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Securities Law Alert

In This Edition:

- Second Circuit: Gifting Confidential Information With an Intent to Benefit the Tippee Satisfies *Dirks*' Personal Benefit Requirement, Even If the Tipper Does Not Have a Relationship With the Tippee
- Ninth Circuit: *Morrison* Does Not Preclude Section 10(b) Claims Concerning Domestic Transactions in Unsponsored ADRs
- Delaware Supreme Court: *Corwin*'s Cleansing Rule Is Inapplicable If the Disclosures Omitted Material Facts That a Reasonable Stockholder Would Likely Have Considered Important in Deciding How to Vote

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–*Chambers USA* 2018

Second Circuit: Gifting Confidential Information With an Intent to Benefit the Tippee Satisfies *Dirks*' Personal Benefit Requirement, Even If the Tipper Does Not Have a Relationship With the Tippee

On June 25, 2018, the Second Circuit held that *Dirks*' personal benefit requirement[1] can be satisfied with evidence that the tipper gifted confidential information with an intent to benefit the tippee, even in the absence of evidence of a personal relationship between the tipper and the tippee. [*U.S. v. Martoma*, 894 F.3d 64 (2d Cir. 2018) (Katzmann, J.) (*Martoma II*)].[2]

Background

In *U.S. v. Newman*, 773 F.3d 438 (2d Cir. 2014), the Second Circuit addressed the question of when "a personal benefit may be inferred from a personal relationship between the tipper and tippee, where the tippee's trades resemble trading by the insider himself followed by a gift of the profits to the recipient." The *Newman* court held that "such an 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."

Not long afterwards, the Supreme Court in *Salman v. U.S.*, 137 S.Ct. 420 (2016), held that *Dirks*' personal benefit requirement is satisfied whenever a tipper makes a gift of confidential information to a trading relative or friend, even if there is no tangible benefit to the tipper.[3] The *Salman* Court explained that "[i]n 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." The *Salman* Court specifically found

1. In *Dirks v. S.E.C.*, 463 U.S. 646 (1983), the Supreme Court held that the "test" for tippee liability is "whether the insider [the tipper] personally will benefit, directly or indirectly, from his disclosure." The Court noted that "[t]here are objective facts and circumstances that often justify [ ] an inference" of a personal benefit. The Court offered the examples of "a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the particular recipient." The Court stated that "[t]he elements of fiduciary duty and exploitation of nonpublic information also exist when an insider makes a gift of confidential information to a trading relative or friend."

2. Please click here to read our discussion of the *Newman* decision.

3. Please click here to read our discussion of the Supreme Court's decision in *Salman*.

Newman's requirement that the tipper also "receive something of a 'pecuniary or similarly valuable nature' in exchange for a gift to family or friends . . . inconsistent with *Dirks*."

Newman's "Meaningfully Close Personal Relationship" Test Remains Good Law After *Salman*

Last year, in *U.S. v. Martoma*, 869 F.3d 58 (2d Cir. 2017) (Katzmann, J.) (*Martoma I*), the Second Circuit found that "*Salman* fundamentally altered the analysis underlying *Newman*'s 'meaningfully close personal relationship' requirement such that [it] is no longer good law."[4] On reconsideration, the Second Circuit in *Martoma II* determined that it was not necessary to address whether "*Newman*'s gloss on the gift theory is inconsistent with *Salman*." The *Martoma II* court reasoned that "there are many ways to establish a personal benefit" within the meaning of *Dirks*.

The *Martoma II* court then considered the contours of *Newman*'s "meaningfully close personal relationship" test. The court explained that "[t]he term . . . is new to our insider trading jurisprudence, and, viewed in isolation, it might admit multiple interpretations." But the *Martoma II* court found that "*Newman* provided substantial guidance" because "[i]mmediately after introducing the 'meaningfully close personal relationship' concept, *Newman* held that it 'requires evidence of a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit [the latter].'" Based on this language, which originates from *Dirks*, the *Martoma II* court determined that "*Newman* cabined the gift theory using two *other* freestanding personal benefits that have long been recognized by our case law."

