FRIENDS WITH BENEFITS: REDEFINING PERSONAL GAIN IN INSIDER TRADING UNDER *SALMAN V. UNITED STATES*

WENDY R. BECKER*

INTRODUCTION

With Martha Stewart, Mark Cuban, and Phil Mickelson, insider trading investigations have become a high profile form of corporate crime.[1] With stories full of interesting characters, it is not hard to see why this problem has caught the public's eye. Examples of these stories range from the sympathetic, like Rajat Gupta, the sixty-three-year-old retiree who started with nothing,[2] to the shameless, like Gupta's tippee, Raj Rajaratnam, the billionaire investor whose entire business was based on receiving tips from those close to his company and teaching them to conceal those tips.[3] Prosecutions and public attention focused on insider trading have seen an unprecedented rise in the last few decades.[4] Scholars have attributed the proliferation of these cases as a "symptom of cancerous greed on Wall Street."[5] However, Congress has failed to enact a statute outlawing any form of insider trading outright.[6] Rather, prosecutors are forced to rely on the general fraud statutes,

---

* J.D. Candidate, Duke University School of Law, Class of 2018.

1. Stephen Clark, *Insider Trading and Financial Economics: Where Do We Go From Here?*, 16 STAN. J. L. BUS. & FIN. 43, 45 (2010) (discussing how insider trading has captured the attention of the academy and the public).

2. Peter Lattman & Azam Ahmed, *Rajat Gupta Convicted of Insider Trading*, N.Y. TIMES (June 16, 2012), http://www.dealbook.nytimes.com/2012/06/15/rajat-gupta-convicted-of-insider-trading/.

3. Anna Driggers, *Raj Rajaratnam's Historic Insider Trading Sentence*, 49 AM. CRIM. L. REV. 2021, 2028 (2012).

4. Charles C. Cox & Keven S. Fogerty, *Bases of Insider Trading Law*, 49 OHIO ST. L. J. 353, 353 (1988).

5. *Id.*

6. Jill E. Fisch, *Start Making Sense: An Analysis and Proposal for Insider Trading Regulation*, 26 GA. L. REV. 179, 179–80 (1991) (explaining the ambiguity in insider trading regulations and how to combat them).

such as Section 10(b) of the Securities Exchange Act of 1934, and the Securities and Exchange Commission's (SEC) Rule 10b-5.[7] As a result, there continues to be some ambiguity as to what constitutes insider trading and how to combat the use of material, nonpublic information to deceive counterparties in these deals.

Following contentious litigation and investigations by the SEC, the Supreme Court held in *Dirks v. SEC*[8] that a fiduciary duty is breached when the insider privy to the information receives a "personal benefit."[9] However, confusion still surrounds this pronouncement, and courts remain divided on what is required to constitute a personal benefit. The Court granted certiorari in *United States v. Salman* to clarify whether the personal benefit must be a pecuniary gain, as the Second Circuit determined in *United States v. Newman*,[10] or if the insider can personally benefit in other ways in order to uphold insider trading convictions.[11]

This commentary argues that the Court should interpret the personal benefit standard in *Dirks* to constitute two possibilities: (1) a *quid pro quo* relationship; and (2) when the relationship between the tipper and tippee is so clear that the tipper inherently does receive a benefit by providing material nonpublic information to the tippee. It proceeds in the following parts. Part I summarizes the factual and procedural background in *Salman*. Part II explains the legal background of insider trading. Part III presents the Ninth Circuit's holding and rationale in *Salman*. Part IV explores the parties' arguments. Part V analyzes how the Supreme Court should rule on *Salman* based on the holdings in *Dirks*, *Newman*, and the decisions below.

I. FACTUAL AND PROCEDURAL HISTORY

In 2002, Maher Kara began working for Citigroup in its healthcare investment banking group.[12] Throughout the next few years, Maher sought help from his brother Michael Kara to better understand the

---

7. 15 U.S.C. § 78j(b) (2008).
8. 463 U.S. 646 (1983).
9. *Id.* at 664.
10. United States v. Newman, 773 F.3d 438, 452 (2d Cir. 2014).
11. *See* Salman v. United States, 135 S. Ct. 899, 899 (2016) (granting certiorari to question one in the Petition).
12. Brief for the United States in Opposition at 2, Salman v. United States, No. 15-628 (2015) [hereinafter Brief for the United States in Opposition].

science behind his work.[13] By 2004, Maher was sharing confidential information about Citigroup's practices.[14] From 2004 to 2007, Maher knowingly disclosed information about upcoming mergers and acquisitions by Citigroup clients.[15] Maher suspected that Michael was trading on the information, but Michael denied it.[16]

Maher and Michael were extremely close.[17] Michael helped pay Maher's college tuition and took on the role of their deceased father at Maher's wedding.[18] Maher testified that he gave Michael the information to benefit Michael by "getting him off my back, and fulfilling whatever needs he had."[19]

