CONFIDENTIALITY AGREEMENTS AND THE MISAPPROPRIATION THEORY OF INSIDER TRADING: AVOIDING THE FIDUCIARY DUTY FETISH

Harry S. Gerla[1]

Consider the following situation which might appear in a classroom discussion or on an examination in a Securities Regulation or Business Associations course. One night Y, the Chief Executive Officer of the Momentum Corporation, calls X, the largest stockholder in the corporation. X, however, is not an employee or a director of the corporation. Indeed, X has no relationship with the Momentum Corporation other than as a shareholder. Y asks that X keep what he is about to tell her confidential. X assents to the request. Y reveals that the next day the Momentum Corporation is about to make an announcement of a development which X has opposed and which X believes will cause the price of Momentum's stock to fall. Y is telling this to X merely as a courtesy to her. Shortly after getting off the phone with Y, X calls up her broker and tells him to sell all her stock in the Momentum Corporation without disclosing the development Y has disclosed to her. When the development is announced, the price of Momentum Corporation's stock falls dramatically, as was foreseen by X. Has X engaged in insider trading in violation of Securities Exchange Act Rule 10b-5?[2]

The preceding examination type question became more than a hypothetical inquiry when the Securities and Exchange Commission filed suit against Mark Cuban, best known to the public as the outspoken owner of the Dallas Mavericks franchise in the National Basketball Association

---

[1] Professor of Law, University of Dayton School of Law. The author wishes to thank Ms. Breanne Parcels, Staff Attorney, City of Urbana, Ohio, UDSL '12, for her assistance in researching this article, and Barbara Ullman Gerla, Esq. for her reviewing and proofreading of the manuscript. Of course, any errors of omission or commission in the article are solely the responsibility of the author.

[2] The only possible theory of insider trading, which could apply to X, is the misappropriation theory because the classical and tipper/tippee theories cannot be used. *See infra* text accompanying notes 3–10.

and a regular panelist on the *Shark Tank* television show, accusing him of violating Securities Exchange Act Rule 10b-5, under circumstances somewhat similar to those set forth in the question.[3] Under two of the three theories under which an individual can be held liable for insider trading under Rule 10b-5, the answer is quite clearly no.

The first theory under which a person can be held liable for insider trading under Rule 10b-5 is the so-called "classical theory" of insider trading.[4] Under the classical theory, a person is liable for insider trading if, on the basis of non-public material information in her possession, she trades with persons to whom she owes a fiduciary duty to disclose the information.[5] The duty of disclosure is generally premised on some type of relationship of trust and confidence, usually shorthanded as a "fiduciary relationship[,]" between the person in possession of the material non-public information and the buyer or seller of her securities.[6] Under the "classical theory" X is not liable. X is not an employee, or director of the Momentum Corporation. She is not likely a temporary insider of the corporation.[7] Nor is it very likely that X stands in any other sort of fiduciary relationship with persons who will be purchasing her stock. In the absence of some sort of fiduciary relationship with the buyers of her securities, X is under no duty to disclose the material non-public information prior to selling her securities and therefore, under the classical theory, she does not violate Rule 10b-5 by trading without disclosing the information.

The second theory of Rule 10b-5 insider trading liability is generally called the tipper/tippee theory of liability.[8] Under this theory, a person who has received a tip in the form of material non-public corporate information is liable for violating Rule 10b-5 when (a) he or she trades on the basis of the information; (b) the tipper is in breach of a fiduciary duty

---

[3] SEC v. Cuban, 634 F. Supp. 2d 713, 720 (N.D. Tex. 2009), *vacated and remanded*, 620 F.3d 551, 558 (2010). Mr. Cuban consistently denied the allegations in the SEC's complaint, including the allegation that he was asked and agreed to keep the information he received in confidence. *Id.* Eventually Mr. Cuban prevailed in his four year battle with the SEC. The trial court first dismissed the SEC's complaint on the grounds that a reasonable finder of fact could not find that Mr. Cuban had ever promised not to trade on the information as opposed to keeping it confidential. That holding was reversed by the Fifth Circuit. *Id.* On remand Mr. Cuban demanded a jury trial. The jury, in response to questions posed to it in the jury instructions specifically found that the SEC failed to prove that Mr. Cuban had received material *nonpublic* information from Mamma.com, that Mr. Cuban ever agreed not to trade on the information, that Mr. Cuban had traded on the basis of that information, that Mr. Cuban failed to disclose his intentions to trade on the information to Mamma.com, and that Mr. Cuban had acted knowing or recklessly in selling his stock. Court's Charge to the Jury at 13–14, SEC v. Cuban (Civil Action No. 3:08-CV-2050-D) (N.D. Tex. 2013), www.securitiesmatters.com/files/2013/12/cuban-jury-instructions-and-jury-verdict-form.pdf.

[4] *See* United States v. O'Hagan, 521 U.S. 642, 651–52 (1997) (stating the "classical theory" nomenclature was sanctioned by the Court).

[5] *Id.*

[6] *Id.*

[7] Dirks v. SEC, 463 U.S. 646, 655 n.14 (1983).

[8] *Id.* at 661 (citing *In re* Investors Mgmt. Co., 44 SEC 633, 651 (1971) (Smith, Comm'r, concurring in result)).

owed to the corporation by supplying the information; and, (c) he or she knows or should have known of the tipper's breach of fiduciary duty.[9] In *Dirks v. SEC*, the Supreme Court held that a tipper only violates his or her fiduciary duty to the corporation if he or she receives a personal benefit from revelation of the information, either in the form of pecuniary gain or reputational enhancement, or if he or she is bestowing a gift upon the recipient of the information.[10] In the hypothetical which opens this essay, it is extremely unlikely that the second element of the tipper/tippee theory of liability can be proven. Y is not supplying the information for any pecuniary benefit, nor is he likely to be enhancing his reputation by releasing the information. Y does not seem to be bestowing the information upon X as a gift. X is not liable under the tipper/tippee theory because Y, at least under the Supreme Court's formulation, is not in breach of the fiduciary duty he owes to the Momentum Corporation.