4. Please click here to read our discussion of the Second Circuit's decision in *Martoma I*.

An Intent to Benefit the Tippee, Standing Alone, Is Sufficient to Satisfy the Personal Benefit Requirement

Significantly, the *Martoma II* court found that an "intent to benefit [the tippee] is a standalone personal benefit under *Dirks,*" even without evidence of a relationship between the tipper and the tippee. The court determined that the "key sentence" in *Dirks* (which was quoted in *Newman*) should be read as stating, "there may be a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or there may be an intention to benefit the particular recipient."[5] The *Martoma II* court found this interpretation "more consonant with *Dirks* as a whole." The court reasoned that *Dirks'* "personal benefit requirement is designed to test the propriety of the tipper's purpose." "Because the existence of a breach depends in large part on the purpose of the disclosure," the *Martoma II* court explained that "it makes perfect sense to permit the government to prove a personal benefit with objective evidence of the tipper's intent, without requiring in every case some additional evidence of the tipper-tippee relationship."

The *Martoma II* court offered the example of a tipper who "discloses inside information to a perfect stranger and says, in effect, you can make a lot of money by trading on this." The court stated that "[t]he tipper's intention to benefit the tippee proves a breach of fiduciary duty because it demonstrates that the tipper improperly used inside information for personal ends and thus lacked a legitimate corporate purpose." The court emphasized that this "is precisely what, under *Dirks*, the personal benefit element is designed to test."

Judge Pooler, Dissenting, Expresses Her View That an Intent to Benefit the Tippee Cannot Alone Satisfy the Personal Benefit Requirement

In a dissenting opinion, Judge Pooler stated that she found no basis in the language of *Dirks* or Second Circuit precedent to allow the government to satisfy the personal

5. The *Martoma II* court found the Second Circuit had previously adopted this same reading of *Dirks* in *U.S. v. Warde*, 151 F.3d 42 (2d Cir. 1998). There, the Second Circuit stated that "[t]he 'benefit' element of § 10(b) is satisfied when the tipper 'intends to benefit the . . . recipient' or 'makes a gift of confidential information to a trading relative or friend.'"

benefit requirement solely with evidence of the tipper's intent to benefit the tippee, absent any evidence of a relationship between the two. She explained, "[e]ven assuming arguendo that there was any ambiguity on the topic in our precedents, *Newman* removed it by requiring a 'meaningfully close personal relationship' in order to prove personal benefit via the gift theory." She expressed her view that "[w]ithout objective evidence of such a relationship, . . . the inference that a gratuitous tip functioned as a gift will not be available."

Judge Pooler emphasized that "[m]aking the inquiry into 'whether the insider receives a direct or indirect personal benefit' by disclosing confidential information 'requires courts to focus on objective criteria.'" *Id.* (quoting *Dirks*, 463 U.S. 646). But under the majority rule, "[t]he only objective facts the government would have to prove would be the communication of material non-public information. All of the protections of the personal benefit rule—a clear guide for conduct, preventing liability for slip ups and other innocent disclosures—would erode."

Ninth Circuit: *Morrison* Does Not Preclude Section 10(b) Claims Concerning Domestic Transactions in Unsponsored ADRs

On July 17, 2018, the Ninth Circuit found the district court "misapplied" *Morrison v. National Australia Bank*, 561 U.S. 247 (2010), in holding that Section 10(b) does not reach securities fraud claims involving domestic transactions in unsponsored American Depositary Receipts and Shares ("ADRs").[6] *Stoyas v. Toshiba Corp.*, 2018 WL 3431764 (9th Cir. 2018) (Wardlaw, J.). The Ninth Circuit emphasized that under *Morrison*, courts must "examine the location of the transaction[;] it does not matter that a foreign entity was not engaged in the transaction."

