# Unexpected Commonalities: The Applicability of Bioethics Concepts to Insider Trading Law

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## Introduction

ON NOVEMBER 20, 2012, the Federal Bureau of Investigation ("FBI") arrested Mathew Martoma, a former student of bioethics and former CR Intrinsic Investors, LLC fund manager, on charges of insider trading.[1] The Securities and Exchange Commission ("SEC") and the Department of Justice ("DOJ") alleged that Martoma violated insider trading laws by engaging in a scheme with neurologist Sidney Gilman.[2] The charges asserted that Gilman provided confidential information to Martoma about a clinical trial of a drug designed to treat Alzheimer's disease. According to the government, this confidential information allowed Martoma's firm to trade stocks in pharmaceutical companies ahead of a public announcement about the results of the trial that had a negative impact on the value of the shares.[3] On Janu-

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1. Bridget Murphy, *Insider Trading Suspect Was Model Ethics Student*, ASSOCIATED PRESS (Nov. 30, 2012), http://bigstory.ap.org/article/insider-trading-suspect-was-model-ethics-student.

2. *See* Complaint ¶¶ 1–4, SEC v. CR Intrinsic Investors, LLC, No. 12-CV-8466 (VM) (S.D.N.Y. 2012) [hereinafter SEC Complaint]; Complaint ¶¶ 1–3, United States v. Martoma, No. 12-MAG-2985 (DF) (S.D.N.Y. Nov. 19, 2012) [hereinafter DOJ Complaint].

3. DOJ Complaint, *supra* note 2, ¶ 3. At the time of this publication, it is unclear whether the government will charge Steven Cohen, owner of SAC Capital Advisors, with any criminal wrongdoing. *See* Andrew Ross Sorkin & Peter Lattman, *New Details Suggest a Defense in SAC Case*, N.Y. TIMES DEALBOOK (Feb. 3, 2013), http://dealbook.nytimes.com/2013/02/03/new-details-suggest-a-defense-in-sac-case/; Sheelah Kolhatkar, *Why Hasn't Ex-SAC Capital Manager Mathew Martoma Turned on Steve Cohen?*, BLOOMBERG BUSINESSWEEK (Dec. 13, 2012), http://www.businessweek.com/articles/2012-12-13/why-hasnt-ex-sac-capital-manager-mathew-martoma-turned-on-steve-cohen (suggesting that Martoma has not cooperated with the government to provide incriminating information about his former boss, Steve Cohen, because SAC Capital continues to pay Martoma's legal fees).

ary 3, 2013, Martoma pled not guilty.[4] The press has reported that Martoma was a "model ethics student," and his former attorney used Martoma's bioethics background to defend him against the allegations, stating that, "having studied ethics in the biomed area . . . [Martoma] is keenly aware of what's right and what's wrong, and we do not believe he stepped across the line."[5]

This Article explores an unchartered area—the conceptual similarities between concepts in bioethics and the prohibition against insider trading and how these similarities relate to the allegations against Martoma.[6] Part I summarizes Martoma's background in bioethics and his relevant professional experience. Part II provides background regarding the illegality of insider trading and explains concepts in bioethics that are parallel to the concepts underlying insider trading. The prohibition against insider trading makes it illegal to trade on material nonpublic information in violation of a duty of trust.[7] There are at least three concepts in bioethics that are relevant to insider trading: the importance of fiduciary relationships, the maintenance of confidentiality of nonpublic information, and the avoidance of conflicts of interest. Bearing these overlapping concepts in mind, Part III describes the particular allegations the government has made against Martoma.

Finally, in Part IV, this Article analyzes how overlapping concepts in bioethics and insider trading relate to the allegations of insider trading against Martoma. Indeed, while further litigation will determine what liability, if any, Martoma will face, it is fairly clear that the concepts in bioethics that Martoma likely studied are relevant to the government's insider trading charges against him. Martoma's background in bioethics has been used to defend his moral character, but Martoma's bioethics background could be a double-edged sword.[8]

4. Patricia Hurtado & Bob Van Voris, *Former SAC Manager Martoma Pleads Not Guilty to Insider Trading*, BLOOMBERG (Jan. 3, 2013), http://www.bloomberg.com/news/2013-01-03/ex-sac-manager-martoma-pleads-not-guilty-to-insider-trading-1-.html.

5. Murphy, *supra* note 1; Peter Lattman, *Martoma, Former SAC Employee, Changes Lawyers in Insider Case*, N.Y. TIMES DEALBOOK (Apr. 4, 2013), http://dealbook.nytimes.com/2013/04/04/former-sac-employee-martoma-changes-lawyers-in-insider-case/.

6. For a discussion on the ethics of insider trading, see generally Gary Lawson, *The Ethics of Insider Trading*, 11 HARV. J.L. & PUB. POL'Y 727, 733 (1988) (explaining that "the ethics of insider trading are merely a particular, and unexceptional, application of wider moral principles governing marketplace transactions, and one's ethical views of the practice are likely to be determined by one's general perspective on the morality of markets").

7. *See* 17 C.F.R. §§ 240.10b-5 to 10b5-2 (2011).

8. The author intentionally does not opine on the strategy of Martoma's attorney of discussing Martoma's bioethics background with the press. It is sufficient to acknowledge

The government could argue that Martoma's knowledge of key concepts in bioethics demonstrates his awareness of what it means to be in violation of a fiduciary duty of trust, the importance of maintaining confidentiality over nonpublic information, and the reasons to avoid conflicts of interest.