The third theory of liability for insider trading under Rule 10b-5 is the "misappropriation theory." The essence of this theory is that a person is liable for trading on the basis of material non-public information if he has obtained the information through deception practiced on the source of the information.[11] This theory was sanctioned by the Supreme Court in its 1997 decision in *United States v. O'Hagan*.[12] In *O'Hagan* the Court described the misappropriation theory as follows:

> The "misappropriation theory" holds that a person commits fraud "in connection with" a securities transaction, and thereby violates [Section] 10(b) and Rule 10b-5, when he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information. Under this theory, a fiduciary's undisclosed, self-serving use of a principal's information to purchase or sell securities, in breach of a duty of loyalty and confidentiality, defrauds the principal of the exclusive use of that information. In lieu of premising liability on a fiduciary relationship between company insider and purchaser or seller of the company's stock, the misappropriation theory premises liability on a fiduciary-turned-trader's deception of those who entrusted him with access to confidential information.[13]

The answer to the proceeding question would seem to be yes, at least since the 2000 promulgation by the Securities and Exchange

[9] *Id.* at 660.
[10] *Id.* at 663.
[11] United States v. O'Hagan, 521 U.S. 642, 652 (1997).
[12] *Id.*
[13] *Id.* (citation omitted).

Commission [hereinafter SEC] of Securities Exchange Act Rule 10b5-2(b)(1). Rule 10b5-2 purportedly, "[P]rovides a non-exclusive definition of circumstances in which a person has a duty of trust or confidence for purposes of the 'misappropriation' theory of insider trading under Section 10(b) of the Act and Rule 10b-5."[14] Subsection (b)(1) of that Rule provides that one of the circumstances is "[W]henever a person agrees to maintain information in confidence."[15] In the hypothetical at the beginning of this article, X agreed to keep the information she received confidential. When she traded her stock on the basis of the information she was deceiving the source of her information (the management of Momentum, Inc.) and violating Rule 10b-5's prohibition on insider trading under the misappropriation theory. Unfortunately, the answer is not so simple because a credible claim has been raised that the SEC exceeded its statutory authority when it promulgated subsection (b)(1) of Rule 10b5-2. Those advancing the claim make two basic arguments. First, they maintain that the misappropriation theory itself requires that the party misappropriating the information owe the source of the information a fiduciary or fiduciary-like duty arising out of a relationship of trust and confidence. Second, they maintain that the other two theories of insider trading liability, the classical theory and the tipper/tippee theory, independently create a requirement that some type of fiduciary duty be breached in order to establish liability for insider trading.

The phrasing used to describe the misappropriation theory by outside commentators and sometimes by the SEC itself lends some credence to the first claim. For example, Professor Donald Langevoort, in his multi-volume treatise on insider trading describes the misappropriation theory as follows:

> The misappropriation theory of liability for insider trading holds that it is a fraud in connection with the purchase or sale of a security–and therefore a violation of Rule 10b-5–for a person to trade in securities in breach of *fiduciary* duty by secretly converting for personal use information that has been entrusted to him.[16]

The SEC has used somewhat similar language in describing the misappropriation theory. In its Release proposing Rule 10b5-2, the SEC described the misappropriation theory as follows: "Under that theory, a person commits fraud in violation of Section 10(b) of the Exchange Act and Rule 10b-5 by misappropriating material nonpublic information for

---

[14] 17 C.F.R. § 240.10b5-2 (2011).
[15] 17 C.F.R. § 240.10b5-2(b)(1)(2011).
[16] DONALD C. LANGEVOORT, INSIDER TRADING: REGULATION, ENFORCEMENT & PREVENTION § 6:1 (West 2013) (emphasis added).

securities trading purposes, in breach of a duty *of loyalty and confidence*."[17]

The formulations from Professor Langevoort's treatise and the SEC Release differ in one important respect from the first sentence of the earlier quotation from *O'Hagan*. They both add a modifier to the word "duty." Both the "fiduciary" and "of loyalty and confidence" modifiers suggest the same thing. To be liable for insider trading under the misappropriation theory, the person receiving the non-public information must misappropriate the information in violation of a *fiduciary* duty (i.e., one arising out of a relationship of trust and confidence) he owes to the source of the information.

If the misappropriation theory depends on the recipient of material non-public information using the information in breach of a *fiduciary* duty owed to the source of the information, then a "mere" express agreement to keep the information confidential can only be the basis for misappropriation theory liability if the agreement creates a relationship of trust and confidence between the recipient and the source of the information. Thus, in the hypothetical which commences this article, X would only be liable under the misappropriation theory of insider trading if she already owed a fiduciary duty to Y or the Momentum Corporation, or her express agreement to keep the information confidential created a fiduciary duty to the source of the information. As a mere shareholder of the Momentum Corporation, X does not owe a fiduciary duty to the corporation or to Y.[18] X would be liable only if her promise created such a duty.

In promulgating Rule 10b5-2, the SEC explicitly took the position that a confidentiality agreement does create such a fiduciary like relationship, and that X would be liable under the misappropriation theory.[19] The premise that a mere confidentiality agreement creates a relationship of trust and confidence between the parties has been challenged by a number of commentators.[20] Regardless of which side one takes in this debate, the

---

[17] Selective Disclosure and Insider Trading, 64 Fed. Reg. 72590 (proposed Dec. 28, 1999) (to be codified at 17 C.F.R. pt. 230, 240, 243, 249) (emphasis added).

[18] Except in the context of closely-held corporations, shareholders do not normally owe a fiduciary duty to a corporation or other shareholders. *But see* Donahue v. Rodd Electrotype Co., 367 Mass. 578, 593 (Mass. 1975).

[19] LANGEVOORT, *supra* note 16, at § 6:7.

[20] *E.g.,* ALAN R. BROMBERG, LEWIS D. LOWENFELS & MICHAEL J. SULLIVAN, BROMBERG & LOWENFELS ON SECURITIES FRAUD § 6:510.68 (2d ed. 2013); Brief of *Amici Curiae* Law Professors in Support of Defendant-Appellee at 7–17, SEC v. Cuban, 620 F.3d 551 (5th Cir. 2010) (No. 09-10996); Amended Brief of *Amici Curiae* in Support of Defendant's Motion to Dismiss at 3–4, SEC v. Cuban, 634 F. Supp. 2d 713 (N.D. Tex. 2009) (No. 3:08-cv-02050-D); Starkey De Soto, *"Well, Now I'm Screwed": The Ever-Expanding Liability for Outsider Trading*, 33 WHITTIER L. REV. 275, 297-302 (2012); Ray J. Grzebielski, *Why Martha Stewart Did Not Violate Rule 10b-5: On Tipping, Piggybacking, Front-Running and the Fiduciary Duties of Securities Brokers*, 40 AKRON L. REV. 55, 81 (2007); Anthony Michael Sabino & Michael A. Sabino, *From Chiarella to Cuban: The Continuing Evolution of the Law of Insider Trading,* 16 FORDHAM J. CORP. & FIN. LAW 673, 730 (2011). *But see* Robert A. Prentice, *Permanently Reviving the Temporary Insider*, 36 IOWA J. CORP. L. 343, 364 (2011) (arguing that if one party has a legitimate purpose for entrusting another with a confidence and the other willingly accepts it,

conclusion that X is liable for insider trading under the misappropriation theory is still correct because the predicate assumption of both sides is wrong. Both sides in the debate assume that a party who trades on inside information is liable for insider trading only if the party owes some sort of fiduciary duty to the source of the information. That assumption is simply not true.[21]

