GREAT EXPECTATIONS, GOOD INTENTIONS, AND THE APPEARANCE OF THE PERSONAL BENEFIT IN INSIDER TRADING: WHY THE STAGE NEEDS RESET AFTER *MARTOMA*

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I. INTRODUCTION

"All the world's a stage, [a]nd all the men and women [are] merely players . . . ."[1] In the world of insider trading, the audience's attention is often focused on the players and the game being played.[2] However, the game is only one part of a larger scene. Before the players take the stage and put the scene in motion, the stage must first be set. The way in which the stage is set can be almost as important, if not equally as important, as the game itself. The stage provides context and the components needed to make the scene complete. The game needs not only the players, but the rules and all the pieces or elements that go with it, such as the tables, chairs, chips, and cards.[3] If the rules are changed or if one piece of the scene is missing, the show may go on and the players' actions may resemble insider trading, but illegal insider trading has not actually occurred.[4]

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1 William Shakespeare, *As You Like It*, Act II, Scene VII.

2 James B. Stewart, *A Risk-Taker's Game: Insider Trading*, N.Y. TIMES (June 6, 2014), https://www.nytimes.com/2014/06/07/business/Mickelson-Icahn-Walters-and-the-Insider-Trading-Inquiry.html ("Insider trading 'can be seen as a game.'"); *Insider Trading Sanctions and SEC Enforcement Legislation: Hearing on H.R. 559 Before the Subcomm. on Telecomm., Consumer Prot., and Fin. of the H. Comm. on Energy and Commerce*, 98th Cong. 66 (1983) (statement of Rep. Jim Bates, Member, H. Comm. Subcomm. on Telecomm., Consumer Prot., and Fin.) (comparing the act of insider trading to playing with "marked cards"); Charles C. Cox, Comm'r, Sec. & Exch. Comm'n, *The Law of Insider Trading: How They Get Caught*, (Nov. 20, 1986), https://www.sec.gov/news/speech/1986/112086cox.pdf, at 12 (quoting AM. BAR ASS'N, REPORT OF THE TASK FORCE ON THE REGULATION OF INSIDER TRADING, COMMITTEE ON FEDERAL REGULATION OF SECURITIES, *reprinted* in 41 BUS. LAW. 223, 227 (1985)) (comparing insider trading to a "spitball pitcher or card shark with an ace up his sleeve").

3 *See* Chiarella v. United States, 445 U.S. 222, 232 (1980) (recognizing that "not every instance of financial unfairness constitutes fraudulent activity under § 10(b)").

4 For example, all types of illegal insider trading require the element of material nonpublic information. If a player (insider, tippee, or misappropriator) acts upon information that is not material or that is public information, the element is not met, and illegal insider trading has not occurred. Reed Harasimowicz, *Nothing New, Man! -- The Second Circuit's Clarification of Insider Trading Liability in* United States v. Newman *Comes at a Critical Juncture in the Evolution of Insider Trading*, 57 B.C. L. REV. 765, 779 (2016); *see also* Katherine Drummonds, Note,

Unlike most federal crimes or civil violations, there is no statute that defines insider trading or its elements.[5] Instead, courts have set the stage for illegal insider trading.[6] By relying upon Section 10(b) of the Securities Exchange Act of 1934 (sometimes referred to as the "Exchange Act") and Rule 10b-5, courts have created a cause of action generally requiring material nonpublic information, the purchase or sale securities based upon that information, scienter, and fraud resulting from the breach of a fiduciary duty.[7] In order for insider trading to occur, each element must be on the stage and used during the game. However, the stage is set differently depending upon the facts of the case, the types of players involved, and the theory used to establish a breach of duty.[8]

Dirks v. SEC[9] set the stage for insider trading based on tipper-tippee[10] liability and imposed additional elements to the stage, the most controversial of which is the personal benefit requirement.[11] Without the tipper receiving some "personal advantage" or "personal gain" in return for providing the tippee with the cards, numbers, or information to win the game, neither the tipper nor the tippee breaches a fiduciary duty, meaning illegal insider trading has not occurred.[12]

Resuscitating Dirks*: How the* Salman *"Gift Theory" Of Tipper-Tippee Personal Benefit Would Improve Insider Trading Law*, 53 AM. CRIM. L. REV. 833, 839 (2016) (recognizing that legitimate purposes for disclosing insider information exist).

5 James Walsh, Comment, *"Look Then to be Well Edified, When the Fool Delivers the Madman": Insider-Trading Regulation After*, 67 CASE W. RES. 979, 982 (2017) ("'no statute defines the elements of [insider trading'"); *see also* Joe Nocera, *On Insider Trading, There Ought to Be a La*w, BLOOMBERG: VIEW (Aug. 25, 2017, 8:59 AM), https://www.bloomberg.com/view/articles/2017-08-25/on-insider-trading-there-ought-to-be-a-law ("Congress . . . has never gotten around to defining what [insider trading] is.").

6 *See* Andrew N. Vollmer, *A Rule of Construction for the Personal Benefit Requirement in Tipping Cases*, 11 N.Y.U. J.L. & LIBERTY 331, 339, 342 (2017) (insider trading laws "are creations and creatures of the courts"); Harasimowicz, *supra* note 4, at 769 ("Insider trading . . . has developed through judicial interpretation of Federal statutes and SEC regulations.").

7 Harasimowicz, *supra* note 4, at 769, 774, 778-80; Thaya Brook Knight, Salman v. U.S.*: Another Insider Trading Case, Another Round of Confusion*, 2017 CATO SUP. CT. REV. 181, 193.

8 *See* United States v. O'Hagan, 521 U.S. 642, 652-53 (1997) (There are two theories that demonstrate when a breach of duty occurs. "[C]lassical theory targets a corporate insider's breach of duty to shareholders with whom the insider transacts." Misappropriation theory targets a "breach of a duty owed not to a trading party, but to the source of the information.").

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

10 *See id.* at 663; *see also* Drummonds, *supra* note 4, at 840 ("The seminal case *Dirks v. SEC* created the "personal benefit" requirement in the context of tipper-tippee liability."); Vollmer, *supra* note 6, at 340 ("The tipping violation [recognized in *Dirks*] was a new theory of liability with new elements of proof for conduct different from an insider's trade.").

11 *See Dirks*, 463 U.S. at 662; *O'Hagan*, 521 U.S. at 652-53; *see generally* Nocera, *supra* note 5; Gregory Morvillo, Martoma: *Taking the Personal out of Personal Benefit*, COMPLIANCE & ENFORCEMENT (Sept. 1, 2017), https://wp.nyu.edu/compliance_enforcement/2017/09/01/martoma-taking-the-personal-out-of-personal-benefit/.

12 *Dirks*, 463 U.S. at 662 ("Absent some personal gain, there has been no breach of duty to stockholders. And absent a breach by the insider, there is no derivative breach.").

Although *Dirks* treated the personal benefit as a focal point for determining a player's liability, guilt, or innocence,[13] courts began rearranging the stage and glossed over the personal benefit requirement, moving it to the back of the stage and, at times, assuming the tipper had received it.[14] Starting with *United States v. Newman*,[15] and continuing in *Salman v. United States*,[16] which both emphasized *Dirks* as the governing law for tipper-tippee liability, the pattern changed.[17] However, the greatest changes to the stage have occurred in the Second Circuit's original[18] and amended[19] opinions in *United States v. Martoma*. Although the Second Circuit cursorily treated the personal benefit requirement as part of the scene, the court stripped the personal benefit of all its substance, giving it only the appearance of the limit on liability *Dirks* intended.[20] Where prior decisions simply moved the personal benefit around the stage, *Martoma I* and *Martoma II*, in effect, removed the personal benefit from the stage.[21]

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13 *See id.* ("[T]he test is whether the insider personally will benefit, directly or indirectly, from his disclosure.").

14 *See* Jacob Gershman, *Experts Take Stock of Insider Trading Ruling*, WALL ST. J.: LAW BLOG (Dec. 11, 2014, 11:38 AM), https://blogs.wsj.com/law/2014/12/11/experts-take-stock-of-insider-trading-ruling/; *see also* Harasimowicz, *supra* note 4, at 778-79; Drummonds, *supra* note 4, at 841-42.

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

16 Salman v. United States, 137 S. Ct. 420 (2016).

17 *See* Peter J. Henning, *The Supreme Court Plays Goldilocks on Insider Trading*, N.Y. TIMES (Oct. 6, 2016), https://www.nytimes.com/2016/10/07/business/dealbook/the-supreme-court-plays-goldilocks-on-insider-trading.html (noting most of the Court viewing *Dirks* "as governing law"); Stephen Bainbridge, US v Newman: *A Big Win for Coherence and Fairness In Insider Trading Law*, PROFESSORBAINBRIDGE.COM (Dec. 11, 2014, 12:49 PM), http://www.professorbainbridge.-com/professorbainbridgecom/2014/12/us-v-newman-a-big-win-for-coherence-and-fairness-in-insider-trading-law.html [hereinafter Bainbridge, US v. Newman].

18 United States v. Martoma (*Martoma I*), 869 F.3d 58 (2d Cir. 2017) *amended and superseded by* United States v. Martoma (*Martoma II*), 894 F.3d 64 (2d Cir. 2017).

19 United States v. Martoma (*Martoma II*), 894 F.3d 64 (2d Cir. 2017).

20 *See Martoma II*, 894 F.3d at 84-85 (Pooler, J., dissenting) ("[The majority's] interpretation would eliminate the rule that has been with us since *Dirks* that the government must prove objective facts indicating that the tipper benefitted from her relationship with the tippee."); *Martoma I*, 869 F.3d at 75 (Pooler, J., dissenting) (stating that "the majority strips the long-standing personal benefit rule of its limiting power."); Harry Sandick & Jared Buszin, *INSIGHT: The Amended Opinion in* Martoma *Cuts Back on the Initial Decision, But Still Affirms*, BLOOMBERG (July 9, 2018), https://www.bna.com/insight-amended-opinion-n73014477307/.

21 *See Martoma I*, 869 F.3d at 75 (Pooler, J., dissenting); *see also* Stephen M. Bainbridge, *"*U.S. v. Martoma*": Second Circuit's Latest, but Perhaps Not Last, Word on Insider-Trading Tippee Liability*, LEGAL PULSE (Sept. 15, 2017), https://wlflegalpulse.com/2017/09/15/u-s-v-martoma-second-circuits-latest-but-perhaps-not-last-word-on-insider-trading-tippee-liability/ [hereinafter Bainbridge, U.S. v. Martoma] ("The majority's holding guts the personal benefit requirement."); Morvillo, *supra* note 11; William R. Baker III et al., *Latham Discusses How Second Circuit Broadened Personal Benefit Test for Insider Trading*, CLS BLUE SKY BLOG (Sept. 13, 2017), http://clsbluesky.law.columbia.edu/2017/09/13/latham-discusses-how-second-circuit-broadened-personal-benefit-test-for-insider-trading/ ("[I]n in eliminating important restrictions on what constitutes unlawful sharing of information in the absence of a financial benefit, [*Martoma I*] essentially eviscerate[s] the personal benefit requirement."); Nocera, *supra* note 5 (*Martoma I*

This Note argues that the personal benefit should return to the standard established by *Dirks* and affirmed by *Salman*, thereby restoring the personal benefit to the insider trading stage and requiring the Government to prove that a tipper has received a personal benefit in exchange for the disclosure of material nonpublic information. Without adhering to *Dirks*, courts risk penalizing defendants for the possession of material nonpublic information or on vague standards that prevent the public from knowing when their conduct is contrary to the law, which are standards consistently rejected by the Supreme Court.[22] Part II of this Note describes how the stage for tipper-tippee liability has been set, starting with the establishment of tipper-tippee liability in *Dirks v. SEC*. Parts III and IV analyze the changes made to the stage, culminating in the removal of the personal benefit in *Martoma I* and *Martoma II*, and the impact resulting from those changes. Part V discusses why a return to *Dirks* is the most practical solution and who should reset the stage.

II. BACKGROUND

Although the Securities Exchange Act of 1934 regulates the conduct of all secondary market participants and has broad antifraud provisions, the Exchange Act does not expressly prohibit insider trading.[23] Instead, illegal insider trading has primarily been a legal action developed by the courts to address perceived unfairness resulting from corporate insiders using their positions for their personal benefit.[24] *In re Cady, Roberts & Co*. was the first case to recognize the paradigm of fraud-based illegal insider trading by holding that insiders, who trade on material nonpublic information without disclosing the trade, commit fraud against shareholders by breaching a fiduciary duty.[25] By qualifying insider trading as fraud, the Security and Exchange Commission's (SEC) administrative court connected insider

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"eviscerate[d] the personal-benefit standard . . . In effect, this means that the personal-benefit limitation no longer exists."); Sandick & Buszin, *supra* note 20.

22 *See* Chiarella v. United States, 445 U.S. 222, 235(1980) ("[A] duty to disclose under § 10 (b) does not arise from the mere possession of nonpublic market information . . . ."); Dirks v. SEC, 463 U.S. 646, 657-58 (1983) ("We reaffirm today that 'a duty to disclose arises from the relationship between parties . . . and not merely from one's ability to acquire information because of his position in the market.'").

23 Nocera, *supra* note 5; s*ee also* Sara Almousa, Comment, *Friends with Benefits? Clarifying the Role Relationships Play in Satisfying the Personal Benefit Requirement Under Tipper-Tippee Liability*, 23 GEO. MASON L. REV. 1251, 1254 (2016).

24 Dirks v. SEC, 463 U.S. 646, 653 (1983); *In re* Cady, Roberts & Co., 40 S.E.C. 907, 912 (1961).

25 *Cady, Roberts*, 40 S.E.C. at 911 (Corporate insiders have "[a]n affirmative duty to disclose material information . . . [I]nsiders must disclose material facts which are known to them by virtue of their position but which are not known to persons with whom they deal. Failure to make disclosure in these circumstances constitutes a violation of the anti-fraud provisions.").

trading to the SEC's antifraud provisions, particularly SEC Rule 10b-5.[26] [27] Although the Supreme Court later rejected part of *Cady, Roberts* in *Chiarella v. United States*,[28] federal courts adopted the basic paradigm of fraud-based illegal insider trading.[29]

Due to the emphasis on the breach of duty in determining liability for insider trading, the theories of insider trading are particularly important.[30] The theories help identify whether a party has a duty, to whom the duty is owed, and how the duty is breached.[31] The Supreme Court has recognized two theories of insider trading: classical theory and misappropriation theory.[32] "[E]ach [theory] addresses efforts to capitalize on nonpublic information through the purchase or sale of securities," making the theories complementary to each other.[33] Because each theory seeks to attach liability to those who improperly trade on material nonpublic information, both theories also recognize liability through a tipper-tippee relationship.[34]

A. Theories of Insider Trading

With either classical theory or misappropriation theory, tipper-tippee liability places additional elements on the insider trading stage.[35] While a breach of duty still results from improperly trading on material nonpublic information, the insider or misappropriator does not necessarily trade on the information.[36] Instead, to establish liability, the focus shifts to whether the tipper received a personal benefit for providing the tippee the material nonpublic information and the tippee's knowledge about the tipper's breach

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[26] *Id.* at 913 ("[A] breach of duty of disclosure may be viewed as a device or scheme, an implied misrepresentation, and an act or practice [in violation of 10b-5]."); *see also* Almousa, *supra* note 23, at 1256.

[27] "Section 10(b) of the Exchange Act authorizes SEC rules to prohibit manipulative and deceptive devices used in connection with the purchase or sale of a security, and Rule 10b-5 is the general provision implementing the section." Vollmer, *supra* note 6, at 335.

[28] Chiarella v. United States, 445 U.S. 222 (1980). In *Cady, Roberts*, the SEC adopted a standard that any person trading on material nonpublic information committed illegal insider trading. The Supreme Court rejected this standard in *Chiarella*. The Supreme Court held that illegal insider trading is limited to those who have a duty to shareholders. Knight, *supra* note 7, at 183-84.

[29] *See* Almousa, *supra* note 23, at 1256-57.

[30] Drummonds, *supra* note 4, at 837.

[31] United States v. O'Hagan, 521 U.S. 642, 651-53 (1997).