## I. Mathew Martoma's Background in Bioethics

Martoma studied bioethics at Duke University in the mid-1990s.[9] At the time, he was known as Ajai Mathew Thomas.[10] Martoma's professor at Duke described Martoma's undergraduate performance in a recommendation letter to Stanford's Business School as "extraordinarily intelligent," "remarkably analytic," and "wonderfully fair-minded."[11] The professor appointed Martoma as the chief teaching assistant for an ethics and policymaking class he taught.[12] In addition to being a teaching assistant, Martoma was apparently interested in identifying bioethics concerns in literature. According to the professor's recommendation, Martoma contributed a great deal to class discussions of Sissela Bok's book, *Lying*, and was highly aware of issues of moral capacity raised by Camus' *The Plague*.[13] Martoma graduated from Duke in December 1995.[14]

Shortly after graduating from Duke, Martoma was hired by the National Institutes of Health ("NIH") to assist in conducting a case study about ethics and Alzheimer's disease.[15] According to Martoma's supervisor at the NIH, Martoma was hired due to his strong training in bioethics and his congenial personality.[16] In 1997, Martoma enrolled in Harvard Law School but dropped out before finishing his first year.[17] In July 1998, Martoma authored an article in the *Cambridge Quarterly of Healthcare Ethics* titled *Alzheimer Testing at Silver Years*.[18]

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the high likelihood that the information about Martoma's educational background would have eventually surfaced and that his attorney would have had to address it.

9. Murphy, *supra* note 1.
10. *Id.* Ajai Mathew Thomas legally changed his last name to Martoma in 2001. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. Katherine Burton, Saijel Kishan & Bob Van Voris, *Cohen's 'Elan Guy' Martoma Dropped Ethics for Hedge Fund*, BLOOMBERG (Nov. 23, 2012), http://www.bloomberg.com/news/2012-11-23/cohen-s-elan-guy-martoma-dropped-ethics-for-hedge-fund.html.
15. Murphy, *supra* note 1.
16. *Id.*
17. *Id.*
18. *See* A. Mathew Thomas et al., *Alzheimer Testing at Silver Years*, 7 CAMBRIDGE Q. HEALTHCARE ETHICS 294 (1998).

Martoma eventually enrolled at Stanford University to earn a business degree.[19] At Stanford, one of his classmates described Martoma as "really nice, very smart and ethical."[20] In 2003, Martoma married a pediatrician and took a job as a junior analyst for Sirios Capital Management LP in Boston, where he worked until 2006. He then joined the Connecticut-based SAC affiliate, CR Intrinsic Investors LLC, which was his employer when the alleged insider trading took place.[21] Martoma began as an analyst and advanced to the position of hedge fund portfolio manager with a specialty in the healthcare sector.[22]

## II. The Law of Insider Trading and Parallel Concepts in Bioethics

Boiled down to its most basic terms, insider trading laws prohibit (1) trading securities (2) on the basis of (3) material (4) nonpublic information (5) in violation of a duty of trust or confidence owed directly or indirectly to the corporation, the corporation's shareholders, or the source of the information.[23] These five requirements are nuanced and merit some explanation. (1) "Securities" include a wide variety of instruments and interests, including but not limited to: common and preferred stock, treasury stock, notes, bonds, debentures, certificates of interest, puts, calls, straddles, options or privileges on any security, and any security-based swap or other derivative instrument.[24] (2) A person trades "on the basis of" material nonpublic information if the person was aware of the material nonpublic information at the time the person traded the security.[25] (3) Information is "material" if there is a substantial likelihood that a reasonable investor

19. Murphy, *supra* note 1.

20. *Id.*

21. *Id.*

22. *Id.*

23. Insider trading laws are derived from section 10 of the Securities Exchange Act of 1934, as amended ("Exchange Act"). 15 U.S.C. §§ 78j to 78j-4 (2006 & Supp. IV 2011). Section 10 makes it unlawful to "use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of" rules promulgated by the SEC. *Id.* § 78j(b). Rule 10b-5 under the Exchange Act makes it unlawful to "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5(c) (2011).

24. 15 U.S.C. § 77b(a)(1).

25. 17 C.F.R. § 240.10b5-1(b) ("[A] purchase or sale of a security of an issuer is 'on the basis of' material nonpublic information about that security or issuer if the person making the purchase or sale was aware of the material nonpublic information when the person made the purchase or sale.").

would consider it important in making an investment decision.[26] In other words, information is material if a reasonable investor would consider it as having significantly altered the mix of information already available to the public.[27] (4) Information is "nonpublic" if it has not been disseminated broadly in the marketplace.[28] (5) An "insider" is not expressly defined by the securities laws or the SEC rules, but courts have referred to an insider as a person or entity that by virtue of a fiduciary relationship with an issuer of securities has knowledge of, or access to, material nonpublic information.[29] A person with a duty of trust or confidence is also known as a "fiduciary,"[30] and in the securities context, a fiduciary may not exploit his or her advantageous position by utilizing confidential nonpublic information to secure a pecuniary gain.[31]

While one might not expect for there to be overlapping concepts in securities law and in bioethics, the case against Martoma has brought these similarities to light. Concepts in bioethics are parallel, or at least applicable, to insider trading law in at least three ways: (1) doctors have a fiduciary duty to their patients,[32] (2) healthcare professionals must maintain the confidentiality of their patients' nonpublic

26. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976) (providing the test for "materiality" in the context of § 14(a) cases).

27. *Id.*; *see also* Basic Inc. v. Levinson, 485 U.S. 224, 232 (1988) (adopting the materiality standard for section 10(b) and Rule 10b-5 violations as outlined in *TSC Indus.*, 426 U.S. at 449); United States v. Anderson, 533 F.3d 623, 629–30 (8th Cir. 2008) (internal company reports found sufficiently material for purposes of section 10(b)).

28. *E.g.*, SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833, 854 (2d Cir. 1968) (en banc).

29. *See In re* Cady, Roberts & Co., Exchange Act Release No. 6668, 40 S.E.C. 907, 911, 1961 WL 60638 (Nov. 8, 1961).

30. *Fiduciary Definition*, MERRIAM-WEBSTER ONLINE, http://www.merriam-webster.com/dictionary/fiduciary (last visited Mar. 18, 2013) (defining fiduciary as both "one that holds a fiduciary relation or acts in a fiduciary capacity" and "of, relating to, or involving a confidence or trust: as . . . held or founded in trust or confidence"); *see also, e.g.*, Dirks v. SEC, 463 U.S. 646, 654 (1983) (describing a fiduciary as "a person in whom the sellers [of the securities] had placed their trust and confidence").

31. *See Dirks*, 463 U.S. at 655 n.14 (establishing that underwriters, accountants, lawyers, or consultants may become fiduciaries of shareholders by entering into confidential and business relationships with the corporation).