In 2003, Maher became engaged to Petitioner Bassam Yacoub Salman's sister.[20] The families became extremely close.[21] In the fall of 2004, Michael began to share the trading tips he was receiving from Maher with Salman.[22] Salman decided not to set up his own brokerage account, and instead arranged transfers into an account held jointly under the name of his wife's sister and her husband, Karim Bayyouk.[23] Salman shared the information he learned with Bayyouk, and the two split the profits.[24] The account ultimately grew from $396,000 to approximately $2.1 million; Salman and Bayyouk earned approximately $1.7 million.[25]

According to Michael's testimony, Salman knew that Maher was the source of the trading information.[26] Michael testified that he "directly" told Salman, and that the two agreed "they had to 'protect' Maher and promised to shred all of the papers."[27] Furthermore, there was evidence that Salman knew how close the relationship was between the two brothers.[28]

13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. Petition for Writ of Certiorari at 6, Salman v. United States, No. 15-628 (2015) [hereinafter Petition for Writ of Certiorari].
20. *Id.* at 3.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. United States v. Salman, 792 F.3d 1087, 1089 (9th Cir. 2015).
26. *Id.*
27. *Id.*
28. *Id.* at 1090.

On September 1, 2011, Salman was indicted for one count of conspiracy to commit securities fraud in violation of 18 U.S.C. § 371 and four counts of securities fraud in violation of § 10(b) of the Exchange Act and Rule 10b-5.[29] The jury found Salman guilty on all five counts.[30] Salman was sentenced to thirty-six months in prison followed by three years of supervised release, and ordered to pay restitution of $738,539.42.[31]

Salman moved for a new trial,[32] and his post-conviction motions were denied.[33] The Ninth Circuit affirmed Salman's convictions, holding that "there can be no question that, under *Dirks*, the evidence was sufficient for the jury to find that Maher disclosed the information in breach of his fiduciary duties and that [Salman] knew as much."[34] On November 10, 2015, Salman filed a petition for writ of certiorari to the Supreme Court.[35] The petition sought review on two issues: (1) Under *Dirks*, does the personal benefit to the insider need to be pecuniary or is a familial relationship enough; and (2) Can failure to investigate where the tip came from constitute willful blindness?[36] On January 19, 2016, the Supreme Court granted certiorari limited to the first issue.[37]

II. LEGAL BACKGROUND

A. Section 10(b) and Rule 10b-5

Securities fraud derives from statute. The Securities Act of 1933 and the Securities Exchange Act of 1934 were enacted in direct response to the 1929 crash and subsequent depression.[38] Fears of excessive speculation and another market crash fueled the public's desire for reform.[39]

---

29. *Id.* at 1088.
30. *Id.* at 1090.
31. Brief for the United States in Opposition, *supra* note 12, at 2.
32. United States v. Salman, 792 F.3d 1087, 1090 (9th Cir. 2015).
33. United States v. Salman, No. CR–11–0625, 2013 WL 6655176, at *7 (N.D. Cal. Dec. 17, 2013).
34. *Salman*, 792 F.3d at 1092.
35. Petition for Writ of Certiorari, *supra* note 19.
36. *Id.* at i.
37. *See* Salman v. United States, 135 S. Ct. 899, 899 (2016).
38. Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 STAN. L. REV. 385, 408 (1990).
39. *Id.* at 409.

Courts have read a prohibition against insider trading into § 10(b) of the Exchange Act,[40] which provides a "catch-all" method to combat securities fraud.[41] The SEC then promulgated Rule 10b-5, which states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.[42]

Neither the statute nor the rule specifically prohibit insider trading.[43] However, the illegality of insider training is predicated on the idea that it is securities fraud under Rule 10b-5.[44] Like securities fraud, insider trading is also a breach of a fiduciary duty.[45] Under Rule 10b-5, the person who bears this duty misleads either the opposing party of the transaction or the shareholders by trading on the information.[46] The Supreme Court has determined that Rule 10b-5 must be understood to prevent insider trading based on the idea that traders who have access to information for corporate purposes (nonpublic information) may not take advantage of the information, which is unavailable to the other side."[47] Therefore, the informed person has an obligation to disclose the information or not trade.[48]

40. 15 U.S.C. § 78j(b) (2008).

41. Eric C. Chaffee, *Standing Under Section 10(B) and Rule 10B-5: The Continued Validity of the Forced Seller Exception to the Purchase-Seller Requirement*, 11 U. PA. J. BUS. L. 843, 843 (2009).

42. 17 C.F.R. § 240.10b-5 (2016).

