under section 10(b) and Rule 10b-5 in the U.S. District Court for the Northern District of California.⁵⁸ Evidence presented at trial revealed that on numerous occasions from 2004 to 2007, Salman’s co-conspirator and Michael executed nearly identical trades in securities issued by Citigroup clients shortly before the announcement of major transactions.⁵⁹ At trial, the government presented circumstantial evidence regarding the close familial relationship between Maher (tipper) and Michael (tippee), as well as Maher’s intention to help Michael by giving him confidential information to establish Maher’s personal benefit and breach of fiduciary duties under *Dirks*.⁶⁰ Furthermore, the government presented circumstantial evidence of Salman’s (remote tippee) knowledge of that personal benefit to establish the derivative breach required for his own liability.⁶¹ On September 30, 2013, the jury found Salman guilty on all five counts of securities fraud, which Salman subsequently appealed to the Ninth Circuit.⁶²

⁵⁷ See *Salman II*, 792 F.3d at 1089; Indictment, *supra* note 52, ¶¶ 11–13, 16(d)–(f). Instead of trading through his own account, Salman would deposit money, through a number of transfers, into a brokerage account held jointly by his wife’s sister and her husband, Karim Bayyouk. See *Salman II*, 792 F.3d at 1089; Indictment, *supra* note 52, ¶¶ 11–13, 16(d)–(f). Salman would then relay the inside information to Karim, and the two would split the profits. See *Salman II*, 792 F.3d at 1089; Indictment, *supra* note 52, ¶¶ 11–13, 16(d)–(f). On July 6, 2011, Maher Kara pleaded guilty to federal criminal charges of securities fraud and conspiracy and was subsequently sentenced to three months of home detention. Kara, SEC Release No. 23341, 2015 WL 5258843, at *1 (Sept. 10, 2015). On September 3, 2013, Bayyouk was found guilty of an obstruction charge relating to the SEC’s parallel civil action against Maher Kara, Bayyouk, and Salman, and was subsequently sentenced to eighteen months in prison. *Id.* On August 21, 2015, all three consented to the entry of final judgment against them in the SEC’s civil action. *Id.*

⁵⁸ See *Salman II*, 792 F.3d at 1088; *Salman I*, 2013 WL 6655176, at *1; Indictment, *supra* note 52, ¶¶ 15, 17(o), 19. Salman was indicted for one count of conspiracy to commit securities fraud and four counts of securities fraud. See *Salman I*, 2013 WL 6655176, at *1; Indictment, *supra* note 52, ¶¶ 15, 17(o), 19.

⁵⁹ See *Salman II*, 792 F.3d at 1089; *Salman I*, 2013 WL 6655176, at *1; Indictment, *supra* note 52, ¶¶ 11–13, 16(e)–(f), 17(b)–(o); see also *supra* note 57 and accompanying text (discussing that Salman did not execute the trades directly through his own account, but was still liable for the fraudulent trading activity). As a result of these trades, Salman and Bayyouk’s account grew from \$396,000 to approximately \$2.1 million. See *Salman II*, 792 F.3d at 1089.

⁶⁰ See *Salman I*, 2013 WL 6655176, at *6.

⁶¹ See *id.*

⁶² See *Salman II*, 792 F.3d at 1090; *Salman I*, 2013 WL 6655176, at *1.

II. THE NINTH CIRCUIT DECLINES TO ADOPT AN UNBRIDLED READING OF *NEWMAN*

This Part discusses the holding by the U.S. Court of Appeals for the Ninth Circuit in *United States v. Salman*, in July 2015.⁶³ This Part also briefly discusses the controversy surrounding the U.S. Court of Appeals for the Second Circuit's articulation of the personal-benefit element in *United States v. Newman*, in December 2014, and further, discusses the relationship between these two opinions.⁶⁴ Section A provides an in-depth discussion of the holding in *Salman*, with particular emphasis on the Ninth Circuit's decision not to adopt a broad reading of the *Newman* court's personal-benefit definition.⁶⁵ Section B briefly discusses *Newman*'s controversial reception, and addresses two somewhat contentious views of *Salman*'s impact on *Newman*'s articulation of personal-benefit.⁶⁶

A. *The Ninth Circuit Cautions Concerns Over Newman in United States v. Salman*

In *Salman*, the Ninth Circuit affirmed the lower court's decision and declined to adopt *Salman*'s reading of the personal-benefit definition delineated by the Second Circuit in *Newman*.⁶⁷ The appellant in *Salman* contended that the court in *Newman* held that evidence of a friendship or familial relationship between tipper and tippee alone was not enough to prove personal benefit, and that there must also be evidence of "at least a potential gain of pecuniary or similarly valuable nature" in exchange for the tip.⁶⁸ The Ninth Circuit declined to follow *Newman* to the extent it could be read so broadly, and

⁶³ See *infra* notes 67–74 and accompanying text.

⁶⁴ See *infra* notes 75–83 and accompanying text.

⁶⁵ See *infra* notes 67–74 and accompanying text.

⁶⁶ See *infra* notes 75–83 and accompanying text.