32. Liebergesell v. Evans, 613 P.2d 1170, 1176 (Wash. 1980) ("A fiduciary relationship arises as a matter of law between . . . a doctor and his patient."); *see also* Thigpen v. Locke, 363 S.W.2d 247, 253 (Tex. 1962) (explaining that confidential relationships exist in a variety of situations beyond the attorney-client relationship and stating that the existence of a fiduciary relationship is determined based on the actualities of the relationship between the parties involved).

medical information,[33] and (3) healthcare professionals must refrain from conflicts of interest, especially when a healthcare professional's pecuniary self-interest is weighed against the healthcare needs of patients.[34]

### A. Fiduciary Duties

The concept of a fiduciary duty cuts across securities regulations and bioethics. In both spheres, fiduciary relationships arise when one party is justified in expecting loyal conduct from another.[35] One often becomes a fiduciary when he or she possesses specialized information that creates a knowledge gap between the fiduciary and a third-party beneficiary who entrusts the fiduciary with private information.[36] A fiduciary may enter into an explicit or implicit agreement that calls upon the fiduciary to withhold from use or disclosure the information that creates this information gap.[37] Fiduciaries are charged with a duty of loyalty and must promote the beneficiary's interest over the fiduciary's own interest.[38] This loyalty provides a check on the potential abuse of power by the fiduciary, who is often in an advantaged position with regard to the beneficiary.[39]

The Supreme Court has found there to be three theories of insider trading liability, each of which involves a person violating a fiduciary duty of trust or confidence.[40] The "classical" theory of insider trading applies when an insider, in violation of a fiduciary duty to his

33. *See* Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462, 82464 (Dec. 28, 2000) (codified at 45 C.F.R. § 160.101) (explaining the need for a national health privacy framework).

34. For an overview of the issues raised by conflicts of interest in the doctor-patient relationship, see AM. MED. ASS'N, COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, REPORT A-I-86 ON CONFLICTS OF INTEREST 1 (1996) ("When a physician's commercial interest conflicts so greatly with the patient's interest as to be incompatible, the physician should make alternative arrangements for the care of the patient.").

35. *See* Deborah A. DeMott, *Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences*, 48 ARIZ. L. REV. 925, 936 (2006).

36. *See* ROBERT C. CLARK, CORPORATE LAW 141–57 (1986).

37. *See* Adickes v. Andreoli, 600 S.W.2d 939, 946 (Tex. App. 1980) ("A confidential relationship may arise not only from the technical fiduciary relationships, but may also arise informally from moral, social, domestic, or purely personal relationships.").

38. Marc A. Rodwin, *Strains in the Fiduciary Metaphor: Divided Physician Loyalties and Obligations in a Changing Health Care System*, 21 AM. J.L. & MED. 241, 244 (1995).

39. *Id.*; Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) (charging fiduciaries with the duty of "undivided loyalty").

40. *See* Chiarella v. United States, 445 U.S. 222, 228 (1980) (establishing the "classical" theory); Dirks v. SEC, 463 U.S. 646, 647 (1983) (establishing the "tipper-tippee" theory); United States v. O'Hagan, 521 U.S. 642, 652 (1997) (establishing the "misappropriation" theory).

company, trades the securities of the company on the basis of material nonpublic information obtained by reason of the insider's position.[41] The "tipper-tippee" theory imposes liability when the tipper "has breached his fiduciary duty to the shareholders by disclosing the [material nonpublic] information to the tippee," the tippee "knows or should know that there has been a breach," and the tipper incurred some personal benefit in return.[42] The "misappropriation" theory addresses the situation where a person who is not an insider lawfully comes into possession of material nonpublic information but nevertheless breaches a duty owed to the source of the information by trading on the basis of such information or by conveying it to another person to trade.[43] Importantly, in order to fit within any of the three categories of insider trading, a person must have violated a fiduciary duty of trust or confidence.

Fiduciary duties of trust, confidence, and loyalty are also prevalent in bioethics.[44] The nature of the doctor-patient relationship establishes a special duty for doctors. This is primarily due to the fact that doctors have expert medical knowledge that patients seek and rely on. The law imposes on doctors a "trust," which is a fiduciary responsibility arising from the dependence and vulnerability of patients and the disparity between a patient's and a physician's knowledge and ability to act on their expertise.[45] The American Medical Association's ("AMA") Code of Ethics recognizes the physician's fiduciary duty: "[t]he relationship between patient and physician is based on trust and gives rise to physicians' ethical obligations to place patients' welfare above their own self-interest."[46]

The bioethical principles of nonmaleficence and beneficence underlie the fiduciary relationship between patients and doctors.[47] The

41. *See Chiarella*, 445 U.S. at 228.

42. *Dirks*, 463 U.S. at 660, 662.

43. *O'Hagan*, 521 U.S. at 652.

44. *See generally* Glen O. Gabbard & Carol Nadelson, *Professional Boundaries in the Physician-Patient Relationship,* 273 J. AM. MED. ASS'N 1445 (1995).

45. *See* E. Haavi Morreim, *Conflicts of Interest: Profits and Problems in Physician Referrals,* 262 J. AM. MED. ASS'N 390, 391–92 (1989); AM. MED. ASS'N, CODE OF MEDICAL ETHICS § 8.12 (2006–2007 ed.) [hereinafter AMA CODE]. The Code of Medical Ethics also provides that "[a] physician shall respect the law and also recognize a responsibility to seek changes in those requirements which are contrary to the best interests of the patient" and that "[a] physician shall, while caring for a patient, regard responsibility to the patient as paramount." AMA CODE, *supra* note 45, at xxvii, lxi.

46. AMA CODE, *supra* note 45, § 10.015.

47. Albert W. Wu et al., *To Tell the Truth: Ethical and Practical Issues in Disclosing Medical Mistakes to Patients*, 12 J. GEN. INTERNAL MED. 770, 772 (1997); *see also* Kimberly G. Crone et al., *Between a Rock and a Hard Place: Disclosing Medical Errors*, 52 CLINICAL CHEMISTRY 1809,

tenet of "first, do no harm"[48] embodies the idea of nonmaleficence as doctors have an ethical obligation to avoid harming patients.[49] The principle of beneficence recognizes that physicians have an affirmative obligation to assist their patients by doing what is best for them and admonishes doctors who place their own interests over their patients' needs.[50]

In sum, the bioethical principle of fiduciary obligation relates to insider trading law because under both domains, one party justifiably expects loyalty. The fiduciary must not place his or her own interests over the beneficiary's interests.

