No. 15-137

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

TODD NEWMAN AND ANTHONY CHIASSON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR TODD NEWMAN IN OPPOSITION

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August 24, 2015

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the evidence was insufficient to prove that the corporate insiders in this case received a personal benefit from disclosing information to particular tippees.

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INTRODUCTION

The central legal holding in the court below was that insider trading liability requires a tippee to know that the tipper received a personal benefit. While the government opposed such a requirement in the trial court and on appeal, it does not challenge that ruling now. Instead, the Petition seeks review of a single, fact-based sufficiency determination regarding whether there was a personal benefit in the first place. Notably, the government's articulation of the question presented addresses only the type of evidence required to prove a personal benefit; it does not implicate the

court of appeals' independent holding that Newman committed no crime because he did not *know* of the benefit. Accordingly, even if this Court were to agree with the government that the Second Circuit misstated the type of evidence required to support an inference of a benefit, the decision dismissing the indictment on the independent ground that Newman did not know of any benefit would stand.

The government understands, of course, that the Supreme Court does not grant review to issue advisory opinions. To overcome that obstacle, the government proposes that this Court "correct" the Second Circuit's analysis of what evidence may be used to prove a personal benefit and then remand to the Second Circuit for reconsideration of *both* the sufficiency of whether there was a benefit and whether Newman knew of the benefit. Pet. 29-31. This attempted sleight of hand is unconvincing. The Second Circuit determined that, "[e]ven assuming that the scant evidence . . . was sufficient to permit the inference of a personal benefit," the proof was insufficient to establish knowledge of any benefit because the defendants "knew next to nothing" about the insiders or the circumstances of their disclosures, and the government "presented *absolutely no testimony or any other evidence* that Newman and Chiasson knew . . . that those insiders received any benefit in exchange for such disclosures . . ." Pet. App. 28a[1] (emphasis added). This conclusion was not based on a nuanced view of how personal benefit should be defined; it was based on the utter lack of evidence that the defendants

[1] Citations to "App." are to Petitioner's appendix. Citations to "A-" are to the record on appeal in the Second Circuit, and citations to "Tr." are to the transcript of proceedings before the district court.

knew of *any* benefit, however defined, or even the basic circumstances under which the disclosures were made. No decision by this Court on the narrow issue presented for review would change the ultimate disposition of this case.

The lack of a genuine, outcome-determinative issue is, in itself, sufficient reason to deny the government's Petition. But there are other compelling reasons as well.

First, *Newman* is consistent with this Court's decision in *Dirks* v. *SEC*, 463 U.S. 646 (1983). The Second Circuit quoted and endorsed the relevant language from *Dirks*, and every district court to have addressed the issue since then has ruled that, consistent with *Dirks*, *Newman* permits liability on the basis of a benefit in the form of an insider's gift of information to a trading relative or friend. Moreover, *Dirks* explained that a tipper — who, after all, is the giver of the gift, not the recipient — is deemed to benefit from a disclosure when the tippee's trades "resemble trading by the insider himself followed by a gift of the profits to the recipient." 643 U.S. at 664. Not every personal relationship supports an inference of this kind of gift of trading profits. The Second Circuit's reasoning that such an inference requires a "meaningfully close personal relationship," Pet. App. 26a, adheres to *Dirks* because it limits the inference to circumstances in which the tipper can reasonably be expected to have intended to make a gift of the equivalent of cash to the tippee.

Second, there is no circuit conflict. The Ninth Circuit in *United States* v. *Salman*, No. 14-10204, 2015 WL 4068903 (July 6, 2015), made a hypothetical observation that *if* the Second Circuit's decision were interpreted to preclude liability based on a gift theory

of personal benefit, then the Ninth Circuit would decline to follow it. *Id.* at *6. In fact, no court has interpreted *Newman* that broadly, including the Ninth Circuit, which stated that "*Newman* itself recognized that the 'personal benefit is broadly defined to include not only pecuniary gain, but also, *inter alia*, . . . the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend.'" *Id.* (quoting *Newman*). The outcome in *Salman*, in which the tipper gave inside information to his brother, would have been the same in the Second Circuit as brotherhood is commonly understood to be a "meaningfully close personal relationship" as required by the Second Circuit. Pet. App. 26a.

Similarly, *SEC* v. *Maio*, 51 F.3d 623 (7th Cir. 1995), the other case on which the government relies, involved a tipper and tippee who were close personal friends with a history of gifts and significant financial dealings. The Seventh Circuit had no need to address whether an inference of gift-giving could be based on casual acquaintance alone, as the facts in *Maio* established a far closer personal and financial relationship. It is not a conflict when courts presented with starkly contrasting facts reach different outcomes in analyzing the sufficiency of the evidence in their particular cases.

Finally, the government greatly overstates *Newman's* impact on the ability of law enforcement agencies to pursue traditional insider trading cases. Actual experience has demonstrated that in every case in which a court has ruled on a *Newman*-based challenge to the sufficiency of a personal benefit, the government has prevailed. This string of government victories includes several cases in which the alleged personal benefit was the tipper's gift of information to a trading

relative or friend. The government has had no trouble continuing to pursue insider trading cases — including under the gift theory of personal benefit — even in the wake of *Newman*.