[32] *Id.* at 651-52 (1997); s*ee also* Salman v. United States, 137 S. Ct. 420, 425 n.2 (2016).

[33] *O'Hagan*, 521 U.S. 642, 652 (1997).

[34] Harasimowicz, *supra* note 4, at 778-79 (2016); *see also Salman*, 137 S. Ct. at 425-26 n.2 (Although the Court does not address whether tipper-tippee liability applies to both classical theory and misappropriation theory, the Court assumes that tipper-tippee liability applies to both theories.).

[35] For example, under tipper-tippee liability, the tipper must receive a personal benefit from divulging the information to the tippee and the tippee must know or should know that the tipper has breached a fiduciary duty. Dirks v. SEC, 463 U.S. 646, 660-61, 663 (1983).

[36] Almousa, *supra* note 23, at 1259.

of duty.[37] Under tipper-tippee liability, the theories remain important because the framework resulting from the theories is critical to establishing the nature of the fiduciary duties owed under tipper-tippee liability.[38]

1. Classical Theory

Classical insider trading occurs when, without disclosure to the public, "a corporate insider trades in the securities of his corporation on the basis of material, nonpublic information."[39] While the theory was still under development, the SEC applied the duty to disclose to anyone who traded on material nonpublic information.[40] However, the Supreme Court firmly rejected this approach in *Chiarella*, narrowing liability only to those who had a duty to shareholders.[41] Possessing material nonpublic information is not enough to establish liability.[42] Instead, the relationship between the insider and the shareholders forms the basis of liability.[43] Thus, under classical theory, a person is a "corporate insider" when he or she has a duty to shareholders.[44] Such a duty exists when a person is a fiduciary or has some "other similar relation of trust and confidence [with shareholders]."[45]

Although liability under classical theory is typically associated with corporate executives, directors, and employees,[46] accountability also extends to temporary insiders.[47] Temporary insiders include "underwriter[s], lawyer[s], accountant[s], consultant[s],"[48] or other persons in a position of "trust or confidence that is owed directly, indirectly, or derivatively, to the issuer of that security or the shareholders of that issuer."[49] Temporary

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37 *Dirks*, 463 U.S. at 660-63.

38 Almousa, *supra* note 23, at 1257-59; Drummonds, *supra* note 4, at 837-39.

39 United States v. O'Hagan, 521 U.S. 642, 651-52 (1997).

40 Knight, *supra* note 7, at 184, 186.

41 Chiarella v. United States, 445 U.S. 222, 228 (1980) (finding that "one who fails to disclose material information prior to the consummation of a transaction commits fraud only when he is under a duty to do so").

42 *Id.* at 235 (holding "that a duty to disclose under § 10 (b) does not arise from the mere possession of nonpublic market information").

43 *Id.* at 228 n.14 ("A duty arises from the relationship between parties . . . and accompanying text, and not merely from one's ability to acquire information because of his position in the market."); *see also* Dirks v. SEC, 463 U.S. 646, 657-58 (1983).

44 *Chiarella*, 445 U.S. at 228.

45 *Id.*; *see also* Donna M. Nagy, *Beyond* Dirks*: Gratuitous Tipping and Insider Trading*, 42 IOWA J. CORP. L. 1 (2016) ("*Chiarella* entrenched the classical theory of insider trading, which premises securities fraud liability on a person's silence about material nonpublic information in a securities transaction 'when one party has information "that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them."'")

46 *Insider Trading*, SEC (Jan.15, 2013), https://www.sec.gov/fast-answers/answersinsiderhtm.html (last accessed Nov. 5, 2017).

47 Harasimowicz, *supra* note 4, at 776.

48 Dirks v. SEC, 463 U.S. 646, 655 n.14 (1983).

49 17 C.F.R. § 240.10b5-1 (2017).

insiders acquire a fiduciary duty because "they have entered into a special confidential relationship in the conduct of the business of the enterprise and are given access to information solely for corporate purposes."[50]

2. Misappropriation Theory

The misappropriation theory of insider trading occurs "when, [a person] misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information."[51] Misappropriation theory differs from classical theory in that the misappropiator owes no duty to the shareholders of the corporation.[52] Instead, the misappropriator owes the source of the material nonpublic information "a duty of loyalty and confidentiality."[53] Because the focus of misappropriation theory is on the source of the information, the breach of duty results from the misappropriator's deception to the source of the confidential information.[54] A duty of trust or confidence exists when "a person agrees to maintain information in confidence," or when parties have a "history . . . of sharing confidences" and an expectation of confidentiality.[55] These kinds of relationships include employers or clients.[56] A duty of trust also exists when "material nonpublic information [is obtained] from [a person's] spouse, parent, child or sibling" so long as the parties have a history of sharing confidential information and an expectation that the information will remain private.[57]

B. Tipper-Tippee Liability

Tipper-tippee liability occurs when the tipper,[58] for the tipper's personal benefit, discloses or gives material nonpublic information to the tippee,[59] and the tippee trades on that information.[60] Although tipper-tippee liability is

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50 *Dirks*, 463 U.S. at 655 n.14.

51 United States v. O'Hagan, 521 U.S. 642, 651-52 (1997); *see also Salman* v. United States, 137 S. Ct. 420, 425 n.2 (2016).

52 *Salman*, 137 S. Ct. at 425-26 n.2 ("[T]he [misappropriator] breaches a duty to, and defrauds, the source of the information, as opposed to the shareholders of his corporation.").

53 *O'Hagan*, 521 U.S. at 652.

54 *Id*.

55 17 C.F.R. § 240.10b5-2 (2017).

56 *Salman*, 137 S. Ct. at 425-26 n.2.

57 17 C.F.R. § 240.10b5-2.

58 Under classical theory, the tipper is the corporate insider. Under misappropriation theory, the tipper is the source of the material nonpublic information who confides in the tippee. Harasimowicz, *supra* note 4, at 774, 776.

59 A tippee is a person who receives the material nonpublic information for no legitimate corporate purpose. Drummonds, *supra* note 4, at 839.

60 *Id*.

often treated as a separate theory of insider trading,[61] tipper-tippee liability is a subset of both the classical theory of insider trading[62] and the misappropriation theory of insider trading.[63] Under either theory, tipper-tippee liability essentially adds additional elements to the stage of insider trading and attaches liability to a broader range of players, including the tipper, the tippee, and remote tippees.[64]

Notably, the tipper is not actually required to trade upon the material nonpublic information the tipper discloses.[65] However, because classical theory and misappropriation theory apply, the tipper still is someone who has a fiduciary duty and breaches that duty.[66] Thus, "[n]ot only are [tippers] forbidden by their fiduciary relationship from personally using undisclosed [material nonpublic] information to their advantage, but they also may not give such information to [tippees] for the same improper purpose of exploiting the information for [the tippers'] personal gain."[67]

Disclosing material nonpublic information is not enough to breach the tipper's fiduciary duty.[68] As the Supreme Court stated in *Chiarella* and confirmed in *Dirks*, the possession or mere transmission of material nonpublic information alone is insufficient to establish liability for insider trading.[69] Instead, the tipper's receipt of a personal benefit, combined with divulging material nonpublic information, determines whether a tipper has committed a breach of fiduciary duty.[70] If the tipper has not received any sort of personal benefit in exchange for tipping material nonpublic information, neither the tipper nor tippee can be implicated for committing illegal insider trading.[71]

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61 *Id*. at 837; Knight, *supra* note 7, at 185.

62 Salman v. United States, 137 S. Ct. 420, 425 n.2 (2016). (Under classical theory, a breach of a fiduciary duty would occur "'when a corporate insider['s]' … tippee 'trades in the securities of the tipper's corporation on the basis of material, nonpublic information.'").

63 Harasimowicz, *supra* note 4, at 769 (noting that tippers and tippees of material, nonpublic information can be liable under either theory of insider trading).

64 Drummonds, *supra* note 4, at 839-40.

65 Harasimowicz, *supra* note 4, at 778 ("Individuals do not have to trade on material, nonpublic information to be liable under either theory of insider trading.").

66 *Id*.

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

68 *Id*. at 657-58; *see also* Drummonds, *supra* note 4, at 839; Knight, *supra* note 7, at 186-87.

69 Chiarella v. United States, 445 U.S. 222, 235 (1980) ("a duty to disclose under § 10 (b) does not arise from the mere possession of nonpublic market information"); *Dirks*, 463 U.S. at 662 ("We reaffirm today that "a duty to disclose arises from the relationship between parties . . . and not merely from one's ability to acquire information because of his position in the market.").

70 *Dirks*, 463 U.S. at 662; *see also* Adam C. Pritchard, *Tributes to Professor Alan R. Bromberg:* Dirks *and the Genesis of Personal Benefit*, 68 SMU L. REV. 857, 870 (2015) (Acting with the purpose of receiving a personal benefit, combined with the disclosure of material nonpublic information, may also be sufficient to establish a breach of duty.).

71 Almousa, *supra* note 23, at 1260-61.

The personal benefit is based on the idea that the tipper did not disclose material nonpublic information to the tippee for a legitimate purpose.[72] Legitimate purposes include discussing the corporation's financial outlook with an accountant or seeking advice from the corporation's lawyer.[73] A purpose is never legitimate when the tipper receives a "personal advantage" or "personal gain" in return.[74] Essentially, to determine the personal benefit, one must determine what the tipper gets, directly or indirectly, out of making the disclosure.[75]

While the basic premise of the tipper's liability remains the same, the personal benefit requirement has seen the most changes since the Supreme Court decided *Dirks* in 1983.[76] Recent tipper-tippee liability cases have hinged on whether the tipper received a personal benefit from the tip in question.[77] These cases have modified the requirements for the personal benefit, significantly altering the cases' outcomes.[78] However, this aspect will be discussed further in Parts III and IV below.

The tippee's liability also results from a breach of fiduciary duty[79]. As a result of the tipper's breach, the tippee acquires the burden of the tipper's fiduciary duty to disclose or abstain from trading material nonpublic information.[80] The tippee's duty derives from the tipper's improper disclosure of the material nonpublic information.[81] Thus, the tippee breaches a duty when the tippee knows, or should have known, that the tipper breached a fiduciary duty and the tippee trades upon that information.[82]

A tippee's liability may also ensue from the tippee's disclosure of material nonpublic information to another person, known as a remote tippee.[83] Each person who subsequently receives this information may become a remote tippee and be liable for illegal insider trading.[84] However,

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72 *Dirks*, 463 U.S. at 662 ("In some situations, the insider will act consistently with his fiduciary duty to shareholders, and yet release of the information may affect the market."); *see also* Drummonds, *supra* note 4, at 839.

73 Drummonds, *supra* note 4, at 839.

74 Dirks v. SEC, 463 U.S. 646, 663-64 (1983).

75 *Id.*

76 *See* United States v. Newman, 773 F.3d 438 (2d Cir. 2014); Salman v. United States, 137 S. Ct. 420 (2016); United States v. Martoma (*Martoma I*), 869 F.3d 58 (2d Cir. 2017); United States v. Martoma (*Martoma II*), 894 F.3d 64 (2d Cir. 2017).

77 *See id.*

78 *See generally Newman*, 773 F.3d 438 (finding that the defendants were not guilty of insider trading because they received no personal benefit); *Salman*, 137 S. Ct. 420 (finding that the defendant was guilty for insider trading because he received a personal benefit).

79 *Dirks*, 463 U.S. at 659-60.

80 *Id.*

81 *Id.* at 660 ("[T]ippees must assume an insider's duty to the shareholders not because they receive inside information, but rather because it has been made available to them improperly.").

82 Almousa, *supra* note 23, at 1259.

83 Harasimowicz, *supra* note 4, at 778.

84 Almousa, *supra* note 23, at 1259.

a remote tippee's liability depends on the fraudulent acts committed by the original tipper and tippee, and the remote tippee's knowledge that the tipper breached a fiduciary duty.[85]

III. THE EVOLUTION OF THE PERSONAL BENEFIT

As discussed in Part II, the personal benefit of tipper-tippee insider trading has changed since the Supreme Court established the element in *Dirks v. SEC*. Although *Dirks* clarified that the personal benefit indicates a breach in duty, the Court did not clearly define the personal benefit's parameters.[86] Without this clarification, divergent interpretations of the personal benefit followed *Dirks* in the lower courts.[87]

Until the Second Circuit's decision in *Martoma I*, courts moved the personal benefit upstage,[88] away from the players and the audience, or downstage, to a place of prominence.[89] *Martoma I* made the greatest changes to the personal benefit by moving this piece completely off the stage.[90] However, each movement represents a change in the weight or importance of the personal benefit in illegal insider trading.[91] The following examines the evolution of the personal benefit through the cases that demonstrate the most significant changes to the personal benefit requirement.

A. *Dirks v. SEC*: Setting the Stage and Establishing the Personal Benefit

1. The Decision

In *Dirks*, a former officer of a nation-wide insurance company contacted Raymond Dirks, an insurance analyst for institutional investors, alleging that the insurance company was engaging in fraudulent activities.[92] After receiving encouragement to investigate the claims from the former officer, Mr. Dirks confirmed the allegations were true and discussed his findings with clients and investors, some of whom sold their investments in the insurance company.[93] Although Mr. Dirks exposed the insurance

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85 *Id.*

86 *See* Vollmer, *supra* note 6, at 334-35; Almousa, *supra* note 23, at 1262.

87 *See* Vollmer, *supra* note 6, at 335.

88 *See* Nocera, *supra* note 5; *Upstage*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/upstage (last updated Feb. 25, 2018) ("toward or at the rear of a theatrical stage").

89 *Downstage*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/downstage (last updated Feb. 25, 2018) ("toward or at the front of a theatrical stage"); *see generally* United States v. Newman, 773 F.3d 438 (2d Cir. 2014).

90 *See* Nocera, *supra* note 5; Bainbridge, U.S. v. Martoma, *supra* note 21.

91 *See* Nocera, *supra* note 5.

92 Dirks v. SEC, 463 U.S. 646, 648-49 (1983).

93 *Id.* at 649.

company's fraud, the SEC found Mr. Dirks, as a tippee, liable for illegal insider trading because Mr. Dirks possessed material nonpublic information without disclosing it to the general public.[94]

The Supreme Court rejected the SEC's determination, reconfirming that possessing material information alone is insufficient to establish liability for insider trading.[95] Instead, the tipper must breach a fiduciary duty, which occurs when the tipper discloses material nonpublic information for an improper purpose.[96] The test for liability depends on whether the tipper, such as the former insurance company officer, received a personal benefit, either "directly or indirectly" from disclosing the information to the tippee.[97] If the tipper receives a personal benefit, then the tipper has breached a fiduciary duty and the tippee acquires a fiduciary duty from the tipper's disclosure.[98]

The Court also provided several examples for courts to consider in determining whether a personal benefit exists.[99] A personal benefit can result from "a pecuniary gain or a reputational benefit that will translate into future earnings."[100] A personal benefit can also be inferred from the relationship between the tipper and tippee.[101] For example, the relationship may indicate "a quid pro quo" scenario between the tipper and tippee, "an intention to benefit the particular [tippee]," or "a gift of confidential information [from a tipper] to a trading relative or friend."[102] Gifts of material nonpublic information also qualify as a personal benefit to the tipper because gifts "resemble trading by the insider himself followed by a gift of the profits to the recipient."[103]

The Court ultimately determined that the former insurance officer did not receive a personal benefit by disclosing material nonpublic information to Mr. Dirks because the former officer received nothing in return for his disclosure.[104] Additionally, the "tippers were motivated by a desire to expose fraud," not by the prospect of personal gain.[105] Since the former insurance officer did not receive a personal benefit, there was no improper purpose for

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94 *Id.* at 651-52 ("'Where "tippees" -- regardless of their motivation or occupation -- come into possession of material "corporate information that they know is confidential and know or should know came from a corporate insider," they must either publicly disclose that information or refrain from trading.'").

95 *Id.* at 654.

96 *Id.* at 660, 662.

97 *Id.* at 662.

98 *Id.* at 662 ("Absent some personal gain, there has been no breach of duty to stockholders. And absent a breach by the insider, there is no derivative breach.").

99 Knight, *supra* note 7, at 187.

100 *Dirks*, 463 U.S. at 663.