## B. Confidentiality

In many ways, a healthcare professional's or securities trader's commitment to maintain the confidence of a patient's or company's sensitive information is an outgrowth of a fiduciary's duty of trust and loyalty. Beneficiaries, such as companies and patients, entrust knowledge of themselves to their fiduciaries. This creates an uneven relationship in that the vulnerability is one-sided.[51] The beneficiary should not fear that his or her nonpublic information or medical conditions will be disclosed to others. There is generally an expectation that the fiduciary will hold that special knowledge in confidence and use it exclusively for the benefit of, or on terms established by, the beneficiary.[52]

1810–11 (2006); Joan Gibson, *Thinking About the "Ethics" in Bioethics*, *in* BIOETHICS: HEALTH CARE LAW AND ETHICS 4–5 (Barry Furrow et al. eds., 5th ed. 2004).

48. *Nonmaleficence Definition*, STEDMAN'S MEDICAL DICTIONARY 1226 (27th ed. 2000) ("The ethical principle of doing no harm, based on the Hippocratic maxim, *primum non nocere,* first do no harm.").

49. There is a difference between "doing no harm" and "providing benefit." *See* ROBERT M. VEATCH, A THEORY OF MEDICAL ETHICS 22 (1981). This is important because sometimes a physician may consider the preservation of life as an ideal, but the decision of whether to introduce heroic measures might be different depending upon the circumstances.

50. Thomas L. Hafemeister & Selina Spinos, *Lean on Me: A Physician's Fiduciary Duty to Disclose an Emergent Medical Risk to the Patie*nt, 86 WASH. U. L. REV. 1167, 1184 (2009).

51. *See* Ian E. Thompson, *The Nature of Confidentiality*, J. MED. ETHICS 57, 59 (1979).

52. *See* RESTATEMENT (SECOND) OF TRUSTS § 170(1) (1959) (stating that a fiduciary "is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary"); Eddy v. Colonial Life Ins. Co., 919 F.2d 747, 750–52 (D.C. Cir. 1990). Drawing on the Restatement of Trusts and other non-ERISA sources of fiduciary principles, the D.C. Circuit has ruled that, once an ERISA beneficiary has requested information from an ERISA fiduciary who is aware of the beneficiary's status and situation, the fiduciary has an obligation to convey complete and accurate information material to the beneficiary's circumstance. *Eddy*, 919 F.2d at 750–52. This is so even if that information comprises elements about which the beneficiary has not specifically inquired. *Id.*

A violation of insider trading laws requires that a person trade on the basis of information that is material and *nonpublic*.[53] If the information is available to the public, there is no "insider" per se as other individuals have access to the same information that formed the trader's decision. In the insider trading context, a trader may obtain material nonpublic information about his or her own company in several ways: by virtue of his or her position, from a "tipper" in breach of the tipper's fiduciary duties to a third party of which the tippee is aware, or even lawfully through the use of a consultant.[54] In such circumstances, the law prevents a securities trader from fraudulently benefiting from confidential insider information to protect shareholders who lack the information and to ensure fairness in the industry.[55]

The concept of confidentiality is not new in bioethics. The 3,000-year-old Hippocratic Oath enjoins physicians from revealing what they may "see or hear, in the life of men, which ought not to be spoken of abroad."[56] Patients expect healthcare professionals and institutions to maintain the confidentiality of their sensitive personal information. It fosters a trust relationship as it encourages people to seek medical care and discuss sensitive issues openly.[57] Confidentiality also benefits public health by encouraging patients to seek treatment for serious

53. Courts have established two theories for determining the point when information is in the public realm. Under the first theory, information has reached the public realm when it has been "disclosed in a manner sufficient to insure its availability to the investing public." SEC v. Tex. Gulf Sulfur Co., 401 F.2d 833, 854 (2d Cir. 1968) (en banc). Under the second theory, information is public when trading has caused the "information to be fully impounded into the price of the particular stock." United States v. Libera, 989 F.2d 596, 601 (2d Cir. 1993). The SEC has clung to the first theory, arguing that information becomes public only by a "public release through the appropriate public media, designed to achieve a broad dissemination to the investing public generally and without favoring any special person or group." *In re* Faberge, Exchange Act Release No. 10174 [1973] Fed. Sec. L. Rep. (CCH) ¶ 79,379 at 83,105 (May 25, 1973); *see also* SEC v. Davis, Litigation Release No. 18322 (Sept. 4, 2003) (charging consultant with insider trading for tipping clients of embargoed information relating to the Treasury's halt of long bond sales). In 2000, the SEC provided some limited guidance through Regulation FD (Fair Disclosure) by allowing companies to utilize their websites to distribute information to the public. Regulation FD states that information on a company's website will be considered public information where such a disclosure is "reasonably designed to provide broad, non-exclusionary distribution of the information to the public." *See* Selective Disclosure and Insider Trading, Exchange Act Release No. 33-7881, 65 Fed. Reg. 51,716 (Aug. 24, 2000) (adopting, among other rules, Regulation FD and Exchange Act Rule 10b5-2).

54. *See supra* Part II.

55. Alan Strudler & Eric W. Orts, *Moral Principle in the Law of Insider Trading*, 78 TEX. L. REV. 375, 376, 388–93 (1999) (arguing that "insider trading is wrong because it is a form of fraud").

56. Hippocrates, The Oath of Hippocrates, *in* 38 THE HARVARD CLASSICS 2 (1910).

57. Hafemeister & Spinos, *supra* note 50, at 1186–88.

conditions.[58] Of course, there are some challenging exceptions to maintaining confidentiality in healthcare, such as knowing to whom to disclose an incapacitated patient's condition, disclosures that may ultimately protect a patient, and overriding confidentiality to protect third parties.[59] Nonetheless, these are limited exceptions.[60] The primary principle holds that individuals seeking medical help or advice entrust sensitive personal information to their doctors. This creates an uneven relationship that triggers the duty of confidentiality, which is paramount to the doctor-patient relationship.

