

One Minute Memo®



Salman v. United States Broadens Some Contours of Insider Trading Law, but Leaves Others Uncertain

By Karen Bitar

Synopsis

Salman v. United States,¹ is only the fifth insider-trading case heard by the United States Supreme Court. In *Salman*, the Court upheld the insider trading conviction of Bassam Salman, ruling that a tipper's gift of confidential non-public information to a relative or friend who trades on the information satisfies the "personal benefit" test declared in *Dirks v.*

SEC. ² *Dirks* held that a tipper's liability for insider trading "hinges on whether the tipper breached a fiduciary duty by disclosing inside information," but that such a breach can only occur "when the tipper discloses the inside information for a personal benefit."³ *Salman* not only reaffirmed the personal benefit requirement, but clarified the standard by concluding that the tipper's personal benefit need not be pecuniary; the benefit may be inferred when an insider gifts information to a relative or friend. Critically, the Court stated that, to the extent the Second Circuit, in *United States v. Newman*,⁴ held that an insider must receive something "pecuniary or similarly valuable in nature" in exchange for the information, that requirement is inconsistent with the Supreme Court's holding in *Dirks*. Thus, *Salman* puts to rest that a tipper must receive a pecuniary or other tangible benefit, holding that gifting to a trading relative or friend was a sufficient personal benefit in and of itself. Purposefully left open, however, is the issue of how close a relationship must there be between a tipper and tippee outside the context of relatives or friends sufficient to satisfy the personal benefit requirement set forth in *Dirks*. Indeed, in writing for a unanimous Court, Justice Alito made clear that, based on the specific facts before the Court, which involved "precisely the gift of confidential information to a trading relative that *Dirks* envisioned," adherence to *Dirks* "easily resolves the narrow issue presented here,"⁵ but that "[d]etermining whether an insider personally benefits from a particular disclosure, a question of fact, will not always be easy for courts."⁶

Although the Court declined to address more broadly the nature of what constitutes a personal benefit, it rejected the Government's argument that disclosure of confidential information to anyone, as opposed to a relative or friend, would constitute a personal benefit sufficient to satisfy *Dirks*.

1 No. 15-628 slip op, U.S. Sup. Ct. Dec. 6, 2016

2 463 U.S. 646 (1983)

3 *Dirks*, at 664

4 773 F.3d 438, 452 (2014) cert. denied, 577 U.S. ___, 136 S. Ct. 242(2015)

5 *Salman*, slip op. at 8

6 *Id.* at 11 (internal citations omitted)

Facts

Maher Kara was an investment banker who dealt with highly confidential M&A information in Citigroup's healthcare investment banking group. Over time he provided confidential nonpublic information to his older brother Michael Kara who traded on the information with Maher's knowledge. In turn, Michael Kara tipped the information to Salman, his brother-in-law. Maher Kara never received any pecuniary gain for gifting the information to his brother, nor did he know that Michael was passing the information on to Salman. Salman, however, was aware that the source of the information was Maher and that the information was confidential.

After a jury trial in the Northern District of California, Salman was convicted on four counts of securities fraud and one count of conspiracy. While his appeal to the Ninth Circuit was pending the Second Circuit issued its opinion in *Newman*. In *Newman*, the Second Circuit reversed the convictions of two portfolio managers who traded on inside information noting that the *Newman* defendants were "several steps removed from the corporate insiders" and that "there was no evidence that either was aware of the source of the inside information."⁷ The Second Circuit acknowledged that *Dirks* allowed a factfinder to infer a personal benefit to the tipper from a gift of confidential information to a trading relative or friend, but concluded that to the extent *Dirks* permits such an inference, the 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."⁸ Thus, *Newman* defined the personal benefit in fairly stringent language. Notably, in *Newman* the Government introduced no evidence that the information traded on came from insiders, or that they received any personal benefit in exchange for the tips.⁹ Pointing to *Newman*, Salman asked his conviction be reversed because Maher did not receive anything pecuniary or of a tangible value that was attributable to the exchange.¹⁰ The Ninth Circuit affirmed Salman's conviction, reasoning that a tipper benefits personally when gifting confidential information to a friend or relative, but further noting that, to the extent *Newman* required additional gain to a tipper in gifting cases involving family and friends, it would "decline to follow it."¹¹ The Supreme Court granted certiorari to resolve the tension between the Second Circuit's *Newman* decision and the Ninth Circuit's decision in this case.

The Decision

Relying, as did the Ninth Circuit, on the plain language of *Dirks*, *Salman* makes clear that Maher would have breached his fiduciary duty had he personally traded on the information, and then gave the cash proceeds to his brother. In such a circumstance, the Court reasoned, it is "obvious" that Maher would have personally benefitted in that transaction, but he effectively "achieved the same result" by disclosing the information to his brother with the knowledge that Michael would trade on it.¹² According to the Court, under *Dirks* "when a tipper gives inside information to 'a trading relative or friend' the jury can infer that the tipper meant to provide the equivalent of a cash gift. In such situations, the tipper benefits personally because giving a gift of trading information is the same thing as trading by the tipper followed by a gift of the proceeds."¹³ Accordingly, Salman's jury was properly instructed that a personal benefit includes "the benefit one would obtain from simply making a gift of confidential information to a trading relative." As such, it affirmed the Ninth's Circuit's judgment.

Conclusion

The *Salman* Court reaffirmed the personal benefit requirement in *Dirks* and how it was satisfied in this instance based on the narrow facts presented. It leaves open the scope of the personal benefit requirement outside the context of gifting

⁷ 773 F.3d. at 443

⁸ Id. at 452

⁹ Id. at 453-454

¹⁰ Id. at 452

¹¹ *Salman*, 792 F.3d, at 1092-93

¹² *Salman*, slip op. at 9

¹³ *Salman*, slip op. at 10

information to relatives and friends. Further, to the extent *Newman* has been interpreted as requiring a personal benefit to be pecuniary or otherwise tangible, *Salman* dispenses with this requirement.

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Seyfarth Shaw LLP One Minute Memo® | December 13, 2016

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