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DECEPTION ABSENT DUTY: COMPUTER HACKERS & SECTION 10(B) LIABILITY

BRIAN A. KAROL*

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I. INTRODUCTION

The federal regulation of securities transactions emerged in the wake of the market crash of 1929,¹ when half of the new securities sold in the decade after World War I proved to be worthless.² As a result, Congress passed the Securities Exchange Act of 1934³ to “insure honest securities markets and thereby promote investor confidence” going forward.⁴ As part of the Exchange Act, Congress created the Securities and Exchange Commission (SEC), and equipped it with an “arsenal of flexible

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¹ Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194 (1975).

² See JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET 1-2 (3d. ed. 2003) (stating that approximately \$25 billion of the \$50 billion in new securities sold during that time were valueless).

³ 15 U.S.C. § 78a-u (2000).

⁴ United States v. O’Hagan, 521 U.S. 642, 658 (1997).

enforcement powers.”⁵ Section 10(b) of the Exchange Act and SEC Rule 10b-5 have been the SEC’s principal armaments against securities fraud. These provisions generally prohibit the use of deceptive devices in connection with the purchase or sale of securities.⁶ In 1961, the SEC explained that Section 10(b) is not intended to prohibit particular fraudulent acts or practices, but rather is “designed to encompass the infinite variety of devices by which undue advantage may be taken of investors and others.”⁷ Presently, with the globalization of securities markets and the rapid evolution of internet technology,⁸ this open-ended interpretation of Section 10(b) allows the SEC to protect investors against fraudulent activities that were unimaginable to Congress in 1934.

In recent years, computer “hacking” has become an electronic epidemic.⁹ Computer hackers cause harm in many different ways,¹⁰ “costing billions of dollars annually in theft of information alone.”¹¹ As a result, the SEC has begun to bring enforcement actions under Section 10(b) against computer hackers, who illegally gain access to the confidential information of publicly traded corporations, and

⁵ *Ernst*, 425 U.S. 185 at 195. Most prominently, Section 10(b) gave the SEC the power to promulgate any rules and regulations they deem necessary or appropriate to protect investors and the public interest. See 15 U.S.C. § 78j(b) (2000) (amended 2010). See also *infra* Part V.B.2 (discussing the SEC’s broad enforcement powers).

⁶ See 15 U.S.C. § 78j(b) (2000) (amended 2010); 17 C.F.R. § 240.10b-5 (2008).

⁷ *Cady, Roberts & Co.*, 40 S.E.C. 907, 912 (1961), 1961 WL 60638, at *12.

⁸ See Robert A. Prentice, *The Internet and its Challenges for the Future of Insider Trading Regulation*, 12 HARV. J.L. & TECH. 263, 265-67 (1999) (discussing how the internet is revolutionizing the securities business).

⁹ See *id.* at 293 (stating that computer hacking is a “serious problem of epidemic proportions”); see also Richard Behar, *Who’s Reading Your E-mail?*, FORTUNE, Feb. 3, 1997, at 59 (estimating financial losses from computer crime amount to about \$10 billion a year but arguing that this number is unreliable because 95% of attacks go undetected and 85% of those that are detected go unreported, and quoting the Federal Bureau of Investigation as stating, “The hackers are driving us nuts. Everyone is getting hacked. It’s out of control.”); David M. Remnitz & Ryan Breed, *Network Security Audits Keep the Hackers at Bay*, NAT’L L.J., Feb. 2, 1998, at C9 (describing an Ernst & Young survey on information security, which found that 38% of all U.S. respondents had been victims of industrial espionage in the previous years).

¹⁰ See generally David L. Gripman, Comment, *The Doors Are Locked but the Thieves and Vandals Are Still Getting In: A Proposal in Tort to Alleviate Corporate America’s Cyber-Crime Problem*, 16 J. MARSHALL J. COMPUTER & INFO. L. 167 (1997) (containing an extensive description of computer security problems in United States).

¹¹ Prentice, *supra* note 8, at 293-94. See also Michael Rustad & Lori E. Eisenschnmidt, *The Commercial Law of Internet Security*, 10 HIGH TECH. L.J. 213, 216 (1995) (noting serious problem of theft of information by hackers); Heather Brewer, *Snap Judgments: Online Losses*, BUS. LAW. TODAY, May-June 1998, at 6 (citing study finding that 88% of reporting Fortune 1000 companies had suffered security breaches, 75% had suffered financial losses, and 44% had been hacked by outsiders), available at <http://apps.americanbar.org/buslaw/blt/7-5snap.html>; Jack Nelson, *Grappling with Crime Wave on the Web*, L.A. TIMES, Nov. 30, 1997, at A10 (stating that computer hackers committing commercial espionage cost \$100 billion annually in United States alone).

subsequently trade on the basis of that information.¹² However, some courts – most notably the Fifth Circuit – and commentators have opined that hacking cannot be “deceptive” within the meaning of Section 10(b).¹³ Proponents of this view argue that computer hackers, who exist as non-fiduciary outsiders and do not fall into either generally accepted theory of insider trading, do not breach the requisite pre-existing duty of candid disclosure they insist is necessary for any device to be deemed deceptive under the provision.¹⁴ The fixation on the traditional theories of insider trading, coupled with a lack of jurisprudence on the liability of non-fiduciaries under Section 10(b), has brought about some confusion as to whether there is, in fact, a fiduciary duty requirement for all violations of Section 10(b).¹⁵ For instance, the Second Circuit has taken a more

¹² See, e.g., *SEC v. Dorozhko*, 606 F. Supp. 2d 321 (S.D.N.Y. 2008), *vacated*, 574 F.3d 42 (2d Cir. 2009); *SEC v. Lohmus, Haavel & Viesemann, et al.*, SEC Litigation Release No. 20134, 2005 WL 3309748 (Nov. 8, 2005); *SEC v. Blue Bottle Ltd.*, SEC Litigation Release No. 20018, 2007 WL 580798 (Feb. 26, 2007). This note focuses primarily on SEC civil enforcement actions. This note also applies to private causes of action under Section 10(b); however, in private actions, plaintiffs are required to prove more stringent elements than in SEC civil enforcement actions. See Zathrina Perez, Eric Cochran & Christopher Sousa, *Securities Fraud*, 45 AM. CRIM. L. REV. 923, 926 (2008) (discussing the elements of a private cause of action).