⁶⁷ See *United States v. Salman (Salman II)*, 792 F.3d 1087, 1093–94 (9th Cir. 2015), *cert. granted*, (*Salman III*) 136 S. Ct. 899 (2016) (mem.); Appellant's Reply Brief, *supra* note 10, at 2–3. Judge Jed S. Rakoff, U.S. District Court Judge for the Southern District of New York, sitting on the U.S. Court of Appeals for the Ninth Circuit by designation, penned the court's opinion. *Salman II*, 792 F.3d at 1088. Judge Rakoff had previously been asked to consider the effect of the U.S. Court of Appeals for the Second Circuit's 2014 decision in *United States v. Newman* in a SEC civil enforcement action on April 5, 2015, in *SEC v. Payton* in the U.S. District Court for the Southern District of New York, but declined to directly confront the issue. See *United States v. Newman*, 773 F.3d 438, 445–47 (2d Cir. 2014), *cert. denied*, 136 S. Ct. 242 (2015) (mem.); *SEC v. Payton*, 97 F. Supp. 3d 558, 559, 562 & n.2 (S.D.N.Y. 2015). In *Salman*, Judge Rakoff was freer to assess *Newman*'s articulation of personal benefit in the criminal context as a visiting judge in the Ninth Circuit, where he was unbound from Second Circuit precedent. See *Salman II*, 792 F.3d at 1088; Peter J. Henning, *Judge Rakoff Ruling on Tips May Help Prosecution on Insider Trading Cases*, N.Y. TIMES (July 7, 2015), <http://www.nytimes.com/2015/07/08/business/dealbook/judge-rakoff-ruling-on-tips-may-help-prosecution-on-insider-trading-cases.html> [https://perma.cc/5BMP-GP5A].

⁶⁸ See Appellant's Reply Brief, *supra* note 10, at 2–3 (quoting *Newman*, 773 F.3d at 452).

found that the evidence of Maher's intent to benefit his brother through his disclosure, along with their close familial relationship, was enough to support an inference of personal benefit.⁶⁹ The Ninth Circuit further stated in dictum that such a reading of *Newman* would have unintended implications, and found that the facts of the case were governed directly by the U.S. Supreme Court's definition of personal benefit in *Dirks v. SEC* in 1983.⁷⁰

In distinguishing *Salman* from *Newman*, the Ninth Circuit noted that in *Newman* there was very thin evidence suggesting that either tipper received a personal benefit in exchange for his disclosures.⁷¹ The Ninth Circuit emphasized the *Newman* court's acknowledgment that, under *Dirks*, personal benefit to the insider-tipper can be inferred from making a gift of confidential information to a trading relative or friend in addition to one that would result in a pecuniary gain.⁷² The Ninth Circuit further emphasized that although the *Newman* court recognized that an inference of a personal benefit may be based on a personal relationship between the tipper and tippee, the Second Circuit determined that "such an inference is impermissible in the absence of proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature."⁷³ The Ninth Circuit observed that the Second Circuit in *Newman* concluded that evidence was insufficient to establish that either tipper had received a personal bene-

⁶⁹ *Salman II*, 792 F.3d at 1093–94. The court noted that, according to his testimony, Maher Kara intended to benefit his brother Michael and to fulfill whatever needs Michael had by providing him with the confidential information. *See id.* at 1092, 1094. The court further noted that, according to Michael's testimony, he had repeatedly conveyed to Salman that Maher was the source of the inside information and asserted that the two of them had to "protect" Maher from exposure. *See id.* at 1092. Moreover, the court concluded that evidence of the brothers' close relationship and Maher's intent to help his brother was sufficient to establish that Maher Kara had personally benefited from the disclosure. *See id.* at 1092, 1094. Furthermore, the court concluded that Salman was aware of the personal benefit, and therefore Maher's breach, given his intimate knowledge of the brothers' close relationship. *See id.*

⁷⁰ *See id.* at 1092–94 ("The elements of fiduciary duty and exploitation of nonpublic information also exist when an insider makes a gift of confidential information to a trading relative or friend." (quoting *Dirks*, 463 U.S. at 664)). The court noted that if *Salman*'s reading of *Newman* was accepted, then a corporate insider in the possession of confidential information would be free to disclose it to his or her relatives, and they would be free to trade on it, provided that the insider asked for no tangible compensation in return. *See id.* at 1093.

⁷¹ *See id.* at 1093–94 (quoting *Newman*, 773 F.3d at 451–52). The court also distinguished the case by noting that in *Newman* there was also no evidence that either tippee, *Newman* or *Chiasson*, knew that they were trading on information obtained from insiders. *See id.*; *Newman*, 773 F.3d at 453 (concluding that neither *Newman* nor *Chiasson* knew that they were trading on inside information).

⁷² *See Salman II*, 792 F.3d at 1093 (quoting *Newman*, 773 F.3d at 452).