An examination of the *O'Hagan* opinion itself and an exploration of the doctrinal role that a relationship of trust and confidence plays in the misappropriation theory of insider trading reveals that if the recipient of the information actively deceives the source of the information (such as by promising confidentiality and then violating that promise), he or she need not be in a fiduciary relationship with the source to violate Rule 10b-5 under the misappropriation theory. An exploration of the doctrinal role relationships of trust and confidence play in the classical and tipper/tippee theories of insider trading liability reveals that neither of those theories make a breach of fiduciary duty a *sine qua non* of liability. This Article now turns to the task of examining the three theories and the doctrinal role that fiduciary duties play in each of them.

I. EXAMINING THE O'HAGAN OPINION

The *O'Hagan* case arose out of a hostile takeover bid by the London, England-based Grand Metropolitan PLC [hereinafter Grand Met] for the stock of the Minneapolis-based Pillsbury Corporation.[22] To support its bid, Grand Met employed the Minneapolis law firm of Dorsey & Whitney.[23] One of the partners in the firm, Gerald H. O'Hagan, though not directly involved in the matter, learned of the takeover through the firm. O'Hagan was in desperate need of money to cover thefts from some of his clients, and decided to obtain funds by buying call options for Pillsbury stock and Pillsbury stock itself.[24] O'Hagan correctly presumed that the price of Pillsbury stock and options to buy that stock would soar once Grand Met's bid for Pillsbury's stock was announced publically. After the Grand Met bid was made public, O'Hagan sold his options and stock, garnering a profit of more than 4.3 million dollars.[25]

O'Hagan's activities were discovered and he was indicted for

---

a fiduciary or quasi-fiduciary duty is created that, at a minimum, imposes upon the recipient of the confidential information an obligation to neither disclose nor use it).

21 2 THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 12.17[4] (4th ed. 2002); *accord* Steven J. Cleveland, *Resurrecting Deference to the Securities and Exchange Commission: Mark Cuban and Trading on Inside Information*, 65 FLA. L. REV. 73, 91–92 (2013) (rejecting the notion that a breach of fiduciary duty is a necessary condition for liability under the misappropriation theory of insider trading).

22 United States v. O'Hagan, 521 U.S. 642, 647 (1997).

23 *Id.* at 647.

24 *Id.* at 648.

25 *Id.*

violations of numerous federal statutes, including willfully violating Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 thereunder by engaging in insider trading.[26] O'Hagan was convicted on all counts of the indictment.[27] However, his conviction was reversed by the Court of Appeals for the Eighth Circuit.[28] In doing so, the Eight Circuit rejected the misappropriation theory as a proper basis for finding liability for insider trading under SEC Rule 10b-5, opining among other things, that the theory allowed for a finding of liability without deception, a necessary condition for all Rule 10b-5 violations. The Supreme Court, in a 6 to 3 decision authored by Justice Ginsburg, overturned the Eight Circuit's ruling.[29] The Court's decision expressly accepted the misappropriation theory as a basis for insider trading liability under Rule 10b-5.[30]

Perhaps the best place to begin a discussion of whether the misappropriation theory of insider trading requires a breach of a fiduciary duty is the language of the Court in *O'Hagan*. The Court's most specific enunciation of the theory is the quotation from *O'Hagan* set forth in the preceding section of this article as follows: "The 'misappropriation theory' holds that a person commits fraud 'in connection with' a securities transaction, and thereby violates [Section] 10(b) and Rule 10b-5, when he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information."[31] This first sentence contains the general statement of the misappropriation theory. The sentence speaks only of a "breach of duty owed to the source of the information."[32] The noun, "duty," is not modified by the adjective "fiduciary" or the adjectival phrase "relationship of trust and confidence."

The second sentence of the quotation reads as follows: "Under this theory, a fiduciary's undisclosed, self-serving use of a principal's information to purchase or sell securities, in breach of a duty of loyalty and confidentiality, defrauds the principal of the exclusive use of that information."[33] The second sentence does use the terms "fiduciary" and "duty of loyalty and confidentiality." The sentence is not, however, definitional. The opening phrase "[u]nder this theory" connotes that what follows is merely an exemplar or application, i.e., that when a fiduciary acts in this way, he or she defrauds the principal of his or her right to exclusive use of the information and is potentially liable under the misappropriation theory.

---

26 *Id.*
27 *Id.*
28 *Id.* at 649 (citing United States v. O'Hagan, 92 F.3d 612, 628 (8th Cir. 1996)).
29 *O'Hagan*, 521 U.S. at 646.
30 *Id.* at 659.
31 *Id.* at 652 (citation omitted).
32 *Id.*
33 *Id.*

The final sentence in the Court's description of the misappropriation theory reads: "In lieu of premising liability on a fiduciary relationship between company insider and purchaser or seller of the company's stock, the misappropriation theory premises liability on a fiduciary-turned-trader's deception of those who entrusted him with access to confidential information."[34] While this sentence could be read as requiring a fiduciary relationship to be liable for insider trading under that theory, it is still far from a full-throated endorsement of a requirement that defendant must be in a fiduciary relationship with the source of information. The sentence can be read as an extended application of the example given in the preceding sentence. The credibility of the latter reading is greatly enhanced when one considers the factual and doctrinal contexts which surround the Court's discussion of fiduciary duties in *O'Hagan*.