101 *Id.* at 664.

102 *Id.*

103 *Id.*

104 *Id.* at 667.

105 *Id.*

the disclosure nor a breach of a fiduciary duty.[106] Thus, without the former officer's breach, Mr. Dirks never acquired a fiduciary duty and did not commit illegal insider trading.[107]

2. Tipper-Tippee Liability Established by Dirks

Although the personal benefit requirement explained how tippers and tippees acquired and breached a fiduciary duty, the Court's discussion regarding the personal benefit was difficult for the lower courts to implement in practice.[108] Due to these divergences and subsequent changes to the personal benefit, it is important to keep in mind the overall framework established in *Dirks*. Thus, the elements for tipper-tippee liability after *Dirks* were set as follows:

> (1) the tipper breaches a fiduciary duty by (a) tipping the material nonpublic information[109] and (b) receiving a personal benefit from tipping the tippee, such as a pecuniary gain, reputational benefit translating to future earnings, or a benefit inferred from a relationship between a tipper and tippee,[110] and (2) the tippee (a) knows or should have known the tipper breached his fiduciary duty[111] and (b) uses the information in connection with a securities transaction.[112] [113]

B. *United States v. Newman*: Adjusting the Stage, Strengthening the Personal Benefit

After *Dirks*, the lower courts' failure to recognize or require the government to clearly establish the personal benefit element eventually led to a concern that courts had made the personal benefit requirement worthless.[114] The outcome in *Newman* represented a change in this pattern

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106 *Id.*

107 *Id.*

108 Vollmer, *supra* note 6, at 334-35 ("*Dirks* went on to discuss the personal benefit requirement, and it is that discussion that caused the lower courts to reach divergent interpretations.").

109 *Dirks*, 463 U.S. at 663 ("[T]he initial inquiry is whether there has been a breach of duty by the insider.").

110 *Id.* at 663.

111 *Id.* at 660 ("[A] tippee assumes a fiduciary duty to the shareholders of a corporation not to trade on material nonpublic information only when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should know that there has been a breach.").

112 *See id.* at 653-54; *see also* 15 U.S.C. § 78j (2012); 17 C.F.R. § 240.10b-5 (2017).

113 *See also* Almousa, *supra* note 23, at 1259.

114 Nocera, *supra* note 5 ("Over time, however, the definition of "personal benefit" became so watered down as to be rendered meaningless . . . .").

and an attempt to limit the scope of insider trading liability under the classical theory.[115]

1. The Decision

Unlike *Dirks*, *Newman* involved a chain of tippers and tippees.[116] The original tippers, who were company insiders for Dell and NVIDIA, separately disclosed material nonpublic information to two financial analysts, who were acquaintances of the original tippers.[117] These two financial analysts then shared the information with other financial analysts, who in turn shared the information with their portfolio managers, Todd Newman and Anthony Chiasson.[118] Newman and Chiasson then traded on the information and each reaped millions in profits.[119] A jury found Newman and Chiasson guilty of insider trading based on the Government's argument that Newman and Chiasson, as sophisticated insiders, must have known that the information resulted from someone's breach of a fiduciary duty.[120]

The Second Circuit reversed, finding the Government failed to prove that the original tippers received a personal benefit or that Newman or Chiasson knew the original tippers had received a personal benefit for their disclosures.[121] Without a personal benefit, neither the original tippers nor the tippees violated a fiduciary duty.[122] However, even if the Government had established a personal benefit, Newman and Chiasson still would not have been liable because they did not know whether the original tippers received a personal benefit.[123] Without knowledge of a personal benefit, a tippee could not know whether the original tippers violated a fiduciary duty.[124] Accordingly, the Government only demonstrated that Newman and Chiasson possessed material nonpublic information, which is insufficient to establish liability.[125]

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115 *See* Antonia M. Apps, U.S. v. Martoma*: The End of the* Newman *Personal Benefit Test*, COMPLIANCE & ENFORCEMENT (Sept. 1, 2017), https://wp.nyu.edu/compliance_enforcement/2017/09/01/u-s-v-martoma-the-end-of-the-newman-personal-benefit-test/; *see also* Harasimowicz, *supra* note 4, at 786.

116 United States v. Newman, 773 F.3d 438, 443 (2d Cir. 2014).

117 *Id.*

118 *Id.*

119 *Id.*

120 *Id.* at 443-44.

121 *Id.* at 442-43.

122 *Id.* at 446.

123 *Id.* at 453 ("[T]he Government presented absolutely no testimony or any other evidence 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, or even that Newman and Chiasson consciously avoided learning of these facts.").

124 *Id.* at 447-48.

125 *Id.* at 449, 453.

Newman effectively modified or clarified *Dirks's* standards for tipper-tippee liability in two ways.[126] First, *Newman* required a "meaningfully close personal relationship" between the tipper and tippee.[127] Although *Dirks* provides that a court could infer a personal benefit from the personal relationship between the tipper and tippee and, in the context of gifts, suggested the inference is limited to relationships involving "a trading relative or friend," *Dirks* did not establish a standard to determine the closeness of the relationship.[128] By requiring a "meaningfully close" relationship, the Second Circuit attempted to set a limitation on the nature or type of relationship allowing for the inference of the personal benefit.[129] Without such a limitation, the Second Circuit believed the Government could meet the personal benefit with any weak social connection, which would essentially abolish the personal benefit requirement.[130] Thus, the personal benefit could not be established by proving "two individuals were alumni of the same school[,] . . . attended the same church," or were mere acquaintances.[131]

Additionally, to complete the inference of a personal benefit, a tipper must receive a personal benefit "that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature."[132] This means the tipper must receive something tangible,[133]

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126 *See* Harasimowicz, *supra* note 4, at 768, 788-793 (arguing that *Newman* did not depart from *Dirks*, but merely clarified tipper-tippee liability); Pritchard, *supra* note 70, at 873 (stating that the "standard [in *Newman*] marked . . . a return to *Dirks'* requirement of knowledge of a personal benefit to the tipper."); Bainbridge, US v. Newman, *supra* note 17 (arguing that *Newman* correctly adheres to *Dirks*). *But see also* Walsh, *supra* note 5, at 987 (referring to *Newman* as a "radical deviation" from *Dirks*); Almousa, *supra* note 23, at 1267 (noting that, while *Newman* is not entirely inconsistent with *Dirks*, "the rule derived from the *Newman* opinion must be construed within the context of precedent, which is not compatible with an interpretation that nearly eliminates relationships from the personal benefit requirement."); Nagy, *supra* note 45, at 6 ("regard[ing] *Newman* as a blatant misapplication of *Dirks*").

127 United States v. Newman, 773 F.3d 438, 452 (2d Cir. 2014).

128 Dirks v. SEC, 463 U.S. 646, 664 (1983); *Newman*, 773 F.3d at 449, 452; *see also* Almousa, *supra* note 23, at 1252 ("[A] clear standard to determine what constitutes a 'close relationship' does not yet exist."); Pritchard, *supra* note 70, at 873 ("[*Dirks*] does not qualify how close the relative or friend must be.").

129 Harasimowicz, *supra* note 4, at 768, 789; Almousa, *supra* note 23, at 1251.

130 *Newman*, 773 F.3d at 452 ("If . . . the Government was allowed to meet its burden by proving that two individuals were alumni of the same school or attended the same church, the personal benefit requirement would be a nullity.").

131 *Id.*

132 *Id.*

133 Baker et al., *supra* note 21; Andrew Bauer et al., United States v. Martoma*: The Second Circuit's Latest Attempt to Clarify the "Personal Benefit" Requirement in Insider Trading Cases*, ARNOLD & PORTER KAYE SCHOLER (Aug. 25, 2017), https://www.arnoldporter.com/en/perspectives/publications/2017/08/united-states-v-martoma-the-second-circuits-latest.

valuable,[134] or tantamount to a "quid-pro-quo-type relationship" in exchange for making the gift to the tippee.[135] The "warm glow [someone receives] from making a gift of the information to a family member or friend" likely would not meet the burden required by the Second Circuit.[136] Although one of *Newman's* original tippers received career advice from one of the original tippees, the advice "was little more than the encouragement one would generally expect of a fellow alumnus or casual acquaintance" and did not qualify as a tangible gain sufficient to establish a personal benefit.[137]

The second change to tipper-tippee liability required tippees to know that the original tipper received a personal benefit for disclosing the material nonpublic information.[138] According to the Second Circuit, "the exchange of confidential information for a personal benefit is not separate from a[] [tipper's] breach of his or her fiduciary duty; it is the breach that triggers liability for securities fraud under Rule 10b-5."[139] Thus, liability against a tippee cannot be established if the tippee knows or should have known that a tipper had a fiduciary duty, but did not know the tipper received a consequential personal benefit for the disclosure.[140] As discovered in *Newman*, it may be more difficult to prove a remote tippee knew that the tipper received a personal benefit.[141]

2. Tipper-Tippee Liability after Newman

After the Second Circuit's decision in *Newman*, some hoped that the Circuit's influence in securities law would lead to an overall strengthening

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134 Knight, *supra* note 7, at 188-89 ("*Newman*, at least for the Second Circuit, seemed to be that a conviction for insider trading requires the government to establish that the tipper received something of value from the tippee.").

135 *Newman*, 773 F.3d at 452 ("[T]his requires evidence of 'a relationship between the [tipper] and the recipient that suggests a *quid pro quo* from the [recipient], or an intention to benefit the [recipient].'"); *see also* Harasimowicz, *supra* note 4, at 785 ("[T]he court circumscribed what constitutes a 'personal benefit' under insider trading law, limiting it to a quid-pro-quo type of relationship.").

136 Donald C. Langevoort, *What Were They Thinking? Insider Trading and the Scienter Requirement*, in RESEARCH HANDBOOK ON INSIDER TRADING 52 (Stephen Bainbridge, ed., Edward Elgar Publishing Ltd.), http://scholarship.law.georgetown.edu/facpub/989/.

137 *Newman*, 773 F.3d at 453.

138 Walsh, *supra* note 5, at 987 ("We may . . . read *Newman* as a departure from *Dirks* because the Second Circuit held that 'the Government must prove beyond a reasonable doubt that the tippee knew that an insider disclosed confidential information *and* that he did so in exchange for a personal benefit.'").

139 Harasimowicz, *supra* note 4, at 783.

140 *Newman*, 773 F.3d at 448-49.

141 Walsh, *supra* note 5, at 987 ("Requiring concrete proof that a tippee 'knew' the tipper made the tip in exchange for a 'personal benefit' is a considerably more difficult test when it comes to prosecuting 'remote tippees' . . . .").

of the personal benefit requirement.[142] However, courts did not widely recognize *Newman's* personal benefit standard.[143] A circuit split between the Second Circuit and the Ninth Circuit soon followed.[144] Thus, the Second Circuit's divergence from *Dirks* had important consequences on the personal benefit. The Second Circuit identified tipper-tippee liability under classical theory[145] as follows:

> (1) the corporate insider was entrusted with a fiduciary duty; (2) the corporate insider breached his fiduciary duty by (a) disclosing confidential information to a tippee (b) in exchange for a personal benefit; (3) the tippee knew of the tipper's breach, that is, he knew the information was confidential and divulged for personal benefit; and (4) the tippee still used that information to trade in a security or tip another individual for personal benefit.[146]

However, a more accurate paradigm for tipper-tippee liability after *Newman* is as follows:

> (1) the tipper breaches a fiduciary duty by (a) tipping material nonpublic information to a tippee[147] and (b) receiving a personal benefit from tipping the tippee, that is (i) a tangible (quid pro quo) benefit; (ii) a reputational benefit that will translate into future earnings; or (iii) represented by a gift to a trading relative or friend when the personal relationship between the tipper and tippee is meaningfully close and part of "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature;"[148] and

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142 *See* Nagy, *supra* note 45, at 6 (noting that scholars, such as "Professors Stephen Bainbridge, Jonathan Macey, and Todd Henderson" supported *Newman*, recognizing it as a check against the government's expansion of liability for insider trading).

143 *Id.* at 5 (noting that jurisdictions continued to follow *Dirks* after *Newman* and that the Ninth Circuit and First Circuit expressly rejected to follow *Newman*).

144 Almousa, *supra* note 23, at 1265; Drummonds, *supra* note 4, at 845. *But see* Alison Frankel, *New SCOTUS Briefs: 2nd Circuit Didn't Change Insider Trading Law in* Newman *Case*, REUTERS: BLOG (Aug. 27, 2015), http://blogs.reuters.com/alison-frankel/2015/08/27/new-scotus-briefs-2nd-circuit-didnt-change-insider-trading-law-in-newman-case/ (questioning whether the Ninth Circuit's decision in *Salman* created a circuit split with the Second Circuit regarding the definition of the personal benefit).

145 *Newman's* requirements are limited to the classical theory of insider trading because misappropriation theory is based on the notion that information is given to another in confidence. Where there is an expectation that someone will trade on the information, there can be no expectation of loyalty or confidence. *See* United States v. O'Hagan, 521 U.S. 642, 652-53 (1997).

146 United States v. Newman, 773 F.3d 438, 450 (2d Cir. 2014).

147 *Dirks*, 463 U.S. at 663 ("[T]he initial inquiry is whether there has been a breach of duty by the insider.").

148 Dirks v. SEC, 463 U.S. 646, 663-64 (1983) (establishing that the personal benefit includes "a pecuniary gain or a reputational benefit that will translate into future earnings" or "a gift of confidential information to a trading relative or friend"); United States v. Newman, 773 F.3d 438,

(2) the tippee (a) "knew [or should have known] of the tipper's breach, that is, [the tipper] knew [or should have known] the information was confidential and divulged for personal benefit"[149] and (c) the tippee uses the information in connection with a securities transaction.[150]

C. Salman v. United States: A Return to Dirks

Following the Second Circuit's decision in *Newman*, the Supreme Court denied certiorari to hear the case.[151] In the meantime, the Ninth Circuit ruled in *United States v. Salman*.[152] Although *Salman* shared some similarities to *Newman* (in that a remote tippee was involved), the Ninth Circuit declined to follow the Second Circuit's version of tipper-tippee liability,[153] creating a circuit split.[154] When Mr. Salman appealed, many hoped that the Supreme Court would resolve the split by clarifying all aspects of the personal benefit.[155]

1. The Decision

In *Salman*, Maher Kara, an investment banker who worked with highly confidential business information, provided material nonpublic information to his brother, Mounir "Michael" Kara.[156] Michael Kara then traded on that information for himself and separately tipped the information to Bassam Salman, who was Michael Kara's friend and Maher Kara's brother-in-law.[157] Although Mr. Salman knew Maher Kara was the source of the material nonpublic information, Mr. Salman also traded on the information and earned over one million dollars in profit.[158]

However, the Government later discovered their scheme and a jury found Mr. Salman guilty of committing illegal insider trading.[159] Relying on the personal benefit standard established in *Newman*, Mr. Salman argued for

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450, 452 (2d Cir. 2014) (stating that a personal benefit represented by a gift from the tipper to a trading relative or friend requires "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").

149 *Id.* at 450.

150 *See Dirks*, 463 U.S. at 663; *see also* 15 U.S.C. § 78j (2012); 17 C.F.R. § 240.10b-5 (2017).

151 Harasimowicz, *supra* note 4, at 785.

152 *See* United States v. Salman, 792 F.3d 1087 (9th Cir. 2015).

153 *Id.* at 1093.

154 Salman v. United States, 137 S. Ct. 420, 425 (2016) ("We granted certiorari to resolve the tension between the Second Circuit's *Newman* decision and the Ninth Circuit's decision in this case."); *see also* Walsh, *supra* note 5, at 981. *But see* Harasimowicz, *supra* note 4, at 786.

155 *See* Drummonds, *supra* note 4, at 835.

156 *Salman*, 137 S. Ct. at 424.