⁷³ *Id.*

fit in exchange for their tips, because the “friendships” between the tipplers and their respective tippees in both instances were only of a casual nature.⁷⁴

*B. Chicken Little Looks to the Second Circuit: Newman’s
Reception and Salman’s Response*

The controversy surrounding the *Newman* decision has focused on the Second Circuit’s articulation of the personal-benefit element, which seems to require proof of a consequential exchange in the nature of a quid pro quo rather than a simple gift.⁷⁵ Many have argued that this formulation represents a meaningful departure from *Dirks*, because it limits the definition of personal benefit to a pecuniary exchange, thereby rendering proof of a friendship or familial relationship insufficient in and of itself to support the inference of a benefit.⁷⁶ The practical consequence of this view is that it raises the eviden-

⁷⁴ See *id.*; *Newman*, 773 F.3d at 452–53; see also *supra* notes 43–47 and accompanying text (noting that Tipper A and Tippee A in *Newman* attended business school together, “but were not close,” and that Tipper B and Tippee B knew each other from church). In *Salman*, the Ninth Circuit found that the close familial ties between the brothers, along with Maher’s admission that the disclosure of the confidential information to his brother was intended as a gift, rendered a breach of fiduciary duty that was clear on its face. See 792 F.3d at 1094.

⁷⁵ See *Newman*, 773 F.3d at 442, 452 (“[T]ippee [must have known] that an insider disclosed confidential information *and* that he did so *in exchange* for a personal benefit.” (second emphasis added)); Petition for a Writ of Certiorari at 14–15, *Newman*, 773 F.3d 438 [hereinafter *Newman* Petition for Writ of Cert.] (No. 15-137), 2015 WL 4572753, at *14–15; Dauenhauer, *supra* note 7, at 54, 56–57; Peter J. Henning, White Collar Watch, *Supreme Court Review Could Redefine Insider Trading*, N.Y. TIMES (July 31, 2015), <http://www.nytimes.com/2015/08/01/business/dealbook/supreme-court-review-could-redefine-insider-trading.html> [https://perma.cc/MYM2-GFLP]; Alexandra Stevenson & Matthew Goldstein, *Solicitor General Asks Supreme Court to Review Insider Trading Ruling*, N.Y. TIMES (July 31, 2015), http://www.nytimes.com/2015/07/31/business/dealbook/us-asks-supreme-court-to-review-insider-trading-ruling.html?_r=0 [https://perma.cc/7FSE-JX9R]; Jonathan E. Richman et al., *Ninth Circuit Disagrees with Second Circuit on Personal-Benefit Requirement for Insider Trading*, Client Alert, NAT’L L. REV. (July 10, 2015), <http://www.natlawreview.com/article/ninth-circuit-disagrees-second-circuit-personal-benefit-requirement-insider-trading> [https://perma.cc/9JQP-9LPD]; cf. SEC v. Holley, No. 11-0205 (DEA), 2015 WL 5554788, at *5–6 (D. N.J. Sep. 21, 2015) (noting that *Newman* held that a personal benefit may be found when a tipper intends to benefit those with whom he shares a close personal relationship through his confidential disclosure, even in the absence of a pecuniary gain). In *U.S. v. Salman*, *Judge Rakoff Distinguishes Newman in 9th Circuit Opinion Affirming Insider Trading Conviction*, SEC. DIARY (July 6, 2015), <http://securitiesdiary.com/tag/judge-jed-rakoff/> [https://perma.cc/A67G-MV26] [hereinafter *Judge Rakoff Distinguishes Newman*] (arguing that *Newman* was not a meaningful departure from existing insider trading law). The U.S. Supreme Court in *SEC v. Dirks* in 1983 held that a personal benefit may be inferred from a relationship that suggests such an exchange, but alternatively emphasized that a personal benefit may also “exist when an insider makes a gift of confidential information to a trading relative or friend.” See 463 U.S. at 664.

⁷⁶ See Dauenhauer, *supra* note 7, at 56–57, 91–92; Henning, *supra* note 51; Stevenson & Goldstein, *supra* note 75. But see *Holley*, 2015 WL 5554788, at *5 (concluding that the defendant failed to establish that *Newman* represented a “significant change in the law” for purposes of seeking relief from final judgment under Federal Rule of Civil Procedure 60(b)(5) because intent to

tiary bar for prosecutors, thereby making tipper-tippee insider trading cases harder to prove and less likely to be pursued.⁷⁷

Many initially viewed the *Salman* decision as creating a circuit split regarding the scope of personal benefit because of the Ninth Circuit's refusal to adopt *Salman's* reading of *Newman* and its reaffirmation of the standard announced in *Dirks*.⁷⁸ *Dirks* clearly identifies two different situations in which a court may infer from objective facts and circumstances that the insider received a personal benefit: (1) a relationship that suggests a quid pro quo exchange; or (2) a "gift of confidential information to a trading relative or friend."⁷⁹ Those who endorse the view that the Second and Ninth Circuits are split argue that *Salman* recognized the difference between the two categories of personal benefit announced in *Dirks* and applied the one most applicable to the facts, whereas *Newman* consolidated the two categories into one standard.⁸⁰

In contrast, others have maintained that *Salman* stands for the proposition that *Newman* does not represent a meaningful departure from the *Dirks* framework and will be narrowly construed going forward.⁸¹ They argue that

benefit someone with whom an insider shares a "close personal relationship" is still sufficient to show personal benefit under *Newman*); *Judge Rakoff Distinguishes Newman*, *supra* note 75.