The Eighth Circuit, in reversing O'Hagan's conviction, rejected the misappropriation theory, in part, because the theory did not require "deception."[35] The discussion of fiduciary relationships in Justice Ginsburg's opinion takes place in the context of the Court's rejection of the Eighth Circuit's conclusion that the misappropriation theory does not meet the requirement that conduct had to be "deceptive" to be actionable under Section 10(b) and Rule 10b-5.[36]

The Eighth Circuit's conclusion that O'Hagan did not "deceive" the twin sources of his information, his law firm and Grand Met, his firm's client, is true in one sense. O'Hagan never affirmatively lied to either of them about what he intended to do with the information Grand Met was giving to Dorsey & Whitney. Indeed, he never told either of the sources that he was privy to the information, let alone what he intended to do with it. If deception is limited to affirmative misrepresentations, and Section 10(b) and Rule 10b-5 both require deception, then the Eighth Circuit's conclusion seems to be logically inescapable. Section 10(b) and Rule 10b-5 both require that someone be deceived before liability can be imposed.[37] O'Hagan did not affirmatively misrepresent either to Grand Met or his law firm what he was going to do with information about Grand Met's bid for Pillsbury's stock. O'Hagan, therefore, did not practice deception. Thus, O'Hagan did not violate the statute or rule because he did not deceive anyone. Justice Ginsburg's opinion utilizes the concept of fiduciary duty to derail the preceding syllogism.

As Justice Ginsburg noted, the government's case in *O'Hagan* rested upon "[d]eception through nondisclosure."[38] Unless O'Hagan was

---

[34] *Id.*
[35] *O'Hagan*, 92 F.3d at 617–18.
[36] *O'Hagan,* 521 U.S. at 660.
[37] *Id.* at 651.
[38] *Id.* at 654.

under some sort of duty of disclosure, his pure omission did not deceive anyone. The Court found the necessary duty to disclose in O'Hagan's status as a fiduciary of both the law firm which employed him, Dorsey & Whitney, and his employer's client Grand Met. O'Hagan had a duty not to misuse the information which he received through the two sources, and he engaged in deception by feigning loyalty to those sources while using the information for his personal gain.[39]

When a person receives information after expressly promising to maintain it in confidence, the situation is radically different from *O'Hagan*. The person who receives information under those circumstances has not remained silent. The recipient has stated that he or she promises and intends to use the information only for the purposes for which it was conveyed, or at the very least not to convey the information. A fiduciary relationship is not necessary to find a duty to disclose in the face of silence because the party agreeing to maintain the confidentiality of the information has already broken his or her silence in the form of his or her assent to the confidentiality agreement. Thus, the old common law fraud rule that silence is not a misrepresentation absent a duty to disclose simply does not come into play.

The concept that the promise of confidentiality is a form of voluntary disclosure does seem to run afoul of a different common law rule that a promise is not a statement of fact and therefore generally cannot be the basis for a tort action for deceit or fraud.[40] Of course, the mere existence of the rule under the common law tort of fraud does not necessarily mean that the rule should be imported into Rule 10b-5 fraud. While the Supreme Court has generally been receptive to using common law fraud concepts to set the boundaries of Rule 10b-5 fraud actions, they have not consistently imported all common law fraud rules.[41] For example, in *United States v. Chiarella*, the Court purportedly attempted to align Rule 10b-5 fraud with common law fraud concepts.[42] Yet, in the very same case, the Court approved the concept that the directors, managers, and employees of a corporation owed a fiduciary duty of disclosure to shareholders, or would-be shareholders, when trading in the stock of the corporation.[43] The Court did this despite the rejection by the majority of state courts of such a duty under state law and despite the fact that even the minority of courts which accepted the existence of a fiduciary duty had not done so in the context of

---

[39] *Id.* at 653–54.

[40] PROSSER & KEETON ON TORTS 762 (W. Page Keeton et al. eds., 5th ed. 1984).

[41] *See e.g.*, Chiarella v. United States, 445 U.S. 222, 231 (1980) (holding that the reliance on common law fraud concepts, a person is liable for non-disclosure under Rule 10b-5 only where they had a duty to disclose); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976) (holding that in a private action for violations of Rule 10b-5, the plaintiff must establish that the defendant acted with scienter).

[42] *Chiarella*, 445 U.S. at 227.

[43] *Id.* at 231.

anonymous stock market transactions.[44]

A number of considerations suggest that the rule that a mere promise is not a statement of fact should be among the relics of common law fraud that are not brought into Rule 10b-5. The most important of these is that the common law rule about "mere" promises is internally illogical and inconsistent with other common law fraud doctrines. Most courts recognize an exception to the rule that a mere breach of promise cannot give rise to a fraud action. The exception is that if the promisor did not intend to carry out the promise at the time he or she made it, the making of the promise is a fraudulent misrepresentation of fact.[45] As Lord Bowen's frequently quoted phrase explains, "[T]he state of a man's mind is as much a fact as the state of his digestion."[46] This exception alone would bring many instances of trading on inside information in breach of an agreement to keep the information confidential into the ambit of common law fraud. Whether a person intends to keep a promise he or she is making is generally established by circumstantial evidence.[47] Among the most important pieces of circumstantial evidence is the amount of time between the making of the promise and the breaking of the promise.[48] The shorter the time span, the more likely the promisor never intended to adhere to his or her promise.

In the context of insider trading, the inside information will frequently have a very limited useful life because it becomes useless to the possessor once it becomes public. Thus, in many instances, trading occurs very shortly after the making of the pledge of confidentiality.[49] In these instances, an inference can easily be drawn that the person vowing confidentiality never intended to keep his or her promise and his or her breach of that promise would constitute a form of common law fraud. However, in many cases, enough time can elapse between the making of the promise of confidentiality and its breach, that one cannot easily infer that the maker of the promise never intended to keep it, as opposed to changing his or her mind.[50] Nonetheless, the logic of common law fraud cases suggests that even in the bulk of these cases, i.e., where the maker of the promise of confidentiality fails to tell the promisee of his or her change of heart and intention to break the promise, deceit has occurred.

---

[44] *See generally* WILLIAM K.S. WANG & MARC I. STEINBERG, INSIDER TRADING 290 (1996 & Supp. 2002) (outlining the majority and minority views).

[45] KEETON ET AL., *supra* note 35, at 763.

[46] Edgington v. Fitzmaurice, [1885] 29 Ch. 459 at 483 (Eng.).

[47] KEETON ET. AL., *supra* note 35, at 741–42.

[48] *Id.*

[49] *See, e.g.*, SEC v. Cuban, 620 F.3d 551, 556 (5th Cir. 2010) (alleging that Mark Cuban traded within hours of allegedly pledging to keep the information he received confidential).