¹³ See, e.g., *Regents of the Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 386 (5th Cir. 2007) (“An act cannot be deceptive within the meaning of §10(b) where the actor has no duty to disclose.”); *Dorozhko*, 606 F. Supp. 2d at 321 (holding that a computer hacker cannot be liable under Section 10(b) because he is under no duty to disclose material nonpublic information); see also Saikrishna Prakash, *Our Dysfunctional Insider Trading Regime*, 99 COLUM. L. REV. 1491, 1527 (1999) (“Rule 10b-5 simply does not bar the use of unlawfully acquired information.”); Rebecca S. Smith, Comment, *O’Hagan Revisited: Should a Fiduciary Duty Be Required Under the Misappropriation Theory?*, 22 GA. ST. U. L. REV. 1005, 1014 (2006) (“Under O’Hagan’s version of the misappropriation theory, a person may avoid liability by . . . obtaining the information by theft if one is not standing in a fiduciary relationship with the source”); Donna M. Nagy, *Reframing the Misappropriation Theory of Insider Trading Liability: A Post-O’Hagan Suggestion*, 59 OHIO ST. L.J. 1223, 1255 (1998) [hereinafter Nagy, *Reframing the Misappropriation Theory*] (“[I]t is doubtful that securities trading by the computer hacker or the ‘mere’ thief would violate Section 10(b) and Rule 10b-5, because neither scenario would involve misappropriation through acts that would constitute affirmative deception.”).

¹⁴ *Dorozhko*, 606 F. Supp. 2d at 341–42 (“A computer hacker who breaches the computer security walls of a large publicly held corporation and extracts nonpublic information may also trade and tip without running afoul of the insider trading rules. The burglar and computer hacker may be liable for the conversion of nonpublic information under other laws, but the insider trading laws themselves appear not to prohibit the burglar or hacker from trading or tipping on the basis of the stolen information. This is because there was no breach of a duty of loyalty to traders under the classic theory or to the source of the information under the misappropriation theory.”) (quoting Kathleen Coles, *The Dilemma of the Remote Tippee*, 41 GONZ. L. REV. 181, 221 (2005–2006)).

¹⁵ Compare *Credit Suisse*, 482 F.3d at 386 (“An act cannot be deceptive within the meaning of §10(b) where the actor has no duty to disclose.”), with *SEC v. Dorozhko* 574 F.3d 42, 49 (2d Cir. 2009) (“[N]one of the Supreme Court opinions . . . require a fiduciary relationship as an element of an actionable securities claim under Section 10(b).”) (emphasis in original).

expansive view on Section 10(b) prosecutions and concluded that the Supreme Court's insider trading jurisprudence does not impose a fiduciary duty requirement on all possible Section 10(b) violations. The dissonance between the positions taken by the Fifth and Second Circuits has created a circuit split on the interpretation of Section 10(b), which the Supreme Court has yet to resolve.

This note addresses the ongoing confusion surrounding Section 10(b) liability, focusing primarily on the scope and meaning of the term "deceptive" as it applies to computer hackers. Part II will introduce Section 10(b), and briefly describe the classical and misappropriation theories typically found at the center of insider trading jurisprudence. Part III will confront the recent circuit split on the issue of whether the Supreme Court has limited the meaning of "deceptive" by developing a fiduciary duty requirement for every violation of the provision. Part IV will analyze where fiduciary principles should fit into Section 10(b) liability and argue that a broad, ordinary meaning of "deceptive" should be applied to a Section 10(b) analysis. Applying an ordinary meaning of "deceptive," Part V will explore possible Section 10(b) liability for non-fiduciary outsiders and argue that the misrepresentations employed by certain computer hackers in obtaining material, nonpublic information should fall within the provision's prohibitions.

II. SECTION 10(B) AND INSIDER TRADING

A. Section 10(b)

Section 10(b) of the Exchange Act prohibits any person, directly or indirectly, to use "in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe."¹⁶ Pursuant to Section 10(b), the SEC has promulgated Rule 10b-5,¹⁷ which generally

¹⁶ 15 U.S.C. § 78j(b) (2000) (amended 2010). Section 10(b) provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . (b) To use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Id.

¹⁷ 17 C.F.R. § 240.10b-5 (2008). Rule 10b-5 provides:

It shall be unlawful for any person, directly or indirectly . . .

prohibits fraud in connection with the purchase or sale of any security “to assure that dealing in securities is fair and without undue preferences or advantages among investors.”¹⁸ Section 10(b) and Rule 10b-5 are the SEC’s primary weapons for combating securities fraud¹⁹ and are often described as “catch-all anti-fraud provisions.”²⁰ Despite the SEC’s desire to broadly interpret Rule 10b-5, the Rule is limited to the language of Section 10(b).²¹ Therefore, according to the text of Section 10(b),²² the SEC must successfully show: (1) any “deceptive device” that it is (2) used “in connection with the purchase or sale of securities.”²³

The Supreme Court has explained that Section 10(b) “must not be construed so broadly as to convert every common-law fraud that happens to involve securities into a violation of Section 10(b).”²⁴ In other words, even though Section 10(b) is a catchall anti-fraud provision, what it catches must be “deceptive.”²⁵ On the other hand, the Court also made clear that Section 10(b) should be “construed not technically and restrictively, but flexibly to effectuate its remedial purposes.”²⁶ Since the operative language in Section 10(b) is not defined within the text of the provision, the Supreme Court has attempted to interpret Section 10(b)’s

(a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading, or (c) 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.

Id.

¹⁸ H.R. REP. NO. 94-0229, at 91 (1975) (Conf. Rep.).

¹⁹ Robert Steinbuch, *Mere Thieves*, 67 MD. L. REV. 570, 572 (2008); see 15 U.S.C. § 78u(d) (2000) (granting the SEC the power to seek injunctions, disgorgement of profits, and money damages); see also 15 U.S.C. § 78u-1 (granting treble damages against any person who violates Section 10(b) while in possession of material, non-public information).

²⁰ *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983).

²¹ *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976) (“[The Rule’s] scope cannot exceed the power granted the Commission by Congress under [§] 10(b).”); *United States v. O’Hagan*, 521 U.S. 642, 651 (1997) (“Liability under Rule 10b-5 . . . does not extend beyond conduct encompassed by § 10(b)’s prohibition.”).

²² “The scope of Rule 10b-5 is coextensive with the coverage of § 10(b) . . . therefore, we use § 10(b) to refer to both the statutory provision and the Rule.” *SEC v. Zandford*, 535 U.S. 813, 816 n.1 (2002).

²³ *O’Hagan*, 521 U.S. at 651.

²⁴ *Zandford*, 535 U.S. at 820.

²⁵ For example, holding Bill Gates at gunpoint and stealing Microsoft’s corporate secrets is not deceptive, and is therefore not a violation of Section 10(b).