157 *Id.*

158 *Id.*

159 *Id.*

reversal because Maher Kara, the original tipper, never received a pecuniary or consequential personal benefit for the disclosure to Michael Kara, the original tippee.[160] The Ninth Circuit disagreed, "holding that a tipper benefits personally by making a gift of confidential information to a trading relative or friend."[161]

To resolve the issue of whether a tipper must receive a consequential personal benefit in return for giving a gift of material nonpublic information to a trading relative, the Supreme Court returned to *Dirks*.[162] *Dirks* resolved *Salman* because "*Dirks* makes clear that a tipper breaches a fiduciary duty by making a gift of confidential information to 'a trading relative . . . .'"[163] When a tipper makes a gift of material nonpublic information to a trading relative, the tipper receives a personal benefit because "the tipper meant to provide [the tippee with] the equivalent of a cash gift."[164] Nothing more substantial is required.[165] Thus, the Court expressly found that *Newman's* requirement for the tipper to "also receive something of a 'pecuniary or similarly valuable nature' in exchange for a gift to family or friends . . . inconsistent with *Dirks*."[166] Additionally, by adhering to *Dirks*, the Court rejected the Government's argument to recognize a personal benefit when a tipper gifts material nonpublic information to any person [regardless of the existence of a relationship]."[167]

2. Tipper-Tippee Liability after Salman

By relying on *Dirks*, the Supreme Court returned the stage closer to its original setting.[168] However, the Supreme Court did not address all the issues raised by *Newman*, leaving uncertainty about whether the tipper and tippee must have a meaningfully close relationship or whether the tippee must have knowledge regarding the tipper's personal benefit.[169] Regardless of the

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160 *Id.* (At the trial, Maher Kara said that he gave Michael Kara insider information, with the expectation Michael would trade on it, because he wanted to "help" his brother, "appease" his brother, and to do a favor for his brother.").

161 *Id.* at 426.

162 *See id.* at 427 ("We adhere to *Dirks*, which easily resolves the narrow issue presented here."); *see also* Henning, *supra* note 17.

163 *Salman*, 137 S. Ct. at 427.

164 *Id.* at 428.

165 *Id.* at 427-28.

166 *Id.* at 428.

167 Walsh, *supra* note 5, at 989.

168 *See Salman*, 137 S. Ct. at 426-28.

169 Apps, *supra* note 115 ([B]ecause the case involved tipping between two brothers who were admittedly 'very close,' and *Dirks* specifically contemplated 'a gift of confidential information to a trading relative,' the Court did not address *Newman's* 'meaningfully close personal relationship' requirement."); Aruna Viswanatha & Brent Kendall, *Supreme Court Hardens Stance on Insider Trading*, WALL ST. J. (Dec. 7, 2016, 1:44 PM), http://www.wsj.com/articles/supreme-court-backs-prosecutors-over-tips-from-friends-and-family-in-insider-trading-cases-1481038798 ("The [C]ourt

questions posed after *Newman*, the Court's strong adherence to *Dirks* in *Salman* suggests returning the standard of tipper-tippee liability established by *Dirks*.[170] Therefore, as informed by *Salman*, the tipper-tippee liability elements promulgated by the Supreme Court to establish tipper-tippee liability are:

> (1) the tipper breaches a fiduciary duty by (a) tipping the material nonpublic information[171] and (b) receiving a personal benefit from tipping the tippee, such as "something of value in exchange for the tip, . . . 'a gift of confidential information to a trading relative or friend,'" [172] or "a reputational benefit that will translate into future earnings;"[173] and
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> (2) the tippee (a) knows or should have known the tipper breached his fiduciary duty[174] and (b) uses the information in connection with a securities transaction. [175]

However, it is notable that the Supreme Court expressly rejected only one aspect of the Second Circuit's requirement for tipper-tippee liability.[176] A reasonable reading of *Newman*, as informed by *Salman*, suggests that tipper-tippee liability in the Second Circuit under classical theory would be as follows:

> (1) the tipper breaches a fiduciary duty by (a) tipping the material nonpublic information[177] and (b) receiving a personal benefit from tipping the tippee, such as (i) "something of value in exchange for the tip,"[178] (ii) 'a gift of confidential information to a trading relative or friend'[179] when the personal

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declined to address the thornier questions raised by the *Newman* case about trading among casual friends and professional acquaintances . . . The *Salman* case also didn't deal with a second aspect of *Newman* . . . .").

170 *See Salman*, 137 S. Ct. at 427.

171 Dirks v. SEC, 463 U.S. 646, 663 (1983) ("[T]he initial inquiry is whether there has been a breach of duty by the insider").

172 *Salman*, 137 S. Ct. at 423.

173 *Dirks*, 463 U.S. at 663.

174 *Id*. at 660 ("[A] tippee assumes a fiduciary duty to the shareholders of a corporation not to trade on material nonpublic information only when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should know that there has been a breach.").

175 *See id.* at 653-54; s*ee also* 15 U.S.C. § 78j (2012); 17 C.F.R. § 240.10b-5 (2017).

176 *See Salman*, 137 S. Ct. at 428.

177 *Dirks*, 463 U.S. at 663 ("[T]he initial inquiry is whether there has been a breach of duty by the insider").

178 *Salman*, 137 S. Ct. at 423.

179 *Id*. at 423.

> relationship between the tipper and tippee is meaningfully close,[180] (iii) or "a reputational benefit that will translate into future earnings;"[181] and
>
> (2) the tippee (a) "knew [or should have known] of the tipper's breach, that is, [the tipper] knew [or should have known] the information was confidential and divulged for personal benefit"[182] and (b) the tippee uses the information in connection with a securities transaction.[183]

D. *United States v. Martoma I*:

Martoma I was the first tipper-tippee liability case in the Second Circuit to address the effects of *Salman* on tipper-tippee liability and specifically to define what *Salman* changed about *Newman*.[184] As discussed above, *Salman* rejected the Second Circuit's requirement that a tipper gifting information to a tippee must receive, or expect to receive, a pecuniary interest or something of consequence.[185] However, the Supreme Court did not address any of the Second Circuit's other changes to the personal benefit or tipper-tippee liability.[186] Despite the limited scope of *Salman*, the Second Circuit applied *Salman* beyond the issues *Salman* addressed, "abrogate[ing] *Newman's* 'meaningfully close personal relationship requirement,'" substantially changing the personal benefit requirement, and dramatically altering the stage established by *Dirks* for tipper-tippee liability.[187]

1. The Decision

Matthew Martoma, a prominent hedge fund manager, initiated his insider trading scheme after investing hedge fund assets into two pharmaceutical companies working on an experimental drug treatment for Alzheimer's Disease.[188] As part of his effort to learn more about the drug, Martoma hired Dr. Sidney Gilman and Dr. Joel Ross, who were involved in the drug's clinical trials.[189] Although both Dr. Gilman and Dr. Ross had obligations to keep the drug's trial results confidential, both men disclosed material nonpublic information to Mr. Martoma, who traded on the

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180 United States v. Newman, 773 F.3d 438, 452 (2d Cir. 2014).
181 *Dirks*, 463 U.S. at 663.
182 *Newman*, 773 F.3d at 450.
183 *Dirks*, 463 U.S. at 653-54; *see also* 15 U.S.C. § 78j (2012); 17 C.F.R. § 240.10b-5 (2017).
184 *See* United States v. Martoma (*Martoma I*), 869 F.3d 58, 65 (2d Cir. 2017); Bainbridge, U.S. v. Martoma, *supra* note 21.
185 Salman v. United States, 137 S. Ct. 420, 428 (2016).
186 *Id.* at 425 n.1; *Martoma I*, 869 F.3d at 69.
187 *Martoma I*, 869 F.3d at 61; s*ee also* Morvillo, *supra* note 11.
188 *Martoma I*, 869 F.3d at 61.
189 *Id.* at 61-62.

information.[190] Because Mr. Martoma received the drug's final trial results days before the public, Mr. Martoma learned that the drug was ineffective in treating most Alzheimer's patients, traded on the information, and prevented his employer from losing millions.[191]

While Mr. Martoma appealed his conviction, the Second Circuit reversed *Newman* and the Supreme Court affirmed *Salman*.[192] Based on *Newman*, Mr. Martoma argued the Government failed to prove that Dr. Gilman, as the tipper, received a personal benefit for disclosing the material nonpublic information because Mr. Martoma and Dr. Gilman "did not have a 'meaningfully close personal relationship.'"[193] According to Mr. Martoma, the evidence was then insufficient to establish the personal benefit under *Newman's* personal benefit requirement for gifts, meaning his conviction should be overturned.[194] However, the Second Circuit correctly determined that the pair had a quid pro quo relationship in which Mr. Martoma paid Dr. Gilman for information and Dr. Gilman provided Mr. Martoma with material nonpublic information.[195] Neither *Newman* nor *Salman* rejected the inference of a personal benefit from quid pro quo relationships.[196]

Although *Martoma I* seemed relatively straightforward, the court inexplicably continued to analyze the gift theory's personal benefit requirement and particularly focused on *Newman's* requirements for inferring the personal benefit.[197] As the Second Circuit noted, the Supreme Court rejected *Newman's* pecuniary benefit requirement.[198] However, the Second Circuit also read *Salman* to abrogate *Newman's* meaningfully personal relationship requirement based on *Salman's* observations that "'giving a gift of [inside] information is the same thing as trading by the tipper followed by a gift of the proceeds'" and tippers are prohibited from personally benefitting or giving material nonpublic information to another for the tipper's "personal gain."[199] The nature of the relationship did not matter because "the personal benefit one receives from giving a gift of insider information is *not* friendship or loyalty or gratitude of the [tippee]."[200] Instead, the personal benefit is derived from the gift's resemblance to a trade made by the tipper followed by a gift of cash to the tippee.[201] As the Second Circuit reasoned, *Salman's* observations did not "support[] a distinction

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190 *Id.* at 62.
191 *Id.*
192 *Id.* at 64-65.
193 *Id.* at 64-65.
194 *Id.*
195 *Id.* at 67.
196 *Id.* at 66-67; s*ee also* Bainbridge, U.S. v. Martoma, *supra* note 21.
197 Nocera, *supra* note 5.
198 *Martoma I*, 869 F.3d at 65.
199 *Id.* at 69.
200 *Id.* at 72.
201 *Id.*

between gifts to people with whom a tipper shares a 'meaningfully close personal relationship' . . . and gifts to those with whom a tipper does not share such a relationship," meaning that "gifts to anyone, not just relatives and friends," could establish the personal benefit.[202] The key implication is whether the tipper expected the tippee to trade upon the information.[203] Thus, the Second Circuit held:

> an insider or tipper personally benefits from a disclosure of inside information whenever the information was disclosed "with the expectation that [the recipient] would trade on it," and the disclosure "resemble[s] trading by the insider followed by a gift of the profits to the recipient," whether or not there was a "meaningfully close personal relationship" between the tipper and tippee.[204]

2. Tipper-Tippee Liability after Martoma I

Although the Second Circuit asserted that *Martoma I* did not eliminate the personal benefit from tipper-tippee liability, their expectation-based personal benefit requirement left the form of the personal benefit but none of the substance that *Dirks* attempted to create.[205] As a result, the overall framework appeared largely the same and removed the changes *Newman* sought to implement.[206] Following *Martoma I*, tipper-tippee liability under classical theory[207] in the Second Circuit was as follows:

> (1) the tipper breaches a fiduciary duty by (a) tipping the material nonpublic information to a tippee[208] and (b) the tipper receives a personal benefit from tipping at the time of disclosure (i) by receiving "something of value in exchange for the tip;"[209] (ii) by receiving "a reputational benefit that will translate into future earnings;"[210] or (iii) by gifting confidential information to another with (1) the expectation that the tippee would trade on the material nonpublic information (2) when the disclosure resembles trading

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202 *Id.* at 69.

203 *Id.* at 69-70.

204 *Id.* at 70 (citations omitted).

205 *See id.* at 71.

206 *See id.* at 71.

207 Although *Martoma I* did not expressly limit its holding to classical theory, its articulation of the personal benefit requirement could not apply to misappropriation theory because, under misappropriation theory, there is no expectation that someone will trade on the material nonpublic information. *See* United States v. O'Hagan, 521 U.S. 642, 652 (1997) (describing misappropriation as deception); *see also* 17 C.F.R. §240.10b5-2 (2019) (describing misappropriation as a breach of trust or confidence).

208 Dirks v. SEC, 463 U.S. 646, 663 (1983) ("[T]he initial inquiry is whether there has been a breach of duty by the insider.").

209 Salman v. United States, 137 S. Ct. 420, 423 (2016).

210 *Dirks*, 463 U.S. at 663.

> by the tipper followed by a gift of the profits from the tipper to the tippee, regardless of any meaningfully close relationship between the tipper and tippee;[211] and
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> (2) the tippee (a) "knew [or should have known] of the tipper's breach, that is, [the tipper] knew [or should have known] the information was confidential and divulged for personal benefit;"[212] and (b) the tippee uses the information in connection with a securities transaction.[213]

D. *United States v. Martoma II*:

On June 25, 2018, the Second Circuit withdrew *Martoma I* and issued an amended opinion.[214] In *Martoma II*, the Second Circuit stepped back from its changes to gift theory and its conclusion that *Newman's* "'meaningfully close personal relationship' requirement is no longer good law."[215] Instead, the Court reinterpreted *Dirks* to find that the personal benefit requirement is satisfied solely by a tipper's intention to benefit the tippee, without any need to prove a relationship between the two.[216] As the dissent suggests, this is a more subtle change to the personal benefit requirement,[217] but the effect is essentially the same as the change attempted in *Martoma I*: the Second Circuit has altered the personal benefit requirement to the point it no longer exists, changing the stage set by *Dirks*.[218]

1. The Decision

In *Martoma II*, the Second Circuit uses the same facts and a revised rationale to reach the same result as *Martoma I*.[219] As with *Martoma I*, the Court found that Matthew Martoma and Dr. Gilman had a quid pro quo

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211 *Martoma I*, 869 F.3d at 70.

212 United States v. Newman, 773 F.3d 438, 450 (2d Cir. 2014).

213 *See Dirks*, 463 U.S. at 653-54; *see also* 15 U.S.C. § 78j (2012); 17 C.F.R. § 240.10b-5 (2017).

214 United States v. Martoma (*Martoma II*), 894 F.3d 64 (2d Cir. 2017).

215 *Martoma II*, 894 F.3d. at 71, 76-77; *Martoma I*, 869 F.3d at 69.

216 *Martoma II*, 894 F.3d at 74-75.

217 *See id.* at 83 (Pooler, J., dissenting).

218 *See* Sandick & Buszin, *supra* note 20 ("The amended *Martoma* decision appears to again lower the bar for insider trading prosecutions in the Second Circuit."); Gregory Morvillo, *Finality on Insider Trading Law… Until the Next Challenge*, COMPLIANCE & ENFORCEMENT (July 5, 2018), https://wp.nyu.edu/compliance_enforcement/2018/07/05/finality-on-insider-trading-law-until-the-next-challenge/ (The *Martoma* majority has . . . essentially ensured that unless there is a money for information quid pro quo, all insider trading cases will be tried under the most expansive theory of insider trading ever – the tipper's subjective intention to improperly benefit the tippee.").

219 *See Martoma II*, 894 F.3d at 80; *Martoma I*, 869 F.3d at 74; *see also Second Circuit Again Holds That Tipper/Tippee Liability Can Arise from a Gift of Inside Information Even Without a Close Personal Relationship*, PROSKAUER (June 28, 2018), https://www.proskauer.com/alert/second-circuit-again-holds-that-tipper-tippee-liability-can-arise-from-a-gift-of-inside-information-even-without-a-close-personal-relationship.

relationship[220] and that a jury could have found a personal benefit based on that relationship from the jury instructions.[221]

Despite establishing the personal benefit requirement and acknowledging that there is enough evidence to sustain the conviction,[222] the Court again analyzes and changes the personal benefit requirement.[223] However, rather than addressing gift theory, the Court changed tactics by returning to *Dirks* and focusing on one sentence within the opinion that describes "'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'" as objective facts allowing for the inference of a personal benefit.[224] According to the Second Circuit, *Dirks's* use of the comma before "or" means that "an intention to benefit the particular recipient" is itself a personal benefit to the tipper that is independent from the existence of any relationship between the tipper and tippee.[225] Phrased another way, the sentence in *Dirks* has been reinterpreted to mean that a personal benefit can be inferred by showing (1) the tipper had an intention to benefit the tippee or (2) a quid pro quo relationship exists between the tipper and tippee.[226] This interpretation relies on an understanding of the personal benefit requirement as a means to determine an improper purpose and that an intent to benefit a tippee with material nonpublic information is an improper purpose.[227] The distinction is significant because it raises the inference of the tipper's intent alone to an objective fact and reinforces the idea that the personal benefit requirement is easy for the government to meet.[228]

Unlike *Martoma I*, the Court was less dismissive of *Newman's* meaningfully close personal relationship requirement.[229] However,

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220 *Martoma II*, 894 F.3d at 71, 78.