[50] *Cf.* SEC v. Adler, 137 F.3d 1325, 1328 (9th Cir. 1998) (defendant received material non-public information on September 14, 1989 and sold his shares between September 19, 1989 and September 26, 1989); SEC v Texas Gulf Sulphur Co, 401 F2d 833, 840 (2d Cir in banc 1968), cert denied 394 US 976 (1969) (non-public information of rich ore strike accumulated over several months, and purchases of securities on the basis of that information were also made over several months).

As suggested by Lord Bowen's pithy phrase, one's intention to adhere to a promise is a fact. When one makes a promise of confidentiality, one is impliedly representing that he or she intends to adhere to the promise, at least at the time the promise is made. When a person agreeing to confidentiality no longer intends to honor that promise, the fact of the person's intentions has changed. Under common law fraud doctrine, a person who makes a statement of material fact is potentially liable for deceit if the person (1) becomes aware that the fact is no longer true, (2) is aware that the party to whom he or she has made the representation does not know that the representation is no longer true, and (3) fails to correct the now erroneous representation.[51] Some courts have imported this "duty to correct" into Rule 10b-5 fraud.[52]

In spite of the doctrinal logic behind the view that a form of deceit is practiced when the maker of a promise changes his or her mind and fails to inform the promisee of his or her change of heart, the law of common law fraud does not appear to have followed that path. The reason underlying the refusal to follow that path is the same reason that supports the basic rule that a "mere" breach of promise is not a false statement of fact– a concern that such a rule would turn every simple breach of contract claim into a common law fraud claim.[53] In the context of a breach of confidentiality agreement forming the basis for liability under the misappropriation theory of insider trading, this concern is misplaced.

Rule 10b-5 fraud does not involve the entire gamut of contracts. For fraud to be actionable under Rule 10b-5, it must be committed "in connection with the purchase or sale of any security."[54] In addition, in an action for insider trading, the actionable wrong is not the repudiation of the promise of confidentiality but is the trading of securities based on that repudiation, an even more limited set of circumstances.

Finding deception on the basis of an undisclosed change of intention of keeping a promise of confidentiality also fits comfortably within Justice Ginsburg's reasoning in the opinion in *O'Hagan*. In the opinion, Justice Ginsburg notes that a fiduciary commits deception when he or she feigns fidelity by pretending to remain loyal while violating his or her implied

[51] RESTATEMENT (SECOND) OF CONTRACTS § 161(a) cmt. c (1981); RESTATEMENT (SECOND) OF TORTS § 551(2)(c) (1965); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, DOBBS LAW OF TORTS § 682 (2d ed. 2013); FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, HARPER, JAMES AND GRAY ON TORTS 563 (3d ed. 2006).

[52] *See, e.g.*, *In re* Time Warner, Inc. Securities Litigation, 9 F.3d 259, 267 (2d Cir. 1993); Backman v. Polaroid Corp., 910 F.2d 10, 16–17 (1st Cir. 1990); *but see* Stransky v. Cummins Engine Co., 51 F.3d 1329, 1331–32 (7th Cir. 1995) (drawing a distinction between duty to correct a statement which was false when made, which the court recognizes, and a duty to update a statement which was true when made but made false by subsequent developments, which the court does not recognize).

[53] DAN B. DOBBS ET. AL., *supra*, note 45 at § 678; KEETON ET. AL, *supra* note 35 at 764.

[54] 17 C.F.R. § 240.10b–5 (2011).

promise by using the information they receive for personal benefit.[55] If he or she discloses their intention to use the information, they are not liable for violating 10b-5 because they have not deceived the source of their information.[56] A person who signs a confidentiality agreement commits deception when he or she pretends to continue to honor his or her promise unless he or she discloses to the promisee that he or she has changed his or her mind and no longer intends to adhere to his or her commitment.[57]

A rule that a person who trades on the basis of information in violation of a confidentiality agreement (unless he or she discloses the intention to violate the agreement) is not contrary to *O'Hagan*, but is in harmony with the reasoning behind that decision. Those who argue against the rule also argue that the rule is inconsistent with the other two theories of insider trading liability, the classical theory and the tipper/tippee theory. This is because both of those theories "require" the existence of a fiduciary relationship to find liability under those theories. A careful examination of those theories, and the role fiduciary relationships play in them, reveals that the argument is simply wrong.

II. FIDUCIARY RELATIONSHIPS AND THE CLASSICAL THEORY OF INSIDER TRADING

The case which established the contemporary boundaries of the "classic" theory of insider trading is *United States v. Chiarella*.[58] In *Chiarella*, an employee of a financial printer learned which firms were using his employer to print documents in connection with tender offers they were about to make, and used the information to purchase stock in the targets before the public announcements of the tender offers.[59] Chiarella's activities were uncovered and he was indicted and convicted of a criminal violation of Section 10(b) and Rule 10b-5 thereunder.[60] Chiarella's conviction was affirmed by the United States Court of Appeals for the Second Circuit, but reversed by the Supreme Court.[61] In his opinion for the Court, Justice Powell stated that Chiarella could only be liable for insider trading if he were under a common law duty to disclose the information he possessed. Powell went on to say:

> But one who fails to disclose material information prior to the consummation of a transaction commits fraud only

---

55 United States v. O'Hagan, 521 U.S. 642, 655 (1997).

56 *Id.*

57 Of course, if the maker of the confidentiality pledge never intended to carry it out, they still would be liable for common law fraud as most courts interpreted that cause of action, and should also be liable under Rule 10b-5 fraud. *See supra* notes 34, 38, and accompanying text.

58 Chiarella v. United States, 445 U.S. 222, 227 (1980).

59 *Id.* at 224.

60 *Id.*

61 *Id.* at 225.

> when he is under a duty to do so. And the duty to disclose arises when one party has information "that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them."[62]

Those who argue that a mere breach of a confidentiality agreement made with the source of inside information will not support liability for insider trading under the misappropriation theory cite this language as a creating a requirement that insider trading liability can only be imposed in the presence of a fiduciary or fiduciary-like relationship.[63] This assertion completely ignores the doctrinal context of Powell's language. In *Chiarella*, the Court was faced with a pure omissions case. Chiarella did not make any representations to anyone. Justice Powell's language refers only to a situation in which the liability of the defendant must be established on the basis of the defendant's silence toward the party on the other side of the transaction. In *Chiarella*, this would be the persons who sold the stock to Chiarella. Justice Powell was not creating a categorical rule that insider trading under Rule 10b-5 must be premised upon a breach of fiduciary duty.

