No. _____

In The
Supreme Court of the United States

ERIC WELLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

NISHAY K. SANAN
Counsel of Record
CECE WHITE
LAW OFFICE OF
NISHAY K. SANAN
53 W. Jackson Blvd.,
Ste. 1424
Chicago, IL 60604
(312) 692-0360
nsanan@aol.com
cece@sananlaw.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

Liability for insider trading arises when someone acts on material nonpublic information. *Dirks v. SEC*, 463 U.S. 646, 653 (1983). That person may be an insider who has access because of their position, or that person may be a tippee, an outsider who receives the information. *Id.* There is no general duty to abstain from trading solely because one knowingly receives material nonpublic information. *Id.* Instead, the duty arises from the insider's fiduciary duty to the corporation. *Id.* In the case of a tippee, who has no such relationship to the corporation, a duty exists only if the insider's disclosure is a breach of fiduciary duty. *Id.* at 655. An insider's disclosure is a breach if the insider receives a direct or indirect personal benefit. *Id.* at 660. This Court has held that the personal benefit to the insider may often be inferred from the insider's intention to benefit the tippee or make a gift of confidential information to a trading relative or friend. *Id.* at 664. Thus, the relationship between the insider and the tippee often serves as the proof of the personal benefit to the insider. *See*, *e.g.*, *SEC v. Obus*, 693 F.3d 276, 291 (2d Cir. 2012). A tippee is only liable if the tippee participates in the insider's breach, which requires the tippee to know that the insider disclosed in exchange for a personal benefit. *Salman v. United States*, 580 U.S. 39, 42 (2016). However, when a tippee is more remote, having no contact with either the insider or the first tippee, the following questions arise:

1. Is a remote tippee's mere knowledge that a friendship exists between the insider and first tippee sufficient on its own to establish the

QUESTIONS PRESENTED – Continued

remote tippee's knowledge that the insider received a personal benefit, particularly where, as here, the insider received a pecuniary personal benefit, of which the remote tippee had no knowledge?

2. Is a remote tippee within a larger insider trading conspiracy part of a more narrow conspiracy where he is unknown to the insider and provides the insider no benefit, as the Second Circuit held in *Geibel*, or is such an argument limited only to the insider and foreclosed to the remote tippee, as the Seventh Circuit held in this case?

PARTIES TO THE PROCEEDING

The parties to this proceeding in the United States Court of Appeals for the Seventh Circuit were Petitioner, Eric Weller, and Respondent, United States of America.

RELATED CASES

United States v. Weller, et al., No. 17-CR-763, U.S. District Court for the Northern District of Illinois. Judgment entered September 13, 2019 and amended to correct a clerical error on September 29, 2019.

United States v. Weller, No. 19-2814, U.S. Court of Appeals for the Seventh Circuit. Judgement entered July 7, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Eric Weler respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Seventh Circuit's opinion (App. 1-7) is reported at 40 F.4th 563. The District Court's opinions denying petitioner's motion for judgment of acquittal and new trial (App. 8-14) and motion for dismissal (App. 15-23) are unreported.

JURISDICTION

On July 7, 2022, the Seventh Circuit affirmed the District Court's rulings. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case does not involve interpretation of statutory or constitutional provisions.

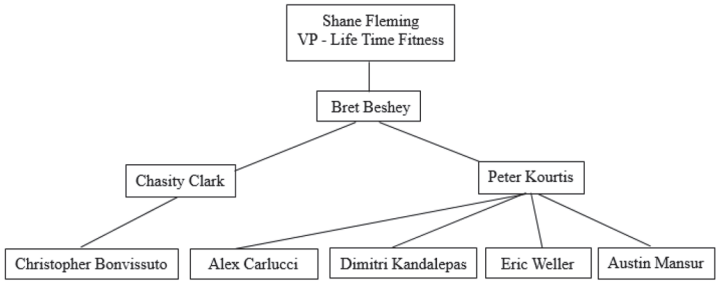
STATEMENT OF THE CASE

A. Factual Background

Petitioner Eric Weller was convicted of conspiring to commit insider trading as a remote tippee of insider Shane Fleming, a vice president of Life Time Fitness, Inc. ("LTF"). App. 2. In his capacity as vice president, Fleming learned that the company was likely to be acquired by private equity firms, and that the price of LTF's stock would increase to at least $65 per share. *Id.* Fleming had a fiduciary duty to LTF to maintain the confidentiality of this material nonpublic information and not to disclose it to others. App. 16. Fleming disclosed the information to his friend and business partner, Bret Beshey, knowing that Beshey would use the information to purchase and sell securities. *Id.* Beshey agreed to pay Fleming a share of the profits that he earned as a result. *Id.* Beshey then provided the information to Chasity Clark, his girlfriend, and Peter Kourtis, his friend and business partner. *Id.* Beshey told Clark and Kourtis that the information came from a friend who was a senior employee at LTF. *Id.* Beshey and Kourtis agreed that Kourtis would purchase out-of-the-money LTF call options and would pay Beshey a share of the profits that he earned as a result. *Id.*

Clark and Kourtis both shared the information with others. *Id.* Clark provided the information to Christopher Bonvissuto. *Id.* Kourtis provided the information to Alex Carlucci, Dimitri Kandalepas, Austin Mansur, and the petitioner, Eric Weller. Weller is a

remote tippee, multiple levels removed from the insider, as the following chart illustrates:



According to the indictment, Kourtis told each person that he tipped that the information came from his friend (Beshey) who learned the information from a senior employee at LTF (Fleming), who had misappropriated the information from LTF in breach of his duties to the company. App. 31. Kourtis testified that he told Weller, "Hey listen, my friend Bret Beshey who I do business with, he's got a friend high up at Life Time, and he's saying that the company is going to be bought out at $65 a share, approximately, and it's going to go private." Tr. 222.[1] Weller responded that he would "look into it" and call Kourtis back. Tr. 223. Soon after, Weller called Kourtis, stating, "Yeah, I did some research on it, and I read that there was a significant equity purchase by some green valley or green something company." *Id.* Kourtis and Weller talked about the possibility of trading options, but they did not discuss or agree on what kinds of options to purchase, what

[1] "Tr." indicates a reference to the trial transcripts, followed by the relevant page number. The transcripts are available on the District Court's docket, Document Nos. 378-383.

amount to purchase, or any sort of profit-sharing arrangement or kickback. Tr. 223-24, 242. Weller ultimately purchased out-of-the-money call options, earning more than $550,000. App. 2. After Kourtis learned of Weller's profits, he asked Weller, "Hey, so would you like to take care of me?" Tr. 243. Weller did not pay Kourtis a share of his profits, but he did give Kourtis 10-15 pounds of marijuana which Kourtis was able to sell for approximately $20,000. *Id.* at 244.

B. Procedural Background

On September 29, 2017, a grand jury returned an indictment charging Weller and eight codefendants – Fleming, Beshey, Kourtis, Carlucci, Mansur, Kandalepas, Clark, and Bonvissuto – with one count of conspiracy to commit securities fraud by insider trading, in violation of 18 U.S.C. § 371, and nine counts of securities fraud by insider trading, in violation of 15 U.S.C. §§ 78j(b), 78ff(a), and 17 C.F.R. § 240.10b-5. App. 24-44. Weller was charged in the conspiracy count as well as three substantive insider trading counts. App. 28, 39-41.

Weller, joining codefendant Mansur, moved to dismiss the indictment for failing to allege that he, as a downstream remote tippee, knew that the insider received a personal benefit of any kind. R. 160.[2] His motion sought dismissal of both the substantive counts and the conspiracy count in that, without such

[2] "R." indicates a reference to the District Court's record, followed by the relevant document number on the docket.

knowledge, he could not have conspired to commit insider trading. *Id.* The District Court denied the motion because the indictment alleged that Weller knew that the tipper, Fleming, and the tippee, Beshey, were close friends, finding this sufficient to allege knowledge of a personal benefit inferred by friendship, based on this Court's ruling in *Salman*. App. 19 (citing *Salman*, 580 U.S. 39). The Court further found the allegations sufficient to allege a conspiracy with a common purpose, namely, the knowing use of material, nonpublic information to trade securities for personal gain in violation of the insider's fiduciary duty. App. 19-20.

Weller's case proceeded to jury trial on April 9, 2019. Tr. 1. Other than Weller, all alleged conspirators admitted their guilt. Fleming (R. 96), Beshey (R. 214), Kourtis (R. 94), Clark (R. 196), and Mansur (R.221) each pled guilty to conspiracy to commit insider trading, and Carlucci (R. 80), Kandalpas (R. 73), and Bonvissuto (R. 68) entered into deferred prosecution agreements. Pursuant to their agreements with the government, Fleming, Kourtis, Carlucci, and Kandalepas each testified at Weller's trial. On April 11, 2019, Weller's oral Rule 29 motion was denied as to the conspiracy and the District Court reserved ruling on all remaining issues. R. 247. The jury ultimately found Weller guilty of conspiracy to commit insider trading but acquitted him of the three substantive insider trading counts. App. 8.

On May 21, 2019, Weller filed a post-trial motion for judgment of acquittal, or for new trial, arguing that the evidence was insufficient to support the jury's

finding of guilt, that the Court erred in admitting post-conspiracy statements and had failed to properly instruct the jury. R. 270. The District Court denied the motions, finding that while "there was no evidence that Weller was aware of any other remote tippee," the law "does not require each conspirator to know all of the other or all of the details of the conspiracy." App. 10 (citing *United States v. Blumenthal*, 332 U.S. 539, 557 (1947); *United States v. Bolivar*, 532 F.3d 599, 603 (7th Cir. 2008)). On September 9, 2019, Weller was sentenced to a term of imprisonment of one year and one day. R. 350. Judgment was entered on September 13, 2019 and was amended to correct a clerical error on September 29, 2019. R. 350, 375. On September 19, 2019, Weller timely filed his notice of appeal. R. 357.

On appeal to the Seventh Circuit, Weller argued that his case never should have proceeded to trial because the indictment failed to allege an essential element of the offense – that Weller knew that the insider received a personal benefit in exchange of the disclosure of material nonpublic information in breach of his fiduciary duty. AR. 8.[3] Further, he argued that the evidence was insufficient to establish that he knew of the personal benefit, and thus, was insufficient to prove he had the requisite knowledge to join the conspiracy. *Id.* Weller argued that the allegation and evidence that Weller had knowledge that a friendship existed between Fleming and Beshey was insufficient to allege or prove his knowledge that Fleming had disclosed the

[3] "AR." indicates a reference to the Appellate Court's record, followed by the relevant document number on the docket.

information to his friend as a gift, thereby personally benefitting himself, in breach of his fiduciary duty. *Id.* The application of this personal benefit inference based on friendship was especially problematic in that Fleming had received money from Beshey in exchange for his disclosure and the government had offered no evidence that Weller had knowledge of this pecuniary personal benefit. *Id.* Thus, without knowing that Fleming had sold the information for money, it was not illegal for Weller to trade on that information. *Id.* Further, he argued he could not have knowingly joined in the single conspiracy alleged in the indictment where his connection to the other members was so attenuated, as the Second Circuit had held in *Geibel*. *Id.* (citing *United States v. Geibel*, 369 F.3d 682 (2d Cir. 2004)).