221 *Id.* at 78-79. The original jury instructions provided in part that the jury could determine that Mr. Martoma received a personal benefit by "you find that Dr. Gilman or Dr. Ross gave the information to Mr. Martoma with the intention of benefiting themselves in some manner, or with the intention of conferring a benefit on Mr. Martoma, or as a gift with the goal of maintaining or developing a personal friendship or a useful networking contact." *Id.* at 70. Mr. Martoma argued that the jury instructions were in error because they did not describe the gift requirement in the terms established by *Newman*. *Id.* at 68. As the Court notes, Mr. Martoma did not challenge the remaining aspects of the jury instructions. *Id.* at 78.

222 *Id.* at 79-80.

223 *See generally id.* at 73-76.

224 *Martoma II*, 894 F.3d at 74 (quoting Dirks v. SEC, 463 U.S. 646, 664(1983)).

225 *Martoma II*, 894 F.3d at 74-75 ("The comma separating the 'intention to benefit' and 'relationship . . . suggesting a quid pro quo' phrases can be read to sever any connection between them.").

226 *Id.* at 74.

227 *See id.* at 73, 75. *But see Dirks*, 463 U.S. at 662-63.

228 *See Martoma II*, 894 F.3d at 75-76 (indicating that the government's evidentiary burden is not cumbersome). As the dissent also suggests, the majority's opinion can also be read to treat *Dirks's* personal benefit test as merely a guide, not a requirement. *Id.* at 85 (Pooler, J., dissenting).

229 *See id.* at 71, 77 (majority opinion). While the Court does not abrogate *Newman*, it does reinterpret *Newman's* holding by stating that a meaningfully close personal relationship under gift theory must include "'an intention to benefit the [tippee]" or "'a relationship . . . suggest[ing] quid pro quo from

Newman's meaningfully close personal relationship requirement still will likely be relegated to obscurity because it is harder to meet and unnecessary with the intent-based option.[230] The Court implicitly recognizes this outcome because, although the jury instructions were partially wrong based on the Court's reinterpretation of *Newman*, the instructions included other methods for the jury to find that the tipper received a personal benefit.[231] With "many ways to establish a personal benefit," the government will have no reason to rely on gift theory.[232]

2. Tipper-Tippee Liability after Martoma II

Like *Martoma I*, *Martoma II* purports to follow *Dirks* and dutifully quotes the "objective facts" and criteria the Supreme Court offered to assist courts in finding the personal benefit requirement.[233] By maintaining the language used in *Dirks*, the Second Circuit invokes an appealing connection to *Dirks*.[234] Additionally, by restoring part of *Newman's* meaningfully close personal relationship requirement, the Second Circuit resolved some of the concerns that resulted in abrogating *Newman* without an en banc review.[235] As a result, there are few changes to the overall framework for tipper-tippee liability. Based on these considerations, a reasonable construction of tipper-tippee liability framework in the Second Circuit is as follows:

> (1) the tipper breaches a fiduciary duty by (a) tipping the material nonpublic information[236] and (b) receiving a personal benefit from tipping the tippee, such as (i) "a 'pecuniary gain' (i.e. receiving "something of value in

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the [tippee]." *Id.* at 77. *But see* United States v. Newman, 773 F.3d 438, 452 (2d Cir. 2014) (holding that, regarding the inference of a personal relationship, "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.").

230 *See Martoma II*, 894 F.3d at 80 (Pooler, J., dissenting); Morvillo, *supra* note 218.

231 *See Martoma II*, 894 F.3d at 77-78.

232 *Martoma II*, 894 F.3d at 71; *see also id.* at 80 (Pooler, J., dissenting); Morvillo, *supra* note 218.

233 *Martoma II*, 894 F.3d at 67-68.

234 *See* John C. Coffee, Jr., *Tippees and Tippers:-- The Impact of* Martoma II, CLS BLUE SKY BLOG (July 23, 2018), http://clsbluesky.law.columbia.edu/2018/07/23/tippees-and-tippers%C2%AD%C2%AD-the-impact-of-martoma-ii/#_ednref7; Morvillo, *supra* note 218.

235 *See Second Circuit Amends* Martoma *and Reaffirms, but Arguably Still Weakens*, Newman's *"Meaningfully Close Personal Relationship" Test in Insider Trading Cases Involving Tips*, LEXOLOGY: SHEARMAN & STERLING LLP (July 23, 2018), https://www.lexology.com/library/detail.aspx?g=d63955ad-2232-47e4-b633-19cc5b85e171 ("Numerous commentators questioned the decision, contending that it had seemingly overturned a portion of the *Newman* decision without an en banc hearing or explicit support in the *Salman* decision, and *Martoma* filed a petition for rehearing.").

236 Dirks v. SEC, 463 U.S. 646, 663 (1983) ("[T]he initial inquiry is whether there has been a breach of duty by the insider").

> exchange for the tip"[237]), (ii) a 'reputational benefit that will translate into future earning,' (iii) a 'relationship between the [tipper] and the [tippee] that suggests a quid pro quo from the [tippee],' (iv) the tipper's 'intention to benefit the particular recipient,'"[238] or (v) "'a gift of confidential information to a trading relative or friend'[239] when the personal relationship between the tipper and tippee is meaningfully close.[240]
>
> (2) the tippee (a) "knew [or should have known] of the tipper's breach, that is, [the tipper] knew [or should have known] the information was confidential and divulged for personal benefit"[241] and (b) the tippee uses the information in connection with a securities transaction.[242]

However, it is important to bear in mind that treating the "intention to benefit the particular recipient" as an independent basis for meeting the personal benefit requirement is a substantive change to tipper-tippee liability.[243] As Part IV will demonstrate, while there are indeed "many ways to establish a personal benefit,"[244] only one will actually be needed to meet the personal benefit requirement in the future.[245]

IV. EXAMINING THE EVOLUTION: THE EFFECTS TO THE STAGE

The personal benefit requirement is a pivotal element in tipper-tippee liability.[246] Without it, there is no breach of fiduciary duty for either the tipper or tippee and no liability for insider trading.[247] While *Dirks* provided a broad standard for the personal benefit,[248] the Supreme Court intentionally imposed the personal benefit requirement as a limitation on the Government's ability to penalize market participants and to prevent the mere possession of material nonpublic information as a cause of action.[249] The problem with departures from *Dirks*, and the movement of the personal benefit to the backstage, is that courts weaken these limitations.[250]

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237 Salman v. United States, 137 S. Ct. 420, 423 (2016).
238 *Martoma II*, 894 F.3d at 74.
239 *Salman*, 137 S. Ct. at 423.
240 United States v. Newman, 773 F.3d 438, 452 (2d Cir. 2014).
241 *Id.* at 450.
242 *See* Dirks v. SEC, 463 U.S. 646, 653-54 (1983); *see also* 15 U.S.C. § 78j (2012); 17 C.F.R. § 240.10b-5 (2017).
243 Sandick & Buszin, *supra* note 20.
244 United States v. Martoma (*Martoma II*), 894 F.3d 64, 71 (2d Cir. 2017).
245 *See* Morvillo, *supra* note 218.
246 *See Dirks*, 463 U.S. at 663.
247 *Id.* at 662-63.
248 *See* United States v. Newman, 773 F.3d 438, 452 (2d Cir. 2014).
249 *See Dirks*, 463 U.S. at 664, 664 n.24 ("Without legal limitations, market participants are forced to rely on the reasonableness of the SEC's litigation strategy, but that can be hazardous . . . .").
250 *See* United States v. Martoma (*Martoma II*), 894 F.3d 64, 77 (2d Cir. 2017); Apps, *supra* note 115 ("*Dirks* provided a broad definition of personal benefit . . . .").

Newman attempted to correct the problems caused by the departures from *Dirks*, but went a step too far.[251] As *Salman* clarified, and correctly interpreted from *Dirks*, the personal benefit does not require the tipper to receive a tangible or pecuniary benefit in return for a gift to a trading relative or friend.[252] The relationship between the tipper and trading relative or friend allows for the inference that "the tipper [intended] the equivalent of a cash gift."[253]

Although *Martoma I* purported to follow *Dirks*, the Second Circuit's decision represented a significant departure from *Dirks*.[254] By changing the personal benefit to allow the inference of a benefit to the tipper when the tipper gifts information to any tippee with the expectation the tippee will trade on the information, the Second Circuit weakened the personal benefit to the point where it no longer existed.[255] In equating a personal benefit with nothing more than an intention to benefit the tippee, *Martoma II* suffers from the same problem.[256] Without the personal benefit requirement, the breach of fiduciary duty is essentially assumed, making it easy for the SEC and Department of Justice to establish illegal insider trading.[257]

A. *Dirks* to *Newman*: Setting and Rearranging the Stage

One of the criticisms of the tipper-tippee liability standard established by *Dirks*, and perpetuated by *Newman*,[258] is that courts cannot convict some people who have traded on material nonpublic information.[259] However, the Supreme Court expressly established limits to insider trading, such as the fiduciary duty framework or the personal benefit requirement, with the purpose of creating such a paradigm.[260] The Supreme Court was noticeably concerned about the likelihood of the SEC expanding litigation to new groups of market participants and the effect that such an expansion could

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251 *See* Stephen M. Bainbridge, *US Supreme Court's '*Salman v. US' *Decision Answers One Insider-trading Question, Leaves Others Unresolved*, LEGAL PULSE (Dec. 8, 2016), https://wlflegalpulse.com/2016/12/08/us-supreme-courts-salman-v-us-decision-answers-one-insider-trading-question-leaves-others-unresolved/ [hereinafter Bainbridge, US Supreme Court's].

252 Salman v. United States, 137 S. Ct. 420, 425 (2016).

253 *Salman*, 137 S. Ct. at 428; *Dirks*, 463 U.S. at 664 ("The tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient.").

254 *See* Nocera, *supra* note 5.

255 Bainbridge, U.S. v. Martoma, *supra* note 21.

256 *See* Sandick & Buszin, *supra* note 20.

257 *See id.*; Baker et al., *supra* note 21.

258 Almousa, *supra* note 23, at 1265 ("Prosecutors criticized the *Newman* decision for making it more difficult to act against securities fraud.").

259 Harasimowicz, *supra* note 4, at 791.

260 Dirks v. SEC, 463 U.S. 646, 656-59 (1983) (recognizing that "only some persons, under some circumstances, will be barred from trading while in possession of material nonpublic information."); *see also* Chiarella v. United States, 445 U.S. 222, 234, n.14 (1980).

have on the market itself.[261] Limits were needed to rein in the SEC and provide a "guiding principle" to market participants so that they could know what activities may expose them to legal liability.[262] The personal benefit requirement fulfilled that need by ensuring a duty would not exist every time a person possesses material nonpublic information,[263] preventing attempts to penalize inadvertent or good faith disclosures,[264] and protecting market participants by limiting the grasp of the SEC.[265]

In terms of creating limits against the SEC and protecting market participants, *Newman* does not represent a substantial shift from *Dirks*.[266] Instead, *Newman* more accurately is a departure from the movement of the personal benefit to the background of insider trading law[267] and precedent increasingly "favorable to government insider-trading enforcement efforts."[268]

Newman correctly adhered to *Dirks* by recognizing the role of relationships in establishing the personal benefit requirement.[269] The existence of some sort of relationship, no matter how attenuated, is not enough on its own to infer a personal benefit to the tipper.[270] As indicated in *Dirks*, a relationship is one "objective fact[] [or] circumstance[]" contributing to an inference of an improper purpose.[271] In the context of gifts, the improper purpose is derived from "exploiting information for the personal gain [or benefit of another person]."[272] The tipper receives a benefit from

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261 *Dirks*, 463 U.S. at 658-59; *see also* Drummonds, *supra* note 4, at 858-59.

262 *Dirks*, 463 U.S. at 664.

263 *Id.* at 656-57.

264 *Id.* at 662.

265 *Id.* at 658, 664 n.24; s*ee also* Brief of Amicus Curiae Law Professors Stephen Bainbridge, M. Todd Henderson, and Jonathan Macey in Opposition to the United States of America's Petition for Rehearing or Rehearing En Banc at 4, United States v. Newman, 773 F.3d 438 (2d Cir. 2014), (No. 13-1837-cr(L)); Pritchard, *supra* note 70, at 868.

266 *See* Harasimowicz, *supra* note 4, at 788.

267 Brent Kendall & Christopher M. Matthews, *Limits on Insider-Trading Prosecutions to Remain*, WALL ST. J. (Oct. 5, 2015, 7:31 PM), http://www.wsj.com/articles/supreme-court-denies-doj-appeal-on-insider-trading-prosecutions-1444053439; Apps, *supra* note 115 ("Prior to *Newman* . . ., prosecutors and courts proceeded as though *Dirks'* reference to 'a gift . . . to a . . . friend' set a low bar."); *see also* Drummonds, *supra* note 4, at 842 ("The *Dirks* requirement that the tippee be aware that the tipper disclosed the information for a particular 'personal benefit' was largely eroded.").

268 Drummonds, *supra* note 4, at 841-42. The weakened emphasis on limiting the expansion of insider trading is particularly evident in the Second Circuit, which had an 85-0 success rate in prosecutions from 2009 to 2014. *Id.*

269 *See* Dirks v. SEC, 463 U.S. 646, 656 n.15, 664, (1983) (Stating that "mere possession of nonpublic information does not give rise to a duty to disclose or abstain; only a specific relationship does that," and that "objective facts and circumstances," such as a quid pro quo relationship allow for the inference of the personal benefit or a gift to a "trading relative or friend.").

270 *See* United States v. Newman, 773 F.3d 438, 452 (2d Cir. 2014); *see also* Brief of Amicus Curiae, *supra* note 265, at 4, 11.

271 *Dirks*, 463 U.S. at 664.

272 *Id.* at 659, 664 ("Not only are insiders forbidden by their fiduciary relationship from personally using undisclosed corporate information to their advantage, but they may not give such information

this interaction because a gift of information is the equivalent of the tipper personally trading on the information and giving the proceeds to the tippee.[273] Thus, it is not the mere existence of a relationship that allows for the inference of a personal benefit from any disclosure to a tippee, but the relationship between the tipper and tippee combined with the purpose of gifting information that creates the inference.[274] Stated another way, a relationship combined with the purpose to benefit another person (i.e. providing material nonpublic information to enrich that person) in that relationship allows the inference that the tipper has received a personal benefit.[275]

Another aspect of relationships addressed by *Newman* involves the closeness of the relationship between the tipper and tippee when the disclosure of information is a gift.[276] *Dirks* limited its discussion of gifts serving as a personal benefit to situations involving a "trading relative or friend."[277] However, *Dirks* never specified a requisite minimum relationship or degree of closeness that would support inferring a personal benefit.[278] Instead, the Court left the nature of the relationship as "a question of fact [that] will not always be easy for courts" to determine.[279]

Newman, recognizing the difficulties that resulted from the absence of direction on the nature of a relationship, required a "meaningfully close personal relationship" to make such an inference because those kinds of relationships indicate "'a quid pro quo from the [tippee], or an intention to benefit the [tippee].'"[280] Arguably, neither relationships between church acquaintances nor former classmates and current work colleagues are enough to establish friendships allowing for the inference of the personal benefit under *Dirks*.[281] If the existence of these types of relationships can serve as

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to an outsider for the same improper purpose of exploiting information for their personal gain." Similarly, "[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."); *see also* Brief of Amicus Curiae, *supra* note 265, at 4, 11.

273 *Dirks*, 463 U.S. at 664.