Thus, for both healthcare professionals and securities traders, improper use or dissemination of a beneficiary's confidential information must be avoided.

### C. Conflicts of Interest

A conflict of interest[61] exists when a person entrusted with the interests of a client, dependent, or the public violates that trust by promoting his or her own self-interest or a third party's interest.[62] Both healthcare professionals and securities traders who have entered into fiduciary relationships must make decisions in the best interest of the beneficiary and avoid conflicts of interest and even the appearance of such a conflict.[63] This applies particularly to personal or finan-

58. *See id.* (explaining that candid disclosure may enhance patients' trust in physicians and reassure them that they are receiving adequate care).

59. In the absence of express statutory mandates, some courts have found a common law duty, founded on reasons of public policy, to disclose patient information when physicians become aware of such information that, if not disclosed, could result in physical harm or death to members of the public. *See, e.g.*, Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 347 (Cal. 1976) (imposing a common law duty on psychotherapists to disclose threats of harm by their patients to third parties in limited circumstances); TEX. OCC. CODE ANN. § 159.004(2)(A) (West 2012) (permitting disclosure when physician determines that there is a probability of imminent physical injury to a third person).

60. Bernard Friedland, *Physician-Patient Confidentiality: Time to Re-Examine a Venerable Concept in Light of Contemporary Society and Advances in Medicine*, 15 J. LEGAL MED. 249, 257–59 (1994).

61. A conflict of interest is "a situation in which the self-interest of a person may conflict with a fiduciary duty that he owes to another, or in which a person has potentially conflicting fiduciary duties to two or more persons." NORMAN S. POSER, BROKER-DEALER LAW AND REGULATION § 1.02 (2d ed. 1997).

62. *See generally* INST. OF MED. OF THE NAT'L ACAD., CONFLICT OF INTEREST IN MEDICAL RESEARCH, EDUCATION, AND PRACTICE 46–48, 303–05 (Bernard Lo & Marilyn J. Field eds., 2009).

63. CLARK, *supra* note 36. Clark explains:

> [Fiduciaries] may not abuse the beneficiaries in situations in which they have a conflict of interest. In some contexts, they may act improperly simply by maintaining a state of affairs in which they have a conflict of interest. Most importantly, this general fiduciary duty of loyalty is a residual concept that can include factual

cial conflicts that derive from the fiduciary's role, which might then influence, or appear to influence, the fiduciary's judgment when deciding what is in the best interest of the beneficiary.[64]

Insider trading laws, at their core, are directed at preventing conflicts of interest. The laws prohibit insiders from using the nonpublic information of a fiduciary for personal advantage or to favor third parties.[65] This is a conflict of interest because the information would have been obtained from a fiduciary as a result of a trader's position at a company or because the insider enjoys a business relationship with a company or its agent. Ultimately, the harm caused by engaging in such conduct injures other shareholders and discourages potential market participants from making investments due to a lack of trust in financial markets.[66]

In healthcare, conflicts of interest may be financial, such as those resulting from reimbursement incentives, personal investments in

> situations that no one has foreseen and categorized. The general duty permits, and in fact has led to, a continuous evolution in corporate law. At the same time, the courts and legislatures have developed more specific rules, or particular fiduciary duties, to deal with many recurring situations involving a conflict of interest.

*Id.* at 141.

64. *See* INST. OF MED. OF THE NAT'L ACAD., *supra* note 62, at 52 (acknowledging that the acceptance of a gift or the prospect of influencing stock in which the fiduciary has an interest stands to influence the fiduciary's judgment); Twomey v. Mitchum, Jones & Templeton, Inc., 262 Cal. App. 2d 690, 708–09 (1st Dist. 1968).

65. *See* Christopher M. Gorman, Note, *Are Chinese Walls the Best Solution to the Problems of Insider Trading and Conflicts of Interest in Broker-Dealers?*, 9 FORDHAM J. CORP. & FIN. L. 475, 477–78 (2004); Mark J. Loewenstein & William K.S. Wang, *The Corporation as Insider Trader*, 30 DEL. J. CORP. L. 45, 52 (2005) (explaining that if a director or officer owes fiduciary duties to the corporation and shareholders, then the officer or director will be subject to multiple conflicting fiduciary duties, and the best interests of the corporation may not coincide with the best interests of an individual shareholder transacting business with the corporation).

66. Thomas C. Newkirk, Assoc. Dir., Div. of Enforcement, U.S. Sec. & Exch. Comm'n & Melissa A. Robertson, Senior Counsel, Div. of Enforcement, U.S. Sec. & Exch. Comm'n, Insider Trading—A U.S. Perspective, Remarks at the 16th International Symposium on Economic Crime (Sept. 19, 1998), *available at* http://www.sec.gov/news/speech/speecharchive/1998/ spch221.htm).

> Some argue that insider trading is a legitimate form of compensation for corporate employees, permitting lower salaries that, in turn, benefits shareholders. It provides an incentive to innovation, some argue, by promising huge rewards for developing a plan or product that will lead to a precipitous rise in the stock (citation omitted). This argument, however, fails to address the real and significant hazard of creating an incentive for corporate insiders to enter into risky or ill-advised ventures for short term personal gain, as well as to put off the public release of important corporate information so that they can capture the economic fruits at the expense of shareholders.

*Id.*

medical facilities, or gifts from drug companies.[67] In general, conflicts of interest should be avoided because they may lead to bad outcomes. Patients and the public may be directly harmed if physicians base clinical decisions on what is best for them or a third party rather than on what is best for the patient.[68] Patients need to rely on their physicians' recommendations because physicians have expertise. If patients fear that physicians are not acting on their behalf, they may worry or fail to follow recommendations. The public may also be harmed because if healthcare professionals make decisions based on their own interests, there is a greater likelihood that they may fail to properly treat populations and lose public trust.[69]

It is worth mentioning that in both the healthcare setting and the insider-trading context, sometimes conflicts may be cured by proper disclosures.[70] Nonetheless, for both doctors and securities traders, conflicts of interest exist because the fiduciary is entrusted with the interests of a beneficiary and should not violate that trust by promoting self-interest or the interests of third parties.