6. "An ADR is a receipt that is issued by a depositary bank that represents a specified amount of a foreign security that has been deposited with a foreign branch or agent of the depositary, known as the custodian. . . . An unsponsored ADR is established with little or no involvement of the issuer of the underlying security. A sponsored ADR, in contrast, is established with the active participation of the issuer of the underlying security." *Stoyas v. Toshiba Corp.*, 191. F. Supp. 3d 1080 (C.D. Cal. 2016).

Background

In *Morrison*, 561 U.S. 247, the Supreme Court held that Section 10(b) applies only to (1) "transactions in securities listed on domestic exchanges," and (2) "domestic transactions in other securities." The district court found *Morrison*'s first prong inapplicable because the unsponsored ADRs at issue were traded on an over-the-counter market, rather than a "domestic exchange." *Stoyas v. Toshiba Corp.*, 191 F. Supp. 3d 1080 (C.D. Cal. 2016).

As to *Morrison*'s second prong, the district court acknowledged that the transactions "occurred domestically" because the ADRs were "both sold and purchased in the United States." The court nevertheless found Section 10(b) did not govern the transactions because the foreign issuer did not sponsor the ADRs at issue. The court noted that "nowhere in *Morrison* did the Court state that U.S. securities laws could be applied to a foreign company that only listed its securities on foreign exchanges but whose stocks are purchased by an American depositary bank on a foreign exchange and then resold as a different kind of security (an ADR) in the United States." The court reasoned that "[p]laintiffs' proffered understanding would create essentially limitless reach of § 10(b) claims because even if the foreign defendant attempted to keep its securities from being sold in the United States, the independent actions of depositary banks selling on [over-the-counter] markets could create liability." The court found such a result would be "inconsistent with the spirit and law of *Morrison*." Plaintiffs appealed.

Adopting the *Absolute Activist* Test, Ninth Circuit Finds Domestic Trades in Unsponsored ADRs Constitute "Domestic Transactions" Under *Morrison*'s Second Prong

As an initial matter, the Ninth Circuit found the Exchange Act applies to ADRs because "the economic reality of [ ] ADRs is closely akin to stock" and thus, "ADRs fit comfortably within the Exchange Act's definition of 'security.'" The Ninth Circuit also agreed with the district court's determination that the transactions did not satisfy *Morrison*'s first prong because "[t]he over-the-counter market on which [the unsponsored ADRs at issue] trade is simply not an 'exchange' under the Exchange Act."[7]

The Ninth Circuit then considered the application of *Morrison*'s second prong under the irrevocable liability test set forth in *Absolute Activist Master Fund Ltd. v. Ficeto*, 677 F.3d 60 (2d Cir. 2012), which the Ninth Circuit adopted.[8] The *Absolute Activist* court held that plaintiffs may plead a "domestic transaction" by alleging facts demonstrating "that the purchaser incurred irrevocable liability within the United States to take and pay for a security, or that the seller incurred irrevocable liability within the United States to deliver a security." Alternatively, plaintiffs may allege that title was transferred within the United States. In the case before it, the Ninth Circuit found plaintiffs "could almost certainly allege sufficient facts" to satisfy the irrevocable liability test because the ADRs were traded in the United States by United States entities.

A Foreign Issuer's Involvement in a Domestic Transaction Is Irrelevant for Purposes of the *Morrison* Analysis

Defendant did not challenge the domestic nature of the ADR transactions. Rather, defendant contended that *Morrison* precludes plaintiffs' claims because plaintiffs did not allege that defendant had "any connection" to the transactions. Rejecting this argument, the Ninth Circuit found that a foreign issuer's level of involvement has no bearing on the *location* of a securities transaction—which is the focus of the *Morrison* analysis. The Ninth Circuit explained that in order "[f]or the Exchange Act to *apply*, there must be a domestic transaction." The possibility that a foreign issuer "may ultimately be found not liable for causing the loss in value to the ADRs does not mean that the Act is inapplicable to the transactions."