43. United States v. Newman, 773 F.3d 438, 445 (2d Cir. 2014).

44. *Id.*

45. J. Kelly Strader, *(Re)Conceptualizing Insider Trading:* United States v. Newman *and the Intent to Defraud*, 80 BROOKLYN L. REV. 1, 6 (2015).

46. Willis W. Hagen II, *Insider Trading Under Rule 10b-5: The Theoretical Bases for Liability*, 44 THE BUS. LAW. 13, 15 (1988).

47. SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833, 848 (2d Cir. 1968).

48. Hagen, *supra* note 46, at 15.

The scope of insider trading hinges on definitions contained in the statute and the regulation. An "insider" is defined as a director, officer, or principal stockholder under Section 16 of the Exchange Act.[49] Rule 10b-5 is applicable not only to "insiders," but also to anyone with material, nonpublic information.[50]

Congress and the SEC do not provide a definition of "material, nonpublic information."[51] However, courts have typically held that unlawful insider trades occur when trades are made immediately prior to the disclosure of corporate takeovers, earnings announcements, or dividend announcements.[52] The SEC defines "nonpublic information" as information that investors "may not lawfully acquire without the consent of the source," or information that has not been made available to investors generally.[53] The Second Circuit defines material information as "those facts which affect the probable future of the company[,] and those which may affect the desire of investors to buy, sell, or hold the company's securities."[54]

Proponents of criminalizing insider trading argue that it is unfair to consumers and "undermines public confidence in capital markets."[55] According to the Supreme Court, an animating purpose behind the enactment of the Exchange Act was "to insure honest securities markets and thereby promote investor confidence."[56] Advocates also claim that this conduct allows traders to profit from corporate misfortune, or that it allows insiders to divert profits from shareholders to themselves.[57]

B. *Common Law Insider Trading and the "Personal Benefit" Requirement*

The first time that insider trading was considered a form of securities fraud was in the SEC investigation's *In re Cady, Roberts &*

49. *See* Securities Exchange Act of 1934 § 16(a), 15 U.S.C. § 78p (2011).
50. *Tex. Gulf Sulphur Co.*, 401 F.2d at 848.
51. Cindy A. Schipani & H. Nejat Seyhun, *Defining "Material, Nonpublic": What Should Constitute Illegal Insider Trading Information?*, 21 FORDHAM J. CORP. & FIN. L. 327, 342 (2016).
52. *Id*.
53. *See* Victor Brudney, *Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws*, 93 HARV. L. REV. 322, 322 n.2 (1979).
54. *Tex. Gulf Sulphur Co.*, 401 F.2d at 849.
55. Dennis W. Carlton & Daniel R. Fischel, *The Regulation of Insider Trading*, 35 STAN. L. REV. 857, 858 (1983).
56. United States v. O'Hagan, 521 U.S. 642, 658 (1997).
57. Carlton & Fischel, *supra* note 55, at 858.

Co.[58] The SEC ruled that insider trading was defined by two elements: (1) "the existence of a relationship giving access directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone[,]" and (2) "the inherent unfairness involved where a party takes advantage of such information knowing it is unavailable to those with whom he is dealing."[59] Seven years later, the Second Circuit ruled in *SEC v. Texas Gulf Sulphur Co.*[60] that the SEC's understanding of insider trading in *Cady, Roberts* was correct.[61] The court then explained that the congressional purpose behind Rule 10b-5 was that investors should have equal access to information, rewards, and risks of securities markets.[62]

In 1983, the Supreme Court granted certiorari in *Dirks v. SEC.*[63] Raymond Dirks was an officer of a New York broker-dealer firm when he received information from Ronald Secrist, a former officer of Equity Funding of America, who alleged that the company's assets were overvalued due to fraudulent practices.[64] Dirks investigated the allegations, and while senior management denied the misconduct, employees of the corporation corroborated the story.[65] Dirks urged William Blundell at the Wall Street Journal's Los Angeles office to write a story on the fraud, but Blundell did not believe such a massive fraud could be occurring and turned down the story.[66] While Dirks continued to investigate, he told people about Secrist's allegations.[67] Those people then traded based on the information, and Equity Funding stock prices fell dramatically.[68] The SEC convicted Dirks for aiding and abetting the fraud.[69] The Supreme Court overturned his conviction and ruled that Dirks had no duty to abstain from use of the inside information that he obtained.[70]

Under the "classical theory" of insider trading, anyone in possession of material, nonpublic information about a corporation

58. 40 S.E.C. 907 (1961).
59. *Id*. at 912.
60. 401 F.2d 833 (2d Cir. 1968).
61. *Id.* at 852.
62. *Id.*
63. 463 U.S. 646 (1983).
64. *Id*. at 648–49.
65. *Id*. at 649.
66. *Id*. at 649–50.
67. *Id*.
68. *Id*.
69. *Id*. at 650.
70. *Id.* at 665.

