

**BLURRING THE EDGES OF CORPORATE LAW:
INSIDER TRADING AND THE *MARTOMA* DECISION**

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I. Introduction

In its recent decision, the Second Circuit in *United States v. Martoma*¹ overturned key aspects of its decision in *United States v. Newman*.² Justifying this departure based on the Supreme Court's ruling in *Salman v. United States*,³ the majority in *Martoma* held that there is no requirement to prove a meaningfully close personal relationship in order to find liability for insider trading under Rule 10b-5.⁴ While *Martoma* ostensibly changed the test for tippee liability, this Article argues that the substantive outcome for most insider trading cases is likely to remain unaffected. However, because *Martoma* expanded the scope of tippee liability, more claims can now get into court. This expansion should be resisted under the traditional *Santa Fe* doctrine⁵ because it threatens to blur the distinction between corporate law and securities law. This Article first provides a quick roadmap to insider trading law, then dives into an analysis of *Martoma* and the decisions immediately preceding it, and concludes by offering perspectives on what the likely impact of the decision will be.

II. Insider Trading and 10b-5 Actions

Insider trading is governed by section 10(b) of the Securities Exchange Act of 1934 (the 1934 Act),⁶ implemented by the Securities and Exchange Commission (SEC) as Securities Exchange Act Rule 10b-5 (Rule 10b-5);⁷ section 16 of the 1934 Act;⁸ Regulation Fair Disclosure;⁹

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¹ 869 F.3d 58 (2d Cir. 2017).

² 773 F.3d 438 (2d Cir. 2014).

³ 137 S. Ct. 420 (2016).

⁴ See 869 F.3d at 61.

⁵ See *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479–80 (1977).

⁶ 15 U.S.C. § 78j(b) (2012).

⁷ 17 C.F.R. § 240.10b-5 (2017).

⁸ 15 U.S.C. § 78p.

⁹ 17 C.F.R. § 243.100 (2017).

and Rule 14e-3.¹⁰ Section 16 primarily details disclosure requirements and short-swing profit liability of statutory insiders.¹¹ Regulation Fair Disclosure governs insider tipping.¹² Finally, Rule 14e-3 governs trading in the context of a tender offer.¹³ Given that the *Martoma* decision revolved around the scope of section 10(b) and Rule 10b-5,¹⁴ only section 10(b) and Rule 10b-5 shall be dealt with in depth in this piece.

Rule 10b-5 was not originally enacted to prohibit insider trading,¹⁵ but rather was (and still is) the basis for bringing general actions for securities fraud and deceit under its “catchall” provisions.¹⁶ It was only in the case of *In re Cady, Roberts & Co.*¹⁷ that the SEC laid down a straightforward rule to bring specific trading based on material, non-public information within the ambit of Rule 10b-5 fraud. After *Cady, Roberts*, individuals had to either “disclose material facts which are known to [the insiders] by virtue of their position but which are not known to persons with whom they deal and which, if known, would affect their investment judgment”¹⁸ or “forego the transaction.”¹⁹ This boils down to a simple, oft repeated mantra—“disclose or abstain.”²⁰

Over the years, courts have interpreted the rule articulated in *Cady, Roberts* to capture a wider spectrum of activity as running afoul of the insider trading prohibition under Rule 10b-5.²¹ This Article will focus on what is understood by the term “insiders” and precisely which class of people can be held liable under Rule 10b-5.

In 1968, basing its decision on the equal access theory, the Second Circuit in *SEC v. Texas Gulf Sulphur* determined that “insiders” included any participant in the market, not merely corporate insiders.²² Rejecting this approach in favor of a relationship-based theory of liability, the Supreme Court in *Chiarella v. United States* held that mere materiality is not enough to generate liability from nondisclosure.²³ In other words, a duty to abstain from trading arises only

¹⁰ 17 C.F.R. § 240.14e-3 (2017).

¹¹ See 15 U.S.C. § 78p(a)–(b).

¹² See 17 C.F.R. § 243.100(a).

¹³ See *id.* § 240.14e-3(a).

¹⁴ See *United States v. Martoma*, 869 F.3d 58, 63 (2d Cir. 2017).

¹⁵ See Richard W. Painter et al., *Don't Ask, Just Tell: Insider Trading After United States v. O'Hagan*, 84 VA. L. REV. 153, 160 (1998) (“[I]t seems unlikely that [Congress] specifically envisioned insider trading as coming within the proscriptions of Section 10(b).”).