## III. Allegations Against Martoma

The SEC's case against Martoma, Gilman, and CR Intrinsic was outlined in the SEC's Complaint filed on November 20, 2012 in the Southern District of New York ("The Complaint").[71] The Complaint alleged that Martoma's scheme earned his hedge fund over $276 mil-

67. BERNARD LO, RESOLVING ETHICAL DILEMMAS: A GUIDE FOR CLINICIANS 213 (4th ed. 2009).

68. *Id.*

69. *See* INST. OF MED. OF THE NAT'L ACAD., CONFLICT OF INTEREST IN MEDICAL RESEARCH, EDUCATION, AND PRACTICE 185 (Bernard Lo & Marilyn J. Field eds., 2009) (expressing that conflicts of interest create "unwarranted risks of compromising physician judgment and undermining public trust—risks that are not outweighed by prospective benefits for patients or society").

70. Robert Steinbrook & Bernard Lo, *Medical Journals and Conflicts of Interest*, 40 J.L. MED. & ETHICS 488, 490 (2012) (explaining that, in the medical context, "[d]isclosure provides information and can make financial and other relationships widely known. It can be used as a starting point for asking questions and seeking additional information. Through news media publicity or apprehension about such publicity, disclosure may lead to changes that will resolve some conflicts of interest. Disclosure, however, has its limits. Disclosure does not eliminate bias or resolve a conflict of interest. It does not manage or end financial ties. Disclosure can also have unintended consequences and perverse effects"); Roberta S. Karmel, *Outsider Trading on Confidential Information—A Breach In Search of a Duty*, 20 CARDOZO L. REV. 83, 113 (1998) (explaining that, in the corporate context, "the ban on insider trading [is] related to the disclosure obligations of issuers, bidders, and other market participants under the federal securities laws, as a means to enforce those obligations and accelerate the release of material information").

71. *See* SEC Complaint, *supra* note 2.

lion in illegal profits or avoided losses in July 2008 by trading based on material nonpublic information that Martoma learned from Gilman ahead of a negative public announcement.[72] The public announcement was about the clinical trial results for a potential Alzheimer's drug being jointly developed by companies in which Martoma's firm held a significant amount of securities: Elan Corporation, an Ireland-based biotechnology company, and Wyeth, a U.S. pharmaceutical company that was acquired by Pfizer in 2009.[73]

Before a pharmaceutical company can release a new drug, it must conduct clinical trials to determine whether the drug is safe and effective in providing treatment to patients.[74] From 2006 to 2008, Elan and Wyeth jointly conducted a Phase II clinical trial for a potential drug called bapineuzumab that would have treated Alzheimer's disease.[75] In Phase II, the drug is given to a large group of people (generally, 200–300) to determine if it is effective and to evaluate its safety.[76] Dr. Sidney Gilman, an 80-year-old professor at the University of Michigan Medical School, served as the chairman of the Safety Monitoring Committee ("SMC"), which oversaw the clinical trial and met regularly to discuss the health of the trial participants.[77] The SMC Operating Guidelines provided that "strict confidentiality will be maintained by all the SMC members in accordance with written agreement with [Elan]."[78] Gilman's contract with Elan provided that "[a]ny and all information which Elan may disclose to Consultant under this Agreement will be considered confidential."[79]

According to the Complaint, Martoma met with Gilman through paid consultations, arranged by a New York-based expert network firm,[80] that took place between 2006 and 2008.[81] During this two-year

72. *Id.* ¶ 1.

73. *Id.* psign; ¶ 1, 14–15.

74. *See* Food, Drug, and Cosmetic Act, 21 U.S.C. § 355(b) (2006); *Regulatory Information: Legislation*, U.S. FOOD AND DRUG ADMIN., http://www.fda.gov/RegulatoryInformation/Legislation/default.htm (last visited July 21, 2012) ("The Federal Food, Drug, and Cosmetic Act of 1938 completely overhauled the public health system. . . . authori[zing] the FDA to demand evidence of safety for new drugs.").

75. SEC Complaint, *supra* note 2, ¶ 19.

76. *Id.* ¶ 18.

77. *Id.* ¶¶ 2, 22; Kolhatkar, *supra* note 3.

78. SEC Complaint, *supra* note 2, ¶ 23.

79. *Id.*

80. "Expert network" refers to a firm that connects clients, principally institutional investors such has hedge funds, with individuals who have special expertise in the client's area of interest. *See* Bradley J. Bondi & Steven D. Lofchie, *The Law of Insider Trading: Legal Theories, Common Defenses, and Best Practices for Ensuring Compliance*, 8 N.Y.U. J.L. & BUS. 151, 177 (2011).

period, Gilman earned nearly $108,000 from fifty-nine consultations with portfolio managers and analysts at CR Intrinsic and an affiliated investment advisor, forty-two of which were consultations with Martoma.[82] The Complaint states that Gilman developed a personal relationship with Martoma such that Gilman eventually came to view Martoma as a friend and pupil.[83] Starting at the latest in 2007, Gilman would call Martoma after SMC meetings to inform him of what he learned during the meetings. Gilman's expert network consultations with Martoma were allegedly coordinated around scheduled SMC meetings. The Complaint further alleges that the consults frequently occurred on the same day or shortly after Gilman had attended an SMC meeting.[84]

Throughout 2007 and up to July 2008, CR Intrinsic and an affiliated investment advisor established long positions in Elan and Wyeth securities.[85] As of June 30, 2008, their portfolios owned over $328 million worth of Elan securities and $373 million of Wyeth stock despite advice from two CR Intrinsic analysts against holding these positions.[86]

On June 17, 2008, Elan and Wyeth released top-line results of the Phase II trial.[87] The market reacted positively to the announcement, and the stock prices of Elan and Wyeth rose more than ten percent and four percent, respectively.[88] However, the Complaint alleges that investors were looking ahead to the expected release of final, detailed results on July 29, 2008.[89]

In late June 2008, Gilman learned that Elan and Wyeth had selected him to offer the public announcement of the trial results at a medical conference on July 29, 2008.[90] Allegedly, after finding out about his selection, Gilman sent an email to Martoma with the subject

81. SEC Complaint, *supra* note 2, ¶ 3.

82. *Id.* ¶ 25.