The Ninth Circuit was also unpersuaded by defendant's contention that "applying the Exchange Act to . . . unsponsored ADRs would undermine *Morrison*'s animating comity concerns." The Ninth Circuit reasoned that this "is not a basis for declining to follow the [*Morrison*] Court's clear instructions," even if "the *Morrison* test in some cases will result in the Exchange Act's application to claims of manipulation of share value from afar."

Ninth Circuit Declines to Follow the Second Circuit's Decision in *Parkcentral*

The Ninth Circuit expressly disagreed with the Second Circuit's holding in *Parkcentral Global Hub v. Porsche Automobile Holdings*, 763 F.3d 198 (2d Cir. 2014), that "a domestic transaction is necessary but not necessarily sufficient to make § 10(b) applicable."[9] The Ninth Circuit found *Parkcentral*'s approach "contrary to Section 10(b) and *Morrison* itself" because it "carves out 'predominantly foreign' securities fraud claims from Section 10(b)'s ambit, disregarding Section 10(b)'s text." The Ninth Circuit stated that "*Parkcentral*'s test for whether a claim is foreign is an open-ended, under-defined multi-factor test, akin to the vague and unpredictable tests that *Morrison* criticized and endeavored to replace with a clear, administrable rule."[10] Finally, the Ninth Circuit concluded that *"Parkcentral's* analysis relies heavily on the foreign location of the allegedly deceptive conduct, which *Morrison* held to be irrelevant to the Exchange Act's

7. The Ninth Circuit noted that OTC Link, the over-the-counter market on which the unsponsored ADRs at issue trade, "is separately regulated by the [SEC] and is specifically exempt from the Exchange Act's definition of 'exchange.'"

8. Please click here to read our discussion of the Second Circuit's decision in *Absolute Activist*.

9. Please click here to read our discussion of the *Parkcentral* decision.

10. The *Parkcentral* court stated that it did "not purport to proffer a test that will reliably determine when a particular invocation of § 10(b) will be deemed appropriately domestic or impermissibly extraterritorial." The *Parkcentral* court further stated that "courts must carefully make their way with careful attention to the facts of each case and to combinations of facts that have proved determinative in prior cases, so as eventually to develop a reasonable and consistent governing body of law on this elusive question."

applicability, given Section 10(b)'s exclusive focus on transactions."[11]

Section 10(b)'s "in Connection With" Requirement Could Potentially Preclude Claims Involving Unsponsored ADRs

The Ninth Circuit made it clear that while "*Morrison* delineates the transactions to which the Exchange Act can theoretically apply without being impermissibly extraterritorial," satisfying the *Morrison* test is "not sufficient to state an Exchange Act claim."

To survive dismissal, plaintiffs asserting a Section 10(b) claim must plead "a connection between the misrepresentation or omission and the purchase or sale of a security." The Ninth Circuit stated that "for fraud to be 'in connection with the purchase or sale of any security,' it must 'touch' the sale—i.e., it must be done to induce the purchase at issue." The Ninth Circuit found the complaint "falls short" of meeting this standard, and suggested that plaintiffs may need to allege facts concerning the foreign issuer's involvement in the ADRs to satisfy the "in connection with" requirement.[12]

11. The Ninth Circuit also explained that *Parkcentral* was factually "distinguishable on many grounds." For instance, the court noted that *Parkcentral* concerned "entirely private" securities-based swap agreements which are "[u]nlike ADRs" because they "do not constitute investments in the company on whose securities they are based nor do they confer any ownership interest in those reference securities."

12. The Ninth Circuit noted that "before the district court and on appeal, [plaintiffs] argued that 'it is likely that [the foreign issuer] was indeed involved in the establishment' of the ADRs . . . However, none of these facts is alleged in the [complaint]." The Ninth Circuit remanded the action to allow plaintiffs an opportunity to amend their complaint.

