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Tipper/Tippee Insider Trading as Unlawful Deceptive Conduct: Insider Gifts of Material Nonpublic Information to Strangers

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I. INTRODUCTION

"[T]o the poor folk they would give
a helping hand in need and trouble . . . ."[1]

Public company officers and directors, among others, come into contact with important nonpublic information relevant to the firm's stock value as a normal part of their jobs in managing the firm. Fiduciary duties require that officers and directors hold information of this kind in trust as confidential information. Yet, this nonpublic information has value in the marketplace.

What would the world look like if a public company officer or director, recognizing this value and intending to benefit people of limited means, gave this valuable information to those less fortunate without the knowledge or consent of the firm and without any expectation of benefit in return? How, if at all, do we desire to regulate that behavior? The officer or director apparently would be in breach of his or her fiduciary duty absent a valid, binding, and enforceable agreement to the contrary. Does that conduct also, however, violate U.S. federal insider trading rules? Should it? This article offers answers to those questions.

Under U.S. federal securities law, insiders—people with a fiduciary or fiduciary-like duty of trust and confidence to another[2]—may violate Section 10(b) of the Securities Exchange Act of 1934, as amended (Section 10(b)"), by trading securities or tipping information to others.[3]

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1. HOWARD PYLE, THE MERRY ADVENTURES OF ROBIN HOOD 5 (1883) (quoting from the prologue).
2. *See* Chiarella v. United States , 445 U.S. 222, 228-29 (1980).
3. *See generally* John P. Anderson, *Greed, Envy, and the Criminalization of Insider Trading*,

Specifically, trading or tipping is unlawful under Section 10(b) when an insider uses or employs a "deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."[4] The U.S. Securities and Exchange Commission ("SEC") adopted Rule 10b-5 under Section 10(b) ("Rule 10b-5"), under which insider trading is proscribed as a "device, scheme, or artifice to defraud . . . or . . . [an] act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."[5] Decisional law spanning a period of more than fifty years has illuminated various circumstances under which an insider engages in deceptive conduct that contravenes the statute and the rule.[6]

2014 UTAH L. REV. 1, 27 ("[U]nder the current section 10(b) regime, trading on material nonpublic information will incur liability if . . . a corporate insider seeks to benefit by trading (or by tipping others who trade) in shares of her own company based on material nonpublic information"); William K.S. Wang, *Stock Market Insider Trading: Victims, Violators and Remedies-Including an Analogy to Fraud in the Sale of a Used Car with a Generic Defect*, 45 VILL. L. REV. 27, 58 (2000) ("Section 10(b) and SEC rules 10b-5 and 14e-3 are . . . some of the federal statutes and regulations governing insider trading and tipping.").

4. 15 U.S.C. § 78j(b) (2012).

5. 17 C.F.R. § 240.10b-5(a), (c) (2017). *See Chiarella*, 445 U.S. at 225 n.5 (1980) ("Only Rules 10b–5(a) and (c) are at issue here."); Fried v. Stiefel Labs., Inc., 814 F.3d 1288, 1293 (11th Cir.), *cert. denied*, 137 S. Ct. 102 (2016) ("Insider trading is actionable under Rule 10b–5(a) and (c)."); Town N. Bank, N.A. v. Shay Fin. Servs., Inc., No. 3:11-CV-3125-L, 2014 WL 4851558, at *12 n.7 (N.D. Tex. Sept. 30, 2014) ("[T]rading on insider information qualifies as a "deceptive device" under sections 10(b) and 10b–5(a) and (c)."); *see also* United States v. Carpenter, 791 F.2d 1024, 1029–30 (2d Cir. 1986), *aff'd*, 484 U.S. 19 (1987).

> The Rule prohibits "*any* person," acting "directly or indirectly," from employing "*any* device, scheme or artifice to defraud." It equally prohibits "*any* act, practice, or course of business which operates as a fraud or deceit upon *any* person." This repeated use of the word "any" evidences Congress' intention to draft the Rule broadly. The Supreme Court has recognized that section 10(b) of the 1934 Act, as implemented by Rule 10b–5, "was designed as a catchall clause to prevent fraudulent practices."

Id. (citations omitted).

6. *See, e.g.*, Miriam H. Baer, *Insider Trading's Legality Problem*, 127 YALE L.J. F. 129, 132-33 (2017), http://www.yalelawjournal.org/forum/insider-tradings-legality-problem ("Neither Section 10(b), nor even the SEC's subsequently promulgated Rule 10b-5, explicitly define the conduct known as "insider trading." To the contrary, the content of that prohibition is best mined by reading a series of cases, notably the Supreme Court's trio of oft-cited opinions: *Chiarella v. United States*, *Dirks v. SEC*, and *United States v. O'Hagan*." (footnotes omitted)).

Specifically, insider trading is unlawful when an insider in possession of material nonpublic information violates her duty of trust and confidence by recklessly or intentionally trading a security or tipping the information to others in connection with the purchase or sale of a security.[7] Well-worn federal case law, affirmed in a U.S. Supreme Court opinion in December 2016, dictates that an insider possessing material nonpublic information violates that duty of trust and confidence when the insider shares material nonpublic information with others improperly.[8] Under that same decisional law, the insider shares information improperly when the "the insider personally will benefit, directly or indirectly, from his disclosure."[9] This is because U.S. insider trading liability is a type of securities fraud, and a "fiduciary who pretends loyalty to the principal while secretly converting the principal's information for personal gain dupes or defrauds the principal."[10] Unlawful insider trading is criminally culpable and enforceable in the United States when it is willful.[11]

This article explores the deception that underlies unlawful insider trading under U.S. federal securities law. More specifically, the article considers the circumstances under which information-sharing by an insider in connection with the purchase or sale of a security is "improper," and, as a result, the foundation for unlawful insider trading under Section 10(b) and Rule 10b-5. In addition, the article offers observations on

7. *See generally* Richard A. Booth, *The Missing Link Between Insider Trading and Securities Fraud*, 2 J. BUS. & TECH. L. 185, 196 (2007) ("In general, the courts have defined insider trading as using material nonpublic information in violation of a duty to the source of the information not to use the information for personal gain."); Michael R. Siebecker, *Political Insider Trading*, 85 FORDHAM L. REV. 2717, 2740–41 (2017) ("[A]ctionable insider trading occurs when an individual trades (or tips others to trade) based on material nonpublic information in violation of a fiduciary duty."); J. Kelly Strader, *(Re)conceptualizing Insider Trading:* United States v. Newman *and the Intent to Defraud*, 80 BROOK. L. REV. 1419, 1464 (2015) ("insider trading liability requires three basic *actus reus* components: (1) the possession of material nonpublic information; (2) the purchase or sale of a security; and (3) the breach of duty.").

8. *See* Salman v. United States, 137 S. Ct. 420, 428 (2016) (citing Dirks v. SEC, 463 U.S. 646, 659 (1983)).

9. *Dirks*, 463 U.S. at 662; *see also Salman*, 137 S. Ct. at 428-29 (construing the notion of personal benefit).

10. United States v. O'Hagan, 521 U.S. 642, 643 (1997).

11. 15 U.S.C. § 78ff(a) (2012) ("Any person who willfully violates any provision of this chapter . . . or any rule or regulation thereunder the violation of which is made unlawful . . . shall upon conviction be fined not more than $5,000,000, or imprisoned not more than 20 years, or both, except that when such person is a person other than a natural person, a fine not exceeding $25,000,000 may be imposed . . . .").

whether improper information-sharing is the *only* way in which a breach of duty can trigger unlawful insider trading under Section 10(b) and Rule 10b-5 and whether the receipt of a personal benefit is the *only* manner in which information may be improperly shared for purposes of Section 10(b) and Rule 10b-5 insider trading liability. These and related issues are important as a matter of both civil and criminal enforcement of insider trading proscriptions under U.S. law, but they have particularly important ramifications in a criminal enforcement context.

At the heart of these inquiries is a desire to clarify the nature of the deception under Section 10(b) and Rule 10b-5 that gives rise to civil and criminal insider trading liability. This article is designed in part to address a particularly thorny, unresolved scenario in this regard, represented by the following facts:

- An agent with a fiduciary duty of trust and confidence to a firm (the principal) conveys material nonpublic information obtained through the fiduciary relationship to a third person, the recipient;
- The recipient of the information is someone with whom the fiduciary has no prior familial or friendship relationship;
- The conveyance is made to the recipient by the fiduciary without the knowledge or consent of the firm;
- The conveyance is made to the recipient gratuitously—nothing is requested or required in return;
- The fiduciary's purpose in conveying the information is to benefit the recipient;
- Specifically, the fiduciary knows that the recipient has the ability and incentive to trade on the information or further convey it to others who have the ability and incentive to trade;
- The fiduciary has clear knowledge and understanding of the resulting detriment to the firm; and
- The recipient knows that the fiduciary owes a duty of trust and confidence to the firm.

Under these facts, assuming the requisite state of mind (scienter), has the fiduciary engaged in deception that constitutes a violation of insider trading proscriptions under Section 10(b) and Rule 10b-5? This scenario may be analogized to the story of Robin Hood robbing from the rich and giving to the poor[12] and therefore refers to the scenario posited as the "Robin Hood scenario." The fiduciary receives neither pecuniary nor (arguably) reputational benefit. Rather, the fiduciary's inspiration is best described as pure altruism. The Robin Hood scenario strongly motivates the doctrinal inquiry and analysis undertaken in this article.