¹⁶ See *Chiarella v. United States*, 445 U.S. 222, 234–235 (1980).

¹⁷ *Cady, Roberts & Co.*, Exchange Act Release No. 6668, 40 SEC Docket 907 (Nov. 8, 1961).

¹⁸ *Id.* at 911.

¹⁹ *Id.*

²⁰ *Chiarella*, 445 U.S. at 227.

²¹ A.C. Pritchard, *United States v. O'Hagan: Agency Law and Justice Powell's Legacy for the Law of Insider Trading*, 78 B.U. L. REV. 13, 14–17 (1998) (affirming that most insider trading law is judicially created and that the misappropriation theory under *O'Hagan* captures a wider spectrum of activity than classical theories).

²² See 401 F.2d 833, 848 (2d Cir. 1968).

²³ 445 U.S. at 235.

if trading constitutes a breach of a “fiduciary or other similar relation of trust and confidence between [the trader and the shareholders of the company].”²⁴

Three years later, the Supreme Court recognized the need to restrict trading done by outsiders (“tippees”) on the basis of information received from insiders,²⁵ and thus held in *Dirks v. SEC* that a tippee would assume a fiduciary duty to shareholders not to trade, but only when (a) the insider breached her fiduciary duty in giving the tip and (b) when the tippee “[knew] or should [have known] that there [had] been a breach.”²⁶ It further indicated that the insider would need to “personally . . . benefit, directly or indirectly, from her disclosure . . . [which includes] pecuniary gain or a reputational benefit.”²⁷ It further suggested that in some cases temporary insiders, such as lawyers and accountants, may be held to owe fiduciary duties to shareholders by virtue of the insiders’ relationship with the company.²⁸

Over a decade later in *United States v. O’Hagan*,²⁹ the Supreme Court had to grapple with a circuit split between the Second, Seventh, and Ninth Circuits on one side and the Fourth and Eighth Circuits on the other.³⁰ The split was over, *inter alia*, whether the basis of attaching liability to insider trading under Rule 10b-5 could be expanded under the misappropriation theory, rather than limited by a strict interpretation of the relationship theory under *Chiarella*.³¹ The Supreme Court in *O’Hagan* approved the misappropriation theory, affirming that an individual commits fraud “in connection with” a securities transaction—and thereby violates section 10(b) and Rule 10b-5—if the individual misappropriates confidential information for securities-trading purposes in violation of the duty owed to the source of information.³² This is to say that whenever an individual uses confidential, material, and non-public information to make trades on *any* securities transaction, then that individual can face criminal liability that follows from a breach of section 10(b)³³ and Rule 10b-5.³⁴

We thus have three different approaches to insider trading that can be applied to regulation under Rule 10b-5: the equal access approach, the fiduciary-relationship approach, and the misappropriation approach. It is not at all clear that any of them are “complementary,” as suggested by the majority in *O’Hagan*,³⁵ but more on this below.

²⁴ *Id.* at 228.

²⁵ See *Dirks v. SEC*, 463 U.S. 646, 659 (1983).

²⁶ *Id.* at 660.

²⁷ *Id.* at 662–63.

²⁸ See *id.* at 655 n.14.

²⁹ 521 U.S. 642, 649 (1997).

³⁰ See Micah A. Acoba, *Insider Trading Jurisprudence After United States v. O’Hagan: A Restatement (Second) Of Torts § 551(2) Perspective*, 84 CORNELL L. REV. 1356, 1386 (1999).

³¹ See *id.* at 1390.

³² 521 U.S. at 652–53.

³³ 15 U.S.C. § 78ff (2012).

³⁴ 17 C.F.R. § 240.10b-5 (2017).

³⁵ *United States v. O’Hagan*, 521 U.S. 642, 652 (1997); see also Donald C. Langevoort, “*Fine Distinctions*” in *the Contemporary Law of Insider Trading*, 2013 COLUM. BUS. L. REV. 429, 430 (2013).

III. Tippee Liability and *Martoma*

In 2015, the Second Circuit elaborated on the standard of tippee liability established in *Dirks* by holding in *United States v. Newman* that “to the extent . . . that *Dirks* suggests that a personal benefit may be inferred from a personal relationship between the tipper and tippee . . . such an inference is impermissible in the absence of proof of a meaningfully close relationship” which “generates an exchange that . . . represents at least a potential gain of a pecuniary or similarly valuable nature.”³⁶

In 2016, however, the Supreme Court held in *Salman v. United States* that the reasoning in *Newman* was “inconsistent with *Dirks*” insofar as *Newman* held that there was a need to show potential gain of a pecuniary or similarly valuable nature.³⁷ The Supreme Court clarified that “the jury [could] infer that the tipper meant to provide the equivalent of a cash gift,” if there existed a close personal relationship,³⁸ essentially eroding the potential gain aspect of the test for tippee liability in *Newman*.