STATEMENT OF THE CASE

1. The government's case at trial established that Newman received quarterly financial information related to Dell Inc. and NVIDIA Corporation from his research analyst, Jesse Tortora. Tortora was a member of a group of friends who exchanged information they obtained from various sources, including company insiders. Tr. 51, 137–38, 143. It was undisputed that Newman dealt only with Tortora, and did not know or have contact with the insiders. *See* Tr. 52-53, 61-62, 3668. The court of appeals noted that "the Government has not cited, nor have we found, a single case in which tippees as remote as Newman and Chiasson have been held criminally liable for insider trading." Pet. App. 16a. The government did not challenge this observation when seeking *en banc* review, and does not challenge it now.

a. *Dell*. As to Dell, the evidence showed that Newman was three steps removed from the original source of information. Rob Ray, an employee in Dell's Investor Relations ("IR") department, gave information to Sandy Goyal, an analyst at Neuberger Berman, who gave information to Tortora, who gave information to Newman. Tr. 52–53. Though the government's theory was that Ray engaged in criminal insider trading for personal gain, the government

never brought any charges — criminal, civil, or administrative — against Ray.[2] Pet. App. 5a.

Ray and Goyal were acquaintances. They knew each other from business school (where they were in different class years) and from when they both worked at Dell, although at Dell they spoke only a few times. Tr. 1390. After Goyal left Dell for jobs at Prudential and then Neuberger Berman, his relationship with Ray remained arm's length; for example, Goyal never socialized with Ray while Ray was at Dell.[3] Tr. 1512. At trial, Goyal testified that his relationship with Ray was "not very close or personal." Tr. 1411. When the government tried to get Goyal to say that he and Ray were "friends", Goyal would not agree, testifying that Ray "was not that close." *Id.* And, at his own guilty plea, Goyal described Ray as an "acquaintance", never using the word "friend". Tr. of Plea Allocution at 17, 19; *United States* v. *Goyal*, No. 11-cr-00935 (S.D.N.Y. Nov. 3, 2011), ECF No. 10.

As a member of Dell's IR department,[4] Ray was authorized to speak to analysts at financial firms. Tr.

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[2] The government also declined to charge Tortora's stepfather, to whom Tortora gave confidential Dell information knowing that his stepfather would trade. Tr. 915–16.

[3] The government's suggestion that Ray and Goyal had a social relationship, Pet. 4, is misleading because what limited social contact they eventually had occurred only *after* Ray left Dell and moved to New York for another job. Tr. 1512. At all relevant times, *i.e.* while Ray was at Dell and allegedly providing tips, Goyal and Ray never socialized. Tr. 1469, 1512.

[4] The government says that Ray also worked in Dell's corporate development department, Pet. 3, but his move from IR to corporate development occurred very late in the charged conspiracy period, well after all of the trading that formed the substantive counts of the Indictment. Tr. 2866.

2918. An important part of Ray's job was to run Dell's investor "targeting" program, through which IR identified and "targeted" firms that Dell wished to attract as long-term investors. Tr. 2901–04, 2921–22. One of the firms that Dell targeted was Neuberger Berman, where Goyal worked. Tr. 2903–04. Ray's boss knew that Ray spoke to Goyal, which the boss agreed "was a normal part of Rob Ray's job." Tr. 2929–30. While there were other IR personnel with whom Goyal could also speak, Ray's boss said that Dell IR personnel were free to choose which analysts they would talk to. Tr. 2918.

The evidence showed that conversations in which IR personnel assisted analysts with financial modeling were a regular part of the business. Goyal testified that he spoke to IR departments "a lot" to run his model by them to ask whether his assumptions were "too high or too low" or in the "ball park" Tr. 1511. Ray's boss further confirmed that it was "the job of a financial analyst" to use conversations with IR to come up with specific estimates, through modeling, of a company's "upcoming" financial results. Tr. 2880-81. Dell IR not only tracked analysts' models to monitor street expectations, but assisted analysts with developing their models. Tr. 2925. Ray's boss testified that if an analyst working on a model inquired about a specific Dell financial line item, IR "would absolutely discuss it." Tr. 2827-28.

In the conversations that the government charged as unlawful tips, Goyal told Ray he was in Neuberger Berman's "research department," Tr. 1516, and that he was "working on a model and [] wanted to check the accuracy of the model." Tr. 1517. Goyal never told Ray he was sharing the information with others or that anyone was trading on the information. Tr. 1611. The

government makes much of the after-hours timing of Goyal's conversations with Ray. Pet. 3–4. But Ray's boss testified that "[w]e operated in an industry where information flows relatively quickly" and Dell IR "encouraged a flexible work schedule for sure." Tr. 2894. Ray's boss agreed that "there was nothing wrong with talking to analysts at nights and weekends." Tr. 2896.

Consistent with Goyal's testimony that he led Ray to believe he was seeking routine help in preparing a financial model, the information Ray provided was imprecise. While Ray had access to precise numbers as a member of IR, he did not give those numbers to Goyal, but rather gave "a range of numbers" or expressed the numbers relative to analysts' expectations, *i.e.*, higher/lower than market consensus. Tr. 1417. When Tortora communicated with Newman, he conveyed the lack of precision of the information. *E.g.* A-2012 (Tortora told Newman he got Dell information from Goyal, based on which he "guess[ed]" that Dell's gross margin would not get as high as analysts were expecting "but who knows[?]"). Ray's information, as filtered through Goyal, was also often wrong. *E.g.* A-153 ¶ 15; Tr. 828–30 (Ray told Goyal that gross margin would be higher than the market expected; in fact, gross margin came in lower than expectations); Tr. 882–83; A-2019 (Ray's revenue estimate to Goyal was almost $400 million off the actual reported numbers).[5]

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[5] The evidence showed many other examples of Goyal's information being inaccurate. *See* A-2000 (wrong about gross margin in Dell's earnings announcement); A-2377–78 (wrong about Dell unit data reported by IDC/Gartner); A-2021 (information from Ray did not indicate problems less than three days before Dell pre-announced negative results); A-2396 (Tortora telling another analyst he was "dead wrong" on Dell last quarter).