²⁶ *Zandford*, 535 U.S. at 819 (internal citations omitted) (quoting *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972)).

ambiguous terminology to determine the scope of liability.²⁷ Nevertheless, precisely which conduct the Supreme Court deems “deceptive” within the meaning of Section 10(b) is still unclear, particularly regarding the conduct of individuals who improperly obtain and trade on inside information but who owe no fiduciary duty to the source of the information.²⁸

Absent from the statutory language Section 10(b) is any reference to fiduciary duty or fiduciary duty-like principles of disclosure.²⁹ Notwithstanding, some courts – most notably the Fifth Circuit – have gone so far as to hold that the Supreme Court has developed an additional element to Section 10(b): no device, scheme, or contrivance can be “deceptive” absent some breach of a pre-existing duty to disclose or abstain from trading.³⁰ Presumably, this requirement finds its origins in the Supreme Court’s insider trading jurisprudence, where silence cannot constitute deception unless there is a breach of some duty to disclose or abstain from trading.³¹ However, the inclusion of this requirement would transform Section 10(b) exclusively into a fiduciary-trading prohibition, thereby severely limiting the SEC’s ability to regulate securities transactions.³² The remainder of this Part will briefly summarize traditional insider trading liability under Section 10(b).

²⁷ The Supreme Court has defined the terms “device” and “manipulative” in Section 10(b) by consulting the 1934 edition of Webster’s International Dictionary. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 nn.20–21. The Court also concluded that the relevant test to determine whether a “device” is used “in connection with” a securities transaction is whether the device and transaction “coincide.” See *Zandford*, 535 U.S. at 822.

²⁸ Compare *Regents of the Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 386 (5th Cir. 2007) (holding that the Supreme Court has authoritatively construed the term “deceptive” to require a breach of a duty of candid disclosure), with *SEC v. Dorozhko*, 574 F.3d 42, 48 (“[N]one of the Supreme Court opinions . . . establishes a fiduciary-duty requirement as an element of every violation of Section 10(b).”).

²⁹ See 15 U.S.C. § 78j(b) (2000) (amended 2010); 17 C.F.R. § 240.10b-5 (2008).

³⁰ See *Credit Suisse*, 482 F.3d at 386; *SEC v. Dorozhko*, 606 F. Supp. 2d 321, 330 (S.D.N.Y. 2008), vacated, 574 F.3d 42 (2d Cir. 2009).

³¹ *Credit Suisse*, 482 F.3d at 389 (“[T]he [Supreme] Court, in its other cases interpreting § 10(b), has established that a device, such as a scheme, is not ‘deceptive’ unless it involves breach of some duty of candid disclosure.”) (referring to the Supreme Court’s decisions in *Chiarella* and *O’Hagan*).

³² For example, the SEC would not be able to bring enforcement actions against computer hackers, or any other outsider traders, who have no pre-existing duty of candid disclosure to either the shareholders of the corporation, or the source of the information they obtained.

B. Insider Trading

The Court's inclusion of insider trading liability under Section 10(b) is consistent with the remedial purposes of the provision. Section 10(b) is "aimed at reaching misleading or deceptive activities, whether or not they are precisely and technically sufficient to sustain a common law action for fraud and deceit."³³ "Although informational disparity is inevitable in securities markets,"³⁴ a major objective in the federal regulation of securities has been to curtail structural inequities regarding access to information.³⁵ Therefore, while neither Section 10(b), nor any other federal statute directly prohibits insider trading,³⁶ the Supreme Court has found insider trading to be unlawful where the insider trader's silence constitutes fraud.³⁷

Essentially, the traditional corporate insider can be defined as an individual privy to material, nonpublic information³⁸ by means of his position within a corporation, who then uses that information to gain an unfair advantage in subsequent securities transactions.³⁹ An insider trader does not disclose this information prior to transacting and remains silent in breach of some duty to keep the information confidential.⁴⁰ In other words, the insider trader's silence concerning legally obtained information can be "deceptive" and trigger Section 10(b), if a failure to disclose this information prior to transacting is in breach of some duty of candid disclosure.⁴¹ To date, the Supreme Court has developed two theories of

³³ Cady, Roberts & Co., 40 S.E.C. 907, 912 (1961), 1961 WL 60638, at *12.

³⁴ United States v. O'Hagan, 521 U.S. 642, 658 (1997).

³⁵ SEC v. Dorozhko, 606 F. Supp. 2d 321, 331 (S.D.N.Y. 2008).

³⁶ ELIZABETH SZOCKY, THE LAW AND INSIDER TRADING: IN SEARCH OF A LEVEL PLAYING FIELD 3 (1993).

³⁷ See generally Chiarella v. United States, 445 U.S. 222 (1980); United States v. O'Hagan, 521 U.S. 642 (1997).

³⁸ Nonpublic or omitted information is material if its disclosure would significantly alter the total mix of the information available as viewed by the reasonable investor. Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988).

³⁹ "Insider trading is a term of art that refers to unlawful trading in securities by persons who possess material nonpublic information about the company whose shares are traded or the market for those shares. The term insider trading can be a misnomer because modernly the prohibition against this kind of trading applies to a larger class of persons than those traditionally considered to be corporate insiders. The term is often used to refer to anyone who has access to privileged information." DONALD C. LANGEVOORT, INSIDER TRADING REGULATION 3-4 (1988).

⁴⁰ Chiarella, 445 U.S. at 228.

⁴¹ O'Hagan, 521 U.S. at 651-52.

insider trading liability under Section 10(b): the classical theory and the misappropriation theory.

1. *The Classical Theory*

The SEC took the first step in establishing insider trading liability under Section 10(b) when it determined that corporate insiders seeking to trade in their own company's shares must either disclose the material, nonpublic information in their possession, or abstain from trading.⁴² The SEC has recognized a relationship of trust and confidence between corporate insiders, who have obtained confidential information as a result of their position within the company, and the past, present, and future shareholders of the corporation whose stock is traded.⁴³ This relationship "gives rise to a duty to disclose because of the necessity of preventing a corporate insider from taking advantage of the uninformed minority stockholders."⁴⁴

The Supreme Court first considered whether insider traders were liable under Section 10(b) in *Chiarella v. United States*.⁴⁵ Here, the Court found that there is no general duty to disclose material, nonpublic information and held that "a duty to disclose under Section 10(b) does not arise from the mere possession of nonpublic market information."⁴⁶ The Court explained that 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."⁴⁷ Chiarella was not a traditional insider (a corporate employee), or in any kind of fiduciary or similar relationship of trust or confidence with the

⁴² This is now commonly known as the "disclose or abstain" rule, and is the basis of the fiduciary principles that surround insider trading liability under Section 10(b). See Cady, Roberts & Co., 40 S.E.C. 907 (1961), 1961 WL 60638.

⁴³ *Id.*

⁴⁴ *Chiarella*, 445 U.S. at 228-29.

⁴⁵ See generally *Chiarella v. United States*, 445 U.S. 222 (1980). Chiarella, a financial printer, obtained confidential information about a corporate takeover by deducing the coded names of target companies. Based on this material nonpublic information, Chiarella purchased shares in the target companies, and when the information was later revealed to the public, he sold those shares in a rising market and realized a substantial profit. The government eventually indicted Chiarella, and he was later convicted on seventeen violations of Section 10(b). The Supreme Court reversed Chiarella's conviction, holding that the defendant's silence was not fraudulent because he was under no obligation to disclose his knowledge of inside information. *Id.* at 224-25.