This brings us to the Second Circuit’s 2017 decision in *United States v. Martoma*.³⁹ Mathew Martoma was a portfolio manager at SAC Capital who obtained information about an experimental drug used to treat Alzheimer’s Disease from two doctors, both of whom owed duties to keep results of clinical trials confidential.⁴⁰ After learning about a determination from one of the doctors that the drug might not be as effective as a previous press release had suggested, SAC began to reduce its position in the securities of the companies manufacturing the drugs by entering into short-sale and options trades that would generate profit and reduce SAC’s losses if the companies’ share prices were to subsequently fall.⁴¹ It was only after this point in time that the results of the determination were made public and the companies’ share prices plummeted.⁴² The trades made before the presentation of the results led to SAC making \$80 million in profits and avoiding \$195 million in losses.⁴³ Martoma was convicted in February 2014,⁴⁴ before either *Newman* or *Salman* had been decided.⁴⁵ On appeal, in light of *Newman*, Martoma challenged whether the evidence presented at trial was sufficient to sustain the conviction⁴⁶ and whether the jury instruction to infer a personal benefit even in the absence of a meaningfully close personal relationship was correct.⁴⁷

³⁶ 773 F.3d 438, 452 (2d Cir. 2014).

³⁷ 137 S. Ct. 420, 428 (2016).

³⁸ *Id.*

³⁹ 869 F.3d 58 (2d Cir. 2015).

⁴⁰ *See id.* at 61–62.

⁴¹ *See id.* at 62.

⁴² *See id.*

⁴³ *See id.*

⁴⁴ *See id.* at 61, 64.

⁴⁵ *Newman* was decided on December 10, 2014, *see United States v. Newman*, 773 F.3d 438, 438 (2d Cir. 2014), and *Salman* was decided on December 6, 2016, *see Salman v. United States*, 137 S. Ct. 420, 420 (2016).

⁴⁶ *See Martoma*, 869 F.3d at 65–66.

⁴⁷ *See id.* at 67.

The majority (Chief Judge Robert Katzmann and Judge Denny Chin) rejected the sufficiency of evidence argument, citing the deferential test as affirmed in *United States v. Coplan*⁴⁸ and holding that “hav[ing] the opportunity to . . . yield future pecuniary gain” was sufficient to satisfy the personal benefit limb of the test.⁴⁹ They further recognized that the *Newman* “meaningfully close personal relationship” requirement could not be sustained in light of *Salman* and upheld the district court’s jury instruction.⁵⁰ The majority thus concluded that it was “possible to personally benefit from a disclosure of inside information as a gift to someone with whom one does not share a ‘meaningfully close relationship.’”⁵¹

IV. Tippee Liability: New-But-Same?

What the decision in *Martoma* does is simple: it retains the need for tippees to incur a personal benefit but abolishes the requirement to prove either a familial or other close personal relationship between the insider and the tippee from which the insider incurred some personal gain.⁵² In the abstract, this must be correct—there is no reason why deriving a personal gain from sharing insider information should be limited only to meaningfully close relationships. An insider *can* benefit, as the facts of *Martoma* clearly demonstrate, through the payment of money for services provided.⁵³ So *Newman*, on its face, seems wrongly decided.

But the *Newman* holding is subtler than that—a personal benefit cannot be inferred merely because of the existence of a personal relationship; a personal benefit can be inferred only when the relationship is a meaningfully close relationship. Otherwise, the personal benefit needs to be shown through other means. This is also consistent with *Dirks*, in which the Supreme Court held that a personal benefit could be satisfied in many ways, notably (but not only) through some pecuniary or reputational gain.⁵⁴

This, in fact, is the key argument made by Judge Rosemary Pooler in the dissenting opinion of *Martoma*.⁵⁵ She concluded that *Salman* only criticized the holding of *Newman* insofar as *Newman* required some further evidence of a pecuniary or similar benefit on the part of the tipper giving insider information to relatives or friends.⁵⁶ In other words, the Supreme Court in *Salman* did not reject the requirement of a meaningfully close personal relationship for an inference of personal benefit; rather, it merely restated that the personal benefit test needed to be satisfied and that one way of doing so was by showing a meaningfully close relationship.⁵⁷

⁴⁸ 703 F.3d 46, 62 (2d Cir. 2012).