Apropos of aspects of the Robin Hood scenario, as work on this article was proceeding, the U.S. Court of Appeals for the Second Circuit decided *United States v. Martoma*,[13] a criminal insider trading appeal in which the defendant unsuccessfully argued that the lack of a "meaningfully close personal relationship" between a putative insider trading tipper and tippee represents a barrier to liability. The Second Circuit opinion in *Martoma* is clear in its view: the transfer of material nonpublic information in breach of a fiduciary duty to someone who is expected to trade on the information is sufficient to find insider trading liability under Section 10(b) and Rule 10b-5.[14] However, the *Martoma* case involved a *quid pro quo* relationship between the tipper and tippee that does not exist in the Robin Hood scenario.[15] Accordingly, it is unclear not only whether the U.S. Supreme

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12. *See supra* note 1 and accompanying text. "Robin Hood" defenses in insider trading enforcement actions have been referenced in the popular press. *See* Bruce Carton, *The 'Robin Hood' and 'Mother Teresa' Defenses in Insider Trading Cases*, COMPLIANCE WEEK (May 18, 2012), https://www.complianceweek.com/blogs/enforcement-action/the-robin-hood-and-mother-teresa-defenses-in-insider-trading-cases#.WXvqT63MxAY; Meena Krishnamsetty, *Robin Hood Gautham Shankar Receives Probation in Insider Trading Case*, INSIDER MONKEY (April 19, 2012), http://www.insidermonkey.com/blog/robin-hood-gautham-shankar-receives-probation-in-insider-trading-case-11993/. However, this type of defense—in which a criminal defendant asks for leniency in adjudicating culpability or sentencing because of his largess to the poor or needy—is different from the Robin Hood scenario.

13. United States v. Martoma, 869 F.3d 58, 61 (2017).

14. *Id.* at 70. Specifically, the *Martoma* court holds:

> 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," and the disclosure "resemble[s] trading by the insider followed by a gift of the profits to the recipient," whether or not there was a "meaningfully close personal relationship" between the tipper and tippee.

Id. (citations and footnote omitted). In the process, the opinion expressly concluded "that *Salman* fundamentally altered the analysis underlying *Newman*'s 'meaningfully close personal relationship' requirement such that the 'meaningfully close personal relationship' requirement is no longer good law." *Id.* at 69.

15. *Id.* at 67 ("[I]n the context of their ongoing 'relationship of *quid pro quo,*' . . . 'a rational trier of fact could have found the essential elements of the crime [of insider trading] beyond a

Court would affirm the result in *Martoma* if it were to hear the case (which may be unlikely[16]), but also whether the Court would do so based on the same reasoning. Even if the Court were to adopt the reasoning in *Martoma*, it may choose to limit that reasoning to the facts of the *Martoma* case, which involved a pre-existing relationship between the tipper and tippee—albeit not a meaningfully close personal one.[17] Regardless, the Second Circuit's opinion in *Martoma* offers additional impetus to consider and resolve insider trading liability questions arising from the Robin Hood scenario.

To accomplish its objectives, this article proceeds in three substantive parts before concluding. First, it explores the function of improper information sharing in asserted breaches of fiduciary and fiduciary-like duties. If improper information sharing in breach of a fiduciary or fiduciary-like duty is central to tipper/tippee insider trading liability, then this type of a breach of fiduciary duty deserves direct scrutiny. The article then surveys views from the existing academic literature and commentary regarding tipper/tippee insider trading liability in this context to identify salient theories and themes. Finally, the article comments on the linkage between these doctrinal and scholarly foundations and the deception required for insider trading liability under Section 10(b) and Rule 10b-5. A brief summary conclusion follows. In each substantive part of this

reasonable doubt' under a pecuniary *quid pro quo* theory." (citations omitted)).

16. *See*, *e.g.*, Peter J. Henning, *In a Boon to Prosecutors, Insider Trading Ruling Is Reshaped*, N.Y. TIMES DEALBOOK, Aug. 24, 2017, https://www.nytimes.com/2017/08/24/business/dealbook/insider-trading-mathew-martoma-appeal.html?mcubz=1&_r=0 (noting, among other things, that "[i]n addition to the fact that only a very small percentage of cases are taken up by the court, the justices just decided *Salman* last term, offering what appeared to be the final word on tipping in a unanimous opinion.").

17. The *Martoma* court raises its own example to illustrate this point.

> Imagine that a corporate insider, instead of giving a cash end-of-year gift to his doorman, gives a tip of inside information with instructions to trade on the information and consider the proceeds of the trade to be his end-of-year gift. In this example, there may not be a "meaningfully close personal relationship" between the tipper and tippee, yet this clearly is an illustration of prohibited insider trading, as the insider has given a tip of valuable inside information in lieu of a cash gift and has thus personally benefitted from the disclosure.

Martoma, 869 F.3d at 70. The insider and the doorman have a pre-existing relationship. The Robin Hood scenario assumes no pre-existing relationship between the disclosing fiduciary and any recipient of the information.

article, the Robin Hood scenario offers motivation and an opportunity for reflection.

II. IMPROPER INFORMATION SHARING IN A FIDUCIARY CONTEXT

Has the fiduciary in the Robin Hood scenario violated his duty of trust and confidence to the firm? Two primary sources of fiduciary duty law offer insights: corporate law and agency law. General principles of each area of law regard certain information sharing by fiduciaries improper.

A. Improper Information Sharing Under Corporate Law

Under corporate law, directors and officers are fiduciaries of the firm; each owes fiduciary duties to the corporation (and, in certain circumstances, its shareholders or stockholders).[18] Primary among these are duties of care and loyalty.[19] Standards of care and elements of the duty of loyalty can vary from jurisdiction to jurisdiction.[20]

The Robin Hood scenario invites attention to a possible breach of the duty of loyalty, which is described generally as "a broad encompassing duty, that in appropriate circumstances is capable of impressing a special obligation upon a director or officer in any of his or her relationships with

18. *See*, *e.g.*, O'Connor & Assocs. v. Dean Witter Reynolds, Inc., 529 F. Supp. 1179, 1184 (S.D.N.Y. 1981) ("Corporate officers and directors owe fiduciary duties to the corporation and its shareholders to administer their duties for the common good of all the shareholders."); 3 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 837.50 ("Directors and officers stand in a fiduciary relationship to the corporation and its shareholders."); *id.* ("[A] director or officer of a corporation owes the corporation complete loyalty, honesty, and good faith."); *id.* § 1011 ("A director or other officer of a corporation, although not responsible for errors of judgment, is a fiduciary charged with the duty of caring for the property of the corporation and of managing its affairs honestly and in good faith."); *see also id.* § 848. Director and officer fiduciary duties are construed to be substantially similar, if not identical. *See id.* § 846 ("An officer's fiduciary duties appear coextensive with those of directors. In Delaware, corporate officers owe fiduciary duties that are identical to those owed by corporate directors." (footnotes omitted)). Employees and other corporate agents, as well as shareholders, also may owe fiduciary duties to the firm. *See id.*; *see also id.* § 991.

19. *See id.* § 837.60 ("In discharging their function of managing the business and affairs of the corporation, directors and officers owe fiduciary duties of care and loyalty to the corporation." (footnotes omitted)).

20. *See*, *e.g.*, *id.*; *see also* 3A WILLIAM MEADE FLETCHER ET AL., FLETCHER CYC. CORP. § 1032.

the corporation."[21] Although officers and directors both owe fiduciary duties to the corporation, directors occupy a distinctive position of trust in the corporate structure.

> It has been said that directors of corporations occupy a responsible and important business relationship to the general public; and, in accepting such position of trust and responsibility, it is not only presumed, but expected of them, that they will deal with the corporate property and conduct the business of the corporation with prudence and good faith.[22]

As a general matter, the duty of loyalty of corporate managers is wide-ranging and detailed and may include many different types of behavioral constraints and directives in a variety of contexts.

Under Delaware corporate law (the leading and most plentiful source of corporate law in the United States[23]), it is clear that the fiduciary duties of directors and officers comprise duties of care and loyalty.[24] The fiduciary duty of loyalty under Delaware corporate law includes an obligation to act in good faith.[25] Apropos of the Robin Hood scenario, a violation of that Delaware corporate law obligation of good faith (and, as a result, the duty of loyalty) is implicated

> where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, where the fiduciary acts with the intent to violate

21. 3 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYC. CORP. § 837.60.

22. *Id.* § 990 (footnote omitted).

23. *See*, *e.g.*, John Armour et al., *Delaware's Balancing Act,* 87 IND. L.J. 1345, 1399 (2012) (noting "the Delaware courts' dominance in writing leading corporate law decisions" and "Delaware's dominance as the incorporation locus for publicly traded companies"); Stephen M. Bainbridge, *Fee-Shifting: Delaware's Self-Inflicted Wound*, 40 DEL. J. CORP. L. 851, 855 (2016) (citing to "Delaware's status as the leading corporate law jurisdiction"); James J. Park, *The Limits of the Right to Sell and the Rise of Federal Corporate Law*, 70 OKLA. L. REV. 159, 174 (2017) (referring to Delaware as "the leading state corporate law maker"). Delaware corporate law is described and used here because it is relatively well articulated and often cited. However, it seems important to note that U.S. corporate fiduciary duty law varies somewhat from state to state.

24. *See* Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006).

25. *Id.* at 369-70.

> applicable positive law, or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties.[26]

Importantly, the fiduciary's dissemination of firm information without notice or permission in the Robin Hood scenario apparently constitutes bad faith conduct because the fiduciary is acting intentionally with a purpose other than advancement of the best interests of the firm. However, the unauthorized disclosure has not yet been classified in decisional law as improper information sharing foundational to tipper/tippee insider trading liability under federal law.

