



## Salman v. Newman: The developing standard for insider trading liability

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Appellant Bassam Salman was convicted of conspiracy and insider trading following a jury trial, based on trades that Salman (the tippee) made using material, nonpublic information he obtained from a friend (the intermediary tippee), who, in turn, had obtained the information from his brother (the tipper). On appeal to the 9th Circuit, Salman argued that the 9th Circuit should adopt his interpretation of the 2nd Circuit's December 2014 *Newman* holding and declare the evidence insufficient to sustain his conviction, because there was no evidence that the tipper-tippee relationship was sufficient to give rise to a breach of the tipper's fiduciary duties, since the tipper never received a "pecuniary or similarly valuable" benefit from the tip.

The 9th Circuit rejected Salman's argument, holding that there was sufficient evidence that the tipper received a "personal benefit" from the direct tippee within the meaning of the Supreme Court's landmark tippee-liability case, *Dirks v. S.E.C.*, 463 U.S. 646 (1983). See Slip Op. at 10 (Dirks "governs this case."). *Dirks* held, among other things, that a tippee can be held liable as part of an insider trading prosecution "when an insider makes a gift of confidential information to a trading relative or friend." *Id.* at 10. In the 9th Circuit's view, that is the only "personal benefit" necessary to prove a breach of the tipper's fiduciary duty—and thus to give rise to Salman's insider trading liability as a remote tippee.

Salman protested that *Newman* had properly clarified *Dirks* to mean that the "personal benefit" standard could not be satisfied "by the mere fact of a friendship, particularly of a casual or social nature," Slip Op. at 12-13 (quoting *Newman*, 773 F.3d at 442-443); or, otherwise, every relationship would satisfy the "personal benefit" test, and tippee liability would be unlimited. Rather, relying on *Newman*, Salman argued that there must exist a relationship

leading to an exchange representing “at least a potential gain of pecuniary or similarly valuable nature.” *Id.* However, the 9th Circuit disagreed: “To the extent Newman can be read to go so far, we decline to follow it.” *Id.* at 13. Rather, “[p]roof that the insider disclosed material nonpublic information with the intent to benefit a trading relative or friend is sufficient to establish the breach of fiduciary element of insider trading,” with no proof of something resembling a “pecuniary” benefit necessary. *Id.* at 14.

*Salman* represents a potential setback for criminal defendants facing remote tippee charges, and a fresh incentive for prosecutors to aggressively pursue insider trading charges against tippees one or more levels removed from the original tipper—at least outside of the 2nd Circuit. Although the 9th Circuit denied rehearing *en banc* without dissent, in light of the 9th Circuit’s disagreement with the 2nd Circuit’s high-profile *Newman* opinion, the stage is set for a possible Supreme Court certiorari petition later this fall.

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