⁴⁹ *Martoma*, 869 F.3d at 66–67 (quoting *United States v. Newman*, 773 F.3d 438, 452 (2d Cir. 2014)).

⁵⁰ *Id.* at 61, 67.

⁵¹ *Id.* at 71.

⁵² *See id.* at 61.

⁵³ *See id.* at 72.

⁵⁴ *Dirks v. SEC*, 463 U.S. 646, 663 (1983).

⁵⁵ 869 F.3d at 80 (Pooler, J., dissenting).

⁵⁶ *See id.*

⁵⁷ *See id.*

Moreover, a powerful argument for such a reading of *Salman* can be found in the Supreme Court's rejection of the government's argument that the "gift of confidential information to anyone" should be enough to prove securities fraud.⁵⁸ In rejecting this argument and reaffirming *Dirks*, the Supreme Court explicitly endorsed the restricted scope of tippee liability. On this basis, the holding of the majority in *Martoma* that *any* relationship of quid pro quo could lead to a breach of Rule 10b-5⁵⁹ may well be wrong.

One way of resolving this conundrum is by concluding that the courts have essentially talked past each other. On one hand, the majority in *Martoma* held that the "logic of the gift-giving analysis" in *Salman* meant that liability would follow if the insider shared confidential information "with the expectation that [the recipient] would trade" on the basis of the information or otherwise exploit it for her pecuniary gain.⁶⁰ On the other hand, the Court in *Salman* reaffirmed the need for a personal benefit test as laid down in *Dirks*.⁶¹ If personal benefit is the same thing as an expectation to trade, then both courts are in agreement.⁶² If not, then they are engaging in two different tests. What is important to note is that on the facts of *Dirks*, application of either of the tests would give the same answer. This is due to the nature of the relationship of the tipper and tippee in *Dirks*, where the tipper had no expectation that the tippee would trade on the information and consequently did not derive any personal benefit from sharing it.⁶³

The better way of resolving the two decisions would be to affirm that the test in *Martoma* is essentially the same test, just put in different words. While theoretically it appears that *Martoma* has widened the scope of who could be caught for insider trading,⁶⁴ it is not altogether clear whether the open-ended personal benefit test under *Dirks* and the expectation to trade test under *Martoma* will lead to meaningfully different outcomes. If the tipper is to incur some personal benefit—pecuniary, reputational, or otherwise—then there will (almost always) be a corresponding expectation that the tippee will trade on the information obtained.⁶⁵ Sharing with an analyst or reporter who is not expected to trade on the information, for example, would probably not cause the tipper to incur a personal benefit, or at least not a benefit that would be caught by the test in *Dirks*. Sharing between brothers, as was done in *Salman*, would likely be caught under the expectation to trade test just as much as the personal benefit test. The point is that the *Dirks* reference to a friend has been interpreted to set a low bar, and decisions pre- and

⁵⁸ *Salman v. United States*, 137 S. Ct. 420, 426–27 (2016).

⁵⁹ *See Martoma*, 869 F.3d at 67.

⁶⁰ *Id.* at 69 (quoting *Salman*, 137 S. Ct. at 428).

⁶¹ *See Salman*, 137 S. Ct. at 427.

⁶² Indeed, the expectation to trade requirement is not new and has been present in Second Circuit jurisprudence for a while. *See, e.g., United States v. Gansman*, 657 F.3d 85, 92 (2d Cir. 2011).

⁶³ *Compare Dirks v. SEC*, 463 U.S. 646, 667 (1983) ("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") *with Martoma*, 869 F.3d at 71 ("But our holding reaches only the insider who discloses inside information to someone *he* expects will trade on the information.").

⁶⁴ *See* 869 F.3d at 70.