This Delaware taxonomy of director and officer fiduciary duties, the relationship the duty of loyalty to good faith, and the elements of bad faith content are significant and helpful to an assessment of potential liability based on the facts of the Robin Hood scenario. Having said that, these matters may be less clear under the law of jurisdictions other than Delaware. Yet, however the detailed components are categorized and labeled, expressions of corporate fiduciary duties in other jurisdictions are consistent in requiring that corporate directors and officers comply with fiduciary duties of care and loyalty.

Generally, corporate law fiduciary duties—specifically the duty of loyalty—incorporate duties of trust and confidence relative to the sharing of nonpublic information by corporate agents.[27] Specifically, in an informational context,

> [d]irectors and officers who acquire confidential or special knowledge or information by virtue of their fiduciary relationship with the corporation and its shareholders are not free to exploit that knowledge or information for their own personal benefit and profit, and to do so has been held to constitute a breach of their fiduciary duties or an abuse of their fiduciary relationship, even though no

26. *In re* Walt Disney Co. Deriv. Litig., 906 A.2d 27, 67 (Del. 2006).

27. *See generally* 3 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYC. CORP. § 1011 ("It is a breach of trust and a violation of the corporate officer or agent's duty to the principal for an officer or agent to . . . use for himself or herself any information gained in that regard.").

injury to the corporation results.[28]

In many corporate contexts, the law views confidential corporate information acquired by fiduciaries as a corporate asset to be used by firm managers for corporate benefit.[29] Equitable and legal relief may be available to the corporation "where an officer, director, employee or shareholder of the corporation, who acquires or is given access to such information in confidence, adopts and uses it for his or her own private benefit and personal profit to the exclusion and detriment of the corporation."[30]

Corporate decisional law on breaches of fiduciary duty arising from improper information sharing spans many topics—among them, trade secrets, noncompetition, other conflicting interests, and even state law claims regarding insider trading.[31] The rules and rationales follow from general principles of corporate fiduciary duty.

> Confidential information compiled by a corporation in the course and conduct of its business is a species of property to which the corporation has the exclusive right and benefit . . . . Where an employee, officer, director or stockholder of a corporation, who is given access to such information in confidence, adopts and uses it for his own private benefit and personal profit to the exclusion and detriment of the corporation he may be enjoined at the instance of the corporation. An officer, director or stockholder of a corporation in particular is subject to restraint in this connection because of the position of trust

28. *Id.* (footnotes omitted).

29. *See id.* § 857.10 ("Confidential information acquired or compiled by a corporation in the course and conduct of its business is a species of property to which the corporation has the exclusive right and benefit, and which a court of equity will protect through the injunctive process or other appropriate remedy.").

30. *Id.*

31. *See*, *e.g.*, Veco Corp. v. Babcock, 611 N.E.2d 1054, 1061 (Ill. App. 1993) ("Corporate officers breach their fiduciary duties where they use the company's confidential business information for the new business, either before or after their departure."); Diamond v. Oreamuno, 248 N.E.2d 910, 912 (N.Y. 1969) ("[A] corporate fiduciary, who is entrusted with potentially valuable information, may not appropriate that asset for his own use . . . .").

> he occupies and the fiduciary relationship he holds and enjoys with the corporation and the stockholders, imposing upon him the duty to exercise good faith toward the corporation and to subordinate his own selfish interests to those of the corporation where they conflict.[32]

These matters are clear under both general legal principles and specific court opinions. Yet, research has not revealed published opinions that expressly address a corporate insider's fiduciary duty under corporate law to refrain from sharing confidential information in the manner contemplated by the Robin Hood scenario—a selfless manner, for the benefit of the recipient and without clear pecuniary or non-pecuniary benefit to the fiduciary.

B. Improper Information Sharing Under Agency Law

The law of agency is a primary touchstone for principles of fiduciary duty and a foundational source for fiduciary principles under corporate law.[33] The Robin Hood scenario posits that the fiduciary is an agent of the firm. This is unsurprising since agency relationships are fiduciary in nature; agents are fiduciaries of their principals.[34] The general fiduciary principle underlying agency law is that "[a]n agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the

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32. Clark-Lami, Inc. v. Cord, 440 S.W.2d 737, 740–41 (Mo. 1969).

33. *See* Matthew G. Dore, *Statutes of Limitation and Corporate Fiduciary Claims: A Search for Middle Ground on the Rules/standards Continuum*, 63 BROOK. L. REV. 695, 727 (1997)

("[C]ourts properly require corporate managers to discharge their obligations to the corporation and its shareholders consistently with fiduciary duties . . . derived from trust and agency law" (footnote omitted)); Lyman P.Q. Johnson & David Millon, *Recalling Why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597, 1637 (2005) ("[P]ositive law imposes the fiduciary duties of agency law on corporate officers.").

34. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."); *see also* RESTATEMENT (SECOND) OF AGENCY § 1(1) (1958) ("Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."); *id.* § 13 ("An agent is a fiduciary with respect to matters within the scope of his agency.").

agency relationship."[35]

Specifically, as related to the type of deceptive, improper information sharing proscribed by U.S insider trading law, "[a]n agent has a duty . . . not to use or communicate confidential information of the principal for the agent's own purposes or those of a third party."[36] Under this general agency law rule, it is clear in various fiduciary contexts (outside the insider trading context) that an agent's use or disclosure of confidential information for the agent's own benefit is unlawful.[37]

> It is well established, as a general proposition, that a person who acquires special knowledge or information by virtue of a confidential or fiduciary relationship with another is not free to exploit that knowledge or information for his own personal benefit but must account to his principal for any profits derived therefrom. This, in turn is merely a corollary of the broader principle, inherent in the nature of the fiduciary relationship, that prohibits a trustee or agent from extracting secret profits from his position of trust.[38]

This rule is consistent with the definition of improper information sharing that is a basis for tipper/tippee insider trading liability under federal law.[39] It is not, however, facially instructive in resolving the Robin Hood scenario, since the fiduciary in that scenario neither seeks nor apparently receives a benefit from his disclosure.

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35. *See* RESTATEMENT (THIRD) OF AGENCY § 8.01; *see also* RESTATEMENT (SECOND) OF AGENCY § 387 ("Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency.").

36. *See* RESTATEMENT (THIRD) OF AGENCY § 8.05; *see also* RESTATEMENT (SECOND) OF AGENCY § 395 ("Unless otherwise agreed, an agent is subject to a duty to the principal not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency or in violation of his duties as agent, in competition with or to the injury of the principal, on his own account or on behalf of another . . . .").

37. *See*, *e.g.*, Recovery Ltd. Partnership v. Wrecked and Abandoned Vessel S.S. Cent. America, 790 F.3d 522, 527, 532 (4th Cir. 2015) (attorney-client context); Coulter Corp. v. Leinert, 869 F. Supp. 732, 735 (E.D. Mo. 1994) (employer-employee context); Hollinger Int'l, Inc. v. Black, 844 A.2d 1022, 1061 (Del. Ch. 2004), *aff'd*, 872 A.2d 559 (Del. 2005) (controlling shareholder context)

38. Diamond v. Oreamuno, 248 N.E.2d 910, 912 (1969) (citation omitted).

39. *See supra* note 9 and accompanying text.

However, the general agency law prohibition on information exploitation and sharing also extends to the agent's use or communication of the principal's confidential information for the purposes of a third party.[40] It is more difficult to find decisional law support for the unlawfulness of an agent's use or disclosure of confidential information for the purposes of a third party. Dicta in a 2008 California Court of Appeals case involving the assertion by a landlord (Mozart) that the tenant's agent (BTC) owed the landlord a duty to disclose information proprietary to the tenant (Handspring) appears to confirm the unlawful nature of improper information disclosures by agents where the disclosure may benefit others:

> It appears from the face of the cross-complaint that the information in question was acquired by BTC in confidence from Handspring. It is also alleged unequivocally that whatever BTC's relationship to Mozart, it was an agent of, and to, Handspring. Therefore disclosure of Handspring's confidential information to Mozart, without Handspring's consent, would unquestionably have constituted a breach of BTC's fiduciary duties to Handspring.[41]

Also, a physician's disclosure of confidential patient information to a third party for the purposes of the third party may breach the physician's fiduciary duty to the patient.[42]

The disclosure made by the fiduciary in the Robin Hood scenario would be a breach of his fiduciary duty of trust and confidence under this rule. The fiduciary discloses the information not for his own benefit, but for the benefit or purpose of the recipient. Yet, the fiduciary's breach of this agency law duty based on unauthorized disclosures is not clearly classified under decisional law as improper information sharing that

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40. *See supra* note 36 and accompanying text.

41. Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC, 162 Cal. App. 4th 858, 888, 76 Cal. Rptr. 3d 325, 348–49 (2008) (citing to RESTATEMENT (THIRD) OF AGENCY § 8.05(2)).

42. *See* Doe v. Roe, 588 N.Y.S.2d 236, 240 (Sup. Ct. 1992), *aff'd as modified*, 190 A.D.2d 463 (1993).

provides a basis for tipper/tippee insider trading liability under federal law.[43]

III. ACADEMIC LITERATURE AND COMMENTARY ON FIDUCIARY DUTY IN THE INSIDER TRADING CONTEXT

The actual and potential synergies and distinctions between general principles of fiduciary duty—including principally fiduciary duties of trust and confidence under corporate and agency law—and those that may found U.S. federal insider trading liability have not gone unnoticed. A number of scholars have identified and addressed these synergies and distinctions in a variety of contexts. This part summarizes salient aspects of that work as they may relate to a resolution of the Robin Hood scenario as a matter of U.S. insider trading jurisprudence.