cannot trade on this information, or the information needs to be disclosed to the party on the other side of the trade.[71] This can be true if the person who has the information (the "insider") trades, or if the insider becomes a "tipper" and gives the information to another (the "tippee") who trades.[72] It is also possible to have "tipping chains."[73]

In *Dirks*, the Court established the modern requirements for tipper/tippee liability under this classical framework.[74] The Court held that (1) the insider must breach her fiduciary duty to shareholders; and (2) the tippee must know, or should know, that the breach occurred.[75] The Supreme Court concluded that a tippee does not inherit a duty to "disclose or abstain" automatically.[76] The Court held that two elements establish a violation of Rule 10b-5: "(i) the existence of a relationship affording access to inside information intended to be available only for a corporate purpose, and (ii) the unfairness of allowing a corporate insider to take advantage of that information by trading without disclosure."[77]

However, the Court also held that not every breach of fiduciary duty falls under Rule 10b-5.[78] The Court recognizes, as does the SEC, the vital role that market analysts play in the "preservation of a healthy market," and that this role would be inhibited if prosecutions could occur when there is any disparity of information.[79] Accordingly, the Court determined that tippees assume an insider's duty to the shareholders when the information is obtained improperly.[80] The Court determined that the intent behind Rule 10b-5 was to eliminate the

71. David T. Cohen, *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, 552–53 (2006).

72. *See id*. at 554 (stating that liability under the classical theory occurs when a person is an insider or the tippee of an insider).

73. This occurs when A (the tipper) gives information to B (tippee 1) and B gives that information to C (tippee 2), C can be liable, as long as C had reason to know that A (the source of the information) breached a fiduciary duty by disclosing it the first time. *See* Stephen M. Bainbridge, The Law and Economics of Insider Trading: A Comprehensive Primer 20 (Mar. 13, 2001) (unpublished manuscript), http://papers.ssrn.com/paper.taf?abstract_id=261277. *See, e.g.*, United States v. Salman, 792 F.3d 1087, 1090 (9th Cir. 2015); United States v. Newman, 773 F.3d 438, 445 (2d Cir. 2014).

74. Cohen, *supra* note 71, at 558.

75. *Id*. at 558–59.

76. Dirks v. SEC, 463 U.S. 646, 659 (1983).

77. *Id*. at 653–54 (quoting Chiarella v. United States, 445 U.S. 222, 227 (1980)).

78. *Id*. at 654 (quoting Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 472 (1977)).

79. *See id*. at 658.

80. *See id*. at 660.

ability of individuals to obtain a "personal advantage" through the use of inside information.[81] Therefore, the test for inside-trading liability is "whether the insider personally will benefit, directly or indirectly, from his disclosure."[82] When the individual privy to the inside information obtains no personal benefit, the duty to shareholders has not been breached.[83] This is the issue that the Court must further define in *Salman*.

C. The Circuit Split

Circuits are currently divided on when a personal benefit to the insider may be inferred from a personal relationship between the tipper and tippee. The Second and Ninth Circuits diverge as discussed below.

The Second Circuit applied the Supreme Court's holding in *Dirks* to *United States v. Newman*.[84] Newman and Chiasson, two portfolio managers, were convicted of securities fraud.[85] The Second Circuit vacated the convictions and remanded the case to dismiss the indictments.[86]

The parties did not dispute that Chiasson and Newman knew almost nothing about the insiders nor any personal benefit the insiders may have received.[87] The Second Circuit found that if there was a benefit in this case, then "practically anything would qualify."[88] One tipper received career advice from a tippee.[89] The other tipper only knew a tippee from church, and they occasionally socialized together.[90] Therefore, the Government's evidence was insufficient to prove a personal benefit in order to establish tipper liability, so Chiasson and Newman could not be liable as tippees.[91]

81. *Id*. at 662 (quoting In re Cady, Roberts & Co., 40 S.E.C. 907 (1961)).
82. *Id*.
83. *Id*.
84. United States v. Newman, 773 F.3d 438, 452 (2d Cir. 2014).
85. *Id*. at 442.
86. *Id*. at 455.
87. *Id.* at 453.
88. *Id*. at 452.
89. *Id*.
90. *Id*.
91. *Id.* at 451. However, in a prior case, the Second Circuit broadly defined "personal benefit" and held that "it includes not only 'pecuniary gain,' such as a cut of the take or a gratuity from the tippee, but also a 'reputational benefit' or the benefit one would obtain from simply 'mak[ing] a gift of confidential information to a trading relative or friend.'" SEC v. Obus, 693 F.3d 276, 285 (2d Cir. 2012) (quoting Dirks v. SEC, 463 U.S. 646, 663–64 (1983)).