On July 7, 2022, the Seventh Circuit affirmed. App. 1. The Court upheld the denial of Weller's motion to dismiss because the indictment alleged that Beshey was Fleming's friend and that Fleming violated a duty to this employer. App. 4. The Court held that "given *Salman* and *Dirks*," these allegations were sufficient to allege that Fleming received a personal benefit. *Id.* The Court found that the evidence was sufficient, despite Weller's lack of knowledge beyond the existence of a friendship, because there is no requirement to prove that a monetary benefit was received by the insider. *Id.* The Seventh Circuit found that while the insider would be entitled to acquittal had he been charged with conspiring with Weller, the same was not true of Weller where he was charged with conspiring with the insider. App. 6 (referencing *Geibel*, 369 F.3d 682). The

Court explained that even if Weller had only participated in a narrower conspiracy, he had not been prejudiced because, "no matter what else one makes of the evidence, Weller and Kourtis conspired to misuse material nonpublic information." App. 6. The Seventh Circuit rejected Weller's other grounds for appeal, and ultimately affirmed. App. 7.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition to resolve the important questions it raises when determining tippee liability under *Dirks* and *Salman*, questions which courts have long struggled to answer: (1) what level of knowledge a remote tippee must have of the personal benefit to the insider to have participated in the insider's breach, especially where, as here, the insider received money in exchange for disclosure, but also claimed he intended to benefit a friend, and (2) how to determine the scope of a conspiracy when a remote tippee is far removed from the insider and does not participate in, or have knowledge of, the conspiracy's profit sharing agreement.

I. The Personal Benefit and Knowledge Elements for Insider Trading Liability Merit this Court's Review

The Court should reexamine the limits of the personal benefit test for insider trading liability and its connection to the requisite knowledge that a remote

tippee must have to knowingly conspire. These elements have broadened so significantly since they were established by this Court that they no longer serve the limiting purpose for which they were intended, and instead now function as a general duty on all market participants, in stark contrast to this Court's prior rulings. *See*, *e.g.*, *Chiarella v. United States*, 445 U.S. 222, 235 (1980).

A. Courts Now Interpret the Personal Benefit Test as a Mere Formality

The lower courts have broadened the personal benefit test significantly since it was described in *Dirks*. 463 U.S. 646. There, the Court explained that to be liable for insider trading, someone must act on material nonpublic information. *Id.* at 653. That person may be an insider who has access to the information because of their position or that person may be a tippee, an outsider who received the information as a tip from the insider. *Id.* However, the Court has repeatedly recognized that there is no general duty to disclose or abstain from trading solely because a person knowingly receives material nonpublic information from an insider. *Id. See also Chiarella*, 445 U.S. at 233; *United States v. O'Hagan*, 521 U.S. 642, 663 (1997); *Salman*, 580 U.S. at 42.

Instead, the duty to disclose or abstain from trading arises from the insider's fiduciary duty to the corporation and its shareholders. *Chiarella*, 445 U.S. at 227-29. In the case of a tippee who has no such

relationship to the corporation himself, the duty exists only if the insider's tip was a breach of fiduciary duty. *Dirks*, 463 U.S. at 655. Thus, to determine whether the insider beached by disclosing, the Court established the personal benefit test – "the test is whether the insider personally will benefit, directly or indirectly, from his disclosure. Absent some personal gain to the insider, there has been no breach of duty to stockholders." *Id*. at 662. The Court recognized that this would often be a difficult question of fact and advised that its determination should involve a "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." *Id.* at 664. The Court further explained that "there are objective facts and circumstances that often justify" an inference that the insider personally benefited 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." *Id.*

The Court also provided an example of how the personal benefit test may be inferred in situations where no tangible benefit is received by the insider, such as "when an insider makes a gift of confidential information to a trading relative or friend." *Id.* In this scenario, the factfinder can infer that the tipper meant to provide the equivalent of a cash gift. *Id.* The logic of this "gift theory," is that the insider still personally benefits because giving a gift of trading information to a friend or relative, with the expectation that he or she

will trade on it and collect a profit, is the same as the insider trading on the information himself, collecting a profit, and giving the proceeds to the friend or relative as a gift. *Id.*