⁷⁷ *E.g.*, *Hurtado*, *supra* note 51; *see also* Ed Beeson, *Bharara Drops Steinberg Insider Trading Cases After Newman*, LAW360 (Oct. 22, 2015, 3:44 PM), http://www.law360.com/articles/717819/bharara-drops-steinberg-insider-trading-case-after-newman?article_related_content=1 [<https://perma.cc/9AJS-HYRK>] (discussing the decision of U.S. Attorney for the Southern District of New York, Preet Bharara, to drop charges in several insider trading cases following the U.S. Supreme Court's refusal to review the *Newman* decision, because of his view that "maintaining the guilty pleas" in light of *Newman* "would not be in the interest of justice").

⁷⁸ *See* Petition for a Writ of Certiorari at 11–14, *Salman III*, 136 S. Ct. 899 (No. 15-628), 2015 WL 7180648, 11–14 [hereinafter *Salman* Petition for Writ of Cert.]; Newman Petition for Writ of Cert., *supra* note 75, at 22–24; Baker et al., *supra* note 13; Stevenson & Goldstein, *supra* note 75; Richman et al., *supra* note 75.

⁷⁹ *See Dirks*, 463 U.S. at 663–64; Newman Petition for Writ of Cert., *supra* note 75, at 17. The Court further noted that "intention to benefit a particular recipient" refers to a situation where the tipper hopes for a return from a "particular" tippee who is in a position to do the tipper a personal business favor. *See Dirks*, 463 U.S. at 664.

⁸⁰ *See* Newman Petition for Writ of Cert., *supra* note 75, at 17–19, 23–24. The Ninth Circuit focused on whether there was sufficient evidence that the tipper disclosed the confidential information with the intent to benefit a trading relative, and stayed within the *Dirks* framework. *See Salman II*, 792 F.3d at 1092–94; Newman Petition for Writ of Cert., *supra* note 75, at 23–24. In contrast, the Second Circuit emphasized the lack of evidence that there was a "meaningfully close personal relationship" between the tipper and tippee, or evidence of an "exchange that [was] objective, consequential and represent[ed] at least a potential gain of a pecuniary or similarly valuable nature." *See Newman*, 773 F.3d at 452–53 (emphasis added); Newman Petition for Writ of Cert., *supra* note 75, at 18, 20, 23–25.

⁸¹ *See, e.g., Holley*, 2015 WL 5554788, at *4–5 (discussing *Newman* as clarifying the standard announced in *Dirks*); SEC v. Megalli, No. 1:13-cv-3783-AT, 2015 WL 9703789, at *7 (N.D. Ga. Sept. 24, 2015) ("*Newman* has made waves, but [we are] not convinced it is a total sea change."); Vincent Paul (Trace) Schmeltz III, Commentary, *Newman Appeal Represents Government's Misguided Effort to Change the Law of Insider Trading*, WESTLAW J. DERIVATIVES, Sept.

the *Salman* court interpreted the *Newman* holding as being limited to instances where the relationship between tipper and tippee is casual, rather than flat-out rejecting the Second Circuit's reasoning.⁸² Furthermore, observers contend that *Newman* merely limited how far the government can stretch casual friendships and acquaintances to prove liability under the *Dirks* framework.⁸³

III. THE SKY IS NOT FALLING: *SALMAN* READS *NEWMAN* BROADLY

This Part argues that in 2015, the U.S. Court of Appeals for the Ninth Circuit in *United States v. Salman* correctly declined to apply the personal-benefit definition described by the U.S. Court of Appeals for the Second Circuit in its 2015 decision, *United States v. Newman*.⁸⁴ First, this Part argues that *Salman* is not inconsistent with *Newman* because *Newman* involved attenuated "friendships" whereas *Salman* involved family: two categories that can, and should, be treated differently.⁸⁵ Second, this Part argues that the Ninth Circuit's measured interpretation of *Newman* in *Salman* illustrates that *Newman* was not a meaningful departure from existing insider-trading doctrine, but rather an attempt to set limits to the type of "friendships" from which personal benefit may be inferred under the framework established by the United States Supreme Court in its 1983 decision, *Dirks v. SEC*.⁸⁶ Finally, this Part argues that the two cases should be reconciled by the Supreme Court in an affirmation of the *Salman* holding and a clearer articulation of existing doctrine.⁸⁷

First, *Salman* and *Newman* are reconcilable because they involve significantly different facts pertaining to the insider-tippee relationships.⁸⁸ In *New-*

24, 2015, at *1, *5; *Judge Rakoff Distinguishes Newman*, *supra* note 75 ("In short, the sky did not start falling when the *Newman* opinion was adopted."); Levine, *Justices Will Know*, *supra* note 7.