Conversely, the Ninth Circuit, in this case, held that the personal benefit element of the breach of fiduciary duty was satisfied when the "insider makes a gift of confidential information to a trading relative or friend.'"[92] The Ninth Circuit held that reading *Newman* as requiring the tipper to receive a tangible benefit, and that the tippee knows about it, contradicted *Dirks*.[93] It also pointed out that *Newman* recognized personal benefit as including the benefit of gifting confidential information to a friend.[94]

III. HOLDING

The Ninth Circuit affirmed Salman's conviction.[95] The court held that the evidence was "more than sufficient for a rational jury to find both that the inside information was disclosed in breach of a fiduciary duty, and that Salman knew of that breach at the time he traded on it."[96]

The court interpreted "personal benefit" to include an insider gifting confidential information to a trading relative or friend.[97] The Government provided evidence that Maher breached his fiduciary duty when he disclosed nonpublic information in exchange for education and to further their relationship.[98] It is unclear if Salman knew the entire history or extent of Maher and Michael's relationship, but it is uncontroverted that Salman knew the brothers were close.[99] Therefore, Salman knew that Maher gave the information to Michael intending to benefit his relative.[100] The court held that this relationship was sufficient grounds to establish a personal benefit; that Maher breached his fiduciary duty for this relationship; and that Salman's knowledge of this relationship and the breach was sufficient to affirm his conviction.[101]

92. United States v. Salman, 792 F.3d 1087, 1093 (9th Cir. 2015) (quoting *Dirks*, 463 U.S. at 664).
93. *Id.*
94. *Id.* at 1093–94 (quoting *Newman*, 773 F.3d at 452).
95. *Id.* at 1094.
96. *Id*.
97. *Id.* at 1092.
98. *Id.* at 1094.
99. *Id.* at 1094.
100. *Id*.
101. *Id*.

IV. ARGUMENTS

A. *Salman's Arguments*

Salman argues that the Court's test under *Dirks* has not been met because the Government did not prove that the disclosure by the insider (Maher) was motivated by pecuniary gain.[102] Therefore, no fiduciary duty was breached.[103] Furthermore, Salman argues a broader construction of insider trading liability, where no pecuniary gain occurs, violates the Constitution.[104]

Salman's argument is three-pronged. First, the Government's theory of tippee liability contradicts the Court's precedent and is not supported by the language or legislative history of Section 10(b).[105] Second, since Section 10(b) does not explicitly prohibit insider trading, the rule of lenity requires the common law doctrine be narrowly construed.[106] Third, Salman's conviction does not meet the Court's pecuniary gain standard.[107]

First, Salman argues that the Government is attempting to rewrite the definition of insider trading by vastly expanding tippee liability, in complete disregard for the Court's precedent and the language and history of Section 10(b).[108] He claims that the Government is attempting to replace the "personal benefit" test that the Supreme Court provided in *Dirks* with a "'lack of corporate purpose' test: knowingly trading on material nonpublic information would be criminal whenever an insider disclosed the information 'for personal, rather than corporate, reasons.'"[109]

Salman also argues that the Government's arguments are inconsistent with the text and history of Section 10(b). Section 10(b) contains no language specifically outlawing insider trading, unlike other countries that have outlawed the practice.[110] Salman points out that both the statute and legislative history are ambiguous, so courts created liability based on judicial interpretations and SEC

102. *See* Reply Brief for Petitioner at 24, Salman v. United States, No. 15-628 (2016) [hereinafter Reply Brief for Petitioner].
103. *See id.* at 4.
104. *Id.* at 26.
105. *See id*. at 24.
106. *See id*.
107. *See id*.
108. *Id.* at 2.
109. *Id*.
110. *Id.* at 8.

administrative decisions.[111] Similarly, the drafters of the Exchange Act were aware of inside trading, but did not address the subject or intend for Section 10(b) to determine its illegality.[112]

Next, Salman argues that the Government switched its theory upon appeal when it realized its original theory was too vague.[113] Originally, the Government argued that gifting a tip to a friend or relative was a benefit to the tipper.[114] According to Salman, this theory violates due process because it fails to state what relationships are sufficiently close to automatically give off a personal benefit and it does not identify what a disclosure must consist of to constitute a gift.[115] Now, Salman claims the Government presents a new theory to the Court: that the tip will be a breach of fiduciary duty if it does not coincide with a corporate purpose.[116] Salman argues that under this new test, there would be no need to ask what benefits are sufficient, or to examine the relationship between the tipper and tippee, because any relationship would lead to liability.[117]

Second, Salman argues that since Section 10(b) does not expressly prohibit insider trading, courts must construe the statute narrowly.[118] The Constitution vests the power to define crimes solely with the legislature.[119] Since Congress has not made policy decisions to explicitly codify insider trading, the common-law doctrine is ambiguous.[120] Therefore, until Congress enacts legislation on the matter, the crime should be narrowly construed in courts' application.[121] The Government, specifically the SEC, has hesitated to create any bright line rule so that investors are not given reign to trade legally using nonpublic information.[122] Salman argues that the Government has tried to prosecute corporate crime using "seemingly indeterminate language to usurp the power to define the crime" until the Court holds the