⁶⁵ *See id.* at 70–71.

post-*Newman* would not have been decided differently under the *Martoma* expectation to trade test.⁶⁶

The real issue for 10b-5 liability thus is not the new-but-same test advocated by the Second Circuit. Contrary to the argument in the dissenting opinion by Judge Pooler,⁶⁷ the majority *did* add a new (or rather restated the old) limitation to “replace” the personal benefit rule: the expectation to trade test.⁶⁸ This restriction comes in the guise of the nature of the relationship between the tipper and tippee. In other words, while *Martoma* expanded the reach of insider trading regulation to reach any type of relationship, it also reigned in the reach of 10b-5 by noting that the nature of the relationship may well mean that no liability would attach to the sharing of the information.⁶⁹ In fact, the real issue, largely overlooked by the courts in *Newman*, *Salman*, and *Martoma*, is that the underlying theoretical approach of *Dirks* was eroded a long time ago by the Supreme Court in *O’Hagan*, and thus the courts’ heavy reliance on *Dirks* seems to be problematic.

V. The Misappropriation Theory

While the development of the law in tippee liability cases has been argued to be “circuitous and complex,”⁷⁰ the underlying test laid down by *Dirks* has remained unchanged. There are two *de minimis* elements that need to be shown: (a) breach of a fiduciary duty to the shareholders by the insider, and (b) knowledge (or recklessness) on the part of the tippee that such a breach had occurred.⁷¹

Newman,⁷² *Salman*,⁷³ and *Martoma*⁷⁴ all ostensibly affirm the logic of *Dirks* on this point. The court in *Newman*, when it affirmed the scienter requirement, also affirmed that the tippee’s liability derives “only” from the tipper’s breach.⁷⁵ The Court in *Salman* reasoned that the *Dirks* analysis generates liability when “a tipper breaches a fiduciary duty.”⁷⁶ The majority in *Martoma* stated that the legality of insider trading is “coextensive with a corporate insider’s fiduciary duty

⁶⁶ See, e.g., *SEC v. Obus*, 693 F.3d 276, 290 (2d Cir. 2012) (stating that the tipper and tippee were “college friends”); *United States v. Parigian*, 824 F.3d 5, 15 (1st Cir. 2016) (stating that the tipper and tippee were alleged to be “reasonably good friends” and that the tipper had an expectation that he would be treated to a golf outing and other “luxury items”). Both cases would likely have found that the expectation to trade test was satisfied.

⁶⁷ See *Martoma*, 869 F.3d at 75 (Pooler, J., dissenting).

⁶⁸ See *id.* at 70.

⁶⁹ See *id.* at 71.

⁷⁰ James J. Benjamin, Jr. et al., *U.S. v. Martoma: The Second Circuit reconsiders the personal benefit rule in insider trading cases and announces the partial abrogation of Newman*, WESTLAW J. WHITE COLLAR CRIME (Sept. 2017), <https://www.akingump.com/images/content/6/0/v2/60549/WLJ-WCC3201-BenjaminsAsaro.pdf>.

⁷¹ See *Martoma*, 869 F.3d at 63.

⁷² *United States v. Newman*, 773 F.3d 438, 447 (2d Cir. 2014).

⁷³ *Salman v. United States*, 137 S. Ct. 420, 427 (2016).

⁷⁴ 869 F.3d at 73.

⁷⁵ *Newman*, 773 F.3d at 447.

⁷⁶ *Salman*, 137 S. Ct. at 427.

of loyalty to the corporation.”⁷⁷ Hence, the starting point for tippee liability still remains “derivative from that of the insider’s duty,”⁷⁸ since “[i]n the absence of a breach of duty to shareholders by the insiders” there would be no derivative breach by a tippee.⁷⁹

It is likely that this theoretical dispute was not resolved in the three foregoing cases because the Second Circuit reaffirmed in *SEC v. Obus* that the elements of tipping liability are the same regardless of whether the tipper’s duty arises under the classical (fiduciary) theory or the misappropriation theory.⁸⁰ This is a straightforwardly problematic claim—the Supreme Court in *Santa Fe Industries v. Green* held that a distinction must be maintained between state corporate law and federal securities law and that not every case of alleged corporate misconduct could fall under Rule 10b-5.⁸¹ This, of course, is squarely at odds with the decision in *O’Hagan* because the misappropriation theory could render any participant in the market liable for securities fraud under Rule 10b-5, essentially making the breach of a fiduciary duty a criminal sanction against the backdrop of a securities transaction.⁸² Whether such a transformation of state fiduciary law should be permitted by judicial fiat is a question that is thrown into sharp relief against the language of *Martoma*.⁸³

Justice White warned in *Santa Fe* that “[t]here may well be a need for uniform federal fiduciary standards . . . [b]ut those standards should not be supplied by judicial extension” of securities law so as to “cover the corporate universe.”⁸⁴ *Martoma* may well end up not changing the substantive test, but its language does indeed cover the corporate universe. Imagine a company, which employs a doctor to conduct a series of research trials. The doctor hires three research assistants. One of the assistants is in a queue for lunch and meets a bystander. During their conversation, the assistant hints that the company is on the verge of a breakthrough. The bystander, riveted by the news, pays for the assistant’s lunch and goes home to tell her brother, who owns a different corporation, which is heavily invested in the stocks of competitors of the company. The brother’s corporation subsequently dumps its stock but does not invest in the company. The price of the company’s stock spikes, and the competitors’ shares lose value.