Take, for example, the following situation: A and B are riding on a commuter train. A, an employee of the XYZ Corporation, accidentally leaves a copy of a document containing material non-public information about the corporation on a seat on the train. B sees and reads the document and realizes that when the information is made public, the price of XYZ stock is likely to rise substantially. B calls his friend C using interstate telephone lines and asks C if he would like to sell his stock in XYZ to B. C asks B if he is in possession of any non-public information which might affect the price of XYZ stock. B replies that he has no such information. C agrees to sell his stock to B.

No one can seriously doubt that B has violated SEC Rule 10b-5 even though there is nary a single breach of fiduciary duty in sight. According to the Court in *Dirks v. SEC*, A has not violated his fiduciary duty to the XYZ Corporation because he has not released the information to obtain some personal benefit or to bestow a gift on someone else.[64] Indeed, A has not intentionally released the information at all. B does not have any kind of relationship with A, other than sharing a seat on a train with him. Sharing a seat on a train is hardly the type of relationship that gives rise to fiduciary duties. B does not have any relationship with C or any other shareholders of the XYZ Corporation. Thus, his actions do not constitute a

---

[62] *Id.* at 228 (citations omitted).

[63] De Soto, *supra* note 20, at 303–04; Ray J. Grzebielski, *Friends, Family, Fiduciaries: Personal Relationships as a Basis for Insider Trading Violations*, 51 CATH. U. L. REV. 467, 492 (2002); Joseph Pahl, *A Heart as Far From Fraud as Heaven From Earth:* SEC v. Cuban *and Fiduciary Duties Under Rule 10b5-2*, 106 NW. U. L. REV. 1849, 1878 (2012).

[64] Dirks v. SEC, 463 U.S. 646, 661–62 (1983).

breach of the duties the Supreme Court posited between corporate insiders and corporate shareholders.[65] Nonetheless, B violated Rule 10b-5 when he lied to C about his possession of pertinent material non-public information about the XYZ Corporation. While a duty to disclose may generally arise out of fiduciary relationships, a duty not to lie arises out of Rule 10b-5 and Section 10(b)'s prohibitions on deceit.

When a person trades on the basis of material non-public information in contravention of a confidentiality agreement he or she have entered into, the person, much like B has gone beyond pure silence. The person, like B, has voluntarily chosen to speak in the form of his or her promise to keep the information confidential. Two distinctions do exist between the situation involving B and the one in which a person trades on material non-public information in contravention of a confidentiality agreement. In the latter situation, the misrepresentation is not made to a party on the other side of a securities trade, but to the source of the information. In the case of a breach of a confidentiality agreement, the party taking advantage of the information is not "lying," but merely breaking a promise he or she has made. Neither distinction should make a difference.

The adoption of the misappropriation theory in *O'Hagan* vitiates any significance of the misrepresentation's being made to the source of the information rather than to the party on the other side of the trade. *O'Hagan* establishes the principle that deceiving the source of the information used for insider trading creates the same liability as deceiving one's trading partner. Of course, one could argue that *O'Hagan* has been subjected to a great deal of scholarly criticism and should be rethought, if not overruled.[66] If one wishes to travel down that road, the same argument could be made about *Chiarella* itself, which also has been confronted with a barrage of unfavorable commentary.[67] The second difference is that a breach of a confidentiality agreement involves a breach of promise rather than an outright lie. This difference only has significance in light of the old common law rule that a "mere" breach of a promise does not suffice for the tort of deceit. As has already been discussed, the rule is internally inconsistent, and no good reason exists to import it into Rule 10b-5 jurisprudence.[68]

The classical theory of insider trading does not support the view that

---

[65] *Chiarella*, 445 U.S. at 227–29.

[66] *See, e.g.*, STEPHEN M. BAINBRIDGE, SECURITIES LAW: INSIDER TRADING 114–22 (2d ed. 2007); Richard W. Painter et al., *Don't Ask, Just Tell: Insider Trading After United States v. O'Hagan*, 84 VA. L. REV. 153, 154–55 (1998); Larry E. Ribstein, *Federalism and Insider Trading*, 6 SUP. CT. ECON. REV. 123, 124–25 (1998). *But see*, Randall W. Quinn, *The Misappropriation Theory of Insider Trading In the Supreme Court: A (Brief) Response to the (Many) Critics of* United States v. O'Hagan, 8 FORDHAM J. CORP. & FIN. L., 865, 867–68 (2003).

[67] ALAN R. BROMBERG ET AL., *supra* note 20, at § 6:519.

[68] *See supra* text accompanying notes 35–46.

a breach of fiduciary duty is a *sine qua non* of liability under the misappropriation theory. As will be demonstrated in the next section, the tipper/tippee theory of liability also does not compel a finding that a breach of fiduciary duty is a necessary condition for liability under the misappropriation theory.

III. FIDUCIARY RELATIONSHIPS AND THE TIPPER/TIPPEE THEORY OF INSIDER TRADING

Of the three theories of insider trading liability, the tipper/tippee theory is the one that best supports the argument that a breach of fiduciary duty is a necessary condition for insider trading liability. Once again, however, a careful examination of the role of fiduciary duties in the theory reveals that it does not require a breach of fiduciary duty for insider trading liability.

The Supreme Court explicated the tipper/tippee theory of insider trading in its decision in *Dirks v. SEC*.[69] *Dirks* involved the famous Equity Funding of America scandal. The issuer in that scandal, Equity Funding of America, was primarily in the business of selling life insurance and mutual funds.[70] The company had vastly overstated its assets.[71] Ronald Secrist, a former officer of the company, tried in vain to get enforcement officials and the media to investigate Equity Funding. Secrist then turned to Raymond Dirks, an officer of a broker-dealer firm that specialized in providing investment analysis of insurance company securities.[72] Secrist revealed the overstatement of assets to Dirks in the hopes of generating an investigation of Equity Funding.[73] Dirks, after receiving the information, began his own investigation of Equity Funding and became convinced that Secrist's charges were true.[74] He also relayed Secrist's information to several of his clients who held Equity Funding stock, and advised them to sell it, which some of them did.[75]

The SEC brought an administrative proceeding against Dirks for aiding and abetting violations of section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereafter.[76] The Commission found that Dirks had violated the Act and the Rule, but merely censured him because of his role in bringing the Equity Funding scandal to light.[77] Dirks appealed the censure and the case eventually reached the Supreme Court. The Court

---

69 *Dirks*, 463 U.S. at 657.
70 *Id.* at 649.
71 *Id.*
72 *Id.* at 648.
73 *Id.* at 649.
74 *Id.*
75 *Id.*
76 *Id.* at 650.
77 *Id.* at 651–52.

ruled that Dirks was not liable for violating Rule 10b-5.[78] In doing so, the Court set forth the framework for assessing whether tippers and tippees of material non-public information were liable for insider trading.