111. *See id.* at 9 (quoting Chiarella v. United States, 445 U.S. 222, 226 (1980)).
112. Brief of Amicus Curiae Mark Cuban in Support of Petitioner at 4, United States v. Salman, No. 15-628 (2016) (quoting Donald Cook & Myer Feldman, *Insider Trading Under the Securities Exchange Act*, 66 HARV. L. REV. 385, 386 (1953)).
113. Reply Brief for Petitioner, *supra* note 102, at 13.
114. *Id*.
115. *Id*.
116. *Id.* at 14.
117. *Id.*
118. *Id.* at 15.
119. *See* U.S. CONST. art. I, § 8, cl. 10.
120. Reply Brief for Petitioner, *supra* note 102, at 15.
121. *Id*.
122. *Id.* at 16–17.

Government in check.[123] According to Salman, until Congress "enacts a statute identifying [the] elements [of insider trading], courts lack the appropriate tools to implement the will of Congress."[124] The pecuniary gain standard provides an unambiguous test.[125] Salman defines pecuniary gain as "broker commissions or other compensation, not some intangible benefit."[126]

Third, Salman argues that the Government's argument cannot stand under the pecuniary gain standard because Maher had no financial incentive to release the information.[127] Even if the Court were to accept a "lack of corporate purpose" theory, Salman argues his conviction should be overturned because the jury was never instructed on this rule.[128]

B. *The Government's Arguments*

The Government argues that there is "overwhelming" evidence of Section 10(b) liability, including personal benefit to the tipper, and the petitioner's knowledge of this benefit.[129] The Government's argument rests on three ideas. First, the personal benefit standard in *Dirks* creates liability when a tipper acts for her own benefit instead of the corporation.[130] Second, *stare decisis* requires the court to uphold, rather than reconsider the standard in *Dirks*.[131] Finally, the Government did not create a new federal crime with insider trading, rather it defined a crime that was already prohibited by Section 10(b).[132] The heart of the Government's argument is that "[t]he tipper's purpose, rather than the identity of the recipient, is dispositive."[133]

The Government argues that "[t]he existence of [a] 'personal benefit' is simply the flip side of the absence of a corporate purpose."[134] The personal benefit test is fulfilled when the tipper discloses

123. *Id.* at 18.
124. *Id.* at 22.
125. *Id*.
126. *Id.* at 5 (parentheses omitted).
127. *Id.* at 24.
128. *Id*.
129. Brief for the United States at 54–55, Salman v. United States, No. 15-628 (2016) [hereinafter Brief for the United States].
130. *See id*.
131. *See id*.
132. *See id*.
133. *Id.* at 42.
134. *Id.* at 19.

information for personal rather than corporate reasons.[135] The Government reasons that whenever an insider discloses nonpublic information, he breaches his fiduciary duty by "inherently act[ing] contrary to a corporate purpose, to the detriment of shareholders."[136] In this case, the Government analogizes insider trading to embezzlement, arguing that the criminal act is "the embezzler's use of the property—here, confidential information—not for the purposes for which it was entrusted, but for the person's own purposes."[137] The Government further pointed to the Court's use of "trading relative or friend" in *Dirks* to exemplify personal, as opposed to corporate purposes.[138]

Next, the Government argues that *stare decisis* and Congress's endorsement mean that the Court should uphold *Dirks*' standard.[139] Salman's argument lacks merit because the Court itself states "that personal benefit includes things '*such as* pecuniary gain'. . . [and] then goes on to list a number of other forms of benefit that qualify."[140] Furthermore, a pecuniary gain standard would create new ambiguities regarding the timing of the gain, the amount of money that triggers these protections, and whether the money needs to be received or can be expected.[141] Salman has not addressed any of these questions.[142] The Government also argues that the Second Circuit was "erroneous" in *Newman*, and that this represents the sole example of a misapplication of *Dirks*.[143] Therefore, the standard is not ambiguous.