⁸² See *Holley*, 2015 WL 5554788, at *5; Henning, *supra* note 67; *Judge Rakoff Distinguishes Newman*, *supra* note 75 (arguing that *Newman* never suggested that evidence of a tipper making a personal gift of confidential information to a tippee with whom he has a close relationship is insufficient to support a conviction); see also *Salman II*, 792 F.3d at 1093–94 ("[A]lthough the 'personal benefit' standard is 'permissive,' it 'does not suggest 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.'" (quoting *Newman*, 773 F.3d at 452)).

⁸³ See *Judge Rakoff Distinguishes Newman*, *supra* note 75 (arguing that *Newman* creates limits on the types of friendships that infer a disclosure was intended as the "gift of confidential information" described in *Dirks*); Levine, *Justices Will Know*, *supra* note 7.

⁸⁴ See *infra* notes 88–102 and accompanying text.

⁸⁵ See *infra* notes 88–96 and accompanying text.

⁸⁶ See *infra* notes 97–102 and accompanying text.

⁸⁷ See *infra* notes 103–108 and accompanying text.

⁸⁸ See *United States v. Salman (Salman II)*, 792 F.3d 1087, 1093–94 (9th Cir. 2015), *cert. granted*, (*Salman III*) 136 S. Ct. 899 (2016) (mem.); *United States v. Newman*, 773 F.3d 438, 452–53 (2d Cir. 2014), *cert. denied*, 136 S. Ct. 242 (2015) (mem.); *SEC v. Andrade*, C.A. No. 15-231 S, 2016 WL 199423, at *3–4 (D. R.I. Jan. 15, 2016); *SEC v. Holley*, No. 11-0205 (DEA), 2015 WL 5554788, at *1, *5 (D. N.J. Sept. 21, 2015); Jonathan E. Richman, *What to Expect from*

man, the “friendships” between the two insiders and their respective tippees were of a casual and attenuated nature: alumni of the same school and fellow parishioners.⁸⁹ Because *Dirks* refers to a “gift of confidential information to a trading . . . friend,” the Second Circuit in *Newman* was forced to read in-between the lines of *Dirks* and to answer the necessary question of what constitutes a “friend.”⁹⁰ It noted that if the personal-benefit requirement could be met by the mere fact of two people knowing each other in a social or casual capacity, “the personal benefit requirement would be a nullity.”⁹¹

High Court's New Insider Trading Case, LAW360 (Jan. 19, 2016), <http://www.law360.com/articles/748341/what-to-expect-from-high-court-s-new-insider-trading-case> [<https://perma.cc/KS5C-ES9Y>]; *Judge Rakoff Distinguishes Newman*, *supra* note 75; Levine, *Justices Will Know*, *supra* note 7; see also *Dirks v. SEC*, 463 U.S. 646, 664 (1983) (“[T]he elements of fiduciary duty and exploitation of nonpublic information also exist when an insider makes a gift of confidential information to a trading relative or friend.” (emphasis added)).

⁸⁹ See *Newman*, 773 F.3d at 452–53; *Holley*, 2015 WL 5554788, at *5. For example, Tippee A knew Tippee A from business school, but the court found evidence that the two were not very close and that their relationship was of little consequence. *Newman*, 773 F.3d at 452. Testimony showed that Tippee A occasionally provided Tippee A with career advice. See *id.* The court concluded that the evidence on record and the nature of the advice amounted to “little more than the encouragement one would generally expect of a fellow alumnus or casual acquaintance.” See *id.* at 453. Tippee B knew Tippee B from church and the two occasionally socialized together, but there was no history of personal favors or a relationship that was objectively meaningful. See *id.* Tippee B even testified that he did not even know Tippee B was trading in NVIDIA stock. See *id.* Such “casual friendships” could either represent a potential gap in the *Dirks* framework or mark its limits. See *Dirks*, 463 U.S. at 664; *Holley*, 2015 WL 5554788, at *4–5; *United States v. Whitman*, 904 F. Supp. 2d 363, 367 n.1 (S.D.N.Y. 2012); see also Mitchell A. Agee, *Friends in Low Places: How the Law Should Treat Friends in Insider Trading Cases*, 7 CHARLESTON L. REV. 345, 365–66 (2013) (noting that the U.S. Supreme Court has not squarely addressed how friends should be treated in insider trading cases). Although the meaning of “trading relative” is fairly clear and objective, “trading friend” is more ambiguous and subjective. See *Dirks*, 463 U.S. at 664; Agee, *supra*, at 372–73; Levine, *When Can Investors Talk*, *supra* note 13 (positing the question of whether frequent, cordial interaction with a company’s investor-relations agent constitutes a friendship under the *Dirks* framework).