The government's personal benefit theory at trial was not that Ray made a gift of information because he and Goyal were particularly close; it was that Ray gave information to Goyal in exchange for advice on advancing his career. Tr. 3697 (government summation arguing, "why did [Ray] do it? He wanted Goyal's help to get a job on Wall Street."). However, Goyal's testimony made clear that this "advice" was little more than a gesture to be polite, and certainly did not translate into any concrete assistance in helping Ray find a job. For example, Goyal "put in a good word" with someone who was not looking to hire at the time, Tr. 1401, encouraged Ray to "keep trying," Tr. 1402, reviewed Ray's resume, and provided "tips" on how to interview, Tr. 1423. But Goyal never found Ray a job at his own firm, Neuberger Berman, or anywhere else, nor did he even arrange for Ray to be interviewed at Neuberger. Tr. 1513–14. Further, Goyal began giving Ray "career advice" nearly two years *before* Ray began providing information, Tr. 1514, and Goyal testified that he would have given Ray advice even without receiving information.[6] Tr. 1515.

As the court of appeals found, Newman knew "next to nothing" about the relationship between Ray and Goyal. Pet. App. 28a–29a. Goyal told Tortora that he received information from someone at Dell who had

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[6] The government's reference to Diamondback's payment to Goyal, Pet. 5, 6, is a red herring. Goyal was paid as a consultant for assisting Tortora with financial modeling and other legitimate activities. Tr. 1519, 1523–31. There was no evidence that Goyal passed any of those funds (or any other funds) to Ray. To the contrary, Goyal testified that he deliberately did not offer to pay Ray "because then [Ray] would have suspected something was wrong." Tr. 1612.

access to "overall" financial numbers, but Tortora did not know Ray's name, position, or the circumstances of how Goyal obtained the information. *See* Tr. 156–57, 603. Newman, who learned everything relevant from Tortora, did not know this information either. Newman certainly did not know about any personal benefit to Ray. In particular, he did not know whether Ray and Goyal were friends (which they were not), whether they spoke about career advice, or if Ray gave Goyal a gift of information knowing that Goyal would trade. (As explained, *supra*, Ray did not know that Goyal was trading).

The government sought to draw an inference that Newman knew of an improper purpose for the disclosures from the fact that he received earnings-related information in advance of Dell's quarterly announcements. But the uncontroverted evidence established that Dell routinely and deliberately leaked this information to analysts.[7] The government's own witnesses acknowledged that these leaks were not made in exchange for personal benefits, and the

[7] *See, e.g.*, A-2387 (Dell IR told an analyst "offline" that Dell would miss quarterly estimates "by a country mile"); A-2397 (head of Dell IR suggested to a group of analysts that Dell's normalized gross margin would be 18%); A-2388 (head of Dell IR told an analyst that gross margin would be stable even if revenue missed expectations); A-2389 (Dell IR told an analyst that the company would report earnings of at least 30 cents per share); A-2394 (head of Dell IR told Tortora that "low 12%" operating margin was "reasonable"); A-2401 (head of Dell IR told an analyst that reported sales would start to improve, led by the small and medium business segment); A-2380 (Dell CFO told an analyst at dinner that Dell would achieve headcount reduction three times larger than what the market was expecting); A-2394 (head of Dell IR told analyst that soon-to-be released industry data would show poor results for Dell); A-2399 (Dell IR said that gross margin would be "in-line at best" with market expectations).

government never contended that the leaks were improper. *E.g.*, Tr. 567–68, 574, 591, 602, 695-96, 703–04, 721, 1510, 1644, 2512; *see* Gov't App. Br. 62 (describing leaks as "authorized" and coming from "legitimate sources"). The leaks were consistent with Dell's "targeting" program that was designed to build institutional relationships with analysts at firms that might invest in Dell, Tr. 2901–02, or were made to condition the market to unexpected news, Tr. 2949–50; Tr. 2897–98. The court of appeals found that the extensive evidence of Dell's deliberate selective disclosures undermined any inference that the defendants' receipt of such information was inherently suspicious. Pet. App. 33a.

b. *NVIDIA*. As with Dell, Newman was multiple steps removed from the NVIDIA source, Chris Choi. Choi, who worked in NVIDIA's finance department, passed information to Hyung Lim, whom he knew from church. Tr. 3032. Lim gave the information to Danny Kuo, an analyst at Whittier Trust, who gave the information to Tortora, who gave the information to Newman. Tr. 61–62. Choi, the insider who, according to the government, engaged in insider trading for personal gain, was never criminally charged. Pet. App. 5a.

As to why Choi provided information to Lim, Choi did not testify, and his motivation was not apparent from the testimony of others. Lim testified that he knew Choi from church and that they attended church activities together and occasionally had lunch. Tr. 3032–33. While Lim acknowledged having told Choi that he traded NVIDIA stock, Lim denied telling Choi that the reason he wanted the information was to trade. Tr. 3068. And Lim did not actually trade NVIDIA in late April 2009, which is the time period

relevant to Newman's alleged insider trading. Tr. 3078. Lim testified that he never gave "anything" to Choi in exchange for the information he received. Tr. 3067–68.

There was no evidence that Tortora had any understanding of the relationship between Choi and Lim, or why Choi provided information to Lim, and Tortora testified that he did not know whether Choi received any kind of personal benefit. Tr. 994. If Tortora, through whom the NVIDIA-related information flowed to Newman, did not know these facts, Newman could not have known them either. The government cites an email in which Kuo said he received certain NVIDIA information "through a friend." Pet. 9. This refers to Kuo being friends with Lim.[8] Kuo said nothing about the relationship between the insider, Choi, and the tippee, Lim. There was no evidence that Newman knew anything about that relationship.