Finally, the Government claims that insider trading's illegality comes directly from Section 10(b)'s language.[144] Section 10(b) is intentionally broad, in order to capture various and new forms of securities fraud.[145] The Court has created a limiting principle by recognizing that the insider must violate a duty for the conduct to be

135. *Id.* at 18.
136. *Id.*
137. *Id.* at 23.
138. *Id.* at 27.
139. *Id.* at 29.
140. *Id.* at 34 (quoting Dirks v. SEC, 463 U.S. 646, 663 (1983)).
141. *Id.* at 34–35.
142. *Id.* at 37–38, 38 n.6.
143. *Id.* at 39.
144. *See* 15 U.S.C. § 78j(b) (2008) (It is unlawful "to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe. . . .").
145. Brief for the United States, *supra* note 129, at 46.

fraudulent.[146] The Government argues that accepting the pecuniary gain rule would absolve liability from any insider that gifts information to his relatives or friends so long as she can show she did not receive a pecuniary return.[147]

The Government also makes a policy argument that eliminating the use of material, non-public information is "vital to investor confidence."[148] If disparity of information becomes a "rigged game," people will refuse to invest because they will not trust the market.[149] Therefore, allowing a pecuniary benefit standard undermines Section 10(b) and Rule 10b-5.[150] Such a test defeats the purpose of insider trading laws, and individuals will stop investing if they perceive markets are no longer fair.[151]

V. ANALYSIS

The Court should hold for the Government. The Court should rule as follows: the information disclosed by Maher was a breach of fiduciary duty, for which he received a personal benefit; Salman knew that Maher breached his duty and that the information was nonpublic when he traded on it. Ruling for the Government in this case would respect *Dirks*. Furthermore, the Court can clarify what the "personal benefit" theory entails and protect the policies behind insider trading criminality. However, there does need to be a clear limiting principle on downstream liability. Finally, *Salman* can be read not to conflict with *Newman*, if the Court finds that *Newman* can be distinguished from this case for lack of a *quid pro quo*.

A. *The Plain Meaning of* Dirks *Requires the Court to Affirm Salman's Conviction*

Based on *Dirks*, the Court should define personal benefit in two ways. First, a personal benefits occurs when there is a *quid pro quo*, which may be monetary or any advantage or profit the insider receives. Second, when the insider and the tippee are so intimately connected by their relationship, the information provided is *per se* a personal benefit.

146. *See id.* at 47 (explaining how *Dirks* rejected a rule that would make it illegal to use confidential information in securities trading just because the counterparty did not have access to that information).
147. *Id.* at 48.
148. *Id*. at 49.
149. *Id.* at 49–50.
150. *See id.* at 52.
151. *See id.* at 49.

The Court ruled in *Dirks* that insider trading occurs when the disclosure is fraudulent, meaning it deceives or defrauds shareholders.[152] The court must look at "objective criteria, i.e., whether the insider receives a direct or indirect personal benefit from the disclosure, such as a pecuniary gain[,] or a reputational benefit that will translate into future earnings."[153] In *Dirks*, the Court discusses two scenarios that could lead a reasonable juror to infer a personal benefit was gained, like (1) a relationship suggesting *quid pro quo*, or (2) when the information is given as a gift to a "trading relative or friend."[154] This leads directly to the two forms of personal benefit the Court should adopt.

These elements are clearly present in this case. It is not contested that Maher and Michael were close. As the Ninth Circuit observed, even if Salman did not know all of the details of the Kara brothers' relationship, as a close friend and family member, a reasonable juror could infer that he knew Maher's tips to Michael were predicated on Maher's intention to receive a benefit.[155] Salman then received the information from Michael. Based on Michael's testimony, the Government proved that Salman both knew where the information came from, and that it was nonpublic. Therefore, following the plain language of *Dirks*, Salman's conviction should be upheld.

Salman contends that the judgment cannot stand on the Government's non-purpose theory because it did not go to the jury.[156] The Court, however, does not need to define a new standard. The Court may uphold the conviction based on *Dirks*, which did go to the jury in this case. If the Court does choose to adopt a "non-corporate purpose" definition of "personal benefit," however, the conviction can still stand. Arguably, the Government did not provide an alternative, novel standard.[157] Rather, it clarified "personal benefit," a term already used, to prevent the ambiguity that has caused confusion in this case.[158]

Finally, the Court could also uphold Salman's conviction under *Dirks* by alternatively defining "personal benefit." An example of this

152. Dirks v. SEC, 463 U.S. 646, 663 (1983).
153. *Id*.
154. *Id.* at 664.
155. United States v. Salman, 792 F.3d 1087, 1094 (9th Cir. 2015).
156. Reply Brief for Petitioner, *supra* note 102, at 24.
157. *See* Brief for the United States, supra note 129, at 40 (explaining that the *Dirks* standard is unambiguous and does not require a new theory).
158. *See id*. at 19 (defining personal benefit as corporate purpose).

would be a "gift theory," in which the tipper does not benefit in a tangible way, but he is incentivized to disclose information in order to bestow a gift to the tippee.[159] Accordingly, the tippee would only need to know that the tipper's motivation was some personal benefit, which under this theory would be the satisfaction of giving a gift.[160] This theory also does not change the *Dirks* standard; it clarifies it. Therefore, the jury was properly instructed. The Government can maintain Salman's conviction because he knew that Maher gifted the information to Michael and that Maher breached his duty, but Salman still traded on it.