⁴⁶ *Id.* at 235.

⁴⁷ *Id.* at 228 n.9 (citing RESTATEMENT (SECOND) OF TORTS § 525(2)(a) (1976)).

target corporation's shareholders.⁴⁸ Therefore, Chiarella's silence was not fraudulent within the meaning of Section 10(b) because the device he employed lacked the required element of deception.⁴⁹

The classical theory of insider trading liability under Section 10(b) turns on whether an insider trader's silence is "deceptive" based on the breach of a pre-existing duty to disclose any inside information received to the corporation's shareholders, or abstain from trading.⁵⁰ For example, a corporate officer or director who trades, or tips others to trade,⁵¹ in his corporation's securities on the basis of material, nonpublic information is liable under Section 10(b).⁵² The theory also extends liability to temporary insiders, such as underwriters, accountants, lawyers, or consultants who may become fiduciaries of the corporation's shareholders because they have entered into special, confidential relationships and are given access to inside information solely for corporate purposes.⁵³ However, the classical theory of insider trading liability under Section 10(b) does not reach outsiders who do not owe a fiduciary duty to the shareholders of the corporation.⁵⁴ Under the classical theory, the absence of a fiduciary duty to the corporation's shareholders forecloses the possibility that the outsider trader's silence can be "deceptive," within the meaning of Section 10(b), because he is under no obligation to disclose or abstain from trading.⁵⁵

⁴⁸ *Id.* at 231.

⁴⁹ *Id.* at 232-33.

⁵⁰ *United States v. O'Hagan*, 521 U.S. 642, 651-52 (1997).

⁵¹ See generally *SEC v. Dirks*, 463 U.S. 646 (1983). *Dirks*, a securities analyst, received information from a former officer of a corporation that this corporation was engaged in fraudulent practices. *Id.* at 648-49. *Dirks* did not own or trade in any of the corporation's stock; however, throughout his investigation to verify the information, *Dirks* openly discussed the alleged fraud with numerous clients and investors, resulting in some of these persons liquidating their holdings in the corporation. *Id.* at 650. The Supreme Court held that some tippees could be liable as insider traders under Section 10(b), but the Court reversed *Dirk's* conviction because the person who tipped him off did not breach a fiduciary duty to the company. *Id.* at 665.

⁵² *Dirks*, 463 U.S. at 660; *Chiarella*, 445 U.S. at 229.

⁵³ *Dirks*, 463 U.S. at 655 n.14.

⁵⁴ See Donna M. Nagy, *Insider Trading and the Gradual Demise of Fiduciary Principles*, 94 IOWA L. REV. 1315, 1329-30 (2009) [hereinafter Nagy, *Gradual Demise of Fiduciary Principles*] (noting that the classical theory allows persons outside the corporation to trade with impunity because they lack the fiduciary nexus to render their silence fraud under Section 10(b)).

⁵⁵ *Id.*

2. The Misappropriation Theory

While also based on fiduciary principles, the misappropriation theory is a more flexible framework for insider trading liability under Section 10(b).⁵⁶ Under the misappropriation theory, Section 10(b) liability is extended to fiduciary outsiders.⁵⁷ Although they are technically "outsiders," because they are not corporate employees and owe no duty to the shareholders of the corporation with whom they traded,⁵⁸ they nonetheless owe a fiduciary duty to the source of the material, nonpublic information they receive.⁵⁹ This fiduciary duty is breached when the corporate outsider does not disclose his knowledge of the information to its source and, subsequently, trades on the basis of that information.⁶⁰ This alternative "fraud on the source" theory was advocated by Justice Stevens in his concurring opinion in *Chiarella*,⁶¹ but the Supreme Court first endorsed the misappropriation theory in *United States v. O'Hagan*.⁶²

Writing for the majority in *O'Hagan*, Justice Ginsberg defined the misappropriation theory, and explained that "a person . . . violates Section 10(b) . . . when he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information."⁶³ Under the misappropriation theory, "a fiduciary's

⁵⁶ For example, *Chiarella* probably would have been liable under the misappropriation theory. In his *Chiarella* concurrence, Justice Stevens stated, "Respectable arguments could be made" that *Chiarella* violated Section 10(b) by breaching the duty to disclose or abstain from trading he "unquestionably owed to his employer and to his employer's customers." *Chiarella*, 445 U.S. 222 at 238 (Stevens, J., concurring). However, Justice Stevens agreed the majority "wisely" left the misappropriation theory for another day because it was not presented to the jury and did not form the basis of *Chiarella*'s conviction. *Id.*

⁵⁷ *United States v. O'Hagan*, 521 U.S. 642, 652-53 (1997).

⁵⁸ See *SEC v. Clark*, 915 F.2d 439, 443 (9th Cir. 1990) (defining outsiders as "persons who are neither insiders of the companies whose shares are being traded, nor tippees of such insiders").

⁵⁹ *O'Hagan*, 521 U.S. at 652-53.

⁶⁰ *Id.* at 655-56.

⁶¹ See *Chiarella v. United States*, 445 U.S. 222, 238 (1980) (Stevens, J., concurring).

⁶² *O'Hagan*, 521 U.S. 642. *O'Hagan*, a partner in a law firm learned that one of his firm's corporate clients was preparing a tender offer for a takeover of another corporation. During the following month, *O'Hagan* began purchasing call options and common stock for the target corporation. When the takeover corporation publicly announced its tender offer two months later, *O'Hagan* sold all of his call options and common stock, making a profit of over \$4.3 million. The government alleged that *O'Hagan* committed fraud through his "silence" because he had a duty to disclose to the source of the information (the client corporation) that he would trade on the basis of that information. *O'Hagan* was charged and convicted of 57 counts fraud, including 17 counts of securities fraud under Section 10(b). However, a divided panel of the Eighth Circuit rejected the misappropriation theory and reversed his convictions. *Id.* at 647-50. The Supreme Court later reversed the Eighth Circuit decision and adopted the misappropriation theory. *Id.* at 659.