Delaware Supreme Court: *Corwin*'s Cleansing Rule Is Inapplicable If the Disclosures Omitted Material Facts That a Reasonable Stockholder Would Have Considered Important in Deciding How to Vote

On July 9, 2018, the Delaware Supreme Court reversed dismissal of a shareholder class action challenging a take-private transaction on the grounds that the disclosures omitted material information concerning a side agreement between the company's founder and the acquiror. [*Morrison v. Berry*, 2018 WL 3339992 (Del. 2018) (Valihura, J.) (*Berry II*)]. The Delaware Supreme Court held that "partial and elliptical disclosures cannot facilitate the protection of the business judgment rule under the *Corwin* doctrine," particularly in transactions involving the sale of the company.[13]

Background

Plaintiffs alleged that the company's founder and his son, who together owned 9.8% of the company's shares, had teamed up with the winning private equity bidder to acquire the company at a discount to fair market value pursuant to a tender offer. Plaintiffs contended that the 14D-9 failed to disclose that the founder (1) made "serious misrepresentations" to the board concerning his agreement with the private equity firm to roll over his equity interest if the firm reached a deal with the company; (2) indicated that he would not engage in an equity rollover with any other potential buyer; and (3) suggested that he would sell his shares if the company remained public. Plaintiffs further claimed that the 14D-9 failed to disclose that the board had formed a committee to consider strategic options not just because of the *potential* for

13. In *Corwin v. KKR Fin. Holdings LLC,* 125 A.3d 304 (Del. 2015), the Delaware Supreme Court held that the business judgment rule is "the appropriate standard of review for a post-closing damages action when a merger that is not subject to the entire fairness standard of review has been approved by a fully informed, uncoerced majority of the disinterested stockholders." The *Corwin* doctrine applies with equal force in the tender offer context. *See In re Volcano Corp. S'holder Litig.*, 143 A.3d 727 (Del. Ch. 2016). Please click here to read our discussion of the Delaware Supreme Court's decision in *Corwin* and here to read our discussion of the Delaware Chancery Court's decision in *Volcano*.

activist stockholder pressure, but because "the directors were motivated by *existing* activist pressure."

The Delaware Chancery Court dismissed the complaint based on the *Corwin* cleansing doctrine because a sizable majority of the outstanding shares were tendered into the merger. *Morrison v. Berry*, 2017 WL 4317252 (Del. Ch. Sept. 28, 2017). The court found the suit "present[ed] an exemplary case of the utility of [*Corwin*'s] ratification doctrine." With respect to the alleged omissions, the court determined that the founder's "threat[ ] to sell his shares on the market if a merger did not close" was "[t]he only factual lacuna in the disclosures that comes close to materiality." However, the court stated that it was "not clear . . . how this would have affected the total mix of information disclosed; certainly, it would not have made investors less likely to tender if they knew that a large blockholder—the founder—was considering a sale if the deal was not consummated."

Information May Be Material Even If It Would Not Necessarily Have Changed a Shareholder's Vote

On appeal, the Delaware Supreme Court found defendants failed to "meet their burden for triggering application of the business judgment rule under *Corwin*." *Berry II*, 2018 WL 3339992. The court explained that the key inquiry is "whether the stockholder vote was fully informed—that is, whether the [c]ompany's disclosures apprised stockholders of all material information and did not materially mislead them."

The Delaware Supreme Court stated that "this materiality test does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote," as the Chancery Court had suggested. Rather, "[o]mitted information is material if there is a substantial likelihood that a reasonable stockholder would have considered the omitted information important when deciding whether to tender her shares or seek appraisal." The Delaware Supreme Court explained that information may be material if it "could make a stockholder less likely to tender," or if it is "the sort of information that would make a stockholder *more likely* to tender." Information may also be material if it is something "a reasonable stockholder would generally want to know in making the decision, regardless of whether it actually sways a stockholder one way or the other, as a single piece of information rarely drives a stockholder's vote."

Here, the Delaware Supreme Court found the *Corwin* doctrine inapplicable because plaintiffs alleged "specific, material, *undisclosed* facts that a reasonable stockholder is substantially likely to have considered important in deciding how to vote," including "'troubling facts regarding director behavior.'" In so holding, the court cautioned that "[c]areful application of *Corwin* is important due to its potentially case-dispositive impact." The court stated that "stockholders cannot possibly protect themselves when left to vote on an existential question in the life of a corporation based on materially incomplete or misleading information."