B. The Policies Behind Insider Trading Liability Support the Government's Position

Allowing Salman to trade on material nonpublic information he obtained in this way contradicts the policies undergirding into Section 10(b) and Rule 10b-5. Salman's knowledge is unfair to consumers because he knows that the information came from Maher, an insider. If the Court were to follow Salman's argument, it would provide a mechanism through which an insider can escape prosecution by providing money to her family members as long as the insider does not receive any money back, even if she receives an intangible benefit.[161] However, the benefit to the insider alone is not what makes insider trading unfair, or else anyone who does well playing the stock market has a problem. Rather, insider trading is unfair because a fiduciary duty was breached by disclosure.[162] Therefore, if personal benefit means receiving any valuable benefit back, or having a relationship where helping the tippee automatically helps the insider, the underlying purpose of the law is protected.

Salman's argument that a pecuniary benefit standard is enough to cover inside traders misses a huge group of individuals that *Dirks* covered. For example, those who trade information in exchange for their child's admission to a prestigious college would be free from liability. Under the Government's "lack of corporate purpose test," these people are now liable. However, the Government's theory ignores reasons why information should be disclosed, even if it goes

159. Katherine Drummonds, *Resuscitating Dirks: How the Salman Gift Theory of Tipper-Tippee Personal Benefit Would Improve Insider Trading Law*, 53 AM. CRIM. L. REV., 833, 849 (2016).

160. *Id*.

161. Brief for the United States, *supra* note 129, at 48.

162. Cohen, *supra* note 71, at 550.

against the wishes of the corporation, like whistleblowing. Someone who seeks to report a company's wrongdoings to help authorities is acting against the company in sharing material non-public information.[163] But prosecuting him for this disclosure is counter-intuitive because he provides a social good.[164] To avoid these types of issues, the Court should use the two standards in *Dirks* but with clarified definitions of (1) a *quid pro quo* situation or (2) specific close relationships, such as family and close friends. This provides a way to curb liability, while protecting the reasons insider trading is illegal in the first instance.

C. Newman *can be Distinguished from the Case at Bar*

The Court can uphold Salman's conviction without overturning *Newman*. *Salman* and *Newman* differ on their facts, specifically the relationship between tippee and tipper.[165] In *Newman*, the Second Circuit ruled that the career advice that the tipper had received and the fact that the tipper and tippee attended the same church, were too attenuated to constitute the relationship *Dirks* required.[166]

Instead of reading *Newman* as a departure from *Dirks*, it can be looked at as a recognition of *Dirks*' limits and an "attempted clarification."[167] It can therefore be argued that *Salman* falls within the limits of "personal benefit," while *Newman* stands outside. In fact, the Ninth Circuit noted that "[t]o the extent *Newman* can be read to go so far, we decline to follow it."[168] Therefore, a true circuit split was not created;[169] the Ninth Circuit simply rejected Salman's interpretation of *Newman*.[170] In *Newman*, there was no *quid pro quo* nor was the relationship between the tipper and tippee, as church acquaintances, enough to meet the standard suggested here. *Salman*, however, meets the element based on the relationship in the case.

163. *See e.g.*, Dirks v. SEC, 463 U.S. 646, 648–50 (1983).
164. *Id.* at 665–67.
165. John L. Potapchuk, *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, 57 B.C. L. REV. 139, 154 (2016).
166. United States v. Newman, 773 F.3d 438, 452 (2d Cir. 2014).
167. Potapchuck, *supra* note 165, at 142.
168. United States v. Salman, 792, F.3d 1087, 1093 (2015).
169. Potapchuk, *supra* note 165, at 158.
170. *Id*.

CONCLUSION

The decision in *Salman v. United States* will be, at its core, a question of what constitutes a "personal benefit" to the insider. The Court should rule that a personal benefit can be (1) a *quid pro quo* situation or (2) defined close relationships such as family and close friends. Here, because the insider passed on the information to his brother, who then shared the information with his close friend and relative, the Court will likely rule for the Government. The Court's ruling should clarify some of the ambiguity surrounding insider trading standards while upholding the policy goals so clearly at stake in securities fraud cases.

While this would help clarify some of the ambiguity in determining insider trading liability, it will not solve everything. Even in this case, the Supreme Court did not grant certiorari to Salman's second question: whether willful blindness is applicable in insider trading[171] If willful blindness is accepted as a theory of liability, it may have negative implications on securities fraud.[172] However, barring the use of willful blindness also provides a loophole where the government cannot prosecute a trader who avoids learning the source of a tip. These questions will need to be decided in the future as insider trading litigation continues to proliferate.

171. Petition for Writ of Certiorari, *supra* note 19, at 9.
172. *See generally* Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).