⁶³ *Id.* at 652.

undisclosed, self-serving use of a principal's information to purchase or sell securities, in breach of a duty of loyalty and confidentiality," violates Section 10(b) because the fiduciary "defrauds the principal of the exclusive use of that information."⁶⁴ Instead of premising liability under the classical theory, 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."⁶⁵ The Court reasoned that both the classical and misappropriation theories are complimentary because each addresses situations where a fiduciary attempts to capitalize on inside information through the purchase or sale of securities.⁶⁶ Thus, the misappropriation theory is intended to extend Section 10(b) liability to "protect the integrity of the securities markets against abuses by 'outsiders' to a corporation who have access to confidential information . . . but who owe no fiduciary or other duty to that corporation's shareholders."⁶⁷

The *O'Hagan* Court maintained that the misappropriation theory satisfies Section 10(b)'s requirement that the "device" used "in connection with" the purchase or sale of securities involves deception.⁶⁸ The Court concluded that misappropriators "deal in deception" when they pretend "loyalty to the principal while secretly converting the principal's information for personal gain."⁶⁹ However, the Court acknowledged that "full disclosure forecloses [Section 10(b)] liability under the misappropriation theory" because the required deception must necessarily involve a "feigning fidelity to the source of the information."⁷⁰ Therefore, "if the fiduciary discloses to the source that he plans to trade on the nonpublic information," then "there is no 'deceptive device'" within the meaning of Section 10(b).⁷¹

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 652-53. ("The classical theory targets a corporate insider's breach of duty to shareholders with whom the insider transacts; the misappropriation theory outlaws trading on the basis of nonpublic information by a corporate 'outsider' in breach of a duty owed not to a trading party, but to the source of the information.").

⁶⁷ *Id.* at 653.

⁶⁸ *Id.* at 653-54.

⁶⁹ *Id.*

⁷⁰ *Id.* at 655.

⁷¹ *Id.* ("[A]lthough the fiduciary-turned-trader may remain liable under state law for breach of a duty of loyalty.").

The misappropriation theory extends Section 10(b) liability beyond classical insiders, to reach those outsiders who misappropriate material, nonpublic information for use in securities transactions in breach of a duty to disclose owed to the source of that information, regardless of whether the misappropriator owes a duty to the shareholders of the corporation with whom he traded.⁷² Nevertheless, both the classical and misappropriation theories are firmly rooted in fiduciary principles.⁷³

III. THE CIRCUITS ARE SPLIT OVER A SECTION 10(B) DUTY REQUIREMENT

At least two federal circuit courts are split on the issue of whether the Supreme Court has authoritatively construed Section 10(b) to require a breach of a fiduciary duty for any "device" to be "deceptive."⁷⁴ Specifically, the Fifth Circuit, in *Regents of the University of California v. Credit Suisse First Boston (USA), Inc.*, determined that the Supreme Court opinions in *Chiarella* and *O'Hagan* interpret Section 10(b) to establish "that a device, such as a scheme, is not 'deceptive' unless it involves breach of some duty of candid disclosure."⁷⁵ On the other hand, the Second Circuit, in *SEC v. Dorozhko*, considered the same Supreme Court precedent and found that neither *Chiarella*, nor *O'Hagan* "establishe[d] a fiduciary-duty requirement

⁷² Steinbuch, *supra* note 19, at 588.

⁷³ Nagy, *Gradual Demise of Fiduciary Principles*, *supra* note 54, at 1369 (noting that fiduciary principles are central to the Supreme Court's view of liability for insider trading).

⁷⁴ See *Regents of the Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 386 (5th Cir. 2007) ("An act cannot be deceptive within the meaning of § 10(b) where the actor has not duty to disclose."). *But see* *SEC v. Dorozhko*, 574 F.3d 42, 48 (2d Cir. 2009) ("[N]one of the Supreme Court opinions . . . establishes a fiduciary-duty requirement as an element of every violation of Section 10(b)."). At least four other circuits have held that a breach of fiduciary duty is not required when a defendant misrepresents himself. See, e.g., *Semerenco v. Cendant Corp.*, 223 F.3d 165, 187 n.14 (3d Cir. 2000) (declining to dismiss plaintiffs' claims on the ground that plaintiffs had not alleged a breach of a duty to disclose.) ("Though defendants who are neither fiduciaries nor insiders generally are not under a duty to disclose material information, they subject themselves to liability under §10(b) and Rule 10b-5 when they make affirmative misrepresentations."); *Rubin v. Schottenstein, Zox & Dunn*, 143 F.3d 263, 267-68 (6th Cir. 1998) (explaining that even in the absence of a duty to disclose information, one "assumes a duty to provide complete and non-misleading information with respect to subjects on which [one] undertakes to speak."); *Backman v. Polaroid Corp.*, 893 F.2d 1405, 1429-30 (1st Cir. 1990) ("[P]laintiffs' arguments on appeal focus on allegedly misleading statements" that constituted "misleading conduct," "the issue of affirmative misrepresentations is distinct from the context of insider trading, and presents a situation where . . . the language of *Chiarella* do[es] not apply."); *Fry v. UAL Corp.*, 84 F.3d 936, 938 (7th Cir. 1996) ("The duty not to make misrepresentations does not depend the existence of a fiduciary relationship.").

⁷⁵ *Credit Suisse*, 482 F.3d at 389.

as an element of every violation of Section 10(b).⁷⁶ This Part will analyze the present Circuit split.

A. The Fifth Circuit: *Regents of the University of California v. Credit Suisse First Boston (USA), Inc.*

In *Credit Suisse*, a number of banks entered into partnerships and transactions with a corporation, which allowed that corporation to temporarily take liabilities off of its books and instead book revenue from those transactions when the corporation was actually incurring debt.⁷⁷ The banks were alleged to have allowed the corporation to misstate its financial condition “in a long-term scheme to defraud investors . . . by inflating revenue and disguising risk and liabilities.”⁷⁸ The district court determined that a “deceptive act,” within the meaning of Section 10(b), includes participation in a “transaction whose principal purpose and effect is to create a false impression of revenues” and granted class certification.⁷⁹

The Fifth Circuit reversed the district court’s grant of class certification and, in reaching this conclusion, determined that the Supreme Court has established that “[a]n act cannot be deceptive within the meaning of Section 10(b) where the actor has no duty to disclose.”⁸⁰ Relying on the Supreme Court opinions in *Chiarella* and *O’Hagan*, the Fifth Circuit concluded that “‘deception’ within the meaning of Section 10(b) requires that a defendant fail to satisfy a duty to disclose material information to a plaintiff.”⁸¹ The court reasoned that “[d]ecisions interpreting . . . statutory text place a limit on the possible definitions that can be ascribed to the words contained in [Section 10(b)].”⁸² The Fifth Circuit explained that the Supreme Court has narrowly and authoritatively defined “deceptive,” and reference to a dictionary or the common law meaning of the term is irrelevant.⁸³ Therefore, according to the Fifth Circuit, “a device, such as a scheme, is not ‘deceptive’ unless it involves breach of some fiduciary duty of candid disclosure.”⁸⁴ Accordingly, the Fifth Circuit held that because the banks owed no duty

⁷⁶ *Dorzhko*, 574 F.3d at 48.

⁷⁷ *Credit Suisse*, 482 F.3d at 377.

⁷⁸ *Id.*

⁷⁹ *Id.* at 378.

⁸⁰ *Id.* at 386.

⁸¹ *Id.* at 384.