Professor Donna Nagy is a leading scholar in the area of U.S. insider trading law. Her work offers (among other things) important insights on breaches of fiduciary duty in the tipper/tippee insider trading context. A number of her observations are relevant to the potential for insider trading liability based on the conduct at the heart of the Robin Hood scenario—a gratuitous disclosure of information by a fiduciary to a recipient with whom the fiduciary has no prior relationship.

In a 2009 article, Professor Nagy observed that "numerous lower courts and the SEC have in effect concluded that the wrongful use of information constitutes the crux of the insider trading offense and that fiduciary principles are only relevant insofar as they establish such wrongful use."[44]

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43. The *Newman* court was very certain of its view on this matter:

> Although this Court has been accused of being "somewhat Delphic" in our discussion of what is required to demonstrate tippee liability, the Supreme Court was quite clear in *Dirks*. *First,* the tippee's liability derives *only* from the tipper's breach of a fiduciary duty, *not* from trading on material, non-public information. *Second,* the corporate insider has committed no breach of fiduciary duty unless he receives a personal benefit in exchange for the disclosure. *Third,* even in the presence of a tipper's breach, a tippee is liable only if he knows or should have known of the breach.

United States v. Newman, 773 F.3d 438, 447 (2d Cir. 2014), *abrogated by* Salman v. United States, 137 S. Ct. 420 (2016) (citations omitted).

44. Donna M. Nagy, *Insider Trading and the Gradual Demise of Fiduciary Principles*, 94 IOWA L. REV. 1315, 1320 (2009).

Specifically, using a number of examples, she shows ways in which decisional law and SEC rules establish insider trading liability in circumstances involving alleged or actual improper information sharing outside the fiduciary duty context. She makes a convincing case that sharing information in breach of a fiduciary duty of trust and confidence is a nonexclusive means of establishing the improper use of information foundational to tipper/tippee insider trading liability in the United States.

This view is consistent with the statutory and regulatory root of U.S. insider trading regulation under Section 10(b) and Rule 10b-5. The essence of liability for insider trading under Section 10(b) and Rule 10b-5 is a deceptive (1) "device, scheme, or artifice to defraud" or (2) "act, practice, or course of business which operates or would operate as a fraud or deceit upon any person," in either case in connection with the purchase or sale of a security.[45] Indeed, Professor Nagy suggests that "a new theory premised on the deceptive acquisition of confidential information"[46] may help clarify insider trading liability. A theory of that kind "could support liability in any case where confidential information was acquired through deceptive means, even in the absence of a fiduciary-like relationship between the trader and the source"[47] while remaining true to the applicable statutory law and regulation.[48] Professor Nagy's work in this article thus reinforces core notions of insider trading liability as deceptive conduct involving an improper sharing of information.

In a subsequent article focusing on the potential insider trading liability of members of Congress, Professor Nagy concludes that "to establish Rule 10b-5 liability on the part of a congressional official for tipping material nonpublic information (as opposed to trading on that information himself),

45. *See supra* note 5 and accompanying text.
46. Nagy, *supra* note 44, at 1369.
47. *Id.* Professor Nagy notes specifically that a deceptive acquisition theory

> has firm roots in the text of Section 10(b) and Rule 10b-5, which extend broadly to encompass all deceptive devices and contrivances used in connection with securities trading. And while fiduciary principles have been central to the Supreme Court's view of Rule 10b-5 liability for insider trading, the plain language of Section 10(b) and Rule 10b-5 command no such limitation.

Id.
48. *Id.*

the SEC would have to show that the official breached a fiduciary-like duty . . . ."[49] The article compellingly argues that congressional officials have duties of trust and confidence to the United States and its citizens, as well as (potentially) fellow congressional and government officials.[50] The foundations of duty implicated in her analysis are broad and deep.[51]

Perhaps most relevantly for purposes of this article, Professor Nagy has explored the role of fiduciary duty in the context of U.S. insider trading law based on the gratuitous tipping of material nonpublic information. In a 2016 law review article, she avows that "fiduciary law can offer particularly valuable guidance" on how a court should "regard a fiduciary's deliberate action to disclose entrusted information so that it can be used to provide one or more persons with a securities-trading advantage."[52] Of especial importance to the Robin Hood scenario, Professor Nagy notes that Delaware state fiduciary duty law in the corporate context recognizes breaches of fiduciary duty outside the realm of self-dealing.[53] She also notes that this development in fiduciary duty law post-dates key U.S. insider trading jurisprudence.[54] Thus, in this work, she makes two key points. First, she asserts that general fiduciary principles are highly relevant to undecided matters under U.S. insider trading law. Second, she offers support for the use of these principles, as manifested in current Delaware corporate law, in circumstances in which an insider does not have a conflicting interest (e.g., where the insider does not benefit—or even expect to benefit—from sharing confidential

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49. Donna M. Nagy, *Insider Trading, Congressional Officials, and Duties of Entrustment*, 91 BOSTON U. L. REV. 1105, 1162 (2011).

50. *Id.* at 1139-58.

51. Having said that, it is important to note that, conservatively, Professor Nagy contends—citing the U.S. Supreme Court's decision in *Dirks v. SEC*—that tipper/tippee liability in a congressional information context would depend on proof that a congressional official received a personal benefit or gifted confidential information to a relative or friend. Nagy, *supra* note 49, at 1162. She constrains her observations in this regard to existing legal doctrine, without interpretation or embellishment, and indicates that a comprehensive inquiry into tipper/tippee liability in a congressional context would require a more detailed analysis. *Id.* at 1161-62 (stating that this tipping analysis "merits an entire article all on its own").

52. Donna M. Nagy, *Beyond* Dirks*: Gratuitous Tipping and Insider Trading*, 42 J. CORP. L. 1, 42 (2016).

53. *Id.* ("*Stone* construes breaches of the duty of loyalty to include not only self-dealing but also other deliberate actions evidencing a lack of good faith") (referencing Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362 (Del. 2006)).

54. *Id.*

information with the recipient).

Professor Jill Fisch also has weighed in on a recurring basis on fiduciary duty issues in insider trading regulation. More than twenty-five years ago, she wrote an important law review article critically assessing "the judicial determination that insider trading is deceptive and thereby fraudulent because of the insider's breach of a fiduciary duty."[55] Although the law has progressed in significant (and, in some cases, unanticipated) ways since that article was written, many of Professor Fisch's original observations continue to have salience in current insider trading debates. In particular, she notes the following with regard to tipper/tippee liability under U.S. insider trading law: "unless disclosure of the inside information harms the company (or results in personal gain to the insider), it is difficult to find a breach of fiduciary duty, even when the disclosure is selective."[56]

More recently, Professor Fisch approached fiduciary duty questions in the tipper/tippee insider trading context—this time, in anticipation of the U.S. Supreme Court's opinion in *Salman*.[57] Somewhat presciently, Professor Fisch observed that "[t]he facts of *Salman* . . . do not present a close legal question but instead fall within the core of the legal standard established by *Dirks*."[58] This observation largely foreshadows the reasoning in the Court's decision in *Salman*.[59]

Importantly, in that 2016 article, Professor Fisch comments on the doctrinal and analytical difficulty presented by gifts of information from insiders to others—the precise situation at the heart of the Robin Hood scenario. Among the chief points she makes are the following:

- The motivation for giving a gift may be multifaceted and complex.[60]

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55. Jill E. Fisch, *Start Making Sense: An Analysis and Proposal for Insider Trading Regulation*, 26 GA. L. REV. 179, 184 (1991).

56. *Id.* at 210-11.

57. Salman v. United States, 137 S. Ct. 420 (2016).

58. Jill E. Fisch, *Family Ties: Salman and the Scope of Insider Trading*, 69 STAN. L. REV. ONLINE 46, 48 (2016); *see also id.* at 52 ("The conduct in *Salman* falls within the core of illegal tipping as defined by the Court in *Dirks*.").

59. *See Salman*, 137 S. Ct. at 427 ("We adhere to *Dirks,* which easily resolves the narrow issue presented here.").

60. Fisch, *supra* note 58, at 50-51. Specifically, Professor Fisch notes:

- "To the extent that gifts are motivated by altruism, it seems difficult to argue that they confer a personal benefit on the giftor."[61]
- "[E]ven gifts that are ostensibly motivated by altruism may increase the donor's personal utility."[62]
- "To the extent that an insider's disclosure reflects a selfish gift in the sense that it increases the insider's personal utility, such a gift is properly understood as conferring a personal benefit on the tipper within the meaning of *Dirks*."[63]

Although Professor Fisch's focus in this work was in contextualizing tipping in family relationship settings, these points are helpful in an insider trading analysis of the Robin Hood scenario because they articulate principles of personal benefit relevant to U.S. insider trading liability in circumstances involving informational gifts.

Finally, Professor Jim Cox's commentary on the *CLS Blue Sky Blog*[64] offers important insights on inappropriate and appropriate information sharing as a component of insider trading regulation based on the Court's opinion in *Dirks*[65]—insights that are consistent with the observations of Professors Nagy and Fisch. In a 2015 post on that weblog, Professor Cox offers views on the opinion of the U.S. Court of Appeals for the Second Circuit in *U.S. v. Newman*.[66] Specifically, Professor Cox posits a "modern day Paul Revere" scenario in which an insider rides through town

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> The motivation for gifts is more complex. Scholars have identified a variety of reasons for gift-giving. One is implicit reciprocity--the expectation that the donee will make a gift in return. But people make gifts for many other reasons. As Eric Posner explains, gifting may be motivated by the giftor's desire to increase his reputation or status. Giving gifts may increase the donor's power or influence; expensive gifts, in particular, may create a sense of obligation in the giftee.36 Exchanging gifts can also create or enhance trust relationships between giver and recipient.

Id. (footnotes omitted).