The personal benefit test is easily applied when there is a pecuniary benefit or a tangible quid pro quo between tipper and tippee. *See*, *e.g.*, *United States v. Parigian*, 824 F.3d 5, 15 (1st Cir. 2016) (noting that friendship alone was not the personal benefit because the insider was promised luxury items in return for the tips). However, the lower courts have struggled to apply the test to intangible benefits and gifts. For example, in *United States v. Newman*, an insider tipped a friend that he met at church with whom he occasionally socialized. 773 F.3d 438, 451 (2d Cir. 2014) *abrogated in part by Salman*, 580 U.S. 39. The government argued that the fact that the insider was friends with the person was tipped was sufficient to prove that the insider derived a personal benefit under *Dirks*. *Id.* at 452. The Second Circuit rejected this argument finding that the personal benefit standard, "although permissive, does not suggest that the government may prove the receipt of a personal benefit by the mere fact of a friendship, particularly of a casual or social nature." *Id.* The Court thus held that while *Dirks* suggested the personal benefit could be inferred when the information was given as a gift, "such an inference is impermissible in the absence of proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a

potential gain of a pecuniary or similarly valuable nature." *Id.*

This Court ultimately rejected *Newman*'s holding in *Salman.* 580 U.S. at 50 (citing *Newman*, 773 F.3d at 452). There, the insider was an investment banker with access to confidential information who tipped his brother to "help him," and to "fulfill whatever needs he had," without receiving a financial or reputational benefit in return. *Salman*, 580 U.S. at 44. The insider's brother, Michael, then tipped Salman, who was Michael's friend as well as the insider's own brother-in-law. *Id.* at 44. Michael testified at trial that Salman knew the information came from the insider as a gift. *Id.* at 44-45. Salman argued that there was no personal benefit to the insider, and thus, no breach of the insider's fiduciary duty from which his own liability could be derived. *Id.* at 46-47. The Court disagreed, relying solely on *Dirks*, to find: "Our discussion of gift giving resolves this case . . . *Dirks* makes clear that a tipper breaches a fiduciary duty by making a gift of confidential information to a trading relative and that rule is sufficient to resolve the case at hand." *Id.* at 49 (citing *Dirks*, 463 U.S. at 659). Thus, the Court found that the insider had breached his fiduciary duty. *Id.* at 50. The Court then turned to whether Salman had participated in the insider's breach finding that he had "acquired and breached himself, by trading on the information with full knowledge that it had been improperly disclosed." *Id.* Addressing *Newman*, the Court held, "to the extent the Second Circuit held that the tipper must also receive something of a 'pecuniary or

similarly valuable nature' in exchange for a gift to family or friends . . . this requirement is inconsistent with *Dirks*." *Id.* (citing *Newman*, 773 F.3d at 452).

The Court's ruling in *Salman* quoted the language of *Dirks*, but its application of the personal benefit test marked a shift. *Dirks* held that a jury may "often" find that "objective facts and circumstances," "justify an inference" that the insider received a personal benefit by disclosing. 463 U.S. at 663. *Salman*, on the other hand, has been interpreted to mean that if an insider tips a friend or family member, the existence of that relationship by itself proves that the insider received a personal benefit. *See*, *e.g.*, *United States v. Bray*, 853 F.3d 18, 27 (1st Cir. 2017) (finding that the testimony established that the insider and tippee were good friends who socialized often and that this was sufficient evidence of a personal benefit). *See also* Andrew W. Vollmer, *Featured Article: Explaining Dirks*, 58 Am. Crim. L. Rev. 523 (Summer 2021) (arguing that courts have misunderstood the personal benefit test established in *Dirks* which is now broadly construed to create liability where insiders have received nothing at all in return).

Going even further, courts have since interpreted *Salman* to mean that a close relationship between the insider and the tippee is not necessary at all for such an inference to apply. For example, following the Court's rejection of *Newman*, the Second Circuit revisited its personal benefit analysis in *United States v. Martoma*. 894 F.3d 64 (2d Cir. 2017). There, the Court explained that because the existence of a breach,

"depends in large part on the purpose of the [insider's] disclosure," the government could prove the personal benefit element solely with evidence that the insider intended to benefit the tippee, even if the tippee is a stranger and the insider receives nothing in return. *Id.* at 74-75. The Second Circuit rationalized this approach because an intention to benefit "demonstrates that the tipper improperly used inside information for personal ends and thus lacked a legitimate corporate purpose." *Id.* at 75. This interpretation of the personal benefit test is nearly identical to the standard proposed by the government in *Salman*: that "a tipper personally benefits whenever the tipper discloses confidential trading information for a noncorporate purpose." 580 U.S. at 47. While this Court rejected that standard in *Salman*, it is effectively the standard applied by the courts today, with nearly anything qualifying as a personal benefit. *See*, *e.g.*, *SEC v. Obus*, 693 F.3d 276, 292 (2d Cir. 2012) (finding a personal benefit where the tipper hoped to curry favor with his boss); *United States v. Evans*, 486 F.3d 315 (7th Cir. 2007) (finding a personal benefit where the tipper and tippee were college roommates who had stayed in touch).

B. The Opinion Below Further Weakens the Personal Benefit Requirement by Allowing for Dual and Contradictory Motivations

The Seventh Circuit further broadened the personal benefit test in this case by holding that alleging and proving that a friendship exists between the

insider and tippee is sufficient on its own to demonstrate that the insider received a personal benefit, even where the insider received money from the same tippee in exchange for disclosure.

In affirming the denial of Weller's motion to dismiss, the Court recognized that the indictment failed to allege either that the insider breached by disclosing, or that in exchange, he received a "forbidden benefit." App. 4. The Court suggested that "an allegation that Beshey's gratitude was a benefit to Fleming would have sufficed." *Id.* However, the Court nonetheless affirmed, finding the indictment "does say that Beshey was Fleming's friend, and that Fleming violated a duty to his employer," and "given *Salman* and *Dirks*," that was "close enough." *Id.* The government relied on the friendship to convict Weller because it is undisputed that Weller had no knowledge of the pecuniary personal benefit. The Seventh Circuit's opinion fundamentally alters the requirement that a remote tippee is only liable if they know or should know of the personal benefit, as is addressed below, but its treatment of the personal benefit element itself merits this Court's review for two reasons. First, the Court has not yet ruled on whether friendship alone establishes a personal benefit or how close a relationship must be to merit that finding. Second, the Court should reject the application of the gift theory inference where the insider was paid for his supposed gift.