⁸² *Id.* at 387.

⁸³ *Id.* at 389.

⁸⁴ *Id.*

to the corporation's shareholders, their participation in the transactions could not be deceptive, "regardless of the purpose or effect of those transactions."⁸⁵ Here, the Fifth Circuit has essentially taken the position that no theory of fraud can prevail under Section 10(b), unless it fits neatly into either of the traditional insider trading theories. This, in turn, would relegate the catch-all anti-fraud provision to merely a fiduciary-trading prohibition.

B. The Second Circuit: *SEC v. Dorozhko*

The Second Circuit, relying on the same Supreme Court precedent, reached the opposite conclusion in *SEC v. Dorozhko*. Dorozhko, a Ukrainian national and resident, allegedly hacked into a publicly traded corporation's secure server,⁸⁶ thereby gaining access to the corporation's earnings report prior to its official release to the public.⁸⁷ Less than an hour after the alleged computer hack, Dorozhko purchased over \$41,000 worth of "put" options for the corporation.⁸⁸ Later that day, the corporation publicly announced that its earnings were 28% below analyst expectations.⁸⁹ When the market opened the next morning, the corporation's stock price declined approximately 28%.⁹⁰ Within six minutes of the market's opening, Dorozhko sold all of his options and generated an overnight profit of more than \$286,000.⁹¹

The SEC alleged that Dorozhko violated Section 10(b) by hacking into the secure server and stealing material, nonpublic information by means of fraudulent misrepresentations.⁹² However, the district court denied the SEC's request for a preliminary injunction, holding Dorozhko's hacking and trading did not amount to a violation of Section 10(b).⁹³ The court conceded that Dorozhko may have broken the law,⁹⁴

⁸⁵ *Id.* at 390.

⁸⁶ The server was located at an investor relations firm the corporation hired to, among other things, manage the online release of the corporation's earnings reports. See *SEC v. Dorozhko*, 482 F.3d 42, 44 (2d Cir. 2009).

⁸⁷ *Id.*

⁸⁸ Dorozhko's purchases represented "approximately 90% of all purchases of 'put' options" for the corporation's stock during the six weeks prior to the hack. The SEC described Dorozhko's purchases as "extremely risky" because he was betting that the corporation's stock price would decline by greater than 20% within the next two days. *Id.* at 44.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *SEC v. Dorozhko*, 606 F. Supp. 2d 321, 322 (S.D.N.Y. 2008), *vacated*, 574 F.3d 42 (2d Cir. 2009).

⁹³ *Id.* at 323.

but it explained that he cannot be liable under Section 10(b) because he did not owe a fiduciary duty to either the source of the information or to the shareholders of the corporation with whom he traded.⁹⁵ The district court reasoned that “violations of Section 10(b) [are] predicated on a breach of a fiduciary (or similar) duty of candid disclosure,” and eliminating the fiduciary requirement would “undo decades of Supreme Court precedent.”⁹⁶ The district court relied principally on the Supreme Court opinions in *Chiarella* and *O’Hagan*, as well as the Fifth Circuit’s interpretation of those Supreme Court opinions in *Credit Suisse*.⁹⁷ The district court concluded that “a breach of a fiduciary duty of disclosure is a required element of any ‘deceptive’ device under Section 10(b).”⁹⁸ As a result, the SEC appealed the district court’s denial of the preliminary injunction.⁹⁹

On appeal, the Second Circuit considered the Supreme Court precedent relied upon by the district court and concluded that “none of the Supreme Court opinions . . . much less the sum of all three opinions . . . establishe[d] a fiduciary-duty requirement as an element of every violation of Section 10(b).”¹⁰⁰ Writing for the panel, Judge Cabranes explained that in each of the Supreme Court opinions “the theory of fraud was silence or nondisclosure, not an affirmative misrepresentation.”¹⁰¹ The court interpreted the Supreme Court opinions to “all stand for the proposition that nondisclosure in breach of a fiduciary duty satisfies Section 10(b)’s requirement of a deceptive device or contrivance.”¹⁰² Judge Cabranes reasoned that “what is sufficient is not always what is necessary,” and “none of the Supreme Court opinions considered by the

⁹⁴ *Id.* at 324.

⁹⁵ *Id.*

⁹⁶ See *Dorozhko*, 606 F. Supp. 2d at 323. The Supreme Court defined “deceptive” in Section 10(b) as necessarily involving the breach of a fiduciary or similar duty. *Id.* at 330.

⁹⁷ See *id.* at 330. The district court also relied upon a third Supreme Court opinion, namely *SEC v. Zandford*, 535 U.S. 813, 815 (2002), but the holding in that case turned on the “in connection with” element of Section 10(b), not deception.

⁹⁸ *Dorozhko*, 606 F. Supp. 2d at 330.

⁹⁹ See *SEC v. Dorozhko*, 574 F.3d 42 (2d Cir. 2009).

¹⁰⁰ *Id.* at 48.

¹⁰¹ *Id.*; see *Chiarella v. United States*, 445 U.S. 222, 226 (1980) (“This case concerns the legal effect of the petitioner’s *silence*.” (emphasis added)); *United States v. O’Hagan*, 521 U.S. 642, 654 (1997) (“Deception through *nondisclosure* is central to the theory of liability for which the government seeks recognition.” (emphasis added)); see also *SEC v. Zandford*, 535 U.S. 813, 823 (2002) (“[A]ny distinction between omissions and misrepresentations is illusory in the context of a broker who has a fiduciary duty to her clients.”).

¹⁰² *Dorozhko*, 574 F.3d at 49 (alterations omitted) (internal quotation marks omitted).

District Court *require* a fiduciary relationship as an element of an actionable securities claim under Section 10(b).¹⁰³

The Second Circuit considered the SEC's alleged misrepresentations to be a "distinct species of fraud" from the fraud through silence claims in *Chiarella* and *O'Hagan*.¹⁰⁴ The court explained that "[e]ven if a person does not have a fiduciary duty to disclose or abstain from trading, there is *nonetheless* an affirmative obligation in commercial dealings not to mislead."¹⁰⁵ Accordingly, the Second Circuit held that "misrepresentations are fraudulent, but . . . silence is fraudulent only if there is duty to disclose."¹⁰⁶

The Second Circuit maintained that unless a controlling precedent narrowly defining the meaning of "deceptive" under Section 10(b) exists, the ordinary meaning of "deceptive" should be applied when determining whether a "device" is in fact "deceptive."¹⁰⁷ Having determined that Supreme Court precedent does not require a breach of a fiduciary duty as a necessary element for deception within the meaning of the provision, the Second Circuit saw "no reason to complicate the enforcement of Section 10(b) by divining new requirements."¹⁰⁸ The Second Circuit reiterated the Supreme Court's oft-cited instruction that Section 10(b) "should be construed not technically and restrictively, but flexibly to effectuate its remedial purposes."¹⁰⁹ Accordingly, the Second Circuit vacated the district court's order denying the preliminary injunction and remanded the case for the district court to consider whether Dorozhko's alleged computer hacking involved fraudulent misrepresentations that were "deceptive" within the ordinary meaning of Section 10(b).¹¹⁰ On remand, the district court granted an unopposed summary judgment in favor of the SEC and against a newly unrepresented Mr. Dorozhko.¹¹¹ As

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* (emphasis added) (internal quotation marks omitted); *see, e.g., Basic, Inc. v. Levinson*, 485 U.S. 224, 240 n.18 (1988). The court distinguishes "situations where insiders have traded in abrogation of their duty to disclose or abstain," from "affirmative misrepresentations by those under no duty to disclose (but under the ever-present duty not to mislead)." *Id.*

¹⁰⁶ *Dorozhko*, 574 F.3d at 50.