61. *Id.* at 51.
62. *Id.*
63. *Id.*
64. James D. Cox, *Giving Tippers a Pass: U.S. v. Newman*, CLS BLUE SKY BLOG (Jan. 27, 2015), http://clsbluesky.law.columbia.edu/2015/01/27/giving-tippers-a-pass-u-s-v-newman-3/.
65. Dirks v. SEC, 463 U.S. 646 (1983).
66. United States v. Newman, 773 F.3d 438 (2d Cir. 2014) *abrogated by* Salman v. United States, 137 S. Ct. 420 (2016).

spreading material nonpublic information to a relevant audience.[67] He reasons that the Paul Revere figure in his hypothetical has breached his state law corporate fiduciary duty but, under the Court's opinion in *Dirks v. SEC*,[68] has not violated U.S. insider trading prohibitions under Section 10(b) and Rule 10b-5 because *Dirks* requires that a tipper receive a personal benefit.[69] He avers that "[w]e can therefore see that the reach of the federal antifraud provision into tipping is not nearly as encompassing as the law of agency or corporate law that do not condition breach upon evidence the company has suffered an injury."[70]

Professor Cox goes on to describe the underlying rationale for the narrow liability rule in the *Dirks* case. "[*Dirks*] states not only that it required objective evidence of a breach but also that such objective evidence of a breach was necessary to foster an environment for financial analysts to 'ferret out' information."[71] In essence, the *Dirks* Court finds that the sharing of information with Mr. Dirks was not improper because the tip at issue served appropriate purposes beyond the tipper's and tippee's personal interests.[72] He further notes that, in *Dirks*, "the Supreme Court emphasized the relationship itself to a friend or relative with the view the tip can thus be understood as 'an intention to benefit a particular recipient . . . by a gift of [the] profits to the recipient.'"[73] The information sharing in the Robin Hood scenario involves no appropriate purposes beyond the tipper's and tippee's personal interests and may be properly understood as a gift of profits to the recipient.

Professors Nagy, Fisch, and Cox address significant matters of concern under existing U.S. insider trading doctrine relating to fiduciary duties. Resolution of many of these concerns is necessary to a determination of liability arising out of the Robin Hood scenario and other similar factual situations, including the context presented by the *Martoma* case.[74] In the

67. *See* Cox, *supra* note 64.
68. Dirks v. SEC, 463 U.S. 646 (1983).
69. *See* Cox, *supra* note 64.
70. *Id.*
71. *Id.* (citing to *Dirks*, 463 U.S. at 659).
72. Specifically, the Court found that the disclosures made by corporate insiders to Mr. Dirks were made to reveal ongoing fraud. *Dirks*, 463 U.S. at 667 ("As the facts of this case clearly indicate, the tippers were motivated by a desire to expose the fraud.").
73. *See* Cox, *supra* note 64 (quoting from *Dirks*, 463 U.S. at 664).
74. *See supra* notes 13-17 and accompanying text.

absence of U.S. Supreme Court opinions on point (and with the thought that, in particular, insider trading cases involving gratuitous tips of information by fiduciaries will continue to present themselves with some regularity), this article proceeds to an analysis of the Robin Hood scenario as a matter of insider trading law under Section 10(b) and Rule 10b-5.

IV. THE ROBIN HOOD SCENARIO AND TIPPER/TIPPEE LIABILITY UNDER U.S INSIDER TRADING LAW

The Robin Hood scenario is as yet unresolved as a matter of positive federal insider trading law. Moreover, the precise facts of the Robin Hood scenario raise interesting normative questions under that law. Existing insider trading principles from decisional law, read together with applicable fiduciary duty doctrine and scholarly commentary on insider trading jurisprudence, offer important touchstones for insider trading cases with facts paralleling those of the Robin Hood scenario.

A. A Broad-Based Positive Legal Analysis of the Robin Hood Scenario

In its most recent insider trading decision, *Salman v. United States*, the U.S. Supreme Court elucidated the law of tipper/tippee liability as follows:

> In *Dirks,* we explained that a tippee is exposed to liability for trading on inside information only if the tippee participates in a breach of the tipper's fiduciary duty. Whether the tipper breached that duty depends "in large part on the purpose of the disclosure" to the tippee. "[T]he test," we explained, "is whether the insider personally will benefit, directly or indirectly, from his disclosure." Thus, the disclosure of confidential information without personal benefit is not enough. In determining whether a tipper derived a personal benefit, we instructed courts to "focus on objective criteria, *i.e.,* whether the insider receives a direct or indirect personal benefit from the disclosure, such as a pecuniary gain or a reputational benefit that will translate into future earnings." This personal benefit can "often" be inferred "from objective

> facts and circumstances," we explained, such as "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." In particular, we held 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*." In such cases, "[t]he tip and trade resemble trading by the insider followed by a gift of the profits to the recipient." We then applied this gift-giving principle to resolve *Dirks* itself, finding it dispositive that the tippers "received no monetary or personal benefit" from their tips to Dirks, "*nor was their purpose to make a gift of valuable information to Dirks*."[75]

This statement of the doctrine offers a roadmap for analyzing the Robin Hood scenario as a matter of positive law. The succeeding paragraphs offer that analysis.

The core legal issue is whether the fiduciary (tipper) described in the Robin Hood scenario has breached the requisite duty predicate to insider trading liability by making disclosures to the recipient (tippee) described in the Robin Hood scenario. Any tippee liability may flow from the legal conclusion that the fiduciary has engaged in unlawful insider trading activity as a tipper. Tipper liability may attach if the breach of duty constitutes deceptive conduct under Section 10(b) and Rule 10b-5 and the tipper has the requisite scienter; tippee liability may follow if the tippee is deemed to inherit that duty from the tipper, breaches the duty by trading or re-tipping, and has the requisite scienter.

The *Salman* Court, like the *Dirks* Court, indicated that a tipper must derive a personal benefit in disclosing nonpublic information in order for there to be a breach of the tipper's duty as a basis for insider trading liability—"disclosure of confidential information without personal benefit is not enough."[76] If the fiduciary in the Robin Hood scenario is engaged in

75. Salman v. United States, 137 S. Ct. 420, 427 (2016) (citations, including parenthetical information about the addition of emphasis, omitted).
76. *Id.*

information sharing born of pure altruism (benefiting the recipient and not the fiduciary), then it would seem that the fiduciary's disclosure of confidential information to the recipient would not be recognized as a breach of duty on which insider trading liability may be founded. This would be consistent with Professor Cox's assessment of the liability of his modern day Paul Revere.[77] Under this reading of the extant insider trading jurisprudence, no personal benefit apparently would obtain.

The *Salman* Court noted, however, that personal benefit may be inferred from factual context, including through "an intention to benefit the particular recipient."[78] The Court specifically referenced circumstances in which the extant information sharing is the equivalent of a gift of unlawful trading proceeds earned by the tipper to the tippee—circumstances in which a "tip and trade resemble trading by the insider followed by a gift of the profits to the recipient."[79] These references open the door to arguments that the fiduciary in the Robin Hood scenario may be deemed to benefit from disclosing confidential information to the recipient because the tip is the equivalent of the fiduciary trading and gifting the proceeds to the recipient. This conclusion would be consistent with the *Martoma* court's reliance on and reading of the *Salman* opinion.[80]

Professor Fisch's recent work provides another possible argument that the fiduciary in the Robin Hood scenario has breached a duty foundational to insider trading liability under Section 10(b) and Rule 10b-5. Although one may view the fiduciary's information sharing in the Robin Hood scenario as purely altruistic, Professor Fisch notes that some gifts may be selfish because, in economic terms, they increase the giver's utility.[81] That increase in utility may be enough to constitute the requisite personal benefit under *Salman* and *Dirks*.

It may even be possible to argue that a person giving a gift altruistically *always* receives a benefit from that conduct. Research indicates that giving altruistically may enhance mental health.[82] Accordingly, the

77. *See* Cox, *supra* note 64 and accompanying text.
78. *Salman*, 137 S. Ct. at 427.
79. *Id.*
80. *See supra* notes 13-15 & 17 and accompanying text.
81. *See supra* notes 62 & 63 and accompanying text.
82. *See*, *e.g.*, Elizabeth W. Dunn et al., *Prosocial Spending and Happiness: Using Money to Benefit Others Pays Off*, CURRENT DIRECTIONS IN PSYCH. SCIENCE (forthcoming),

fiduciary's purely altruistic information sharing in the Robin Hood scenario may confer a personal benefit on the fiduciary, albeit one that is an unintentional byproduct of the fiduciary's actions.

Regardless, a court may find there is no personal benefit received by the fiduciary in the Robin Hood scenario. Therefore, it is important to expressly raise and respond to a few additional points relating to the overall nature of the insider trading conduct prohibited under Section 10(b) and Rule 10b-5. Insider trading is unlawful under section 10(b) and Rule 10b-5 because it is deceptive conduct engaged in by an actor with a particular state of mind (known as scienter).[83] Is it clear that the kind of duty breach by fiduciary insider in the Robin Hood scenario is deceptive, even if one can find no personal benefit in the insider's disclosure of material nonpublic information to the recipient? And is both the fiduciary's and recipient's conduct in the Robin Hood scenario undertaken with the requisite state of mind?

Insider trading under Section 10(b) and Rule 10b-5 constitutes fraud perpetrated through deceptive conduct. Specifically, in *Dirks*, the Court stated that "this fraud derives from the 'inherent unfairness involved where one takes advantage' of 'information intended to be available only for a corporate purpose and not for the personal benefit of anyone.'"[84]

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http://nrs.harvard.edu/urn-3:HUL.InstRepos:11189976 ("The benefits of prosocial spending are evident in givers old and young in countries around the world, and extend not only to subjective well-being but objective health. . . . [O]ne of the best ways to get the biggest payoff personally from a windfall of $20 is to spend it prosocially."); Stephen G. Post, *Altruism, Happiness, and Health: It's Good to Be Good*, 12 INT'L J. BEHAV'L MED. 66, 73 (2005) ("[A] strong correlation exists between the well-being, happiness, health, and longevity of people who are emotionally kind and compassionate in their charitable helping activities—as long as they are not over- whelmed, and here world view may come into play. . . . It can be said that a generous life is a happier and healthier one.")