83. *Id.*

84. *Id.* ¶ 27.

85. *Id.* ¶¶ 31, 33. A long position is "[t]he buying of a security such as a stock, commodity or currency, with the expectation that the asset will rise in value." *Definition of Long Position*, INVESTOPEDIA, http://www.investopedia.com/terms/l/long.asp (last visited Apr. 11, 2013). A short position is "[t]he sale of a borrowed security, commodity or currency with the expectation that the asset will fall in value." *Definition of Short Position*, INVESTOPEDIA, http://www.investopedia.com/terms/s/short.asp (last visited Apr. 11, 2013).

86. SEC Complaint, *supra* note 2, ¶¶ 31, 33.

87. *Id.* ¶ 20.

88. *Id.*

89. *Id.*

90. *Id.* ¶ 36.

line "Some news" and requested that Martoma set up a conversation through the expert network firm.[91] The Complaint alleges that in the weeks leading up to the July 29 announcement, Gilman had several telephone calls with Martoma during which he provided material non-public information regarding the safety and efficacy results for the Phase II trial.[92]

On July 17, 2008, Gilman allegedly provided Martoma with actual, detailed results of the clinical trial, in advance of the July 29 announcement.[93] Specifically, Gilman received a PowerPoint from Elan in an email labeled "Confidential, Do Not Distribute" that summarized the detailed efficacy and safety results for the Phase II Trial.[94] The same day, Gilman and Martoma exchanged phone calls during which Gilman allegedly provided Martoma with information contained in the PowerPoint, which Gilman also sent to Martoma.[95] According to the Complaint, Gilman and Martoma continued to communicate after their July 17 conversation in the days leading up to the July 29 announcement.[96]

According to the Complaint, three days after receiving the PowerPoint presentation, Martoma spoke with the owner and head trader at SAC Capital, Steve Cohen,[97] and informed Cohen that he was no longer "comfortable" with the investments in Elan.[98] Shortly thereafter, the hedge fund portfolios managed by CR Intrinsic and the affiliated investment advisor liquidated their combined long positions in Elan and Wyeth, worth over $700 million, and took substantial short positions (betting against the stock), eventually selling over $960 million in Elan and Wyeth securities in just over a week.[99] Allegedly,

91. *Id.*
92. SEC Complaint, *supra* note 2, ¶ 37.
93. *Id.* ¶ 3.
94. *Id.* ¶¶ 40–42.
95. *Id.*
96. *Id.* ¶ 43.
97. The Complaint states that the individual with whom Martoma spoke was "Portfolio Manager A," who the Complaint identifies as the "owner and founder" of CR Intrinsic. *Id.* ¶ 17. Steven Cohen is the founder and owner of CR Intrinsic. Linette Lopez, *Hedge Fund Billionaire Steve Cohen Is "Portfolio Manager A" in the Latest Insider Trading Case* (Nov. 20, 2012), http:// www.businessinsider.com/steve-cohen-cr-intrinsic-2012-11.
98. SEC Complaint, *supra* note 2, ¶¶ 42, 44. *But see* Sorkin & Lattman, *supra* note 3 ("Internal SAC trading records, according to people directly involved in the case, indicate that the hedge fund did not have a negative bet in place in advance of the announcement of the drug trial's disappointing results. Instead, the records indicated that SAC, through a series of trades, including a complex transaction known as an equity swap, had virtually no exposure—neither long nor short—heading into the disclosure of the drug data.").
99. SEC Complaint, *supra* note 2, ¶ 4.

this re-positioning allowed the hedge funds to collectively reap profits and avoid losses of over $276 million.

On July 29, 2008, after the close of U.S. securities markets, Gilman presented the results of the Phase II Trial at the medical conference, and Elan and Wyeth issued a press release summarizing the results.[100] The July 29, 2008 announcement failed to meet the market's expectations.[101] The next day, Elan's share price fell nearly forty-two percent and Wyeth's share price fell nearly twelve percent.[102] At the end of the year, Martoma received a $9.3 million bonus, a significant portion of which was attributed to the profits that the Elan and Wyeth trades generated.[103]

## IV. Analysis

On their face, the factual allegations, if true, in the SEC's case against Martoma and Gilman appear to be strong.[104] The factual allegations maintain that Gilman provided Martoma with the actual, detailed results of the clinical trial, both by phone and email, and that Martoma caused the liquidation of hundreds of millions of dollars in stock just before the negative public announcement about the clinical trial. However, insider trading cases often hinge on an intricate and nuanced understanding of the facts, and, aside from oral testimony, the government and Martoma's attorneys have at least four million documents to review and digest.[105]

The question for the purposes of this Article, however, is whether Martoma, who was a "model ethics student," was particularly capable of understanding "what's right and what's wrong" in the insider trading context as a result of his bioethics studies, as his former attorney suggested.[106] Such an assertion advances a theory that Martoma's bioethics background in fact prevented him from engaging in wrongdoing.[107] An analysis of the conduct at issue, however, reveals that in-

100. *Id.* ¶ 52.
101. *Id.* ¶ 21.
102. *Id.* ¶ 53.
103. *Id.* ¶¶ 6, 56.
104. *But see* Sorkin & Lattman, *supra* note 3.
105. Patricia Hurtado, *Martoma Judge Grants Defense Time to Review U.S. Evidence* (Mar. 5, 2013), http://www.bloomberg.com/news/2013-03-05/martoma-judge-grants-defense-time-to-review-u-s-evidence.html.
106. *See* Murphy, *supra* note 1.
107. *See* Murphy, *supra* note 1. The author does not comment on the strategic decision or likely impact of introducing evidence regarding Martoma's background in bioethics at trial. It is sufficient to acknowledge that it is possible under FED. R. CIV. P. 404(a)(2).

voking Martoma's background in bioethics may be a double-edged sword.

In order for Martoma to have identified the various issues from his bioethics studies that apply, he would likely have had to consider both his and Gilman's situations. The government likely has two prosecutorial theories in mind. First, under the "tipper-tippee theory," Gilman breached his fiduciary duty to the shareholders of Elan by disclosing material nonpublic information about the clinical trial to Martoma, who knew or should have known about Gilman's breach. Second, under the "misappropriation theory," Martoma lawfully came into possession of material nonpublic information but breached a duty owed to Gilman or Elan by trading on the basis of such information.