Neither *Salman* nor *Dirks* suggested that gratitude is a personal benefit to the insider or that a finding of a personal benefit is automatic where there is a

friendship. The Court explained the rationale of the gift theory in both cases plainly – making a gift of information to a relative or close friend because of a desire to benefit that particular individual, with the expectation that he or she will trade on that information, is the equivalent of the insider himself trading on the information, profiting, and then using the proceeds to make a cash gift to that same person. *Salman*, 580 U.S. at 49; *Dirks*, 463 U.S. at 664. In such a scenario, it is not gratitude that serves as the personal benefit to the insider; the personal benefit to the insider is the money earned by trading itself. The Court in *Dirks* simply recognized that insiders who want money to provide as a gift to a friend or relative could skip a step by disclosing information instead. *Dirks*, 463 U.S. at 664.

Similarly, in *Salman*, the Court explained that liability was clear because the insider "would have breached had he personally traded on the information and then given the proceeds as a gift to his brother. But [the insider] effectively achieved the same result by disclosing the information [to his brother] and allowing him to trade on it." 580 U.S. at 49. It was not the brother's gratitude that served as the personal benefit to the insider. It was not merely the fact that they were brothers that established the personal benefit. Inferring the personal benefit from a relationship must be based on "objective facts and circumstances," 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." *Dirks*, 463

U.S. at 664. In *Salman*, there was ample evidence that the insider tipped his brother as a gift of the resulting profits, and, because they were family and it was not at issue, the Court had no need to determine what level of closeness would support an inference that benefitting a friend is the same as benefitting oneself. *Salman*, 580 U.S. at 49-50.

In the instant case, the Seventh Circuit found that the existence of a friendship itself establishes that the insider received an intangible personal benefit, even where the insider in fact received a pecuniary personal benefit. App. 4. The indictment alleged that Fleming and Beshey agreed that Beshey would provide Fleming a share of his profits. App. 30. The evidence demonstrated that Fleming did receive a share of the profits. Tr. 116. However, because the government could not prove Mr. Weller's knowledge of the profit-sharing agreement, its theory was that the insider not only received a pecuniary personal benefit but had also intended to benefit his friend. Tr. 505-06. Unlike in *Salman*, this is not an inference based on "objective facts and circumstances." *Salman*, 580 U.S. at 49. If Fleming's intent was to benefit Beshey monetarily, he had no reason to collect a share of Beshey's profits. The gift theory is simply inapplicable – the insider here was not motivated by a desire to give a friend money and did not seek to achieve that desire by giving him valuable information instead. *Id.* at 49-50. Fleming disclosed to Beshey in exchange for a share of Beshey's profits. The nature of the relationship between them is

irrelevant. Information that comes at a price is, by any definition, not a gift.

As Courts interpret the element now, it is difficult to imagine facts in which there would be no finding of a personal benefit to the insider. The insider personally benefits if he receives money, reciprocal information, or other things of value, if he receives nothing of value, but the tippee is a family member or friend, or if he receives nothing of value, the tippee is a stranger, but the insider wanted to benefit a stranger. *Martoma*, 894 F.3d at 74-77. As the Seventh Circuit held here, evidence that the insider disclosed for profit does not foreclose an inference that he also disclosed to benefit someone other himself, and the insider personally benefits even if the tippee is nothing more than grateful. App. 4-5.

Returning to *Dirks* helps to illustrate the evolution of this essential element of the offense. Dirks was likely grateful to the insider who provided him with the information that ultimately saved his clients from considerable losses and earned him commissions. 463 U.S. at 649, n. 2. This gratitude alone may now prove a personal benefit to the insider. App. 4. Further, the insider must have intended to benefit Dirks to some degree – he chose Dirks specifically, intending that Dirks would tell his clients to sell their shares in the company, which the insider knew would both expose the fraud and benefit Dirks reputationally and financially. 463 U.S. at 669 (Blackmun, J., dissenting). The insider's altruistic motive does not foreclose the finding that the insider also intended to benefit the tippee, just

as Flemings' desire to earn profits does not foreclose the finding that he also intended to benefit the tippee. Under the standard applied in the opinion below, Dirks would be unlikely to escape liability. This broadening, especially when combined with the Seventh Circuit's treatment of the knowledge requirement, has eviscerated the usefulness of the personal benefit test to distinguish lawful from unlawful conduct. The Court should grant this petition to return meaning to the requirement that the insider must personally benefit from his disclosure to have breached a fiduciary duty.

C. The Opinion Below Conflicts with this Court's Precedent by Requiring Knowledge Only that a Friendship Exists

In addition to broadening the personal benefit test, the opinion below conflicts with *Dirks* and *Salman* in that the Seventh Circuit allowed mere knowledge that a friendship existed between the insider and the first tippee to prove Weller's knowledge that the insider breached his fiduciary duty by disclosing in exchange for a personal benefit.