83. *See supra* notes 3-11 (describing and citing to the law governing U.S. insider trading prohibitions).

84. Dirks v. SEC, 463 U.S. 646, 654 (1983). Mere unfairness, however, has not been deemed sufficient to justify a regulatory prohibition.

> [I]nsider trading is not illegal strictly because of the unfairness of trading by one who possesses confidential information in an environment of information asymmetry. Rather, insider trading in the United States is illegal because it is deceptive as a betrayal of a relationship of trust and confidence relating to material nonpublic information about a corporation or its securities. This kind of trading deceives those who trust the holder of the material nonpublic information—those who trust the holder not to use the information improperly and selectively for his or her or its advantage. The deception caused by the breach of this kind of duty clearly is rooted in unfairness. However, its version of

This reasoning leads the Court to its articulation of the need for a breach of duty and a constituent personal benefit.

> [T]o determine whether the disclosure itself "deceive[s], manipulate[s], or defraud[s]" shareholders, the initial inquiry is whether there has been a breach of duty by the insider. This requires courts to focus on objective criteria, *i.e.,* whether the insider receives a direct or indirect personal benefit from the disclosure, such as a pecuniary gain or a reputational benefit that will translate into future earnings. There are objective facts and circumstances that often justify such an inference. For example, there may be 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 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.[85]

Thus, as Professor Cox's analysis suggests,[86] under a strict reading of *Dirks*, absent the inference or finding of a personal benefit, the requisite deception for U.S. insider trading liability would not exist in the Robin Hood scenario.[87]

Deception can be construed more broadly, however. A lawfully operating firm and its shareholders or stockholders could be deceived by

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> unfairness, as played out in U.S. insider trading regulation, is less transparent and more difficult to prove than the simple unfairness that exists when any person (or a specified person) in possession of material nonpublic information neither discloses the information to all in the market nor refrains from trading.

Joan MacLeod Heminway, *Martha Stewart and the Forbidden Fruit: A New Story of Eve*, 2009 MICH. ST. L. REV. 1017, at 1027-28 (footnotes omitted).

85. *Dirks*, 463 U.S. at 663-64 (citations omitted).

86. *See supra* notes 64-70 and accompanying text.

87. Professor Adam Pritchard offers compelling support for this conclusion in Justice Powell's personal papers. *See* A.C. Pritchard, Dirks *and the Genesis of Personal Benefit*, 68 SMU L. REV. 857, 859-69 (2015).

an insider's unauthorized release of material nonpublic information under general fiduciary duty principles. These constituencies, based on the insider's fiduciary or fiduciary-like relationship with them, expect loyalty, and their trust is therefore betrayed by the insider's disloyalty. The existence of a breach of trust in these circumstances is apparent from the corporate and agency law sources cited *supra* Part II; in particular, Delaware corporate law notions of bad faith conduct and general agency law fiduciary principles provide helpful support.[88] That is deception, as commonly understood—priming someone to believe or expect one thing from you while all the while planning to behave in a manner inconsistent with that fabricated belief or expectation.[89] Yet, the Court's construction of deception does not expressly endorse all information-sharing breaches of an insider's duty of loyalty as deception, by seemingly mandating a judicial "focus on objective criteria, *i.e.,* whether the insider receives a direct or indirect personal benefit from the disclosure, such as a pecuniary gain or a reputational benefit that will translate into future earnings."[90]

At least two arguments exist, however, for reading the "*i.e.*" reference in this passage from *Dirks* as an "*e.g.*"—in other words, for understanding the personal benefit test as a *non*exclusive way to identify a breach of duty that constitutes deceptive conduct. These arguments, described below, support finding deception through a breach of fiduciary duty in the facts of the Robin Hood scenario. Ultimately, the narrow interpretation of the requisite breach of duty in U.S. insider trading law articulated in the express language of the *Dirks* opinion is not well justified or necessary as a matter of legal doctrine.[91]

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88. *See supra* notes 18-42. *See also* Cindy A. Schipani & H. Nejat Seyhun, *Defining "Material, Nonpublic": What Should Constitute Illegal Insider Information?*, 21 FORDHAM J. CORP. & FIN. L. 327, 352-54 (2016) (arguing that "the Court introduced the personal benefit requirement as a proxy for assaying disclosure (il)legitimacy" and concluding "if the government can adduce compelling evidence that the insider-tipper tipped knowingly (not accidentally) *and* that there is no reasonable explanation as to how tipping might promote the best interests of the principal, it then seems unnecessary to insist upon evidence of a specific personal benefit.").

89. The Merriam-Webster dictionary, for example, defines deception as "the act of causing someone to accept as true or valid what is false or invalid." *Deception*, MERRIAM WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/deception (last visited March 24, 2018).

90. *Dirks*, 463 U.S. at 663.

91. *See* Donald C. Langevoort, *"Fine Distinctions" in the Contemporary Law of Insider Trading*, 2013 COLUM. BUS. L. REV. 429, 450 ("*Dirks'* avowed effort to use the insider's motivation as a bright-line way of separating wrongful from legitimate trading is an illusion, but by now that point

First, as Professor Cox notes, the Court's rule regarding personal benefit in *Dirks* emanates from a specific policy objective: encouraging a market in which financial analysts are able to "ferret out" information.[92] The Robin Hood scenario does not implicate this policy goal. Moreover, this policy has lost some of its force in the wake of the SEC's adoption of Regulation FD.[93] Accordingly, the adjudication of facts like those exemplified in the Robin Hood scenario does not require a narrow reading of deception and breach of duty.

Second, as Professor Nagy points out, fiduciary duty jurisprudence was less well developed than it is now at the time the *Dirks* opinion was written.[94] Specifically, at that time, self-dealing was the key, recognized manifestation of the duty of loyalty applicable in an insider trading context. The leading case on the duty of loyalty under Delaware's pre-eminent corporate law, decided in 2006, recognizes a broader scope of conduct that violates the duty of loyalty.[95] Specifically, in an information-sharing context, the duty of loyalty may be breached by conduct that is not in good faith.[96] Under applicable Delaware law, the fiduciary's unauthorized disclosure of confidential information to the recipient in the Robin Hood scenario is most certainly outside the scope of good faith because the disclosure is undertaken "with a purpose other than that of advancing the best interests of the corporation" (as noted supra Part II.A)

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is fairly well understood."). Professor Nagy appears to come to the same view:

> *Dirks's* apposite concern about personal benefit . . . applies whether the corporation's information was exchanged for a tangible benefit or merely given away for the personal benefit of its recipient. Either way, an insider's disclosure would involve "'inherent unfairness'" because the insider would be taking "'advantage' of 'information intended to be available only for a corporate purpose and not for the personal benefit of anyone.'"

Nagy, *supra* note 52, at 12.

92. *See supra* note 71 and accompanying text; *see also Dirks*, 463 U.S. at 658-59.

93. *See*, *e.g.*, Joan MacLeod Heminway, *Willful Blindness, Plausible Deniability and Tippee Liability: SAC, Steven Cohen, and the Court's Opinion in* Dirks, 15 TRANSACTIONS: TENN. J. BUS. L. 47, 58 (2013) ("[T]he adoption of Regulation FD and the practices engendered by it . . . have changed the nature of an analyst's work and curbed the information entrepreneurialism of market intermediaries.").

94. *See* Nagy, *supra* notes 52-54, at 42, and accompanying text.

95. *See supra* notes 24-26 and accompanying text.

96. *See supra* note 25 and accompanying text.

or perhaps even "with the intent to violate applicable positive law."[97]

There is, therefore, a case to be made that deception in connection with the purchase or sale of a security based on a breach of fiduciary duty exists in the Robin Hood scenario and potentially in other tipper/tippee cases involving no personal benefit to a tipper. While that deception is a necessary element in establishing insider trading liability, however, it is alone insufficient. Scienter also must be proven.[98] The concept of scienter—the requisite state of mind required for insider trading liability under Section 10(b) and Rule 10b-5—enjoys an uncomfortable fit in U.S. insider trading doctrine.[99] No opinion of the U.S. Supreme Court has fully or formally established the nature of the required state of mind for insider trading liability under Section 10(b) and Rule 10b-5.[100]

Moreover, the overall decisional law history does not offer a clear view as to how the U.S. Supreme Court may rule if presented with the issue, especially in a tipper/tippee case. In a foundational case under Section 10(b) and Rule 10b-5 outside the insider trading context, the Court indicated that conduct undertaken with cognizance beyond mere negligence is a necessary predicate to liability under Section 10(b) and Rule 10b-5.[101] But cases that specifically address the precise nature of scienter in insider trading law generally (and tipper/tippee circumstances specifically) are relatively rare.[102]

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97. *See* Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362, 369 (Del. 2006) (quoting from and citing to *In re* Walt Disney Co. Deriv. Litig., 906 A.2d 27, 67 (Del. 2006)).

98. Although the scienter aspects of the Robin Hood scenario are not central to the thesis of this article, it may be beneficial to address them here nonetheless, for the sake of completeness.

99. Langevoort, *supra* note 91, at 438-41.

100. *See*, *e.g., id.* at 436 (noting that "the Supreme Court, from *Hochfelder* on, has explicitly avoided deciding the question" of "whether recklessness . . . satisfies the scienter requirement").