⁹⁰ See *Newman*, 773 F.3d at 452–53; see also *Dirks*, 463 U.S. at 664 (“Determining whether an insider personally benefits from a particular disclosure, a question of fact, will not always be easy for courts.”); *supra* note 89 and accompanying text (discussing the ambiguous connotation of “friend” as used in *Dirks*). The U.S. Court of Appeals for the Second Circuit in 2014 in *United States v. Newman* implied that in prior cases where sufficient evidence was found that a personal benefit was reasonably inferred from casual friendships and acquaintances, there were additional factors present that perhaps superseded the casual nature of the friendship. See 773 F.3d at 452–53. In the cases cited by the court, there was evidence of relationships that had the strong potential to yield a pecuniary gain in the near future. See *id.*; see also *United States v. Jiau*, 734 F.3d 147, 153 (2d Cir. 2013) (involving an insider who received access to an investment club where stock tips and insight were routinely discussed); *SEC v. Yun*, 327 F.3d 1263, 1280 (11th Cir. 2003) (concluding that evidence of personal benefit was sufficient where tipper and tippee worked closely together on real estate deals and commonly split commissions); *SEC v. Sargent*, 229 F.3d 68, 77 (1st Cir. 2000) (holding evidence of personal benefit to be sufficient when tipper passed information to a friend who referred others to the tipper’s dental practice).

⁹¹ See *Newman*, 773 F.3d at 452. This reading makes sense when considering the U.S. Supreme Court’s reasoning behind the inclusion of “gift . . . to a trading relative or friend” in the personal benefit standard first announced in *Dirks*. See *Dirks*, 463 U.S. at 664; *Andrade*, 2016 WL

In contrast, in *Salman* there were close familial ties between the brothers.⁹² The court explicitly noted that under such facts involving a familial relationship, *Dirks* squarely governs.⁹³ Several lower courts have since agreed with that distinction.⁹⁴ The close familial relationship and Maher's admission that the disclosure of the confidential information to Michael was intended to help him demonstrated a clear breach of duty under the *Dirks* framework predicated by the personal benefit of tipping a trading family member.⁹⁵ In recognizing these important distinctions, the Ninth Circuit correctly declined to go any further than the facts, and *Dirks*, required.⁹⁶

Secondly, the Second Circuit's formulation of a more descriptive standard for personal benefit in *Newman* was not a meaningful departure from the *Dirks* framework, but rather a recognition of its limits and an attempted clari-

199423, at *4. The Court explained that “the tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient.” *Dirks*, 463 U.S. at 664. This arguably implies the requirement of an intent to financially assist someone with whom the tipper has a personal relationship. *See id.*; *Salman II*, 792 F.3d at 1092, 1094 (emphasizing evidence of the insiders’ intent to “fulfill” his brother’s needs). It is hard to imagine a person altruistic to the point of “gifting” millions of dollars to someone they attended business school with, or met through church, considering the risk of prosecution. *See Newman*, 773 F.3d at 452–53; *Holley*, 2015 WL 5554788, at *5. On Wall Street, for example, there is a “culture of reciprocity,” so traders may reasonably expect a tip in the future, from a friend or acquaintance that they know to be actively trading in exchange for a tip from them. *See James B. Stewart, Justices Take on a Muddled Issue: Insider Trading*, N.Y. TIMES (Jan. 28, 2016), <http://www.nytimes.com/2016/01/29/business/justices-take-on-a-muddled-issue-insider-trading.html> [<https://perma.cc/3HBC-XR4C>]. This is markedly different from gifting a tip to a relative out of love, or an offhand remark made to an attenuated acquaintance. *See id.*; *see also Andrade*, 2016 WL 199423, at *4 (acknowledging the difference between tipping a friend of a social nature and tipping a family member or close friend, suggesting that the former may involve too high of a risk if no pecuniary reciprocity is involved).

⁹² *Salman II*, 792 F.3d at 1092, 1094; Indictment, *supra* note 54, ¶¶ 4, 6; *see also supra* note 69 and accompanying text (discussing the nature of the insider-tippee relationships).

⁹³ *See Salman II*, 792 F.3d at 1092.

⁹⁴ *See Andrade*, 2016 WL 199423, at *3–4; *Holley*, 2015 WL 5554788, at *5. For example, in 2015, in *SEC v. Holley*, the U.S. District Court for the District of New Jersey agreed with the U.S. Court of Appeals for the Ninth Circuit in *United States v. Salman* that “if *Newman* can be read to require the receipt of some tangible benefit for insider trading liability,” then the implications would be absurd. *See Holley*, 2015 WL 5554788, at *5.

⁹⁵ *See Salman II*, 792 F.3d at 1092, 1094; Stewart, *supra* note 87 (citing cases involving confidential tips between relatives as classic, straightforward examples of insider trading). The Ninth Circuit noted that the Maher’s tip to Michael “was precisely the ‘gift of confidential information to a trading relative’ that *Dirks* envisioned.” *Salman II*, 792 F.3d at 1092 (quoting *Dirks*, 463 U.S. at 664). The court gave great weight to the fact that Maher testified that by providing his brother confidential information, he intended to “benefit his brother and to fulfill whatever needs he had.” *Id.*

⁹⁶ *See Salman II*, 792 F.3d at 1092–94; Brief for the U.S. in Opposition at 13, *United States v. Salman (Salman III)*, 136 S. Ct. 899 (Dec. 14, 2014) (No. 15-628); *Judge Rakoff Distinguishes Newman*, *supra* note 75. An insider making a “gift of confidential information to a trading relative” is a situation explicitly mentioned in *Dirks*. 463 U.S. at 664.