This Court held in *Dirks* and affirmed in *Salman*, that the tippee is only liable if he knows, or should know, that there has been a breach of a fiduciary duty. *Dirks*, 463 U.S. at 660; *Salman*, 580 U.S. at 48. This necessitates tippee knowledge of *each element* – "in other words, [the government must prove] that the tippee knew that the tipper disclosed the information for a personal benefit and that the tipper expected trading

to ensue." *Salman*, 580 U.S. at 48. Applying this rule, the Court found that Salman, "acquired and breached himself, by trading on the information with full knowledge that it had been improperly disclosed." *Id.* at 50. This "full knowledge" was proven at trial. *Id.* Testimony established both that Salman knew the information came from the insider, specifically as a gift, and that Salman knew that the insider expected the first tippee to trade on it. *Id.* This Court upheld the judgment of conviction because the "government presented direct evidence that the disclosure was intended as a gift of market-sensitive information" and "Salman knew that [the insider] had made such a gift." *Id.* at 52.

Here, the evidence failed to establish either that the insider's "disclosure was intended as a gift of market-sensitive information," or that Weller "knew that the insider had made such a gift." *Id.* On the contrary, the insider's disclosure was in exchange for a share of the tippee's profits and it is undisputed that Weller had no knowledge of the pecuniary personal benefit to the insider. The government relied on the gift theory at trial, arguing that while Fleming had received money in exchange for his disclosure, his true motivation was friendship. Tr. 505-06. Thus, the government argued, by tipping his friend Beshey, Fleming received an intangible personal benefit in addition to a pecuniary personal benefit. This interpretation conflicts with *Dirks* and *Salman* as argued above.

However, even if this Court ultimately held that the insider can both receive money in exchange for the

tip and claim that he benefited because he intended the tip as a gift to a friend, the government must prove that Weller had knowledge of the personal benefit. There was no evidence that Weller "knew that the insider made such a gift." *Salman*, 580 U.S. at 52. The only evidence as to Weller's knowledge was a general awareness that a friendship existed between Fleming and Beshey, two people whom he had never met. Specifically, Kourtis testified that he told Weller, "Hey, listen, my friend Bret Beshey who I do business with, you know, he's got a friend high up in Lifetime, and he's saying that the company is going to be bought out at $65 a share, approximately, and it's going to go private." Tr. 222. This evidence demonstrates that Weller learned secondhand from Kourtis that a friendship existed.

However, the government failed to present evidence that Weller knew that Fleming disclosed confidential information to Beshey as a gift, or that Fleming expected his friend to trade on it. The government failed to present evidence that Weller knew that Fleming and Beshey had such a close personal relationship that he could also know that helping Beshey was essentially the same as Fleming helping himself. The evidence demonstrated only that he was told they were friends. In affirming his conviction, the Seventh Circuit has now set a precedent that mere knowledge that the insider and tippee are friends is sufficient on its own to establish that a remote tippee participated in the insider's breach.

The indictment is similarly flawed. It alleges that Mr. Weller learned from Kourtis that Fleming and Beshey were friends, and it alleges that Fleming violated a duty to his employer. App. 31. There is no allegation that Fleming provided the information as a gift, based on their friendship, or with an "intention to benefit the particular recipient." *Salman*, 580 U.S. at 49; *Dirks*, U.S. at 664. The mere allegation that Mr. Weller "knew" that the source of the information was a "close personal friend and senior employee" is not sufficient to allege that Mr. Weller knew that Fleming disclosed nonpublic material information in exchange for a personal benefit in breach of his fiduciary duty. The Seventh Circuit further stated, "an express allegation that Beshey's gratitude was a benefit to Fleming would have sufficed." App. 4. This allegation, while not present in the indictment, would not suffice as to Mr. Weller's knowledge – there is no allegation that Mr. Weller knew that Beshey's gratitude was a benefit to Fleming or that Mr. Weller knew that Fleming received a share of the profits. App. 24-44.

In short, the opinion below held that the government need neither allege, nor prove, that the remote tippee knew or should have known of the insider's breach to convict the remote tippee for conspiring to commit insider trading. Instead, the Court found that both the insider's breach itself, and the remote tippee's knowledge of that breach, can be established by the mere existence of a friendship. The Seventh Circuit so held even where the insider received a pecuniary personal benefit of which the remote tippee had no

knowledge. Weller knew that he had received material nonpublic information, but the government failed to allege or establish his knowledge of any personal benefit to the insider. Thus, in at least the Seventh Circuit, there is a general duty to disclose or abstain from trading solely because a person knowingly receives material nonpublic information from an insider.

D. This Case Provides an Excellent Vehicle to Strengthen the Personal Benefit and Knowledge Requirements

The petitioner's case provides an opportunity to strengthen the requirements to convict a remote tippee of conspiring to commit insider trading. While this Court has previously held that a friendship may justify an inference that the insider personally benefited from disclosing as a gift, the Seventh Circuit has now held that the existence of a friendship establishes both the personal benefit to the insider and the knowledge of the remote tippee, even where a personal benefit was pecuniary. The Court should reject this rule, which expands liability to anyone who knowingly trades on insider information, and this case provides an excellent vehicle to do so.