This edition of the Securities Law Alert was edited by
Paul C. Gluckow
pgluckow@stblaw.com / +1-212-455-2653,
Deborah L. Stein
dstein@stblaw.com / +1-310-407-7525,
George S. Wang
gwang@stblaw.com / +1-212-455-2228,
and Jonathan K. Youngwood
jyoungwood@stblaw.com /
+1-212-455-3539.

Simpson Thacher

New York

Paul C. Curnin
+1-212-455-2519
pcurnin@stblaw.com

Stephen M. Cutler
+1-212-455-2773
stephen.cutler@stblaw.com

Michael J. Garvey
+1-212-455-7358
mgarvey@stblaw.com

Susannah S. Geltman
+1-212-455-2762
sgeltman@stblaw.com

Paul C. Gluckow
+1-212-455-2653
pgluckow@stblaw.com

Nicholas S. Goldin
+1-212-455-3685
ngoldin@stblaw.com

Peter E. Kazanoff
+1-212-455-3525
pkazanoff@stblaw.com

Joshua A. Levine
+1-212-455-7694
jlevine@stblaw.com

Linton Mann III
+1-212-455-2654
lmann@stblaw.com

Joseph M. McLaughlin
+1-212-455-3242
jmclaughlin@stblaw.com

Lynn K. Neuner
+1-212-455-2696
lneuner@stblaw.com

Michael J. Osnato, Jr.
+1-212-455-3252
michael.osnato@stblaw.com

Mark J. Stein
+1-212-455-2310
mstein@stblaw.com

Alan C. Turner
+1-212-455-2472
aturner@stblaw.com

Craig S. Waldman
+1-212-455-2881
cwaldman@stblaw.com

George S. Wang
+1-212-455-2228
gwang@stblaw.com

Jonathan K. Youngwood
+1-212-455-3539
jyoungwood@stblaw.com

David Elbaum
Senior Counsel
+1-212-455-2861
david.elbaum@stblaw.com

Janet A. Gochman
Senior Counsel
+1-212-455-2815
jgochman@stblaw.com

Los Angeles

Michael D. Kibler
+1-310-407-7515
mkibler@stblaw.com

Chet A. Kronenberg
+1-310-407-7557
ckronenberg@stblaw.com

Deborah L. Stein
+1-310-407-7525
dstein@stblaw.com

Palo Alto

Stephen P. Blake
+1-650-251-5153
sblake@stblaw.com

Alexis S. Coll-Very
+1-650-251-5201
acoll-very@stblaw.com

James G. Kreissman
+1-650-251-5080
jkreissman@stblaw.com

Simona G. Strauss
Senior Counsel
+1-650-251-5203
sstrauss@stblaw.com

Washington, D.C.

Jeffrey H. Knox
+1-202-636-5532
jeffrey.knox@stblaw.com

Cheryl J. Scarboro
+1-202-636-5529
cscarboro@stblaw.com

Peter C. Thomas
+1-202-636-5535
pthomas@stblaw.com

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Simpson
Thacher

UNITED STATES

New York
425 Lexington Avenue
New York, NY 10017
+1-212-455-2000

Houston
600 Travis Street, Suite 5400
Houston, TX 77002
+1-713-821-5650

Los Angeles
1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto
2475 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.
900 G Street, NW
Washington, D.C. 20001
+1-202-636-5500

EUROPE

London
CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

ASIA

Beijing
3901 China World Tower
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong
ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Seoul
25th Floor, West Tower
Mirae Asset Center 1
26 Eulji-ro 5-gil, Jung-gu
Seoul 100-210
Korea
+82-2-6030-3800

Tokyo
Ark Hills Sengokuyama Mori Tower
9-10, Roppongi 1-Chome
Minato-Ku, Tokyo 106-0032
Japan
+81-3-5562-6200

SOUTH AMERICA

São Paulo
Av. Presidente Juscelino
Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000