The NVIDIA information that originated with Choi — like the Dell information — was often incorrect. *E.g.*, Tr. 995–98; A-2109 (Choi's information on non-GAAP gross margin was 30% off). Moreover, like Dell, the evidence at trial showed that NVIDIA selectively disclosed accurate, confidential information to analysts in advance of the company's earnings announcements.[9] The government witnesses

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[8] The government also cites trial evidence that Kuo paid money to Lim. Pet. 8. But these payments were well after Lim gave the relevant information to Kuo, Tr. 3074–75, and, in any event, there was no evidence that anything was paid to the insider, Choi, for providing information.

[9] *E.g.*, A-2417 (NVIDIA IR told a Diamondback consultant that "09 [would] suck" and that "[m]argins have been hit by collapse of workstation demand . . . higher mix to chipsets, [and] drop in [desktop] margins."); A-2419 (head of NVIDIA IR "[d]id not

testified that there was nothing improper about these disclosures. Tr. 1006–07; Tr. 1043.

2. At the close of the government's case, Newman moved for a judgment of acquittal on the grounds that the evidence of a personal benefit to the tippers was insufficient, as was the evidence that Newman knew of any personal benefit. Tr. 3337. Newman also requested a jury instruction including knowledge of the personal benefit as an element of the offense. Tr. 3594–605; A-200–01, 203. The trial court declined to give the requested charge, Tr. 3604–05, and denied Newman's motion for acquittal, A-2947.

3. On appeal, the Second Circuit made several threshold observations regarding the unusual nature of the government's prosecution. First, the court noted that the government charged hedge fund managers several steps removed from the original sources of information, but did not charge the insiders themselves. Pet. App. 5a. *See also Dirks*, 463 U.S. at 666 n.27 (noting that insider was not charged). Second, the court observed that "the Government has not cited, nor have we found, a single case in which tippees as remote as Newman and Chiasson have been held criminally liable for insider trading," Pet. App. 16a, a proposition that the government has never disputed.

On the merits, the court first addressed the legal question of whether knowledge of the personal benefit is required, finding that such knowledge is required. Pet. App. 19a. The court further determined that the

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flinch" when an analyst asked about a specific revenue number for the coming quarter); Tr. 1008, 1012–13 (Tortora testimony that prior to NVIDIA's earnings announcement in May 2009, it was well known in the investment community that NVIDIA would post a significant revenue increase over the prior quarter).

erroneous jury instruction was not harmless because the defendants elicited evidence that they were unaware of any benefit. Pet. App. 23a. The remainder of the court's opinion addressed the sufficiency of the evidence.

a. The court first addressed whether the evidence of a personal benefit was sufficient. The court readily acknowledged that a personal benefit does not have to be financial or even tangible, but can consist of "the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend." Pet. App. 25a (quoting *United States* v. *Jiau*, 734 F.3d 147, 153 (2d Cir. 2013) (quoting *Dirks*, 463 U.S. at 664)). The court then observed that proof of the "mere fact of friendship", especially of a casual or social nature, is not sufficient to meet this standard. Pet. App. 25a. Instead, where the government seeks an inference that an insider intended to provide a gift based on the relationship between the insider and tippee, the government must present evidence that the relationship is "meaningfully close" so as to generate "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." Pet. App. 26a. The court determined that the evidence in this case was insufficient, *i.e.* that Goyal's "career advice" to Ray was not consequential, and that Choi and Lim were no more than "casual acquaintances." Pet. App. 27a–28a.

b. The court next addressed the sufficiency of the evidence regarding the defendants' knowledge of the personal benefit. The court found the trial evidence insufficient here as well, explaining that Newman, and even Tortora, "knew next to nothing" about the insiders or whether they received any benefits. 28a–29a. The court addressed this issue as a separate and

independent basis for its decision. The court began its analysis by assuming that the trial evidence *did* warrant an inference of a personal benefit. Pet. App. 28a ("Even assuming that the scant evidence described above was sufficient to permit the inference of a personal benefit . . ."). In other words, the court's sufficiency analysis did not ask whether the defendants were aware of a "meaningfully close" personal relationship that gave rise to an objective and consequential exchange; instead, the court assumed that the relationships between the tippers and tippees and the career advice (in the case of Dell) were sufficient to constitute personal benefits and, even then, found the knowledge element lacking.

c. In weighing the evidence of knowledge, the court considered and rejected the same argument that the government now suggests the Second Circuit should consider on remand, that the specificity of the information was sufficient to prove the defendants' understanding that the disclosure was made for personal gain. Pet. 6, 30. In this regard, the court found persuasive the extensive trial evidence that Dell and NVIDIA employees routinely leaked accurate earnings information for non-personal reasons, and that securities analysts were able to make highly accurate predictions of earnings without recourse to improperly obtained information. Pet. App. 30a–32a.

4. The United States petitioned for *en banc* review, which the Second Circuit denied without dissent. Pet. App. 35a–36a.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I. RESOLUTION OF THE QUESTION PRESENTED WILL NOT AFFECT THE OUTCOME OF THE CASE

1. The legal issue that the Second Circuit addressed was whether insider trading liability requires a tippee to know that a tipper received a personal benefit. The first part of the Second Circuit's opinion addresses that question, answering it in the affirmative. Pet. App. 21a. The rest of the decision comes under the heading "Insufficiency of the Evidence", Pet. App. 23a, and is an analysis of whether the trial evidence satisfied the applicable legal standards, not the articulation of new legal standards. *See* Pet. App. 25a–26a (citing existing Supreme Court and Second Circuit precedent for the definition of personal benefit).