101. *See* Ernst & Ernst v. Hochfelder et al., 425 U.S. 185, 214 (1976) ("When a statute speaks so specifically in terms of manipulation and deception, and of implementing devices and contrivances—the commonly understood terminology of intentional wrongdoing—and when its history reflects no more expansive intent, we are quite unwilling to extend the scope of the statute to negligent conduct."). The Court declined, however, to specifically state that reckless conduct would be sufficient to satisfy the standard for liability. *Id.* at 194 n.12 ("We need not address here the question whether, in some circumstances, reckless behavior is sufficient for civil liability under § 10(b) and Rule 10b-5.").

102. *See*, *e.g.*, 3 BROMBERG & LOWENFELS ON SECURITIES FRAUD § 6:319 (2d ed.) (noting that "[o]ne of the few insider trading cases involving scienter in the *Ernst* sense of intent to deceive is *S.E.C. v. Netelkos*"); Langevoort, *supra* note 92, at 435-41 (describing the state of applicable law and citing to relevant cases).

A 2012 opinion of the U.S Circuit Court of Appeals for the Second Circuit, *SEC v. Obus*, articulates a general scienter standard applicable to tippers and tippees. According to this standard, "[i]n every insider trading case, at the moment of tipping or trading, just as in securities fraud cases across the board, the unlawful actor must know or be reckless in not knowing that the conduct was deceptive."[103] The *Obus* court then separately analyzed tipper scienter and tippee scienter.[104] Although *Obus* was a misappropriation case rather than a case involving a classical insider,[105] the court's analysis of the culpable state of mind for a tipper and tippee is more broadly applicable and helpful because it expressly addresses the factors used in determining both tipper and tippee scienter in a general manner (i.e., one not dependent on the facts at issue in *Obus*).

As an initial matter, the *Obus* opinion details the requisite factors in a determination that a tipper has scienter.

> First, the tipper must tip deliberately or recklessly, not through negligence. Second, the tipper must know that the information that is the subject of the tip is non-public and is material for securities trading purposes, or act with reckless disregard of the nature of the information. Third, the tipper must know (or be reckless in not knowing) that to disseminate the information would violate a fiduciary duty. While the tipper need not have specific knowledge of the legal nature of a breach of fiduciary duty, he must understand that tipping the information would be violating a confidence.[106]

Under this analysis, tipper scienter would exist in the Robin Hood scenario because the fiduciary (1) is tipping deliberately, (2) understands that the tipped information is nonpublic and material, and (3) knows that

103. SEC v. Obus, 693 F.3d 276, 286 (2nd Cir. 2012).
104. *Id.* at 286-88.
105. Although the SEC initially alleged liability under both the classical and misappropriation theories in *Obus*, the classical allegations were based on temporary insider status and the trial court's ruling in favor of the defendants on those allegations was not challenged by the SEC on appeal. *See id.* at 283-84.
106. *Id.* at 286-87.

disseminating the tipped information violates a fiduciary duty because that tip violates a confidence. However, neither the general statement of this rule nor the expression of these steps in determining scienter has been blessed by the U.S. Supreme Court (or even a significant number of lower federal courts).

The *Obus* opinion also identifies factors important to tippee scienter. In its opinion in *Obus*, the U.S. Court of Appeals for the Second Circuit emphasizes the importance of the U.S. Supreme Court's opinion in *Dirks v. SEC*. Specifically, the *Dirks* Court ruled that "a tippee assumes a fiduciary duty to the shareholders . . . not to trade on material nonpublic information only when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should know that there has been a breach."[107] In *Obus*, the Second Circuit interprets this language from *Dirks* (read together with U.S. Supreme Court and Second Circuit precedent) and observes that the assessment of a tippee's scienter is founded on

> a fact-specific inquiry turning on the tippee's own knowledge and sophistication, and on whether the tipper's conduct raised red flags that confidential information was being transmitted improperly. *Hochfelder*'s requirement of intentional (or *McNulty*'s requirement of reckless) conduct pertains to the tippee's eventual use of the tip through trading or further dissemination of the information. Thus, tippee liability can be established if a tippee knew or had reason to know that confidential information was initially obtained and transmitted improperly (and thus through deception), and if the tippee intentionally or recklessly traded while in knowing possession of that information.

The Robin Hood scenario posits that "[t]he recipient knows that the fiduciary owes a duty of trust and confidence to the firm." Accordingly, to assert and prove an insider trading violation for the recipient in the Robin Hood scenario under the analysis offered in *Obus*, a plaintiff or prosecutor

107. Dirks v. SEC, 463 U.S. 646, 660 (1983).

must allege and prove in the individual case that the recipient also knew or had reason to know that the transmission of information by the fiduciary to the recipient violated the fiduciary's duty of trust and confidence. The precise situational facts play an important role in establishing this element of insider trading liability. Given that the fiduciary and the recipient in the Robin Hood scenario are neither friends nor family, allegations of this kind of knowledge may be hard to make and prove.

B. Normative Considerations Relating to the Robin Hood Scenario

A legal analysis of the Robin Hood scenario as a matter of current insider trading doctrine (both as applied and as it may be applied) offers arguments for and against liability for the fiduciary (tipper) and recipient (tippee). Given that this positive law analysis yields somewhat uncertain results, however, it seems important to ask whether the actions of the fiduciary or the recipient in the Robin Hood scenario *should* be unlawful as a matter of U.S. insider trading law. Answering this question requires that the respondent know and understand what U.S. insider trading regulation aims to do—what conduct is intended to be proscribed.

The identification of a policy objective for U.S. insider trading prohibitions is not as easy as it would seem (or perhaps as it should be).[108] Scholars have argued, in fact, for over half a century, that insider trading is economically efficient and should be lawful.[109] The debate over the very

108. *See*, *e.g.*, Heminway, *supra* note 84, at 1027–29 (describing various policy objectives for insider trading regulation under U.S. law); Roberta S. Karmel, *The Relationship Between Mandatory Disclosure and Prohibitions Against Insider Trading: Why a Property Rights Theory of Inside Information Is Untenable*, 59 BROOK. L. REV. 149, 150 (1993) (book review) ("[D]espite the popularity of laws prohibiting insider trading, there is little discussion or agreement by regulators or commentators as to the philosophical objectives or precise parameters of such prohibitions."); Sung Hui Kim, *Insider Trading As Private Corruption*, 61 UCLA L. REV. 928, 945 (2014) ("[I]nsider trading law suffers from skepticism about its very purpose."); J. Kelly Strader, *White Collar Crime and Punishment: Reflections on Michael, Martha, and Milberg Weiss*, 15 GEO. MASON L. REV. 45, 69-70 (2007) (summarizing arguments for and against insider trading regulation); Alan Strudler & Eric W. Orts, *Moral Principle in the Law of Insider Trading*, 78 TEX. L. REV. 375, 375–76 (1999) ("[W]hy is trading on inside information wrong in some circumstances but not wrong in others? . . . Despite many cases and a huge literature on the subject, a coherent answer has remained elusive.").

109. *See*, *e.g.*, JONATHAN R. MACEY, INSIDER TRADING: ECONOMICS, POLITICS, AND POLICY 67 (1991) ("[T]he only conceivable justification for banning insider trading is that such trading involves the theft of valuable corporate property from its rightful owner"); HENRY MANNE, INSIDER TRADING AND THE STOCK MARKET (1966) (contending that insider trading, among other things, adds to market

existence of insider trading regulation is, however, beyond the scope of this article. Nevertheless, it is relevant here to identify the type of conduct that should be legally objectionable as a matter of U.S. insider trading law. More particularly, with respect to the Robin Hood scenario, why and when should tipping material nonpublic information be cognizable as unlawful insider trading?

In general, the U.S. federal securities law framework (which consists of mandatory disclosure rules, fraud and liability protections, and substantive regulation) exists to encourage capital formation and facilitate capital market transactions through investor protection and the maintenance of honest and fair securities markets.[110] Insider trading regulation, properly understood and applied, should then forward those objectives.[111] Most regulatory necessity arguments boil down to the effects of a loss of investor confidence.[112] Accordingly, while many may deem an insider's tip of material nonpublic information reprehensible merely because of the inherent betrayal of trust and confidence, that alone is not sufficient to

stability and provides useful compensation to entrepreneurs); Stephen M. Bainbridge, *Insider Trading Regulation: The Path Dependent Choice Between Property Rights and Securities Fraud*, 52 SMU L. REV. 1589, 1604 (1999) ("as a general matter, insider trading neither harms investors nor undermines their confidence in the markets."); Dennis W. Carlton & Daniel R. Fischel, *The Regulation of Insider Trading*, 35 STAN. L. REV. 857 (1983) (arguing, among other things, that much insider trading should be permitted because a firm has property rights in its proprietary information and should be able to allocate that information as it sees fit); *but see, e.g.*, Robert A. Prentice, *Permanently Reviving the Temporary Insider*, 36 J. CORP. L. 343, 384-88 (2011) (presenting economic effects arguments regarding the detriments of insider trading and the benefits of insider trading regulation).

110. *See*, *e.g.*, Iman Anabtawi, *Predatory Management Buyouts*, 49 U.C. DAVIS L. REV. 1285, 1290 (2016) (noting the policy goals of federal securities law "to promote efficient capital formation and flows" and adding that "[a]chieving these goals necessitates establishing a level playing field in securities transactions."); Bainbridge, *supra* note 109, at 1604 ("Securities fraud traditionally has been concerned with protection of investors and preservation of investor confidence in the integrity of the securities markets."); Tamar Frankel, *The Internet, Securities Regulation, and Theory of Law*, 73 CHI.-KENT L. REV. 1319, 1354 n.16 (1998) ("Underlying the securities laws are two paramount policies: the policy of protecting investors, designed to entice investors to put their money at risk in the markets, and the policy of facilitating capital formation, designed to assist issuers in raising capital."); Lyman Johnson, *Why Register Hedge Fund Advisers—A Comment*, 70 WASH. & LEE L. REV. 713, 719 (2013) ("[I]nvestor protection and capital formation are both key policy goals of federal securities laws").