274 *See id.* at 659, 664; *see also* Pritchard, *supra* note 70, at 873-74; Jacob Gersham, *Preet Bharara Pulls Plug on Steinberg Insider Trading Case*, WALL ST. J.: LAW BLOG (Oct. 22, 2015, 4:55 PM), https://blogs.wsj.com/law/2015/10/22/preet-bharara-pulls-plug-on-steinberg-insider-trading-case/ [hereinafter Gersham, *Preet*] (noting that *Newman* "effectively raised the bar for prosecutors, saying that prosecutors couldn't just assume that a person who passes an insider tip to a friend had in mind a quid pro quo").

275 *See Dirks*, 463 U.S. at 659, 664; *see also* Pritchard, *supra* note 70, at 873-74; Gersham, *Preet*, *supra* note 274.

276 *See* United States v. Newman, 773 F.3d 438, 452 (2d Cir. 2014).

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

278 Almousa, *supra* note 23, at 1273; Pritchard, *supra* note 70, at 873 (stating that "[*Dirks*] does not qualify how close the relative or friend must be.").

279 *Dirks*, 463 U.S. at 664.

280 United States v. Newman, 773 F.3d 438, 452 (2d Cir. 2014).

281 Pritchard, *supra* note 70, at 874.

the sole qualifiers for a personal benefit, the *Newman* court had reason to fear that almost any relationship could count towards inferring a personal benefit.[282] In a society where friend can mean a companion for life or Facebook acquaintance,[283] a loose definition would certainly expand the potential for legal liability and negate one purpose for creating the personal benefit requirement.[284]

While *Dirks* intended to leave the nature of the relationship undefined to provide more latitude for the trier of fact,[285] *Newman's* requirement was within the meaning of *Dirks*.[286] For a relationship to serve as an objective fact that would suggest an intent to benefit another person, the relationship would have to be significant enough for someone to expect gifts.[287] Gifts typically result from closer relationships rather than acquaintances.[288] The connection was not lost on the Manhattan U.S. Attorney, Preet Bharara, who indicated that prosecutors "would have to 'think long and hard' about pursing investigations where people who shared insider information never exchanged any gift or other explicit benefit."[289] However, contrary to the fears of prosecutors,[290] requiring a more substantial connection than that of an acquaintance is hardly a strict barrier.[291]

Newman is largely consistent with *Dirks*, but the *Newman* decision departed from *Dirks* in one significant way.[292] *Dirks* never required an immediate or anticipated consequential personal benefit to recognize the

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282 *See Newman*, 773 F.3d at 452.

283 *See Friend*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/friend (last updated Jan. 22, 2018) ("one attached to another by affection or esteem; acquaintance; one that is not hostile; a favored companion").

284 *See Newman*, 773 F.3d at 452; *see also* Viswanatha & Kendall, *supra* note 169 ("The problem with the word friend is that it is very elastic. People have dozens of Facebook friends they couldn't pick out of a lineup and have never met….").

285 Dirks v. SEC, 463 U.S. 646, 664 (1983) ("Determining whether an insider personally benefits from a particular disclosure, a question of fact, will not always be easy for courts.").

286 *See* Pritchard, *supra* note 70, at 874; *see also* Bainbridge, US Supreme Court's, *supra* note 251.

287 *See* Pritchard, *supra* note 70, at 874 ("Would the existence of a casual friendship or acquaintance warrant the inference that the insider breached a duty of confidentiality for the purpose of bestowing a gift?").

288 *See Newman*, 773 F.3d at 452; *see also* Pritchard, *supra* note 70, at 874.

289 Gersham, *Preet*, *supra* note 274.

290 *Id.*

291 *See* SEC v. Payton, 155 F. Supp. 3d 428, 432-33 (S.D.N.Y. 2015) (finding evidence of a close relationship between a tipper and tippee roommates who together had "dinner, drank beers, played video games, watched TV, used drugs, and discussed their respective days, current events, and personal details of their lives"); *see also* United States v. Parigian, 824 F.3d 5, 16 (1st Cir. 2016) (finding that a relationship such as "golfing buddies" was sufficient to infer a personal benefit); SEC v. Sabrdaran, 252 F. Supp. 3d 866, 882-83 (N.D. Cal. 2017) (inferring a relationship sufficiently close to infer a personal benefit between a tipper and tippee who "talked to each other regularly about many subjects, recommended self-help books and seminars to each other, gave each other advice, and made travel plans together.").

292 *See* Bainbridge, US Supreme Court's, *supra* note 251.

breach of a fiduciary duty in connection with a gift.[293] As indicated above, a consequential personal benefit supports finding a breach of fiduciary duty but is not necessary to reach that conclusion. Additionally, while such a personal benefit would reduce prosecutions and potential liability for insider trading, it fails to meet the balance that the Supreme Court attempted to achieve in *Dirks*, leading to under-inclusiveness.[294]

B. *Newman* to *Salman*: Returning to and Reaffirming *Dirks*

As the Supreme Court's first opportunity to clarify the personal benefit standard since *Dirks*,[295] *Salman* significantly reflects the Court's reluctance to either strengthen or weaken the personal benefit requirement beyond *Dirks*.[296] As the Court recognized, to either have strengthened or weakened the personal benefit would have required the Court to "ignore some extremely specific language" from *Dirks* and "change the law that people have come to rely upon. . . ."[297]

As in *Newman*, the role of relationships also influenced *Salman*.[298] The Government argued that a gift of material nonpublic "information to anyone," not just family and friends, should qualify as a personal benefit.[299] Although couched in the terms of an example, *Dirks* arguably limited inferring a personal benefit to situations where there is a gift from the tipper to trading relatives and friends, and certainly limited the inference of a personal benefit to circumstances where a relationship connects the tipper and tippee.[300] The Court did not ignore this aspect of *Dirks*.[301] *Salman* consistently and carefully makes numerous references to relatives and family members,[302] focusing the "core of tipping liability [to] . . . gifts among trading relatives and friends."[303] Accordingly, the Supreme Court easily rejected the Government's arguments to adopt a new, less stringent pecuniary personal

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293 *See* Dirks v. SEC, 463 U.S. 646, 664 (1983).

294 *See* Pritchard, *supra* note 70, at 861; *see also* David B. Massey, Lee S. Richards, III & Paul J. Devlin, *The Implications of the Decision in* United States v. Martoma, LEXOLOGY: RICHARDS, KIBBE, & ORBE LLP (Aug. 29, 2017), https://www.lexology.com/library/detail.aspx?g=67e0fa55-ab2c-4938-907a-96beae53d4fa.

295 *Insider Trading Hits the High Court*, WALL ST. J.: OPINION (Oct. 4, 2016, 7:15 P.M.), http://www.wsj.com/articles/insider-trading-hits-the-high-court-1475622944.

296 Walsh, supra note 5, at 989; see also Aruna Viswanatha, Supreme Court Appears Skeptical of Radically Altering Insider-Trading Rules, Wall St. J. (Oct. 5, 2016, 4:30 PM), https://www.wsj.com/articles/supreme-court-appears-skeptical-of-radically-altering-insider-trading-rules-1475686244.

297 Transcript of Oral Argument at 9, 17, Salman v. United States, 137 S. Ct. 420 (2016) (No. 15-628).

298 *See* Salman v. United States, 137 S. Ct. 420, 427 (2016).

299 Walsh, *supra* note 5, at 989.

300 *See* Dirks v. SEC, 463 U.S. 646, 664 (1983).

301 *See generally Salman*, 137 S. Ct. at 427-28.

302 *See Salman*, 137 S. Ct. at 427-28.

303 Bainbridge, U.S. v. Martoma, *supra* note 21.

benefit requirement, finding "*Dirks* makes clear that a tipper breaches a fiduciary duty by making a gift of confidential information to 'a trading relative'" because "the jury can infer that the tipper meant to provide the equivalent of a cash gift."[304]

Although focused on gifts to trading relatives and friends, *Salman* serves as an important guide for courts considering the future of tipper-tippee liability. A reasonable interpretation of *Salman* suggests courts should restrict the inference of a personal benefit from gifts made to friends or family members.[305] Combined with precedent, the opinion also suggests the personal benefit should only be inferred when there is a tipper-tippee relationship.[306] While making distinctions between gifts made to strangers and those made to family or friends may seem absurd,[307] such a rule is consistent with precedent and offers a relatively clear guiding principle for courts and market participants.[308] More importantly, lower courts tempted by similar SEC arguments to expand gift liability to strangers or allow any inference of a personal benefit from an intent to benefit the tippee risk being directly at odds with Supreme Court precedent.[309]

C. *Salman* to *Martoma* I & II: Tearing the Stage Down Again and Again

Although *Martoma I* purported to follow *Salman* and *Dirks*, the Second Circuit ignored key aspects of both opinions regarding relationships and objective facts needed to infer a personal benefit requirement, reaching a result that the Supreme Court neither indicated nor intended.[310] *Martoma II* offers something *Martoma I* lacked: a greater appearance of consistency.[311] However, the appearance of consistency is deceptive, particularly because *Martoma II* isolates one small portion of a single sentence in *Dirks* to find that an intention to benefit another person is a personal benefit to the tipper.[312]

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304 *Salman*, 137 S. Ct. at 427-28; *see also* Transcript of Oral Argument at 21, Salman v. United States, 137 S. Ct. 420 (2016) (No. 15-628).

305 *See* United States v. Martoma (*Martoma I*), 869 F.3d 58, 83-84 (2d Cir. 2017) (Pooler, J., dissenting); *see also* Walsh, *supra* note 5, at 996.

306 *See* Coffee, *supra* note 234.

307 *See* Stephen Bainbridge, *After Oral Argument in "*Salman v. US*," Will Supreme Court Meaningfully Limit What Counts as Insider Trading?*, LEGAL PULSE (Oct. 7, 2016), https://wlflegalpulse.com/2016/10/07/after-oral-argument-in-salman-v-us-will-supreme-court-put-meaningful-limits-on-insider-trading-crime/.

308 *See Martoma I*, 869 F.3d at 76, 85-86 (Pooler, J., dissenting).

309 Coffee, *supra* note 234; *see also* Insider Gulliver, *The Fourth Substantial Revision of US Insider Trading Law in Five Years* – US v Martoma, WALL STREET GULLIVER'S THOUGHTS ON FINANCIAL MARKETS (June 26, 2018), https://insidergulliver.wordpress.com/2018/06/26/13-the-fourth-substantial-revision-of-us-insider-trading-law-in-five-years-us-v-martoma/; *see generally* Salman v. United States, 137 S. Ct. 420 (2016).

310 *See* Morvillo, *supra* note 11; *see generally Salman*, 137 S. Ct. 420.

311 *See* Sandick, *supra* note 20.

312 *Id.*

In doing so, the Second Circuit missed the context that gives meaning to that small clause.[313] The context signals importance of relationships in inferring the personal benefit and indicates that intent was never meant to be a lone factor in determining the personal benefit requirement.[314] As a result, *Martoma II* gives the form, but none of the substance of *Dirks*.[315]

1. Relationships Matter

Liability for insider trading was built upon relationships.[316] As *Dirks* stated, the " duty [to disclose] arises from the relationship between [the tipper and tippee] and not merely from one's ability to acquire information . . . ."[317] In the context of tipper-tippee liability, "a relationship between the [tipper] and the [tippee]" serves as an "objective fact[] or circumstance[] that often justif[ies] [the inference of a personal benefit]."[318] Similarly, the relationship between the tipper and "a trading relative or friend" allows for the inference that a gift results in a personal benefit to the tipper.[319] In rejecting *Newman's* requirement for a "meaningfully close personal relationship" and changing the requirements for the personal benefit, *Martoma I* significantly altered tipper-tippee liability by finding that relationships do not matter.[320]

While *Martoma I* correctly noted that the Supreme Court did not limit the personal benefit to "meaningfully close personal relationships," as *Newman* attempted to do with gifts,[321] the Second Circuit incorrectly attempted to expand the personal benefit to cover gifts made to any person,[322] regardless of the relationship between the tipper and tippee.[323] As the Second Circuit reasoned, "[n]othing in *Salman[]* . . . supports a distinction" based on the tipper and tippee's relationship because the result to the tipper remained

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313 United States v. Martoma (*Martoma II*), 894 F.3d 64, 80-6 (2d Cir. 2017) (Pooler, J., dissenting); *see also* Coffee, *supra* note 234.

314 *Martoma II*, 894 F.3d at 85 (Pooler, J., dissenting) ("Perhaps one could read the sentence in that way in isolation, but doing so would certainly not be 'more consonant with *Dirks* as a whole'. . . .").

315 *See generally Martoma II*, 894 F.3d at 80-87 (Pooler, J., dissenting).

316 *See Dirks*, 463 U.S. at 655 n.14, 657-58, 664.

317 *Id.* at 657-58 (alteration in original) (quoting Chiarella v. United States, 445 U.S. 222, 231-32 n.14 (1980)).

318 *Dirks*, 463 U.S. at 664.

319 *See id.*

320 United States v. Martoma (*Martoma I*), 869 F.3d 58 (2d Cir. 2017).

321 *Id.* at 68-69.

322 The majority, in its criticism of the dissent, rejected the claim that an insider receives a personal benefit from a "'gift to any person'" because the "holding reaches only the insider who discloses information to someone he expects will trade on the information." *Id.* at 71 (emphasis omitted). However, by acknowledging that the expectation is not limited to persons with a "meaningfully close personal relationship," or any relationship at all, the court's holding effectively finds that a gift to any person presumptively qualifies as a personal benefit. *Id.* at 70-71.

323 *Id.* at 70; *see also* Bainbridge, U.S. v. Martoma, *supra* note 21.

the same.[324] Instead, relationships may only be useful to "assess[] competing narratives" regarding a tipper's expectation that material nonpublic information would be traded.[325] As evidence for this finding, *Martoma I* stated that "the Supreme Court applied gift theory to [the *Dirks's*] case."[326]

When it comes to relationships, *Martoma II* suffers from the same problem as *Martoma I*. To the Second Circuit, relationships do not matter because a comma makes an intention to benefit a tippee an independent personal benefit.[327] A relationship between the tipper and tippee does not make the dissemination of information any more improper.[328] All that matters is that the tippee had the intent to benefit another and the intent to do so in itself is an improper purpose.[329]

However, the findings from *Martoma I* and *Martoma II* are directly at odds with both *Dirks* and *Salman*, which require relationships between the tipper and tippee to infer a personal benefit.[330] As noted above, the relationship between the tipper and tippee matters because it allows the inference of the personal benefit.[331] The relationship is not simply part of a narrative or one way to establish a personal benefit, but is part of the objective circumstances indicating an improper purpose for the disclosure and gives meaning to a disclosure of material nonpublic information.[332] For example, relationships carry a connotation that one may act with an "intention to benefit the recipient."[333] While one may wonder why a person would give a gift or pass along material nonpublic information to someone he or she does not know, there is little doubt about the purpose the transmission when the tipper and tippee are friends, relatives, or close business associates.[334] Without some sort of relationship, whether personal or otherwise, intent cannot reasonably be used to infer a personal benefit to the tipper.[335]

Contrary to the Second Circuit's assertions in *Martoma I's*,[336] *Salman's* strong adherence to *Dirks* reaffirmed the importance of relationships in

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324 *Martoma I*, 869 F.3d at 70.
325 *Id.* at 70 n.8.
326 *Id.* at 70.
327 United States v. Martoma (*Martoma II*), 894 F.3d 64, 74-75 (2d Cir. 2017).
328 *See id.*
329 *Id.*
330 *See* Salman v. United States, 137 S. Ct. 420, 427 (2016); Dirks v. SEC, 463 U.S. 646, 464 (1983); *see also* Pritchard, *supra* note 70, at 873-74.
331 *See Salman*, 137 S. Ct. at 427; *Dirks*, 463 U.S. at 664.
332 *See* Pritchard, *supra* note 70, at 873-74.
333 *Dirks*, 463 U.S. at 664.
334 Pritchard, *supra* note 70, at 873-74.
335 *See* United States v. Martoma (*Martoma I*), 869 F.3d 58, 80 (2d Cir. 2017) (Pooler, J., dissenting); *The Second Circuit's Insider-Trading Feud*, WALL ST. J. (Sept. 17, 2017, 3:41 PM), https://www.wsj.com/articles/the-second-circuits-insider-trading-feud-1505677304.
336 *See Martoma I*, 869 F.3d at 69.

tipper-tippee liability.[337] *Salman's* numerous references to family, friends, and the closeness among the parties supports recognizing a distinction based on the existence of relationships.[338] The references are not coincidental.[339] More importantly, the Second Circuit's disregard for relationships also ignores the Supreme Court's rejection of the Government's argument to recognize a personal benefit when anyone receives a gift of material nonpublic information.[340] Clearly, any gift of material nonpublic information should also have an improper purpose.[341] Under the Second Circuit's reasoning, any improper purpose should be enough to establish a personal benefit, so it should not matter who receives the gift.[342] *Salman* rejected this position because it was inconsistent with *Dirks* and would "change the law people have come to rely upon . . . ."[343]

2. Martoma I's Great Expectations

Martoma I removed the personal benefit from the stage by shifting the focus of tipper-tippee liability from a tipper's improper purpose in making a disclosure[344] to a tipper's "expectation that the [tippee] would trade on [material nonpublic information]."[345] While the distinction may seem minor, the effects are profound, making it substantially easier for the Government to bring insider trading cases,[346] and reflect a departure from both *Dirks* and *Salman*.[347]

The Second Circuit based its holding on *Salman's* finding that the tipper, "by disclosing confidential information as a gift to his brother with the expectation that he would trade on it, . . . breached his duty . . . ."[348]

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337 *See* Salman v. United States, 137 S. Ct. 420, 427 (2016); *see also* Henning, *supra* note 17 (noting most of the Court viewing *Dirks* "as governing law").