The Second Circuit's sufficiency discussion itself has two prongs. First, the court determined that the evidence of a personal benefit to the tippers was insufficient. Pet. App. 27a–28a. Second, the court held that "[e]ven assuming that the scant evidence described above was sufficient to permit the inference of a personal benefit . . . the Government presented *absolutely no testimony or other evidence* that Newman and Chiasson *knew* . . . that [the] insiders received any benefit in exchange for such disclosures, or even that Newman and Chiasson consciously avoided learning these facts." Pet. App. 28a (emphasis added). In other words, even accepting the government's theory that the personal relationships between the tippers and tippees could support an inference of a personal benefit, Newman did not know anything about those relationships, let alone that any benefit was provided

in the form of the insiders gifting information to their friends, the receipt of career advice, or otherwise.

2. The government argues that the Supreme Court should correct the Second Circuit's "redefinition" of what constitutes a personal benefit and then remand for the Second Circuit to reconsider under the correct legal standard. Pet. 29–31. But the question presented in the Petition is limited to the evidentiary contours of the personal benefit requirement, and does not touch on the Second Circuit's independent holdings that a tippee must know of the benefit and that the evidence was insufficient to prove such knowledge. A remand would therefore be pointless.

The court of appeals said that *even if* the facts proved by the government were deemed sufficient to establish a personal benefit, the defendants had no knowledge of the relevant facts. Pet. App. 28a. The Second Circuit's sufficiency determination was not premised on whether the defendants knew of a "meaningfully close" relationship between tipper and tippee, or whether the insiders received anything "objective, consequential" or "pecuniary." *See* Pet. 29. Rather, the court determined, as a factual matter, that the defendants "knew next to nothing" about the insiders, what relationship they may have had with the tippees, or whether they received *anything at all* for disclosing information. Pet. App. 29a. There is no decision this Court could render on the question presented that would change the result of this case.

The government argues that, on remand, the Second Circuit should consider that the specificity of the information provided to the defendants establishes that they consciously avoided confirming that it was disclosed by insiders for a personal advantage. Pet. 30-31. The Second Circuit already rejected this same

factual argument. The court reasoned that Dell and NVIDIA routinely leaked this kind of information, indicating that a portfolio manager at the end of a chain of communications could well believe this was a deliberate leak to assist the company rather than an unauthorized disclosure made for personal gain. Pet. App. 31a. Moreover, "Goyal testified that he frequently spoke to internal relations departments to run his model by them and ask whether his assumptions were 'too high or too low' or in the 'ball park,' which suggests analysts routinely updated numbers in advance of the earnings announcements." *Id.* There is no basis to revisit the court of appeals' well-supported factual findings in this regard.

3. In contrast to this case, there are other pending cases in the lower courts in which the definition of the personal benefit *is* outcome determinative. Knowledge of the benefit is undisputed in those cases because the defendant is the insider or a first level tippee who interacted directly with the insider.[10] In such circumstances, the defendant clearly knew of the benefit if there was one, since the defendant was the person who gave or received the benefit. If this Court considers it important to address the type of evidence from which a personal benefit can be inferred, *but see*

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[10] *See, e.g.*, *United States v. Riley*, No. 15-1541 (2d Cir.) (appeal docketed May 8, 2015) (defendant is insider); *United States v. Martoma*, No. 14-3599 (2d Cir.) (appeal docketed Sept. 19, 2014) (defendant is first level tippee who communicated directly with tipper); *SEC v. Andrade*, No. 15-CV-00231 (D.R.I. July 22, 2015) (defendant is insider); *United States v. McPhail*, Crim. A. No. 14-10201 (D. Mass. Mar. 2, 2015) (defendant is misappropriator); *United States v. Mazzo*, No. 12-cr-00269 (C.D. Cal. Dec. 19. 2014), (defendants are insider and first-level tippee); *SEC v. Holley*, No. 11-cv-00205 (D.N.J. Feb. 2, 2015) (defendant is insider).

infra at 20, then one of those cases would be far more suitable for review than this one.

II. THE SECOND CIRCUIT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *DIRKS* v. *SEC*

The government acknowledges, as it must, that the Second Circuit cited as precedent the very language of *Dirks* that the government says was not followed. Pet. 11–12. Far from "reinterpreting" the holding in *Dirks*, the Second Circuit conscientiously applied it.

1. The Second Circuit's discussion of personal benefit occurs within its analysis of the sufficiency of the evidence. Pet. App. 25a. Consistent with that context, the court weighed the kind of evidence that would support an inference of personal benefit under the legal standards established by *Dirks*, including the gift theory. Pet. App. 26a. Such an analysis of permissible inferences is standard fare for courts applying established legal rules, and does not mean that the court was "reinterpreting" the rule itself. The court fully endorsed the gift theory, but held – as an evidentiary matter – that where one tippee testified that his relationship with the insider was "not very close or personal", Tr. 1411, and the other tipper and tippee were "merely casual acquaintances," Pet. App. 28a, the bare fact that the tippers and tippees knew each other did not support an inference of an intention to provide a gift. Similarly, the court found that Goyal's ineffectual career advice to Ray was not of sufficient consequence to satisfy the *quid pro quo* prong of the benefit analysis. Pet. App. 27a.