Both of these theories require that Martoma knew or should have known that he or Gilman were in breach of a fiduciary duty.[108] Martoma's studies in bioethics likely addressed the special nature of a fiduciary relationship whereby a person or entity justifiably expects loyalty from a fiduciary, implying that the fiduciary will not place his or her own interests ahead of the beneficiary's interest. Gilman was the chairman of the SMC, which oversaw the clinical trial and met regularly to discuss the health of the trial participants.[109] This could provide a basis for the government to argue that Martoma's knowledge of Gilman's status may have caused Martoma to believe that Gilman was a fiduciary of Elan. Likewise, the government could argue that if Martoma lawfully came into possession of material nonpublic information about the likelihood of the Alzheimer's drug's success, he might have concluded that he, too, became a fiduciary.

Further, the government may argue that Gilman's status as the chairman of the SMC may have triggered other aspects of Martoma's bioethics studies that also relate to insider trading regulations. For example, the importance of confidentiality that fiduciaries must maintain when they are entrusted with sensitive knowledge is relevant in both healthcare and securities settings.[110] An important fact in this matter will be whether the information that Martoma received from Gilman was indeed both nonpublic and material. Gilman allegedly sent Martoma a nonpublic PowerPoint presentation from Elan that summarized the detailed efficacy and safety results for the Phase II

108. *See supra* text accompanying notes 42–43.

109. SEC Complaint, *supra* note 2, ¶¶ 2, 22.

110. *See supra* Part II.B.

trial.[111] Part of Martoma's defense strategy will likely be to analyze whether this information was actually nonpublic and whether it was in fact material in the insider trading context—meaning that a reasonable investor would consider it important in making an investment decision.[112]

Additionally, in both healthcare and corporate settings, conflicts of interest should be avoided by fiduciaries who are entrusted with the interests of a third party.[113] A fiduciary violates that trust by promoting self-interest or the interests of third parties. Just as a fiduciary-healthcare professional must prioritize a patient's interest in medical decision-making and avoid considerations that benefit the healthcare professional's pecuniary interest, the insider trading laws disallow a fiduciary who has material nonpublic information from trading securities to benefit himself or a third party.[114]

The dust has certainly not settled on this case.[115] SAC Capital and CR Intrinsic recently settled the SEC's case against the corporate entities for a record $602 million.[116] While further litigation will determine what liability, if any, Martoma will face, it is fairly clear that the concepts in bioethics that Martoma likely studied are relevant and applicable to the government's insider trading charges against him.

It is notable that Gilman was retained through an expert network firm. Such firms are intended to connect clients, principally institutional investors such has hedge funds, with individuals who have special knowledge in the client's area of interest. The concept behind expert networks is to protect investor resources and to eliminate un-

111. SEC Complaint, *supra* note 2, ¶¶ 40–42.

112. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

113. *See supra* Part II.C.

114. *See supra* Part II.C.

115. Another aspect of the case that will require further investigation and understanding is the timing of Martoma and Gilman's discussions. The discussions allegedly occurred almost immediately after Gilman learned of the trial results, allegedly leading Martoma to cause the selling of securities—right before the negative public announcement. *See* SEC Complaint, *supra* note 2, ¶¶ 40–43.

116. Bob Van Voris, *SAC's Record $602 Million Settlement Approved*, BLOOMBERG BUSINESSWEEK (Apr. 16, 2013), http://www.businessweek.com/news/2013-04-16/sac-s-record-602-million-sec-settlement-approved (noting that the settlement remains subject to a future court of appeals decision on whether defendants in SEC cases may be allowed to neither admit nor deny fault in such agreements). Wyeth Investors also recently filed suit against SAC Capital, CR Intrinsic, and SAC founder Steven Cohen seeking damages based on the alleged insider trading. Bob Van Voris, *SAC Capital Sues by Wyeth Investors in Tiping Claim*, BLOOMBERG BUSINESSWEEK. (Apr. 13, 2013), http://www.businessweek.com/news/2013-04-12/sac-capital-sued-by-wyeth-investors-in-tiping-claim.

certainty.[117] When used appropriately, expert networks add value to clients by connecting them with experts who have specialized experience and knowledge.[118] However, according to the Complaint, Gilman was more than an expert who discussed his knowledge of the pharmaceutical industry. Gilman viewed Martoma as a "friend and pupil."[119] Multiple precautions can and should be taken to ensure that communications between investors and experts do not violate insider trading laws or fiduciary obligations, confidentiality, and conflicts of interest. These precautions include, but are not limited to: screening experts, monitoring interactions between the investors and experts, documenting such interactions, and developing a compliance program to deal with insider trading questions and possible government inquiries.[120] It is unclear whether such precautions were taken in this instance. Did Gilman and Martoma's relationship cross the line? When Martoma and Gilman spoke to each other, was a representative of the expert network on each call? This and other facts will be the important details that further investigation will unveil.

While these questions remain unanswered, it is clear (although perhaps unexpected) that the principles of conduct relevant to the field of bioethics intersect with how a fiduciary must deal with material nonpublic information. Whether Martoma's background in bioethics ultimately impacts this case also remains to be seen.

## Conclusion

Conceptual similarities exist between bioethics and insider trading laws. Just as the prohibition against insider trading makes it illegal to trade on material nonpublic information in violation of a duty of trust, concepts in bioethics impose a fiduciary duty on doctors, who should maintain the confidentiality of nonpublic medical information and refrain from conflicts where their pecuniary interest supersedes the needs of patients. At the time of this Article's publication it is unclear what liability, if any, Martoma will face. It is clear, however, that Martoma's background in bioethics and securities trading would have familiarized him with the importance of fiduciary relationships, maintaining confidentiality over sensitive information, and avoiding conflicts of interest.

117. Bondi & Lofchie, *supra* note 80.
118. *Id.*
119. SEC Complaint, *supra* note 2, ¶ 25.
120. Bondi & Lofchie, *supra* note 80.