338 *See generally Salman*, 137 S. Ct. 420.

339 *See Martoma I*, 869 F.3d at 69.

340 Bainbridge, U.S. v. Martoma, *supra* note 21; Apps, *supra* note 115; Coffee, *supra* note 234.

341 *See* Morvillo, *supra* note 218 ("unless there is a money for information quid pro quo, all insider trading cases will be tried under the most expansive theory of insider trading ever . . . .").

342 *See* United States v. Martoma (*Martoma II*), 894 F.3d 64, 75 (2d Cir. 2017).

343 Transcript of Oral Argument at 17, 28, Salman v. United States, 137 S. Ct. 420 (2016) (No. 15-628).

344 *See Martoma I*, 869 F.3d at 68 ("the broader inquiry underlying the examples [in *Dirks*] remained "whether the insider personally will benefit, directly or indirectly, from his disclosure"). *But see* Dirks v. SEC, 463 U.S. 646 (1983) ("Whether disclosure is a breach of duty therefore depends in large part on the purpose of the disclosure. This standard was identified by the SEC itself in *Cady, Roberts*: a purpose of the securities laws was to eliminate 'use of inside information for personal advantage.").

345 *Martoma I*, 869 F.3d at 70 (citation omitted).

346 Nicole Hong, *U.S. Gets Easier Path to Insider-Trading Convictions*, WALL ST. J. (Aug. 23, 2017, 5:44 PM), https://www.wsj.com/articles/federal-court-upholds-martoma-insider-trading-conviction-1503510652.

347 *See* Bainbridge, U.S. v. Martoma, *supra* note 21; Nocera, *supra* note 5.

348 Salman v. United States, 137 S. Ct. 420, 428 (2016); *see also Martoma I*, 869 F.3d at 68-69.

Martoma I's reliance on a tipper's expectation is misplaced because *Salman* did not treat the tipper's expectation as an element for liability.[349] Instead, *Salman* expressly relies upon *Dirks* to determine liability, suggesting that the Court intended "expectation" to actually mean "purpose."[350]

Dirks contemplated an expectation basis for tipper-tippee liability and rejected it.[351] The SEC argued that "a tippee breaches the fiduciary duty which he assumes from the insider when the tippee knowingly transmits the information to someone who will probably trade on the basis thereof . . . ."[352] The Court expressly rejected this argument, making the "test [dependent] on whether the [tipper] will benefit . . . from his disclosure."[353] Probabilities, like one's expectations, were not good enough to show that the tipper had an improper purpose or received a personal benefit, thereby breaching a fiduciary duty.[354] Regardless of the issue of relationships between the tipper and tippee, objective facts are required to determine a personal benefit, which an expectation can never be.[355] As *Dirks* implicitly recognized, what a tipper does and what the tipper can expect a tippee to do are two entirely different things.[356] The distinction is most apparent under misappropriation theory, where there is no expectation that the tippee will share the confidential information the tippee receives.[357] Instead, what mattered in *Dirks* was the tipper's purpose, reflected in an objective personal gain.[358]

Martoma I's exceptions to its expectation basis for liability also demonstrate the problem with conflating expectation with purpose.[359] The basis for the exceptions suggests that good faith disclosures, such as whistleblowing, are protected from liability.[360] However, as *Dirks* indicates, good faith disclosures do not necessarily mean one is immune from insider trading charges, the effects of which can be quite damaging,[361] or that a tippee will only use that information for good.[362] Under *Martoma I's* new elements, even when there is a good faith purpose related to work or an unintended disclosure, it is conceivable that someone who discloses information to another will be charged and convicted for insider trading based on the idea

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349 *See Salman*, 137 S. Ct. at 428.
350 *See* Dirks v. SEC, 463 U.S. 646, 664 (1983); *see generally Salman*, 137 S. Ct. 420 (2016).
351 *See Dirks*, 463 U.S. at 656.
352 *Id*.
353 *Id*. at 662.
354 *See id.*
355 *See id.* at 664.
356 *See generally* Dirks v. SEC, 463 U.S. 646.
357 *See* United States v. O'Hagan, 521 U.S. 642, 652-53 (1997).
358 *See generally Dirks*, 463 U.S. at 664.
359 *See* United States v. Martoma (*Martoma I*), 869 F.3d 58, 71 (2d Cir. 2017).
360 *See Martoma I*, 869 F.3d at 71. *Compare with Dirks*, 463 U.S. 646.
361 *See An Outside the Law Prosecutor*, WALL ST. J. (Dec. 10, 2014, 8:18 PM), http://www.wsj.com/articles/an-outside-the-law-prosecutor-1418260680.
362 *See generally Dirks*, 463 U.S. 646.

that one should have known better.[363] Any disclosure acted upon by a tippee will naturally have the appearance of a gift and assumptions will only be confirmed by the tippee's subsequent acts.[364] Thus, the exceptions would not offer any protection from liability.[365]

Martoma I's emphasis on the tipper's expectation is also problematic because it eliminates the intentional barriers the personal benefit requirement implements to limit the Government's ability to penalize defendants.[366] First, almost anything given to another person can be qualified as a gift.[367] However, as Chief Justice Roberts has noted, "not everything . . . is a gift just because it is disclosed."[368] Secondly, any post hoc analysis will make it easy for the government to argue, and for a jury to assume, that the tipper disclosed the information to the tippee with the expectation that the tippee would trade upon it because, otherwise, the tipper would not have disclosed anything at all.[369] Such an assumption will not only be difficult for defendants to refute, but will certainly lead to convictions where a defendant did not actually receive a personal benefit.[370]

3. Martoma II's Good Intentions

As discussed above, in *Martoma II*, the Second Circuit isolates one small portion of *Dirks* to find that an intent to benefit a tippee is an independent personal benefit and that no relationship between the tipper and tippee is needed to meet the personal benefit requirement.[371] This attempt to ground *Martoma II* within *Dirks's* framework in fact gives the Second Circuit's opinion some appeal and the appearance of accuracy.[372] *Dirks* does in fact use the comma in the sentence providing examples of "objective facts and circumstances," giving the appearance of two unrelated options to infer a personal benefit.[373] However, such an appearance is only a veneer that can

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363 *See generally Martoma I*, 869 F.3d at 74-92 (Pooler, J., dissenting); *The Second Circuit's Insider-Trading Feud*, *supra* note 335.

364 *See generally Martoma I*, 869 F.3d at 74-92 (Pooler, J., dissenting); *The Second Circuit's Insider-Trading Feud*, *supra* note 335.

365 *See generally Martoma I*, 869 F.3d at 74-92 (Pooler, J., dissenting); *The Second Circuit's Insider-Trading Feud*, *supra* note 335.

366 *See Martoma I*, 869 F.3d at 75 (Pooler, J., dissenting).

367 Morvillo, *supra* note 11.

368 Transcript of Oral Argument at 24, Salman v. United States, 137 S. Ct. 420 (2016) (No. 15-628).

369 Walsh, *supra* note 5, at 995.

370 *Martoma I*, 869 F.3d at 80 (Pooler, J., dissenting); *The Second Circuit's Insider-Trading Feud*, *supra* note 335.

371 *See* United States v. Martoma (*Martoma II*), 894 F.3d 64, 74-75 (2d Cir. 2017).

372 *See* Sandick, *supra* note 20; Morvillo, *supra* note 218.

373 *Dirks*, 463 U.S. at 657-58 ("We reaffirm today that '[a] duty [to disclose] arises from the relationship between the parties . . . and not merely from one's ability to acquire information because of his position in the market.").

be dispelled by reading the rest of *Dirks*.[374] As a result, the Second Circuit's intention-alone based standard replicates the same substantive problems as *Martoma I*'s expectation-based requirement and creates an even broader means to establish the personal benefit requirement.[375]

As with the expectation-based standard, almost anything can be characterized as an intent to benefit the tippee, even when there is no intent on the part of the tipper for the tippee to trade on the information.[376] Although the Second Circuit presumes the benefit will be a monetary gain resulting from a trade on material nonpublic information, so long as material nonpublic information is transmitted to the tippee, there is no actual limit on what the intended benefit is.[377] For example, a person talking to another person about a rough day at work because of a proposed merger could intend to benefit the listener by fostering trust, building friendship, or enabling the listener to know how to help the tipper.[378] So long as there was some intent to benefit the listener, no matter how contrived, a tipper's good intentions or a listener's misuse of material nonpublic information disclosed as a secondary part of the discussion are irrelevant.[379]

The intent-alone based standard is also problematic because there is little reason for a jury to think critically about what the tipper's actual intent.[380] The fact that the tipper gave another person and that person traded on the information will be as far as the jury needs to go because, if not to benefit the tippee, why else would the tipper have disclosed the information in the first place.[381] The Second Circuit itself falls into this line of thinking with its example of a tipper who "discloses inside information to a perfect stranger and says, in effect, you can make a lot of money by trading on this."[382] The court assumes that the tipper gives the stranger the information to benefit stranger.[383] However, it is possible that the tipper is acting out of "spite or hostility" and that the tipper's intent is to harm the tipper's employer.[384] Any benefit to the stranger would be purely incidental.[385] However, as *Martoma II* indicates, the Second Circuit would have no

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374 *See generally Martoma II*, 894 F.3d at 84-92 (Pooler, J., dissenting).
375 Sandick, *supra* note 20; *see generally Martoma II, 894 F.3d at 84-92 (Pooler, J., dissenting).*
376 *See Martoma II*, 894 F.3d at 84, 86 (Pooler, J., dissenting).
377 *Id.* at 75 (majority opinion).
378 *See generally id.* at 84-92 (Pooler, J., dissenting).
379 *See id.* at 73 (majority opinion).
380 *Id.* at 84-85 (Pooler, J., dissenting).
381 *See id.* at 85.
382 *Martoma II*, 894 F.3d at 75.
383 Morvillo, *supra* note 218.
384 Coffee, *supra* note 234.
385 *See* Dirks v. SEC, 463 U.S. 646, 662 (1983).

problem finding a personal benefit in such a situation.[386] A jury should not be expected to act any differently, particularly when insider trading is so repugnant in our society.[387]

While an intent to benefit another person can be one aspect of an improper purpose, the personal benefit requires more to actually infer that the tipper received a personal gain when there is no pecuniary gain to the tipper.[388] Intent alone cannot prove breach because there must be a corresponding gain to the tipper.[389] The tipper must receive "some personal gain," demonstrating that insider trading is punished for what the tipper gets and "what [insiders] do," not what they think.[390] The Second Circuit provides no explanation why a tipper's intent to benefit the tippee qualifies as a personal gain to the tipper.[391] The court only indicates that good intentions and, implicitly, the positive feelings the tipper gets as a result, are in some sense a personal benefit and enough to meet the requirement.[392] However, peace of mind or warm feelings have never alone been enough to establish a personal gain to the tipper.[393] Any attempt to make them alone enough to satisfy the personal benefit requirement is "chang[ing] the law people have come to rely upon."[394] That some acts do not get punished under a more stringent personal benefit test is not a persuasive enough reason for a court to change the law.[395] As discussed throughout this Note, this paradigm is a tenant of our legal system and is part of the stage *Dirks* built.

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386 *See Martoma II*, 894 F.3d at 75 ("the statement 'you can make a lot of money by trading on this,' following the disclosure of material non-public information, suggests an intention to benefit the tippee in breach of the insider's fiduciary duty.").

387 *See* John P. Anderson, *Insider Trading: Insider Trading and the Myth of Market Confidence*, 56 WASH. U. J.L. & POL'Y 1, 2 (2018) (generally describing public perception of insider trading as "economically harmful and morally wrong.").

388 *See Dirks*, 463 U.S. at 662 ("the test is whether the insider personally will benefit, directly or indirectly from his disclosure. Absent some personal gain, there has been no breach of duty to stockholders.").

389 *Id. But see Martoma II*, 894 F.3d at 75.

390 *Dirks*, 463 U.S. at 662-663.

391 *Martoma II*, 894 F.3d at 85 (Pooler, J., dissenting); Sandick, *supra* note 20.

392 *Martoma II*, 894 F.3d at 75 ("it is settled law that personal benefits may be direct and intangible and need not be pecuniary at all.").

393 *See Martoma II*, 894 F.3d at 85-86 (Pooler, J., dissenting); Langevoort, *supra* note 136.

394 Transcript of Oral Argument at 17, Salman v. United States, 137 S. Ct. 420 (2016) (No. 15-628). Although the majority in *Martoma II* asserts that *S.E.C. Warde* supports its assertion that an intent to benefit the tippee is enough to establish the personal benefit requirement, *Martoma II* 894 F.3d at 74, the dissent correctly shows that *Warde* found a relationship between the tipper and tippee and that this relationship, combined with the tipper's intent, satisfied the personal benefit requirement. *Id.* at 84 (Pooler, J., dissenting).

395 *See* Dirks v. SEC, 463 U.S. 646, 663-64 (1983) (recognizing that "only some persons, under some circumstances, will be barred from trading while in possession of material nonpublic information.").

V. RESETTING THE STAGE

As reflected in Part IV, *Martoma II's* changes to the personal benefit requirement have weakened the element to the point where it does not really exist on the insider trading stage.[396] A shadow of the personal benefit may remain in the form of a tipper's intention, but that shadow serves as no barrier to liability and prevents market participants from understanding what conduct is actually subject to legal liability.[397] Therefore, the stage must be reset by returning the personal benefit requirement to the stage.[398]

Although the best solution for resetting the stage is the enactment of a federal law defining insider trading,[399] that is not a practical solution. Ultimately, the most practical and likely solution is for courts to follow the path indicated by *Salman*, reject both *Martoma I* and *Martoma II*, and adhere to the standards established by the Supreme Court in *Dirks*.[400]

A. Why the Stage Needs Reset

Martoma I and *Martoma II* matter because they both represent fundamental changes to tipper-tippee liability as established by *Dirks*, a standard which has been recognized for over thirty years and has been reaffirmed as the governing authority by the Supreme Court in *Salman*.[401] By tying the personal benefit requirement to an expectation-based standard, *Martoma I* stripped the personal benefit of all its meaningful substance.[402] Although *Martoma I's* changes to tipper-tippee liability may be viewed as an aberration, its rationale could still be adopted by other jurisdictions.[403] Cases like *Dirks*, *Newman*, *Salman*, and *Martoma* demonstrate that the Government will not drop its efforts to expand insider trading liability, meaning it will continue to push for a broader definition of illegal insider trading with any means possible.[404] Despite precedent to the contrary, *Martoma I* represents a push that the Government can win.[405]

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396 Nocera, *supra* note 5; Sandick, *supra* note 20.

397 *See* United States v. Martoma (*Martoma I*), 869 F.3d 58, 745 (2d Cir. 2017) (Pooler, J., dissenting); Nocera, *supra* note 5; Sandick, *supra* note 20.