2. This Court's review is typically limited to important legal questions, not fact-specific sufficiency determinations. But even if this Court were to

consider the sufficiency issue here, it is clear that the Second Circuit's refusal to accept the mere fact of friendship as *per se* evidence that a tipper intended to bestow a gift on a tippee is consistent with, and indeed compelled by, *Dirks*.

a. *Dirks* recognized that "[d]etermining whether an insider personally benefits from a particular disclosure, a question of fact, will not always be easy for courts." 463 U.S. at 664. By characterizing the inquiry as "a question of fact" the Court appreciated that lower courts would need to formulate rules for weighing the evidence in the particular circumstances before them. That is exactly what the Second Circuit did here. The court of appeals' assessment of what kind of proof would support a factual inference is the type of evidence-based analysis that *Dirks* recognized would be within the province of the lower courts to develop.

b. *Dirks* also recognized that a personal benefit in the form of a gift is not simply a matter of whether a tipper gives inside information to a friend or relative. The Court repeatedly emphasized that it is the *purpose* of the disclosure that is determinative. *E.g.* 463 U.S. at 662 ("Whether disclosure is a breach of duty therefore depends in large part on *the purpose* of the disclosure.") (emphasis added); *id*. at 664 (a benefit may be proved by objective circumstances suggesting "*an intention* to benefit the particular recipient") (emphasis added); *id.* at 667 ("The tippers received no monetary or personal benefit for revealing Equity Funding's secrets, nor was *their purpose* to make a gift of valuable information to Dirks.") (emphasis added). The Court's focus on the purpose of a disclosure would be undermined if a jury were permitted to infer a personal benefit from the bare fact that two people

knew each other. That is because it is not reasonable to presume that the purpose of communicating financial information between casual acquaintances is to provide a gift. Casual acquaintances typically do not give each other the kind of gifts contemplated by *Dirks, i.e.* the equivalent of the insider trading stock and gifting the proceeds to someone else. On the other hand gifts, especially of money, are much more likely among people who take a deep personal interest in each other's lives, such as close friends or relatives. The Second Circuit's evidentiary formulation is thus consistent with the gift theory as articulated in *Dirks* because it limits the inference of an intentional gift of trading proceeds to circumstances that reasonably support that conclusion.

c. "It is essential," this Court said in *Dirks*, "to have a guiding principle for those whose daily activities must be limited and instructed by the SEC's inside-trading rules." 463 U.S. at 664. Such a bright line, in the Court's view, requires "objective criteria" so that participants in the securities markets will know whether their conduct is improper. *Id.* at 663. The Second Circuit followed this guidance to a tee in describing what kind of evidence may support an inference of gift-giving. Trading professionals will not find it difficult to know whether they have a "close personal relationship" that could trigger an inference under the Second Circuit's formulation. The government, on the other hand, would allow an inference of a benefit any time the tipper and tippee were "friends," a term that the government does not define and which provides little objective guidance to those who must make critical decisions about their daily interactions.

3. The government misreads the Second Circuit's decision, arguing that the court's use of the word

"exchange" means that "an insider cannot be liable on a gift theory unless he receives something from the recipient of information 'that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature.'" Pet. 19. But the "exchange" in a gift-giving scenario is that the tippee receives valuable information while the tipper receives the satisfaction of fulfilling his purpose of helping a close relative or friend. That is the understanding of "exchange" advocated by the government itself in the Ninth Circuit when it argued that a tipper improperly disclosed information to his brother "*in exchange* for the personal benefit of appeasing and benefiting his brother." *See* U.S. Supp. Br. 8, *Salman*, No. 14-10204 (9th Cir. Apr. 30, 2015), ECF No. 40-1 (emphasis added). The Second Circuit recognized the same logic and did *not* say that the tipper must himself receive a pecuniary-like benefit. Pet. App. 25a ("We have observed that '[p]ersonal benefit is broadly defined to include not only pecuniary gain, but also, *inter alia* . . . the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend.'") (quoting *Jiau*, 734 F.3d at 153). Rather, the Second Circuit held that when the government relies on the nature of the relationship between the tipper and the tippee to establish a personal benefit under a gift theory, that relationship must be sufficiently close that a jury can reasonably infer that the tipper *intended* to make such a gift of profits and therefore received the satisfaction of fulfilling his intention.

None of the courts to have considered the personal benefit issue in light of *Newman* has interpreted the Second Circuit's decision to require a pecuniary benefit to the tipper, or to preclude liability on the basis of a unilateral gift to a close relative or friend.

E.g. Salman, 2015 WL 4068903, at *6 (*Newman* recognized that personal benefit is broadly defined to include making a gift to a trading relative or friend); *United States* v. *Whitman*, No. 12-cr-125, 2015 WL 4506507, at *3 & n.5 (S.D.N.Y. July 22, 2015) (*Newman* addressed what inferences could be drawn from facts; the Second Circuit "could not, and did not, overturn any prior precedent regarding the meaning of 'personal benefit'"); *United States* v. *Gupta*, No. 11-cr-907-JSR, 2015 WL 4036158, at *3 (S.D.N.Y. July 2, 2015) (defense contention that *Newman* requires a pecuniary benefit to the tipper "is not a fair reading since it would contravene the plain language of *Dirks, Jiau*, and *Newman* itself"); *United States* v. *Riley*, No. 13-cr-339, 2015 WL 891675, at *4 (S.D.N.Y. Mar. 3, 2015) (reading *Newman* to include the benefit one would obtain from making a gift of confidential information to a trading relative or friend).