The opinion below is published and will serve as precedent that expands liability for insider trading and conspiracy to commit insider trading. There is a complete record which includes detailed findings of fact, the most relevant of which are undisputed. The respondent has previously acknowledged that there

was a pecuniary personal benefit to the insider and that it failed to allege or prove the petitioner's knowledge of that pecuniary personal benefit. AR. 18 at 46. Other than Kourtis telling Weller that Fleming and Beshey were friends, the extent and nature of the relationship between the insider and the tippee was not known to Weller, who had never met either of them. Thus, resolution of the question presented here is outcome determinative. If a friendship between the insider and the tippee establishes an intangible personal benefit to the insider, even where the insider benefits financially from the same disclosure, and the remote tippee need have knowledge only of the friendship's existence to participate in that breach, Weller loses. However, if the remote tippee must have knowledge of the pecuniary personal benefit when one exists, or if the remote tippee must have knowledge that the insider disclosed because of his friendship, based on an intent to benefit his friend by providing information on which he expected the friend to trade and profit, Weller prevails. Because it is undisputed that the government relied on both a tangible and intangible personal benefit and it is undisputed that Weller knew only of the friendship's existence, this case affords the Court an opportunity to rule on the personal benefit test and its connection to the remote tippee's knowledge.

II. The Opinion Below Conflicts with the Second Circuit's Opinion in *United States v. Geibel*

The Court should further grant this petition because the Seventh Circuit's ruling in this case conflicts with the Second Circuit's ruling in *Geibel*. 369 F.3d 682. Specifically, while the Second Circuit has held that a remote tippee may seek acquittal where the remote tippee participated in only a narrower conspiracy, the Seventh Circuit has now held that such grounds for acquittal are limited to the insider.

A. The Second Circuit Held in *Geibel* that a Remote Tippee May Escape Liability Where He Participated in a Narrower Conspiracy and was Prejudiced by the Variance

In *Geibel*, the Second Circuit addressed a similar factual scenario to that of the instant case. There, an insider at Goldman Sachs, Freeman, had an agreement with two co-conspirators, Cooper and Erksine, where he would provide them with information in exchange for a percentage of their trading profits. *Id.* at 686. Freeman agreed that Cooper could share the information with two other people. *Id.* However, Cooper also shared the information with Conner without the knowledge or consent of the insider. *Id.* at 686-87. Conner then shared the information with Allen, who then shared the information with Geibel. *Id.* at 687. On appeal, Conner, Allen, and Geibel all claimed that the evidence was insufficient to support the jury's finding of

a single conspiracy, arguing instead that they participated in a much narrower scheme that did not involve the insider or other defendants. *Id.* at 689. The Second Circuit agreed. *Id.*

In its analysis, the Second Circuit recognized that there were past cases that had considered whether the insider was in a conspiracy with remote tippees, but this case was the opposite; here, the issue was whether remote tippees were in a conspiracy with the insider. *Id.* at 690. Thus, the Court applied a slightly different analysis to reach its conclusion. *Id.* First, finding the same factors typically considered as to the insider's liability were still relevant, the Court considered "three hypothetical avenues" for establishing a single conspiracy: (1) if the scope of the trading agreement was broader "to include trading by or for persons other than the small group of conspirators"; (2) if the conspirators reasonably foresaw, as a necessary or natural consequence of the unlawful agreement, information being passed to remote tippees; and (3) actual awareness of the remote tippees. *Id.* (internal citations omitted). Second, recognizing the difference from past cases, the Court also considered whether there was mutual dependence or benefits among the remote tippees and the insider. *Id.* (citing *United States v. Maldonado-Rivera*, 922 F.2d 934, 963 (2d Cir. 1990) ("a single conspiracy is not transformed into multiple conspiracies merely by virtue of the fact that it may involve two or more phases or spheres of operation, so long as there is sufficient proof of mutual dependence and assistance")).

The Second Circuit ultimately found that the remote tippees did not conspire with the insider to trade on inside information. *Geibel*, 369 F.3d at 692. The Court reasoned that the agreement between the insider and those that he tipped was a narrow agreement to exchange information for a share of profits, without foreseeability, or actual awareness, that remote tippees would learn and trade on the information. *Id.* at 690-92. Further, while the remote tippees were aware that the information came from an insider, the Court found that "did not render them members of a conspiratorial enterprise, least of all in an enterprise that neither wanted nor needed their participation." *Id.* at 692. The Court found it important that the remote tippees and the insider were not mutually benefited by the remote tippees' participation. *Id.* The insider's co-conspirator sharing the nonpublic information with the remote tippees benefited those tippees, but not the insider himself. *Id.* The Court also rejected the argument that there was a mutual benefit because some of the remote tippees' trading profits ultimately went to the insider. *Id.* These benefits were "informal and gratuitous, rather than disbursed pursuant to a formal agreed-upon exchange," especially in that the insider was unaware of the money's source and in that the amount provided by the remote tippees was trivial compared to how much they had made using the information to trade. *Id.* While the Second Circuit ultimately affirmed the conviction, finding that the defendants were not prejudiced by this variance, it nonetheless found that a far-removed remote tippee may be entitled to acquittal where he had not conspired with the insider.

B. The Opinion Below Conflicts in that it Held that Such an Argument Applies Only to the Insider Accused of Conspiring with a Remote Tippee

Weller argued on appeal that the government failed to allege or establish a single conspiracy for many of the same reasons raised in *Geibel*. AR. 8. To convict for conspiracy, the government must establish (1) an agreement to commit an offense against the United States, (2) an overt act in furtherance of the conspiracy, and (3) knowledge of the conspiratorial purpose. 18 U.S.C. § 371; *United States v. Soy*, 454 F.3d 766, 768 (7th Cir. 2006). Further, the fundamental characteristic of a conspiracy is a joint commitment to an endeavor which, if completed, would satisfy all the elements of the [underlying substantive] criminal offense. *United States v. Kelerchian*, 937 F.3d 895, 915 (7th Cir. 2019). A co-conspirator must agree to participate in what he knew to be a collective venture directed toward a common goal. *Geibel*, 369 F.3d 682, 689 (2d Cir. 2004).