398 *See generally Second Circuit's Insider-Trading Feud*, *supra* note 335.

399 *See* Drummonds, *supra* note 4, at, 858-59; Nocera, *supra* note 5.

400 *See generally* Henning, *supra* note 17; Bainbridge, U.S. v. Martoma, *supra* note 21.

401 *See* United States v. Martoma (*Martoma II*), 894 F.3d 64, 84 (2d Cir. 2017) (Pooler, J., dissenting); Nocera, *supra* note 5; Bauer et al., *supra* note 133.

402 *See* Nocera, *supra* note 5; Bainbridge, U.S. v. Martoma, *supra* note 21.

403 *See* Coffee, *supra* note 234 (noting that "other circuits may still hesitate about relying on *Martoma* and may continue to require some form of a close relationship.").

404 *See generally* Salman v. United States, 137 S. Ct. 420 (2016), Dirks v. SEC, 463 U.S. 646 (1983); United States v. Martoma (*Martoma I*), 869 F.3d 58, 74-92 (2d Cir. 2017); United States v. Newman, 773 F.3d 438 (2d Cir. 2014); *see also* Nocera, *supra* note 5; Baker et al., *supra* note 21.

405 *See generally Martoma I*, 869 F.3d 58.

Martoma II followed in its wake by allowing an intention-based requirement as the sole means of establishing a personal benefit, reaching the same result.[406] As noted above, *Dirks* created the personal benefit to limit the Government's ability to expand the definition of insider trading and to provide guidance to market professionals so that they would know how to conform their conduct to the law.[407] Without the personal benefit's substance, there are few remaining barriers or guiding principles to prevent the problems that the Supreme Court in *Dirks* feared and sought to avoid.[408] Therefore, the stage needs reset to put these barriers back in place.[409]

Arguably, the effects of *Martoma I* already had an impact on market professionals.[410] Without *Dirks's* guiding principles, *Martoma I's* expectation-based standard left some investment advisors uncertain about what conduct constitutes illegal insider trading and "increasingly . . . afraid that diligent review, analysis, and investigation on behalf of . . . clients will land [them] before the SEC, or worse, yet a defendant in a criminal case."[411] Similarly, *Martoma II's* intention-based standard will only compound this problem as once permissible behaviors become subject to increased scrutiny and legal liability.[412] Fear and uncertainty about the law is a substantial problem.[413] Our law is founded on the principle "that a person cannot be punished for something that has not been formally prohibited in advance."[414] As *Dirks* recognized, real people have to adhere to these laws and they need something to follow.[415] A standard that requires a potential tipper to guess at how the tipper's conduct will be perceived cannot provide that guidance.[416]

B. Who Should Reset the Stage: A Practical Solution

Naturally, the next issue to address is who should be responsible for resetting the stage. Although insider trading is generally recognized as a judicial construct,[417] the development of insider trading law has been a

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406 *See* Coffee, *supra* note 234.

407 *Dirks*, 463 U.S. at 658-59, 664.

408 *See* United States v. Martoma (*Martoma II*), 894 F.3d 64, 84-86 (Pooler, J., dissenting); Sandick & Buszin, *supra* note 20.

409 *See Martoma I*, 869 F.3d at 74, 91-92 (2d Cir. 2017) (Pooler, J., dissenting).

410 *See* Robert Anello, *Letter on Insider Trading from a Confused Wall Streeter*, FORBES: INSIDER (Sept. 6, 2017, 3:20 PM), https://www.forbes.com/sites/insider/2017/09/06/letter-on-insider-trading-from-a-confused-wall-streeter/#14f6b2c3119f.

411 *Id.*

412 *See* Anello, *supra* note 410; Nocera, *supra* note 5; *Second Circuit's Insider-Trading Feud*, *supra* note 335.

413 *See generally* Miriam H. Baer, *Insider Trading's Legality Problem*, 127 YALE L.J.F. 129 (2017).

414 *Id.* at 134.

415 *See* Dirks v. SEC, 463 U.S. 646, 658-59, 664 (1983).

416 *See generally* United States v. Martoma (*Martoma I*), 869 F.3d 58, 74-92 (2d Cir. 2017) (Pooler, J., dissenting); Anello, *supra* note 410.

417 Vollmer, *supra* note 6, at 338-39; Nagy, *supra* note 45, at 27.

collaborative effort among the courts, the SEC, and Congress.[418] Accordingly, each has the capability of resetting the insider trading stage.[419] However, the likelihood of each stepping forward to fill that role varies significantly.[420]

For years, the legal community, scholars, and market participants have suggested that Congress should create an insider trading law.[421] A statute could define insider trading, "subdivide criminal behavior" into distinct offenses, and give the public notice about what conduct constitutes a violation of the law, solving many of the problems resulting from a common law approach.[422] While a federal statute undoubtedly is the best solution, it is not a likely or practical solution.[423]

Congress has had numerous opportunities to define insider trading or enact insider trading laws but has either declined or failed to do so.[424] While some of Congress's inaction likely resulted from politics or the difficulties associated with the legislative process, the SEC has been the primary force contributing to Congress's approach to insider trading.[425] Since the 1980's, the SEC has encouraged Congress to maintain the status quo from concerns that a statute or definition of insider trading would create gaps for the "unscrupulous" to exploit, contribute to new litigation resulting from the law, and limit the agency's flexibility in pursuing potential 10b-5 violations.[426] Each time the issue arises, Congress is satisfied with deferring to the SEC's recommendations.[427] Although some commissioners on the SEC have expressed dissatisfaction with current insider trading laws,[428] that pattern is

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418 Nagy, *supra* note 45, at 27.

419 *See id.*; *see generally* Vollmer, *supra* note 6; Almousa, *supra* note 23.

420 *See* Nagy, *supra* note 45, at 27, 29; Baker et al., *supra* note 21.

421 Nocera, *supra* note 5; Anello, *supra* note 410; Baker et al., *supra* note 21; Dave Michaels, *No Law Needed on Insider Trading, SEC Chief Says*, WALL ST. J. (Sept. 6, 2017), https://www.wsj.com/articles/no-law-needed-on-insider-trading-sec-chief-says-1504733816; *see generally* Baer, *supra* note 413.

422 Baer, *supra* note 413, at 145.

423 *See* Nagy, *supra* note 45, at 27, 29; Michaels, *supra* note 421.

424 *See* Nagy, *supra* note 45, at 27, 29.

425 *See id.* at 27.

426 *Id.* at 29; *see also Insider Trading Sanctions and SEC Enforcement Legislation: Hearing on H.R. 559 Before the Subcomm. on Telecomm., Consumer Prot., and Fin. of the H. Comm. on Energy and Commerce*, 98th Cong. 98-100 (1983) (letter of John S.R. Shad, Chairman, Securities Exchange Commission); 130 CONG. REC. 20,107 (1984) (statement of Sen. D'Amato) (stating that "The Commission testified, however, that it was not dissatisfied with existing case law governing insider trading. The Commission expressed concern that a statutory definition could Introduce new terms and concepts that would generate a significant amount of litigation and that a definition could limit the Commission's flexibility to deal with future abuses.").

427 Nagy, *supra* note 45, at 27.

428 *See* Preet Bharara & Robert J. Jackson Jr., *Insider Trading Laws Haven't Kept Up With the Crooks*, N.Y. TIMES (Oct. 9, 2018), https://www.nytimes.com/2018/10/09/opinion/sec-insider-trading-united-states.html.

not likely to change any time soon.[429] With the current precedent, the SEC already has the broad definition it needs to pursue new violations, making it unlikely for them to pressure Congress into making any changes to insider trading law.[430]

Another approach suggests the SEC should reset the stage for insider trading by adopting the standards established in *Dirks*.[431] However, for many of the reasons noted above, this also is not a practical approach.[432] As the Chairman of the SEC has already indicated, the SEC has no incentive to clarify insider trading law.[433] With the exception of *Newman*, the changing definitions of insider trading have only served to benefit the SEC by putting it in a good "position[] to punish insider trading" and anyone who appears to have committed insider trading.[434] Even if some within the SEC are inclined to change current regulations, the SEC is still unlikely to follow *Dirks*.[435] Adopting a true *Dirks* standard, which is designed to limit the SEC's ability to pursue new insider trading violations, would impede the SEC's ability to obtain settlements[436] and limit its "agenda in expanding the scope of insider trading law."[437]

Thus, the decision to reset the stage ultimately rests in the hands of the courts.[438] As many courts demonstrated in declining to adopt *Newman*, it is a role they are willing and able to handle.[439] While the solution is not perfect,[440] the role is fitting.[441] The same constraints that keep Congress and the SEC from modifying insider trading law do not exist for the courts, who established the cause of action in the first place.[442] However, courts are constrained by precedent and are driven by the need to prescribe clear standards for legal liability, particularly when "an individual's liberty is at stake."[443]

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429 *See* Baker et al., *supra* note 21; Michaels, *supra* note 421.

430 *See* Baker et al., *supra* note 21; Michaels, *supra* note 421.

431 Almousa, *supra* note 23, at 1259.

432 *See* Baker et al., *supra* note 21 (noting that the SEC has been "lukewarm" to attempts to create a law on insider trading because such a law would "limit [the SEC's] enforcement efforts.").

433 *See* Michaels, *supra* note 421; Viswanatha & Kendall, *supra* note 169. It is also important to note that, like the SEC, the Department of Justice has also benefited from decisions like *Martoma I*, making it easier for the Department to pursue prosecutions, and giving it no incentive to seek a definition of insider trading. *See* Nocera, *supra* note 5; Apps, *supra* note 115.

434 Michaels, *supra* note 421.

435 *See* Bharara & Jackson, *supra* note 428.

436 *See* Baker et al., *supra* note 21.

437 Harasimowicz, *supra* note 4, at 794.

438 *See The Second Circuit's Insider-Trading Feud*, *supra* note 335.

439 *See* Nagy, *supra* note 45, at 5.

440 *See* Michaels, *supra* note 421 (noting that allowing courts to define the scope of permissible conduct in insider trading will continue to "grant huge discretion to law enforcement").

441 *See* Vollmer, *supra* note 6, at 338-39 ("The tipping violation is a claim implied by the courts . . . .").

442 *See id.*; Michaels, *supra* note 421.

443 Harasimowicz, *supra* note 4, at 792.

In fulfilling this role, *Salman* serves as an important guide.[444] *Salman* recognized *Dirks* as the governing law for tipper-tippee liability and rejected the government's similar arguments to expand the scope of insider trading that the Second Circuit accepted in *Martoma I*, indicating that the expectation standard does not belong on the stage.[445] Even though *Martoma II* has a stronger foundation from *Dirks*, the same repugnance towards changing the substance of *Dirks* should also guide courts to reject the intention-based standard. Thus, precedent will provide the key for many courts to decline following *Martoma I* and to keep the personal benefit requirement on the insider trading stage.[446]

However, disregarding *Martoma I* and *Martoma II* will not be enough to restore the insider trading stage.[447] To properly reset the stage, courts must also return to the principles *Dirks* established, including the purpose of the personal benefit requirement to limit the scope of legal liability for insider trading and providing a guide to market participants.[448] Resetting the stage must mean something. Returning the requirement to the stage in name only would simply perpetuate the problems reflected in *Martoma I* and *Martoma II's* misapplication of *Dirks* and their modified standards for liability.[449] Although applying a narrow construction to insider trading cases may prove difficult because some individuals will not be prosecuted or convicted, it is a step necessary to ensure that the law can be followed and understood.[450]

VI. CONCLUSION

A tippee cannot assume the tipper's fiduciary attire until the tipper has breached, essentially shedding that mantle by disclosing material nonpublic information for the purpose of receiving a personal benefit.[451] In discarding that mantle, the tippee knows that the tipper has breached his duty and recognizes the benefit the tipper received.[452] The symbolism of such an act cannot be lost on the tippee, who discards the mantle in a similar way by trading on the information.[453] If that scene is not clear, the symbolism is obscured, or the mantle never made it onto the stage, the question we must

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444 *See* Bainbridge, U.S. v. Martoma, *supra* note 21; *see generally* Salman v. United States, 137 S. Ct. 420 (2016).

445 *See* Bainbridge, U.S. v. Martoma, *supra* note 21.

446 *See* United States v. Martoma (*Martoma I*), 869 F.3d 58, 75 (2d Cir. 2017) (Pooler, J., dissenting).

447 *See id.* at 75, 91-92 (Pooler, J., dissenting); Bainbridge, U.S. v. Martoma, *supra* note 21.

448 *See Martoma I*, 869 F.3d at 75, 87 (Pooler, J., dissenting); Vollmer, *supra* note 6, at 331, 344.

449 *See* Nocera, *supra* note 5; Bainbridge, U.S. v. Martoma, *supra* note 21; *The Second Circuit's Insider-Trading Feud*, *supra* note 335.

450 *See* Dirks v. SEC, 463 U.S. 646, 660, 663-64 (1983); *see generally* Vollmer, *supra* note 6.

451 *See Dirks*, 463 U.S. at 662.

452 *See id.* at 660-61, 664.

453 *See id.* at 660-61.

ask ourselves is whether the scene we are looking at on stage is really insider trading.[454]

Dirks provided most of the script and setting for insider trading, placing the personal benefit requirement at the center of the stage.[455] As the focal point, the personal benefit requirement sought to provide an objective standard for determining whether the alleged tipper disclosed material nonpublic information for an improper purpose and to set limits on liability.[456] Despite this guidance, the substance of the requirement has been misplaced or lost, at best giving the appearance that the element remains in the stage and at worst removing the element from the stage completely.[457]

The Second Circuit, with *Martoma II*, would have us believe that an intention-alone based standard for the personal benefit has not substantively changed the stage.[458] However, *Martoma II's* intention-alone based standard disregards the purpose of the personal benefit requirement to limit liability to those who disclose information for an improper purpose of receiving an actual personal gain and removes almost any semblance of a guiding principle to enable market participants to conform their conduct to the law.[459] Such a standard is only a specter of the personal benefit requirement.[460]

To resolve these problems, the stage needs reset.[461] However, neither the courts nor the public should expect Congress or the SEC to resolve the problems with the stage any time soon.[462] Ultimately, this leaves the courts with the decision to reset the stage.[463] To remove the specters *Martoma I* and *Martoma II* have cast, the courts must do more than follow *Salman's* lead in rejecting new or revamped arguments proposing to change the personal benefit requirement.[464] Instead, courts must also seek to restore the strength of the personal benefit requirement as a limit against liability by emphasizing the importance of relationships in inferring a personal benefit and ensuring that the tipper received a personal gain.[465] In the absence of a personal relationship, the personal gain must be more concrete than the positive

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454 *See* Harasimowicz, *supra* note 4, at 779.

455 *See Dirks*, 463 U.S. at 660, 662-64 (stating that "the test is whether the insider personally will benefit, directly or indirectly, from his disclosure").

456 *See id.* at 662-64.

457 *See* Nocera, *supra* note 5.

458 *See generally* United States v. Martoma (*Martoma II*), 894 F.3d 64 (2d Cir. 2017).

459 *See Martoma II*, 894 F.3d at 81-82, 84 (Pooler, J., dissenting); Nocera, *supra* note 5; Anello, *supra* note 410.

460 *See Martoma II*, 894 F.3d at 81-82, 84 (Pooler, J., dissenting); Nocera, *supra* note 5.

461 *See* Nocera, *supra* note 5; Bainbridge, U.S. v. Martoma, *supra* note 21; *The Second Circuit's Insider-Trading Feud*, *supra* note 335.

462 *See* Nagy, *supra* note 45, at 27, 29; Michaels, *supra* note 421.

463 *See* Michaels, *supra* note 421; *The Second Circuit's Insider-Trading Feud*, *supra* note 335.

464 *See generally Martoma I*, 869 F.3d at 75 (Pooler, J., dissenting).

465 *See* United States v. Martoma (*Martoma II*), 894 F.3d 64, 85-86 (2d Cir. 2017) (Pooler, J., dissenting).

feelings one gets from helping someone in need.[466] Without such a standard, courts risk exchanging our key legal principles for nothing more than great expectations and good intentions, which truly would be an improper purpose.

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[466] *See* Nocera, *supra* note 5.