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NINTH CIRCUIT SLAPS BACK REMOTE TIPPEE'S NEWMAN DEFENSE

July 15, 2015 | | Insider Trading,The GEE Blog

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Last week, the Ninth Circuit, with opinion by Southern District of New York Judge Jed S. Rakoff, questioned how far remote tippee insider-trading defendants can stretch the Second Circuit's *Newman* decision. In *United States v. Salman*, the defendant appealed his conviction for conspiracy and insider trading, urging the court to find the evidence against him was insufficient under the *Newman* standard. The conviction arose from Salman's trading on insider information through family connections. Salman's future brother-in-law, Maher Kara, worked in a leading global bank's healthcare investment banking group and shared insider information with his brother, Michael, who became Salman's close friend and in turn shared that insider information with Salman. Michael urged Salman to "mirror-image" his trading, and Salman traded through a brokerage account held by his wife's sister and her husband, Karim Bayyouk. Salman shared the insider information with Bayyouk and the two split the profits from Bayyouk's trading. From trading on the inside information, Salman and Bayyouk grew the account from $396,000 to approximately $2.1 million. Salman argued that under the *Newman* standard, the government had not introduced sufficient evidence that Maher disclosed the information to his brother Michael in exchange for a personal benefit or that Salman knew of such a benefit. The Ninth Circuit sidestepped a direct application of *Newman*, finding that the United States Supreme Court's 1983 decision in *Dirks v. SEC* directly controlled. In *Dirks*, the Supreme Court defined a "personal benefit" as including "when an insider makes a gift of confidential information to a trading relative or friend." The Ninth Circuit found that was exactly what occurred when Maher made the gift of confidential information to Michael and, given the parties' close relationships, Salman knew or readily could have inferred Maher's intent to benefit Michael. The Ninth Circuit did consider *Newman* and declined to accept an expansive reading that because there was no evidence of pecuniary benefit to Maher or evidence Salman knew of such a benefit, the government did not carry its burden, determining that such a holding would contradict *Dirks*: "Proof 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 duty element of insider trading." The Ninth Circuit's reasoning provides more ground for prosecutors to limit the reach of *Newman* in remote tippee cases. We will continue to monitor the judicial trends on this issue.

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