Here, like in *Geibel*, the scope of the conspiratorial agreement did not include trading by Weller and other remote tippees nor did Weller know of the common goal. The insider, Fleming, agreed to provide nonpublic information to Beshey in exchange for a share of his profits. App. 30. While Fleming later learned that Beshey had shared the information with Kourtis, the indictment did not allege, nor did the evidence prove, that Fleming consented, or knew, that Kourtis would then share that information with Weller. Weller did

know about the insider's existence, as did the remote tippees in *Geibel*, but there was no mutual dependence or benefit between Weller and the insider. Unlike the others who agreed to profit sharing, Weller gratuitously provided marijuana to Kourtis after he had already received and traded on the information. Kourtis testified that this was not agreed to in advance nor was any other exchange agreed to in return for the information. Tr. 226.

Further, there was no allegation or proof that Weller knew that the insider breached his fiduciary duty by disclosing to the tippee or that he knew about the profit-sharing goal. Without knowledge of the personal benefit to the insider, an essential element of insider trading, a tippee cannot conspire to commit insider trading. *Kelerchian*, 937 F.3d at 915. Merely agreeing to trade on material nonpublic information with knowledge that it came from an insider is not enough. *Dirks*, 463 U.S. at 659. Thus, Weller argued that he was similarly situated to the remote tippers in *Geibel*, who the Second Circuit found had not participated in a single conspiracy with the insider. 369 F.3d at 692.

The opinion below rejects this argument, stating that "what follows from *Geibel* is that *Fleming* would have been entitled to acquittal had he been charged with conspiring with Weller and other fourth-tier tippees. Fleming conspired with Beshey but not with Weller." App. 6. (emphasis in original). In so ruling, the Seventh Circuit appears to agree with the Second Circuit that "it is not possible to find a conspiracy among

the first tipper and remote tippees unless the first tipper expected or intended wide distribution of the information." *Geibel*, 369 F.3d at 692. However, the Seventh Circuit has also limited such an argument to only the insider, Fleming, and rejected its application to the remote tippee, Weller. App. 6. This holding is in conflict with *Geibel* where the Second Circuit explicitly held the opposite by finding that defendants, the remote tippees, were not in a conspiracy with the insider as alleged in the indictment. 369 F.3d at 692. Similarly to the defendants in *Geibel*, as an "unknown remote tippee," Weller was "less able to appreciate the full scope of the conspiratorial enterprise." *Id.* at 690.

While the Seventh Circuit held that even if it found the argument in *Geibel* applicable to Weller, it would affirm the conviction, its reasoning conflicts with well-established tenets of insider trading law. The opinion below states, "no matter what else one makes of the evidence, Weller and Kourtis conspired to misuse material nonpublic information." App. 6. The ruling does not address what evidence it relies on, but the evidence failed to demonstrate that Weller had the requisite knowledge to conspire with Kourtis to commit insider trading. Kourtis' own testimony was that he gave Mr. Weller the insider's information without reaching an agreement on the key components of the alleged conspiracy. Tr. 222-26. Kourtis testified that they discussed the possibility of purchasing options, but never agreed on whether Mr. Weller or Kourtis would purchase options (or anything else) nor in what amount nor at what price. Tr. 222-24. Kourtis also

testified that there was never an agreement that Weller would pay him or anyone else in exchange for the information. Tr. 226. Kourtis told Weller that the information came from an insider who was friends with Beshey, but, as is discussed at length above, mere knowledge that a friendship exists is insufficient to prove knowledge that the insider personally benefited from disclosure, especially where the insider received money from the tippee.

Weller was charged and convicted of conspiring to commit insider trading. However, he cannot have conspired to commit insider trading if he had no knowledge that the insider received a personal benefit in exchange for disclosure. *Dirks*, 463 U.S. at 659. A co-conspirator need not have knowledge of all members or all details of the conspiracy, but the defendant must have knowledge of the essential nature of the offense, which here, requires his knowledge of the insider's breach of fiduciary duty. *Kelerchian*, 937 F.3d at 915; *Dirks*, 463 U.S. at 659. Thus, if Mr. Weller had been tried on a narrower conspiracy with Kourtis, the evidence would have been insufficient to convict.

By holding that a remote tippee cannot challenge his conviction on the same grounds available to remote tippees in the Second Circuit, the opinion below has created a conflict. Further, the goals of insider trading laws are to prevent insiders from taking unfair advantage of uninformed stockholders, to protect a corporation's exclusive use its information, and more generally, to promote public trust in market fairness. *See Dirks*, 463 U.S. at 659-65. These goals are not

furthered by judicial precedent that protects the insider who breaches his fiduciary duty from liability for conspiring with unforeseen remote tippees while foreclosing the same defense to the remote tippee whose own derivative liability depends on whether the insider breached and whether he had knowledge of the conspiratorial purpose. This Court should grant this petition to resolve this conflict.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

NISHAY K. SANAN
Counsel of Record
CECE WHITE
LAW OFFICE OF
NISHAY K. SANAN
53 W. Jackson Blvd.,
Ste. 1424
Chicago, IL 60604
(312) 692-0360
nsanan@aol.com
cece@sananlaw.com