The Court held that a tippee is liable only if his or her tipper is liable.[79] In the case where the tipper is a corporate insider, the tipper is liable "only when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee."[80] The Court went on to explain that the tipper breaches his fiduciary duty if he or she discloses the information for some form of personal gain or to bestow a gift upon the tippee.[81]

The Court's language quoted in the preceding paragraph could be used to support an argument that a person who receives inside corporate information and then trades upon it in violation of a confidentiality agreement is not liable for insider trading unless his or her actions constitute a breach of a fiduciary duty. The person receiving inside information after agreeing to hold it in confidence is functionally in the same position as a tippee. That is, if corporate official A supplies B with material non-public information about the corporation based upon B's promise of confidentiality, A can be seen as standing in the shoes of Secrist and B can be viewed as standing in the shoes of Dirks. If a breach of fiduciary duty is a necessary element for an insider trading violation, then that breach must be committed either by the source of the information or the recipient of the information. Usually, where a source supplies information on the basis of a pledge of confidentiality, the source is not supplying it either for personal gain or to bestow a gift on the recipient. Thus, the source, like Secrist in *Dirks*, is not in breach of his or her fiduciary duties. If the source of the information does not supply the "necessary" breach of fiduciary duty, it can only come from the recipient. The recipient can supply that "necessary" breach of fiduciary duty only if her breach of her confidentiality pledge constitutes an independent breach of her fiduciary duty.

The problem with the above argument is that it ignores that breach of fiduciary duty, even in the tipper/tippee context, plays only an instrumental role as a means of establishing deception. This point can be understood by examining the two different factual situations in *Dirks* and the SEC's allegations in its suit against Mark Cuban.

In *Dirks*, the chain of information began with Secrist, who relayed the information to Dirks, who relayed the information to his clients, some of

---

[78] *Id.* at 667.
[79] *Id.* at 659–61.
[80] *Id.* at 660.
[81] *Id.*

whom then sold Equity Funding securities to other persons.[82] As the Court noted in *O'Hagan*, to have a violation of Rule 10b-5 there must be deception.[83] On the facts of *Dirks*, that deception is lacking. The information which Secrist supplied to Dirks was accurate. The supply of truthful non-misleading information is not deceptive. Dirks in turn gives the information to his clients holding Equity Funding stock.[84] Again, we have the provision of truthful non-misleading information. No deception there. Finally, we have the trades by Dirks' clients with persons who were either existing Equity Funding shareholders or became Equity Funding shareholders by virtue of their trades with Dirks' clients.

The Court's decision in *Chiarella* precludes any claim that Dirks' clients deceived their trading partners by withholding the material non-public information in their possession. Suppose, however, that Secrist violated his fiduciary duty to Equity Funding and its shareholders by giving the information in exchange for material compensation, to enhance his reputation, or to give a gift to Dirks. The Court states that any of these would cause Secrist to have breached his fiduciary duty to Equity Funding.[85] Such a breach of fiduciary duty is important not because a breach of fiduciary duty is a magical element of insider trading, but because it supplies the missing deception. As the Court explained in *O'Hagan*, when our hypothetical Secrist gave out the information for one of the forbidden motives, without disclosing this to his employer, he was deceiving his former employer by feigning fidelity while being disloyal.

Contrast the facts in *Dirks* with the alleged facts (which the SEC was ultimately unable to prove) in the *Cuban* case. The SEC alleged that the president of Mamma.com first solicited from Mr. Cuban a pledge that he would keep what the president was about to tell him in confidence.[86] The president then informed Mr. Cuban that Mamma.com was about to sell its publicly traded securities in a so-called PIPE (private investment in publicly traded equity) transaction.[87] According to the SEC, Mr. Cuban realized that the transaction would cause the market price of Mamma.com securities to go down and he sold his holdings in the corporation before news of the PIPE transaction became public, without disclosing that information.[88] The release of the information to Mr. Cuban was seemingly authorized, and the information itself was accurate. Just as in *Dirks*, so far no deception. However, unlike *Dirks*, the recipient of the information allegedly expressly agreed to hold the information in confidence. Assuming that the agreement

[82] *Id.* at 648.
[83] *Id.* at 654–55.
[84] *Id.* at 650.
[85] *Id.* at 661–63.
[86] SEC v. Cuban, 620 F.3d 551, 555 (5th Cir. Tex. 2010).
[87] *Id.*
[88] *Id.* at 556.

encompassed a promise not to trade on the information, Cuban either never intended to keep the information confidential or, after receiving the information changed his mind without informing the promisee of his change of heart. At this point, deception exists. Just as O'Hagan "feigned" loyalty by not revealing his intention to trade on the basis on the information about Grand Met's proposed acquisition of Pillsbury, if the SEC's allegations are true, Cuban feigned adherence to his promise to keep the information about Mamma.com's PIPE confidential. A breach of fiduciary duty is not needed to establish this deception. As noted in the case of the other two theories of insider trading liability, the old common law rule that a "mere" breach of promise cannot form the basis for common law fraud can be used to argue against the existence of deception.[89] The reasons why this is not an appropriate response have already been discussed.[90]

The Court's somewhat truncated analysis of fiduciary duty in *Dirks* strongly supports the notion that the key concept is not breach of fiduciary duty, but deception. Justice Powell's opinion in *Dirks* states that a corporate fiduciary generally is in breach of his or her fiduciary duty only if he or she releases the information for personal material, reputational gain, or to give a gift to another.[91] Suppose, however, that the corporate fiduciary releases the information negligently. Under Justice Powell's analysis, that would be insufficient to trigger tipper/tippee liability. However, under traditional analysis that fiduciary has breached his or her fiduciary duty. Fiduciaries generally owe the beneficiary of their duties the "duty of care."[92] That is a duty to avoid injuring the beneficiary by failing to act as the reasonable fiduciary would act in the same or similar circumstances.[93] If, however, deception rather than fiduciary duty is the key concept, Justice Powell's failure to include a well-known and widely-accepted method of breaching one's fiduciary duty in his list of what would trigger tipper/tippee liability makes sense. When a corporate fiduciary releases information for personal gain or to bestow a gift on another, he or she is deceiving the corporation, in the words of *O'Hagan*, by "feigning fidelity" while being disloyal. If the fiduciary releases the same information accidentally, albeit even grossly negligently, they may be breaching their fiduciary duty, but they are not "feigning fidelity," thereby deceiving the corporation.