¹⁰⁷ *Id.* at 49-50.

¹⁰⁸ *Id.* at 49.

¹⁰⁹ *SEC v. Zandford*, 535 U.S. 813, 819 (2002) (internal citations omitted) (quoting *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972)).

¹¹⁰ *Dorozhko*, 574 F.3d at 51.

¹¹¹ *See SEC v. Dorozhko*, SEC Litigation Release No. 21465, 2010 WL 1213430 (March 29, 2010); *see also* Plaintiff Securities and Exchange Commission's Memorandum in Reply to Defendant Oleksandr Dorozhko's Response to the Motion for Summary Judgment at 2, *SEC v. Dorozhko*, No. 07-CV-09606

a result, the District Court permanently enjoined Dorozhko from violating the antifraud provisions of the federal securities laws and ordered the payment of about \$580,000 in disgorgement, prejudgment interest, and civil penalties.¹¹²

The Fifth Circuit, in *Credit Suisse*, and the Second Circuit, in *Dorozhko*, relied on the same Supreme Court interpretations of Section 10(b) to determine whether a “device” can be “deceptive” absent some breach of a duty to disclose.¹¹³ Yet, the Fifth and Second Circuits have reached opposite conclusions on the issue. The Fifth Circuit held that the Supreme Court has interpreted Section 10(b) to establish “that a device, such as a scheme, is not ‘deceptive’ unless it involves breach of some duty of candid disclosure.”¹¹⁴ Conversely, the Second Circuit found that the Supreme Court has not “establishe[d] a fiduciary-duty requirement as an element of every violation of Section 10(b).”¹¹⁵ The next Part will analyze where fiduciary principles should fit into Section 10(b) liability and argue against a fiduciary duty requirement for all Section 10(b) violations.

IV. DECEPTION ABSENT DUTY

A. Fiduciary Requirements and Section 10(b) Liability

The text of Section 10(b) does not mention fiduciary principles, nor require a breach of fiduciary duty for a device to be “deceptive.”¹¹⁶ Moreover, the text of Section 10(b) does not mention or directly prohibit insider trading.¹¹⁷ The Supreme Court has authoritatively construed the ambiguous text of Section 10(b) to prohibit silence only when there is a duty to speak.¹¹⁸ However, it is unclear how the Fifth Circuit, or any other court, can construe the Supreme Court’s interpretations of the term

(NRB), (S.D.N.Y. March 18, 2010), 2010 WL 2333980 (concluding that Dorozhko “has abandoned the litigation”).

¹¹² SEC v. Dorozhko, SEC Litigation Release No. 21465, 2010 WL 1213430 (March 29, 2010).

¹¹³ See *Dorozhko*, 574 F.3d at 48 (citing *Regents of the Univ. of Cal. v. Credit Suisse First Bos. (USA), Inc.*, 482 F.3d 372, 389 (5th Cir. 2007)).

¹¹⁴ *Credit Suisse*, 482 F.3d at 389. “An act cannot be deceptive within the meaning of § 10(b) where the actor has no duty to disclose.” *Id.* at 386.

¹¹⁵ *Dorozhko*, 574 F.3d at 48.

¹¹⁶ See 15 U.S.C. § 78j(b) (2000) (amended 2010).

¹¹⁷ See *id.*

¹¹⁸ See *Chiarella v. United States*, 445 U.S. 222, 234-35 (1980) (holding that silence is not fraudulent under Section 10(b) absent a duty to speak).

“deceptive” under Section 10(b) to limit the scope of liability solely to fiduciaries.

In *Credit Suisse*, the Fifth Circuit took the position that the Supreme Court established that the existence of a breach of a fiduciary duty is a necessary element of any “deceptive device” under Section 10(b).¹¹⁹ In other words, because the two traditional theories of insider trading liability turn on the existence of a breach of a fiduciary duty, no “device” can be “deceptive” under Section 10(b), unless there is a breach of some duty to disclose or abstain.¹²⁰ Under this counterintuitive framework, Section 10(b) will no longer function as a catch-all anti-fraud provision, but will become synonymous with the judicially created theories of insider trading liability, which make up only a part of Section 10(b)’s prohibitions.¹²¹ The Fifth Circuit’s analysis of the Supreme Court’s interpretations of Section 10(b) is incorrect.

Both the classical and misappropriation theories of insider trading liability turn on whether silence or nondisclosure constitutes a “deceptive device” under Section 10(b).¹²² Under the classical theory, an insider’s silence is deceptive only where there is a duty to disclose the inside information to the corporation’s shareholders before trading on the basis of that information.¹²³ Likewise, under the misappropriation theory, a fiduciary outsider’s silence is deceptive only where he is under a duty to disclose his intent to trade on the basis of inside information to the source before trading.¹²⁴ Accordingly, silence will only constitute a “deceptive

¹¹⁹ *Credit Suisse*, 482 F.3d at 389.

¹²⁰ *See id.*

¹²¹ The classical and misappropriation theories only address fraudulent omissions. The Supreme Court has recognized that both affirmative misrepresentations and fraudulent omissions violate Section 10(b). *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 769 (2008) (concluding that misstatements (oral, written, or conduct itself), omissions by one who has a duty to disclose, and manipulative trading practices are deceptive within the meaning of Section 10(b)); *Basic, Inc. v. Levinson*, 485 U.S. 224, 241 n.18 (1988) (distinguishing between “situations where insiders have traded in abrogation of their duty to disclose or abstain . . . and another covering affirmative misrepresentations by those under no duty to disclose or abstain.”); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 474 (1977) (recognizing that Section 10(b) may be violated by either “a material misrepresentation or a material failure to disclose” in breach of a fiduciary duty (emphasis added)).

¹²² *See Chiarella*, 445 U.S. at 226 (“This case concerns the legal effect of the petitioner’s silence.”); *United States v. O’Hagan*, 521 U.S. 642, 654 (1997) (“Deception through nondisclosure is central to the theory of liability for which the Government seeks recognition.”).