111. *See* John P. Anderson, *Solving the Paradox of Insider Trading Compliance*, 88 TEMP. L. REV. 273, 301 (2016) ([I]nsider trading laws are presumably designed to protect a firm's shareholders and market participants in general.").

112. *See* Karmel, *supra* note 108, at 150 ("The SEC generally argues that insider trading is unfair and destructive of investor confidence.").

justify insider trading liability. There must be an actual or possible effect on capital markets or their constituents, and reasonable minds can disagree about whether (and, if so, under what circumstances) tipping by insiders discourages capital formation, puts investors at risk, or makes public securities markets unfair.

A dominant public policy justification for insider trading regulation has been that it prevents insiders from being able to unfairly advantage themselves (or, through the insiders conduct, a selective group of others).[113] Investors who know they will not be in the favored groups for receiving information may perceive themselves as unprotected and the market as unfair without legal prohibitions against insider tipping. Accordingly, investors may be less inclined to participate in capital formation. As commentators have observed, this rationale is not dependent on a specific breach of fiduciary duty, even though a breach is required for liability under Section 10(b) and Rule 10b-5.[114]

Observers also have sought to justify insider trading liability for tippers based on the harm to the principal resulting from the fiduciary's conduct—the insider-tipper's harm to the firm or the misappropriator-tipper's harm to the source of the information—grounded in the principal's property rights to the tipped information.[115] This policy rationale is less well rooted in the overall policies underlying federal securities regulation.[116] Perhaps issuers of securities may deem capital markets lacking in integrity and, as a result, not participate in them if tipping is not unlawful under insider

113. *See*, *e.g.,* Kim, *supra* note 108, at 986-98 (labeling and describing this general policy objective as an unjust enrichment theory of insider trading liability); Kimberly D. Krawiec, *Fairness, Efficiency, and Insider Trading: Deconstructing the Coin of the Realm in the Information Age*, 95 NW. U. L. REV. 443, 467 (2001) ("Those who would limit insider trading most often justify their position in terms of fairness."); Prentice, *supra* note 109, at 381 (footnotes omitted) ("[M]ost people agree that insider trading is unfair. Indeed, there is nearly a worldwide consensus to that effect.").

114. *See*, *e.g.*, Strader, *supra* note 7, at 1431–32 (making this point with respect to the misappropriation theory of insider trading).

115. *See*, *e.g*., Karmel, *supra* note 108, at 150-51 (describing the arguments of adherents to a property rights rationale for insider trading regulation); Kim, *supra* note 108, at 974-86 (describing and critiquing a property rights theory of insider trading liability"); Prentice, *supra* note 109, at 383 ("A . . . policy ground for imposing insider trading liability is to protect corporations' property interests.").

116. *See* Karmel, *supra* note 108, at 151 ("A . . . problem with treating inside information as a form of intellectual property entitled to legal protection is that such a theory fails to integrate insider trading regulation into the overall scheme of securities regulation.").

trading prohibitions. Overall, the connection of the property rights rationale for insider trading liability to securities regulation policy objectives is relatively weak.

Regardless, the Robin Hood scenario supplies an ample factual basis for the reasonable investor to determine that he or she is unprotected. Moreover, and perhaps more importantly, the Robin Hood scenario posits facts that easily provide a basis for reasonable issuers, investors, and intermediaries—as well as the general public—to conclude that public securities markets lack integrity. Under those facts, information is shared selectively to benefit the few—not the many. The fiduciary picks the market participants who benefit in the trading market for the securities. Others may logically sense that they are disadvantaged in the process.

In this analysis, the perception of unfairness or harm may be more important than the reality (including any version of reality represented by economic analysis and modeling). Those perceptions may be difficult to counter, given behavioral biases and an incomplete public understanding of capital markets and economic theory. To the extent that capital markets are adversely affected by perceptions that issuers or investors are under-protected or that markets are dishonestly constructed or maintained, a legal regulatory response should be considered.

Under any of these policy rationales, the fiduciary tipper in the Robin Hood scenario should be liable under the insider trading proscriptions of Section 10(b) and Rule 10b-5, regardless of whether tippee liability may follow. Existing or potential future market participants are likely to sense actual or apparent unfairness in securities markets or real or perceived harm to issuers, investors, or intermediaries if U.S. insider trading regulation fails to punish the type of conduct engaged in by the fiduciary tipper in the Robin Hood scenario. As a result, they may be discouraged from participation. The core values underlying federal securities regulation—the encouragement of capital formation through investor protection and market integrity maintenance—are best safeguarded if the conduct of the fiduciary tipper in the Robin Hood scenario constitutes unlawful tipping under Section 10(b) and Rule 10b-5.

V. CONCLUSION

"Thus died Robin Hood . . . , with mercy in his heart toward those that had been his undoing; for thus he showed mercy for the erring and pity for the weak . . . ."[117]

The Robin Hood scenario offers us an opportunity to consider weaknesses in U.S. federal insider trading regulation in a specific context. That context involves the intentional unauthorized sharing of material nonpublic information by a firm fiduciary with a stranger (perhaps someone of limited means)—an information recipient who is neither family nor friend nor even an acquaintance—for the purpose of giving the stranger economic benefit. Many (if not most) market observers, including some familiar with U.S. insider trading regulation, would classify the tipper's conduct as unlawful under insider trading rules. Yet, a strict doctrinal analysis under Section 10(b) and Rule 10b-5 calls that classification into doubt. This article not only offers an analysis of the Robin Hood scenario under existing federal insider trading law, but also presents doctrinal and normative approaches to the liability question raised by the Robin Hood scenario that yield results consonant with the likely majoritarian conclusion that the tipping insider has committed an insider trading violation under Section 10(b) and Rule 10b-5.

Many commentators have suggested, in analyses of the law generally and as applied in various factual contexts (some close to the Robin Hood scenario) that fiduciary duty should not continue to be important to insider trading liability under Section 10(b) and Rule 10b-5.[118] This may well be

117. PYLE, *supra* note 1, at 296 (quoting from the epilogue).

118. *See*, *e.g.*, Nagy, *supra* note 52, at 48 ("Although fiduciary principles should have a substantial role in Rule 10b-5's insider trading and tipping prohibitions, the crux of the offenses involve defrauding investors by trading on information that was obtained wrongfully, regardless of whether the trader or the tipper violated a fiduciary duty . . . ."); *id.* at 57 (suggesting liability under her theory "when a person knowingly or recklessly uses wrongfully obtained material nonpublic information in connection with a securities transaction, or wrongfully communicates such information, regardless of whether the trader or tipper violated a fiduciary duty . . . ."); Richard W. Painter et. al., *Don't Ask, Just Tell: Insider Trading After United States v. O'Hagan*, 84 VA. L. REV. 153, 228 (1998) ("[T]he securities laws were designed to protect investors, and the financial well being of an investor who trades with a person in possession of material, nonpublic information has little to do with whether the person breached a fiduciary duty to a third party.").

right. Portions of the analyses offered here bolster that view and would render tippers liable under certain facts, regardless of a breach of fiduciary duty. However, limiting or eliminating the role of fiduciary duty in insider trading analyses under Section 10(b) and Rule 10b-5 on a comprehensive basis would likely involve federal legislation or regulation, and neither may be imminent or even foreseeable.

Having said that, under the analyses provided in this article, there may be no need to take that doctrinal leap to find tipper liability in the Robin Hood scenario. Existing principles of applied legal regulation, taken alone and viewed through a policy-grounded normative lens, provide strong arguments for finding the tipping fiduciary in the Robin Hood scenario liable. Ultimately, this article contends that liability should be based on whether the tipper "used the information in a manner inconsistent with a respect for the legitimate interests of his corporation and its shareholders, not whether he received any direct benefit by his action."[119]

Unfortunately, the law in this area remains unclear.[120] A more flexible, less technical approach to fiduciary duty analysis in insider trading cases, consistent with existing fiduciary duty jurisprudence and the policies underlying federal securities law, offers opportunities to provide additional clarity.[121] Because curative legislation or regulation may not be forthcoming in the near future (if at all), it is hoped that the analyses provided here may offer litigants and courts arguments in forthcoming controversies.

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119. Strudler & Orts, *supra* note 108, at 425. A former SEC Branch Chief argued to this effect: more than 30 years ago:

> [T]he corporation and its shareholders, who may be damaged by unauthorized disclosure even if an insider does not improperly benefit, should be protected by a presumption that the insider benefited, i.e., that there is some unfairness in the insider's use of the information. This is especially so in light of the remedial purposes of the anti-fraud provisions of the federal securities laws and the clear policy of enhancing market integrity expressed in the Exchange Act.

Bruce A. Hiler, *Dirks v. SEC—A Study in Cause and Effect*, 43 MD. L. REV. 292, 321 (1984).

120. *See supra* Part IV.A.

121. *Cf.* Nagy, *supra* note 52, at 8 (footnotes omitted) ("[T]o better serve . . . policy goals of promoting market integrity and investor confidence in securities markets, and to buttress the congressional determinations to regard insider trading and tipping as a species of securities fraud, Rule 10b-5's insider trading and tipping prohibitions should be construed as broadly as Section 10(b)'s statutory text allows").