fication.⁹⁷ The court's effort to flesh out the meaning of what the *Dirks* court referred to as "a gift . . . to a trading relative or friend" reflects this notion.⁹⁸ The Ninth Circuit's reading of *Newman* in *Salman* further supports this view.⁹⁹ *Salman* explicitly noted that the *Newman* court recognized the permissive nature of the personal-benefit requirement, as *Dirks* instructed, and further offered clarifying language to elucidate its rationale.¹⁰⁰ The *Newman* court clarified its "new definition" by noting that it requires a showing of either a relationship that suggests an exchange, or an intention from the insider to benefit the recipient.¹⁰¹ Because *Newman* provides two alternatives for the

⁹⁷ See *Newman*, 773 F.3d at 452–53; *Holley*, 2015 WL 5554788, at *4–5 (discussing *Newman* as clarifying the standard announced in *Dirks*); Schmeltz, *supra* note 81, at *5 (arguing that the *Newman* decision clarifies and fortifies the test for determining personal benefit); *Judge Rakoff Distinguishes Newman*, *supra* note 75 (emphasizing the distinguishability between *Salman* and *Newman*); Richman, *supra* note 88 (discussing this argument as one possible conclusion that the U.S. Supreme Court could reach when it hears the *Salman* appeal); cf. Levine, *Justices Will Know*, *supra* note 7 (arguing that *Newman* was an effort to draw lines between cheating and research, and conveying confidential information to family members seems to be more clearly in the realm of cheating); see also *supra* notes 89–90 and accompanying text (arguing that in emphasizing the ambiguous and casual nature of the tipper-tippee relationships and in noting that "the Government may [not] prove the receipt of a personal benefit by the mere fact of friendship," *Newman* implicitly recognized that there must be a limiting principal pertaining to "friend" under *Dirks*). The court in *Salman* did not "reject" what *Newman* actually held. See *Judge Rakoff Distinguishes Newman*, *supra* note 75 (arguing that *Newman* did not hold that an exchange in the nature of a quid pro quo was an absolute necessity to establish the personal-benefit element in all cases, but rather *Newman* implied that a quid pro quo was required in cases involving attenuated relationships).

⁹⁸ See *Newman*, 773 F.3d at 452–53 (quoting *Jiau*, 734 F.3d at 153); see also *Salman II*, 792 F.3d at 1093–94 (quoting *Dirks*, 463 U.S. at 664). The court in *Salman* rightfully emphasized that this search simply rendered insufficient evidence. See 792 F.3d at 1093–94 ("Applying these standards, the court [in *Newman*] concluded that the 'circumstantial evidence . . . was simply too thin to warrant the inference that the corporate insiders received any personal benefit in exchange for their tips" (quoting *Newman*, 773 F.3d at 451–52)).

⁹⁹ See *Salman II*, 792 F.3d at 1092–94.

¹⁰⁰ *Id.* at 1093–94 ("Newman itself recognized that the "personal benefit is broadly defined to include not only pecuniary gain, but also . . . the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend." (quoting *Newman*, 773 F.3d at 452)); see also *Dirks*, 463 U.S. at 663–64 (discussing objective criteria that may allow an inference of either a direct or indirect benefit); *Newman*, 773 F.3d at 452 ("In other words . . . this requires evidence of 'a relationship between the insider and the recipient that suggests a quid pro quo from the latter, or an intention to benefit the [latter].'" (alterations in the original) (emphasis added) (quoting *Jiau*, 734 F.3d at 153)). The court in *Salman* could have even followed *Newman* and reached the same result by relying on that clarifying language, because the court found sufficient evidence that Maher Kara intended to benefit his brother. See *Salman II*, 792 F.3d at 1092; *Holley*, 2015 WL 5554788, at *4; Schmeltz, *supra* note 81, at *5; see also *Newman*, 773 F.3d at 452 ("[O]r an intention to benefit the [latter].").

¹⁰¹ See *Newman*, 773 F.3d at 452; Stewart, *supra* note 91 (acknowledging the difference between a tip with an expectation of reciprocity and a tip to a relative out of love). Consistent with that language, some of the lower courts that have heard defenses raised on *Newman* grounds have construed the opinion as holding that there must be sufficient evidence of either a pecuniary exchange or a meaningfully close personal relationship between tipper and tippee. See, e.g., *Holley*,

basis of an inference of personal benefit, the “new” definition may not be as narrowing as many initially thought.¹⁰²

Finally, the U.S. Supreme should affirm the Ninth Circuit’s holding in *Salman* when it reviews the decision in October 2016 and emphasize the difference between casual relationships and close friendships or familial relationships for the purposes of determining personal benefit.¹⁰³ *Salman* did not create a true circuit split because the Ninth Circuit only declined to follow *Newman* to the extent that it went as far as *Salman* had argued.¹⁰⁴ The Ninth Circuit interpreted *Salman*’s argument as suggesting that the *Newman* personal-benefit standard requires proof of a tangible exchange in all instances, even in those involving a familial relationship.¹⁰⁵ The court was correct in declining to adopt this reading and noted the absurd implications of extending *Newman* beyond the realm of casual relationships.¹⁰⁶ The U.S. Supreme Court should recognize those implications, and affirm the Ninth Circuit’s

2015 WL 554788, at *4; *SEC v. Jafar*, No. 13-4645 (JPO), 2015 WL 3604228, at *1, *4–5 (S.D.N.Y. June 8, 2015).

¹⁰² See *Andrade*, 2016 WL 199423, at *3–4 (acknowledging the distinction between casual relationships and familial relationships and close friendships, and noting the logic behind requiring some additional evidence in cases involving casual or social relationships); *Holley*, 2015 WL 554788, at *4.