The trio of post-*Newman* insider trading cases decided by Judge Rakoff (the author of the Ninth Circuit's *Salman* decision, which the government erroneously says conflicts with *Newman*, *see infra* at 26) is particularly instructive. In *Gupta*, the defendant moved to vacate his conviction, arguing that *Newman* required a pecuniary or similarly valuable benefit to the tipper. 2015 WL 4036158 at *2. Judge Rakoff rejected this premise, explaining that *Newman* was concerned only with what evidence could reasonably support an inference of personal benefit, and that the Second Circuit's own words made clear that "a tipper's intention to benefit the tippee is sufficient to satisfy the benefit requirement so far as the tipper is concerned, and no *quid pro quo* is required." *Id.* at *3. In *Whitman*, Judge Rakoff again rejected a *Newman*-based collateral attack, explaining that *Newman* only

discussed what evidence would support an inference of personal benefit, and did not purport to change the applicable legal standard as set forth in *Dirks*. 2015 WL 4506507 at *3 & n.5. And in *Salman*, Judge Rakoff — this time sitting by designation on the Ninth Circuit — affirmed the defendant's insider trading conviction on a gift theory and rejected the defendant's reading of *Newman*, explaining that "*Newman* itself recognized that the personal benefit is broadly defined to include not only pecuniary gain but also . . . the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend." 2015 WL 4068903 at *6 (internal quotations omitted).

Even the SEC interprets *Newman* to permit a finding of personal benefit under the gifting theory. In *SEC* v. *Holley*, No. 11-cv-00205 (D.N.J.), the defendant, the former chairman of a publicly traded company, gave confidential company information to his cousin and a friend, but received no payment in return. The defendant consented to a final judgment of liability, but then moved to set aside the judgment in light of *Newman* on the grounds that he received no personal benefit. The SEC opposed the motion, arguing that the defendant's gifts of information to his cousin and friend satisfied the personal benefit requirement. *See* Mem. of SEC In Opp'n to Def. Holley's Mot. to Vacate or Set Aside Consent J. 11–12, *Holley*, No. 11-cv-00205 (D.N.J. Feb. 13, 2015) ECF No. 56. The SEC explained: "*Newman* did not purport to distinguish or limit *Dirks*. Indeed, the reasoning of the panel shows that it *expressly recognized that a gift of trading profits constitutes a 'personal benefit.'*" *Id.* at 10 (emphasis added). The SEC concluded that "[a] straightforward reading of *Newman* shows that the

decision in no way changed the legality of Defendant's conduct." *Id.* at 12.

It is apparent, then, that the government is proposing a conflict with *Dirks* based on a reading of *Newman* that no one else shares. This Court's decision to grant review should be based on how *Newman* is actually being applied by the courts, and not on the unfounded and exaggerated fears of prosecutors.

III. THE SECOND CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS

The Second Circuit's decision does not conflict with either the Ninth Circuit's decision in *Salman* or the Seventh Circuit's decision in *Maio*.

1. In *Salman* the Ninth Circuit found that a tipper who made a gift of inside information to his brother, with whom he "enjoyed a close and mutually beneficial relationship" satisfied the personal benefit test in *Dirks*. 2015 WL 4068903 at *2. The Ninth Circuit then made the hypothetical observation that *if* the *Newman* decision were interpreted to preclude the gift theory of personal benefit (*i.e.* to require a pecuniary benefit to the tipper), then the Ninth Circuit would decline to follow it. *Id.* at *6. This observation was entirely unnecessary to the decision; in fact, the Ninth Circuit did not interpret *Newman* that way, explaining that "*Newman* itself recognized" that the personal benefit requirement could be satisfied by "the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend." *Id.* (quoting *Newman*, 773 F.3d at 452). And Judge Rakoff, the author of *Salman*, issued a decision less than three weeks later in which he said that *Newman* held only

that an inference of gift-giving may not be based on "casual friendship" alone. *Whitman*, 2015 WL 4506057 at *3 n.5. According to Judge Rakoff, "*Newman* could not, and did not, overturn any prior precedent regarding the meaning of 'personal benefit'". *Id.* at *3. Judge Rakoff's view is consistent with every other court to address the issue, each of which has interpreted *Newman* as preserving the gifting theory of personal benefit. *See supra* at 23.

Moreover, it is clear that the facts in *Salman* would yield the same result in the Second Circuit. The tipper in *Salman* testified that he "love[d] [his] brother very much" and that he gave the information in order to "benefit him" and to "fulfill [ ] whatever needs he had." *Salman*, 2015 WL 4068903 at *2. These facts easily satisfy the Second Circuit's requirement of a "meaningfully close personal relationship" and an intention to benefit the tippee. *Id.* at *5. Thus, the hypothetical "if" in *Salman* remains purely hypothetical; there is no actual conflict.

2. In *Maio*, the Seventh Circuit found a personal benefit where the insider was a close personal friend of the tippee, they travelled together, regularly attended each other's family weddings, and had a history of gift-giving, including a $250,000 interest-free loan that the insider gave the tippee. 51 F.3d at 627. On these facts, the court held that "the inference that [the insider's] disclosure was an improper gift of confidential corporate information is unassailable." *Id.* at 633. The government asserts a conflict on the grounds that the Seventh Circuit did not explicitly condition the gift inference on additional facts such as a "meaningfully close" relationship. Pet. 24. But the Seventh Circuit had no need for further elaboration because the facts already demonstrated the intimacy

of the friendship and the history of financial entanglement, from which the gift-giving inference was "unassailable." By contrast, the Second Circuit required additional facts to support a gift-giving inference in *Newman* because the personal relationships were so thin. That two courts, faced with entirely different facts, came to different results as to what factual inferences could appropriately be drawn from the evidence presented is not a conflict.