Dirks also poses another challenge to those who support the concept that trading of securities in breach of a confidentiality agreement constitutes

---

[89] *See supra* text accompanying notes 35–46.
[90] *Id.*
[91] Dirks v. SEC, 463 U.S. 646, 663 (1983).
[92] *See, e.g.*, Revised Uniform Partnership Act § 404 (a), (c) (2011–12 ed.) (partners in partnership owe each other duty of care); RESTATEMENT (THIRD) OF AGENCY § 8.08 (2012) (duties of care owed by agents to their principals); RESTATEMENT (THIRD) OF TRUSTS § 77 (2007) (duty of care part of "duty of prudence" owed by trustee).
[93] *Id.*

insider trading under the misappropriation theory. The Court in Dirks approvingly cited the Second Circuit's decision in *Walton v. Morgan Stanley*.[94] Some advocates of requiring a breach of fiduciary duty as a *sine qua non* for insider trading liability rely heavily upon that case.[95]

Neither the Court's citation of the case in *Dirks*, nor *Walton* itself, undermines the possibility that insider-trading liability can be premised on a breach of a "mere" contractual duty of confidentiality. In *Dirks*, the Court described the facts and holding of *Walton* as follows:

> There, the defendant investment banking firm, representing one of its own corporate clients, investigated another corporation that was a possible target of a takeover bid by its client. In the course of negotiations the investment banking firm was given, on a confidential basis, unpublished material information. Subsequently, after the proposed takeover was abandoned, the firm was charged with relying on the information when it traded in the target corporation's stock. For purposes of the decision, it was assumed that the firm knew the information was confidential, but that it had been received in arm's-length negotiations. In the absence of any fiduciary relationship, the Court of Appeals found no basis for imposing tippee liability on the investment firm.[96]

In *Dirks* the Court cites *Walton* for the propositions that a tippee's liability depends upon the tipper's breach of fiduciary duty and that mere receipt of confidential information does not impose any fiduciary duty on the recipient.[97] Neither of these propositions contradicts the idea that one who makes an express promise to keep information confidential deceives the source of the information, if he or she decides to break that promise without informing the other party. More significantly, *Walton* itself did not involve an express promise or even an implicit promise by the defendant to keep the information it received confidential. The majority in *Walton* suggested that the outcome on liability for insider trading might be different if the defendant investment banking firm had made an express or implicit

---

[94] *Dirks*, 463 U.S. at 662 n.22 (citing Walton v. Morgan Stanley & Co., Inc., 623 F.2d 796, 798 (2d Cir. 1980)).

[95] *E.g.*, Grzebielski, *supra* note 20 at 81; Tyler J. Bexley, Note, *Reining in Maverick Traders: Rule 10b5-2 and Confidentiality Agreements*, 88 TEX. L. REV. 195, 212 (2009); Stephen M. Bainbridge, *The SEC Appeals Brief in The Mark Cuban Insider Trading Case*, PROFESSORBAINBRIDGE.COM (Feb. 2, 2010, 11:01 AM), http://www.professorbainbridge.com/professorbainbridgecom/2010/02/the-sec-appeals-brief-in-the-mark-cuban-insider-trading-case.html; Stephen M. Bainbridge, *The Insider Trading Charges Against Mark Cuban*, PROFESSORBAINBRIDGE.COM (Nov. 16, 2008, 4:19 PM), http://www.professorbainbridge.com/professorbainbridgecom/2008/11/the-insider-trading-charges-against-mark-cuban.html.

[96] *Dirks*, 463 U.S. at 662 n.22 (citations omitted).

[97] *Id.*

promise to keep the information confidential when it used the following language in its opinion:

> Appellants contend that Morgan Stanley became a fiduciary of Olinkraft by virtue of the receipt of the confidential information. However, the fact that the information was confidential did nothing, in and of itself, to change the relationship between Morgan Stanley and Olinkraft's management. Put bluntly, although, according to the complaint, Olinkraft's management placed its confidence in Morgan Stanley not to disclose the information, Morgan Stanley owed no duty to observe that confidence. To be sure, in some instances the management of a potential target, such as Olinkraft, might be required by its responsibility to the shareholders' interest to cooperate, and even to disclose confidential information, to a potential acquirer or a financial advisor who, as did Morgan Stanley, stands at arm's length. But that obligation, while it burdens management, *which might therefore reasonably insist upon an agreement of confidentiality*, does not change the relationship between the target and the acquirer or its advisor. *Appellants' complaint alleges no such agreement or understanding*.[98]

Thus, neither *Walton*, nor its citation in *Dirks* undermines the conclusion that a person who trades on material non-public information that he or she has pledged to keep confidential misappropriates that information and violates Rule 10b-5's prohibition on insider trading.

IV. CONCLUSION

When the Court in *Chiarella* stated that a duty to speak usually arises out of a relationship of trust and confidence, it was not enshrining a breach of fiduciary duty as an overarching element in any cause of action for insider trading. Instead, it was adopting what it viewed as the common law’s doctrinal solution for a doctrinal problem. The doctrinal problem was how could one who says nothing be liable for deceiving another person through a misrepresentation? The Court, rightly or wrongly, believed that the answer was only when a fiduciary relationship exists between the silent party and the deceived party. When a person charged with deception voluntarily chooses to speak, the doctrinal problem that was addressed in *Chiarella* vanishes. This is true whether the speech was made in the form of a half-truth, a representation that the maker later discovers is, or has become, false, or a promise to keep information confidential. When the

[98] Walton v. Morgan Stanley & Co., Inc., 623 F.2d 796, 799 (2d Cir. 1980) (emphasis added).

doctrinal problem which was central to *Chiarella* disappears, so too should the quest for finding some sort of fiduciary relationship between the deceiver and the deceived.

Consideration of whether a breach of a confidentiality agreement should be able to form the basis of liability for insider trading does raise a number of interesting issues such as: (a) should the *O'Hagan* and the misappropriation theory be reconsidered; (b) should *Chiarella* itself be reconsidered; (c) are there good or bad policy effects from basing insider trading liability on a breach of a confidentiality agreement; and (d) does a given promise to keep information confidential also encompass a promise not to trade on that information? Debate and discussion on those issues should not be postponed or preempted by an unnecessary search for a mythical breach of fiduciary duty element.