In this scenario, it is likely that the assistant does not owe fiduciary duties to the company (or its shareholders).⁸⁵ As such, on a literal application of the first limb of *Dirks*, the bystander can never be liable as a tippee since the fiduciary duty necessary to establish liability is not

⁷⁷ 869 F.3d at 73.

⁷⁸ *Dirks v. SEC*, 463 U.S. 646, 659 (1983).

⁷⁹ *Id.* at 667.

⁸⁰ *See SEC v. Obus*, 693 F.3d 276, 285–86 (2d Cir. 2014) (citing *United States v. Falcone*, 257 F.3d 226, 233 (2d Cir. 2001)).

⁸¹ *See Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479–80 (1977).

⁸² *See Acoba*, *supra* note 30, at 1406.

⁸³ *United States v. Martoma*, 869 F.3d 58, 70 (2d Cir. 2017) (“[W]e hold that 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.’”) (emphasis added).

⁸⁴ 430 U.S. at 479–80.

⁸⁵ This is assuming that the assistant is employed by the doctor and not employed by the company.

present.⁸⁶ Under the misappropriation theory, however, the assistant is misappropriating confidential information due to the existence of the fiduciary relationship between her and the doctor.⁸⁷ Since the assistant is now *deemed* to be in breach of a fiduciary duty owed to the company's shareholders, the bystander can be liable as a tippee.

The scenario above is not intended to show that the extension of the misappropriation theory to tippee liability is necessarily normatively wrong—in fact, it may strike us as a good thing to curtail any form of insider trading to ensure that nobody gets an unfair advantage over others⁸⁸ (notwithstanding the academic positions to the contrary).⁸⁹ The problem with the scenario is that it captures a huge range of activity, and even if the bystander is held not liable due to the nature of the relationship under the language of *Martoma*, this is still a question of substance and context that will require litigation to resolve. *Martoma* will end up doing exactly what the majority in *Santa Fe* feared; it will open the door to vexatious litigation from a massive class of plaintiffs,⁹⁰ with the added burden of having criminal liability follow if either an insider or a tippee is found in breach of Rule 10b-5.⁹¹

VI. Conclusion

To conclude, the effect of *Martoma*, combined with the recent jurisprudence affirming the misappropriation theory, is likely to lead to more litigation. While this will likely act as a deterrent and a warning to participants in the market not to engage in insider trading, it will also bring unnecessary complexity and uncertainty into the law. The Second Circuit should revisit the *Martoma* decision *en banc* to prevent this effect.

⁸⁶ See *Dirks v. SEC*, 463 U.S. 646, 667 (1983).

⁸⁷ The misappropriation theory presumes that the assistant is in breach of a fiduciary duty to the company because of the existence of the fiduciary duty between the assistant and the doctor, as well as the duty between the doctor and the company. Essentially, it makes up for the lack of a direct duty between the assistant and the company.

⁸⁸ WILLIAM T. ALLEN & REINER KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 687 (5th ed. 2016) (mentioning that the debate on the merits of insider trading “never stray[ed] far from [] academia.”).

⁸⁹ See, e.g., HENRY G. MANNE, INSIDER TRADING AND THE STOCK MARKET, at v (1966) (“The present work . . . does largely defend insider trading.”); Henry G. Manne, *In Defense of Insider Trading*, 44 HARV. BUS. REV. 113, 114 (1966) (arguing that “insider trading is the best, if not the only, method of adequately compensating corporate innovators”); Dennis W. Carlton & Daniel R. Fischel, *The Regulation of Insider Trading*, 35 STAN. L. REV. 857, 861 (1983) (“We attempt in this Article to analyze critically the arguments in favor of prohibiting insider trading and to suggest why allowing the practice may be an efficient way to compensate corporate managers.”).

⁹⁰ See *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977) (citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975)).

⁹¹ 15 U.S.C. § 78ff (2012).