IV. THE SECOND CIRCUIT'S DECISION WILL NOT UNDERMINE EFFORTS TO PROSECUTE INSIDER TRADING

The government argues that the Second Circuit's decision will "impede" its enforcement efforts because it can no longer pursue cases on a gifting theory of personal benefit unless the insider "stood to obtain money (or something of 'similar value') via an 'exchange.'" Pet. 32. As explained above, that is not what *Newman* says, and no court has interpreted *Newman* so broadly. *See supra* at 23. In fact, in every case of which we are aware in which the government has litigated *Newman*-based challenges to the personal benefit requirement, the government has prevailed. *Salman*, 2015 WL 4068903 (affirming conviction on appeal); *SEC* v. *Conradt*, No. 12-cv-8676, 2015 WL 4486234 (S.D.N.Y. July 23, 2015) (denying motions to vacate settlement agreements and consent judgments); *Whitman*, 2015 WL 4506507 (denying 28 U.S.C. § 2255 motion); *Gupta*, 2015 WL 4036158 (denying 28 U.S.C. § 2255 motion); *SEC* v. *Jafar*, No. 13-cv-4645, 2015 WL 3604228 (S.D.N.Y. June 8, 2015) (denying motion to dismiss SEC enforcement action); *SEC* v. *Payton*, No. 14-cv-4644, 2015 WL 1538454 (S.D.N.Y. Apr. 6, 2015) (denying motion to dismiss SEC enforcement action); *Riley*, 2015 WL 891675

(denying post-conviction motion for judgment of acquittal or, in the alternative, for a new trial); *McPhail*, Crim. A. No. 14-10201, 2015 WL 2226249 (D. Mass. May 12, 2015) (denying motions to dismiss indictment); *SEC* v. *Sabrdaran*, No. 14-cv-04825, 2015 WL 901352, at *15–16 (N.D. Cal. Mar. 2, 2015) (denying motion to dismiss SEC enforcement action); *Mazzo*, No. 12-cr-00269 (C.D. Cal. Jan. 23. 2015), ECF No. 312 (denying motions to dismiss indictment).

The only case the government cites to the contrary, albeit in a footnote, is *United States* v. *Conradt*, No. 12-cr-887, 2015 WL 480419 (S.D.N.Y. Jan. 22, 2015). Pet. 32 n.8. In that case, which was brought under the misappropriation theory of insider trading, the district court advised the parties shortly after the *Newman* decision that it was inclined to vacate the defendants' guilty pleas because the court "was skeptical that the pleas were sufficient in light of Newman's clarification of the personal benefit *and tippee knowledge requirements* of tipping liability for insider trading." *Id.* at *1 (emphasis added). The government argued that *Newman* did not apply to misappropriation cases. *Id.* The court rejected this argument and vacated the pleas, *id.*, after which the government voluntarily dismissed the indictment without further litigating the issue of personal benefit. Nolle Prosequi at 1, *Conradt*, No. 12-cr-887 (S.D.N.Y. Feb. 3, 2015), ECF No. 170. However, in a parallel civil proceeding against the same defendants, the SEC did litigate the issue and won a ruling that its complaint sufficiently alleged a personal benefit where the tipper gave information to his roommate with whom he shared "intertwined" expenses, but there was no payment in exchange for the information. *Payton*, 2015 WL 1538454, at *5. Since the government prevailed on the

personal benefit issue when it was actually litigated, *Conradt* belongs in the government's "won" column.

The foregoing cases include fact patterns similar to the scenario that the government asserts it can no longer pursue, *i.e.* gifts to friends and relatives with no money or "similar" value provided in "exchange". *E.g.*, *Salman*, 2015 WL 4068903, at *6 (tipper gave information to brother and received nothing tangible in return); *Payton*, 2015 WL 1538454, at *5 (tipper gave information to roommate with whom he had "intertwined" finances; court found intention to benefit roommate as well as *quid pro quo* exchange); *Riley*, 2015 WL 891675, at *6–7 (tipper gave information to friend and received help with a side business, investment advice, and career advice, but no money or tangible value in return). Actual experience therefore establishes that the government has not had any difficulty pursuing insider trading cases, including those in which the tippers received no money or other pecuniary value in exchange for their tips.

Rather than address its track record in defeating *Newman*-based challenges in court, the government resorts to the argument that the issue presented is important because it has been the subject of media attention, "much of it critical." Pet. 25 n.5. Apart from the fact that this Court generally does not base its certiorari decisions on media coverage, the government's argument is disingenuous because the government itself has stoked the media reaction with unsupported statements to the effect that *Newman* will undermine prosecutorial initiatives. For example, the very first article cited by the government in its Petition quotes a statement by the U.S. Attorney for the Southern District of New York. *See* Ben Protess & Matthew Goldstein, *Appeals Court Deals Setback to*

Crackdown on Insider Trading, N.Y. Times, at A1 (Dec. 11, 2014) (quoting U.S. Attorney as saying *Newman* "will limit the ability to prosecute people who trade on leaked inside information."). It is hardly persuasive for the government to rely on media articles which in turn rely on the government itself for a statement that is not backed up with any actual example of a government defeat resulting from *Newman*.

Finally, the government relies on policy arguments regarding the "integrity" and "efficiency" of the securities markets. Pet. 27. The government's view of what makes good policy is, of course, only one opinion and respected commentators have reached the opposite conclusion. *See, e.g.*, Adam Pritchard, *History Says Newman Is Faithful To Dirks*, Law360 (Aug. 14, 2014) ("With apologies to Samuel Johnson, investor confidence is the last refuge of a securities regulator. The notion that investors will flee the stock markets because tippees three or four steps down a chain from a corporate insider may stumble across material, nonpublic information requires an active imagination, to say the least. The government's fanciful theory is premised on a model of a paranoid investor, not a reasonable one."). In any event, the government's effort to advance its policy agenda would be better directed to Congress, which can and has considered legislation defining the elements of insider trading. Until Congress acts, the personal benefit requirement as articulated in *Dirks* is the law of the land. The government's eagerness to ease its burden in prosecuting insider trading cases — even if couched in terms of advancing market integrity and efficiency — is no reason for this Court to grant review.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 24, 2015