¹⁰³ See *Andrade*, 2016 WL 199423, at *3–4; Stewart, *supra* note 91; Levine, *Justices Will Know*, *supra* note 7 (discussing the intuitive distinction between social, business acquaintances discussing market information and a CEO and his or her family member doing the same); Richman, *supra* note 88 (noting the possibility that the Court could conclude that different inferences should be drawn from relationships of a substantially different character). The question before the U.S. Supreme Court is likely to be determinative to *Salman*’s conviction, because the government showed no proof that Michael conferred an objective, pecuniary benefit upon his brother of any manner in exchange for the tips. See *Salman* Petition for Writ of Cert., *supra* note 78, at 14–15.

¹⁰⁴ See *Salman II*, 792 F.3d at 1093–94 (“To the extent *Newman* can be read to go so far, we decline to follow it.”); Appellant’s Reply Brief, *supra* note 10, at 3 (quoting *Newman*, 773 F.3d at 452); Schmeltz, *supra* note 81, at *5; *Judge Rakoff Distinguishes Newman*, *supra* note 75; *supra* notes 96–98 and accompanying text (arguing that the holding in *Newman* has been misconstrued as requiring a pecuniary exchange in all instances to prove the personal-benefit element). *Salman*’s brief emphasizes a portion of the *Newman* decision that suggests evidence of some type of “exchange” is also necessary in all instances where there is evidence of a personal relationship. Appellant’s Reply Brief, *supra* note 10, at 3.

¹⁰⁵ See *Salman II*, 792 F.3d at 1093–94.

¹⁰⁶ See *id.* at 1094; *Andrade*, 2016 WL 199423, at *3–4; *Holley*, 2015 WL 554788, at *5; Schmeltz, *supra* note 81, at *4–5; *Judge Rakoff Distinguishes Newman*, *supra* note 75 (arguing that *Newman* never held that an exchange in the nature of a quid pro quo was a prerequisite to establish personal-benefit element). By declining to extend *Newman* beyond its facts, *Salman* should assure critics that application of the *Newman* holding will be limited by the courts to situations in which the insider-tippee relationship is of a casual nature. See *Salman II*, 792 F.3d at 1093–94; *Holley*, 2015 WL 554788, at *4–5; *Judge Rakoff Distinguishes Newman*, *supra* note 75. Moreover, it is of particular importance due to the opinion’s author—Judge Rakoff, U.S. District Court Judge for the Southern District of New York—who has a well-respected perspective on white-collar crime, and insider-trading law specifically. See Baker, *supra* note 13.

holding in *Salman*.¹⁰⁷ It should also clarify the *Dirks* doctrine to allow a stronger presumption of personal benefit when insiders provide confidential information to trading family members or close friends, as in *Salman*, rather than casual “friends” or acquaintances, as in *Newman*.¹⁰⁸

CONCLUSION

The Ninth Circuit correctly declined to extend the *Newman* personal-benefit definition beyond its facts, and the U.S. Supreme Court should affirm the Ninth Circuit’s holding in *Salman* upon review in October 2016. *Salman*’s reading of *Newman* illustrates the crucial distinction between close relationships and attenuated “friendships” for the purposes of determining personal benefit. Together, *Salman* and *Newman* hint at the appropriate limits to the government’s power to stretch casual friendships into a gift of confidential information. The delineation should largely depend on the nature of the underlying relationship between the tipper and tippee, with particular emphasis on the distinction between family and friends. *Salman* presents the U.S. Supreme Court with the opportunity to revisit and clarify its decision in *Dirks* and announce to the world that the sky did not start falling when Second Circuit decided *Newman*, but rather became a little less cloudy.

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¹⁰⁷ See *Andrade*, 2016 WL 199423, at *3–4; Stewart, *supra* note 91; Levine, *Justices Will Know*, *supra* note 7.

¹⁰⁸ See *Andrade*, 2016 WL 199423, at *3–4; Stewart, *supra* note 91; Aruna Viswanatha & Brent Kendall, *Supreme Court Takes up Case That Tests Limits on Insider-Trading Prosecutions*, WALL. ST. J. (Jan. 19, 2016, 7:17 PM), <http://www.wsj.com/articles/supreme-court-takes-up-appeal-that-tests-limits-on-insider-trading-prosecutions-1453219625> (quoting a former federal prosecutor as noting the absurdity of the Supreme Court potentially sanctioning the “tipping of brothers-in-law”); Levine, *Justices Will Know*, *supra* note 7; Richman, *supra* note 88 (noting the possibility that the U.S. Supreme Court could conclude that different inferences should be drawn from relationships of a substantially different character).