¹²³ *See Nagy, Gradual Demise of Fiduciary Principles*, *supra* note 54, at 1329-30.

¹²⁴ *O’Hagan*, 521 U.S. at 655 n.6 (stating that under the misappropriation theory, the disclosure obligation runs to the source of the information).

device” under Section 10(b) where some fiduciary duty to “disclose or abstain” from trading both exists and is breached.¹²⁵

The Supreme Court has restricted “deceptive silence” to those instances where a duty to disclose or abstain from trading has been breached;¹²⁶ however, the Supreme Court has **not** narrowly defined the term “deceptive” in Section 10(b) to require a breach of some pre-existing duty to disclose for every violation of the provision.¹²⁷ The majority’s opinion in *Chiarella* “concern[ed] the legal effect of [Chiarella’s] silence.”¹²⁸ In *Chiarella*, the Court held that Section 10(b) is a catch-all anti-fraud provision, and that “[w]hen an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak.”¹²⁹ The Court did not hold that Section 10(b) is a catch-all fiduciary-trading provision, nor did it hold that fraudulent nondisclosure is the only type of fraud caught by Section 10(b). The *Chiarella* Court interpreted how one type of fraud (fraud through silence) may be “deceptive” within the meaning of Section 10(b);¹³⁰ the Court did not attach a deceptive fiduciary requirement to every allegation of fraud under the provision.

Similarly, in *O’Hagan*, the Court held that “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 exclusive use of that information.”¹³¹ The *O’Hagan* Court explained that this “satisfies § 10(b)’s requirement that chargeable conduct involve a ‘deceptive device or contrivance’ used ‘in connection with’ the purchase or sale of securities.”¹³² There, the Court did not hold that Section 10(b) is “an all-purpose breach of fiduciary duty ban;” rather, the Court held that “[Section 10(b)] trains on conduct involving . . . deception.”¹³³ Again,

¹²⁵ Nagy, *Gradual Demise of Fiduciary Principles*, *supra* note 54, at 1323-24 (“The classical and misappropriation theories of insider trading liability establish the circumstances under which . . . a disclosure duty arises, and . . . under either of the Supreme Court’s theories, the existence of a fiduciary-like relationship is essential.”).

¹²⁶ *Id.* See also SEC v. Dorozhko, 574 F.3d 42, 49 (2d Cir. 2009) (“*Chiarella*, *O’Hagan*, and *Zandford* all stand for the proposition that nondisclosure in breach of a fiduciary duty ‘satisfies § 10(b)’s requirement . . . [of] a deceptive device or contrivance.’”) (quoting *O’Hagan*, 521 U.S. at 653).

¹²⁷ *Dorozhko*, 574 F.3d 42 at 49 (“[N]one of the Supreme Court opinions . . . require a fiduciary relationship as an element of an actionable securities claim under Section 10(b).”).

¹²⁸ *Chiarella v. United States*, 445 U.S. 222, 226 (1980) (emphasis added).

¹²⁹ *Id.* at 234-235 (emphasis added).

¹³⁰ *Id.* at 235 (“When an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak.”).

¹³¹ *United States v. O’Hagan*, 521 U.S. 642, 652 (1997).

¹³² *Id.* at 653.

¹³³ *Id.* at 655.

the *O'Hagan* Court interpreted how silence or nondisclosure is “deceptive” only insofar as there is a breach of a fiduciary duty to “disclose or abstain” from trading.¹³⁴ The Supreme Court has not limited Section 10(b) liability to deceptive fiduciaries.¹³⁵

Additionally, the legislative history and the text of Section 10(b) also contradict the Fifth Circuit’s fiduciary duty framework. Section 10(b) prohibits “any person” from using “any . . . deceptive device.”¹³⁶ Moreover, the language of Rule 10b-5 is equally broad: prohibiting “any person” from employing “any device, scheme, or artifice to defraud,” and “any act, practice, or course of business which operate[s] . . . as fraud or deceit upon any person.”¹³⁷ The Supreme Court recently explained that “[r]ead naturally, the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind[,]’”¹³⁸ which suggests that Section 10(b) covers all types of fraudulent schemes perpetrated by all types of persons, not just those with a duty to disclose.¹³⁹ Thomas Corcoran, a principal drafter of the Exchange Act, described the provision as a “catchall” intended to permit the Commission to “deal with new manipulative or cunning devices.”¹⁴⁰ In fact, he described Section 10(b) as the “[t]hou shall not devise any other cunning devices” provision.¹⁴¹ Thus, it is extremely unlikely that “Congress intended Section 10(b) to be a ‘catchall’ only for fiduciaries, or that ‘any deceptive practice’ means ‘any breach of fiduciary duty.’”¹⁴²

The Supreme Court’s interpretations of the “deceptive device” element of Section 10(b), requiring the breach of a pre-existing duty to disclose before silence can be “deceptive” is logical. Without the breach of

¹³⁴ See *id.* at 654 (“Deception through nondisclosure is central to the theory of liability for which the Government seeks recognition.”).

¹³⁵ *Id.* at 655 (“[Section] 10(b) is not an all-purpose breach of fiduciary duty ban; rather, it trains on conduct involving manipulation or deception.”) (internal citations omitted).

¹³⁶ 15 U.S.C. § 78j(b) (2000) (emphasis added) (amended 2010).

¹³⁷ 17 C.F.R. § 240.10b-5 (2011) (emphasis added).

¹³⁸ *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) (quoting *United States v. Gonzalez*, 520 U.S. 1, 5 (1997)) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 97 (1976)).

¹³⁹ See, e.g., *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972) (explaining the antifraud provisions, “by statute and rule, are broad and, by repeated use of the word ‘any’ are obviously meant to be inclusive.”).

¹⁴⁰ *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 202 (1976) (quoting Securities Exchange Act of 1934: *Hearing on H.R. 7852 and H.R. 8720 before the H. Comm. on Interstate and Foreign Commerce*, 73d Cong. 115 (1934) (statement of Thomas Corcoran, Advisor to President Franklin D. Roosevelt)).

¹⁴¹ *Id.*

¹⁴² Reply Brief of the SEC, Appellant at 7, *SEC v. Dorozhko*, 574 F.3d 42 (S.D.N.Y. 2009) (No. 08-0201-CV), 2008 WL 6995895.

some duty to disclose, silence or nondisclosure is not “deceptive.”¹⁴³ However, fraud through silence is not the only theory of liability actionable under Section 10(b), and deceptive traders can be liable through a material misrepresentation, *or* by a material failure to disclose in breach of a fiduciary duty.¹⁴⁴ The Second Circuit ostensibly relied upon correct Supreme Court precedent when it held, “misrepresentations are fraudulent, but silence is fraudulent only if there is a duty to disclose.”¹⁴⁵ Neither the Supreme Court opinions relied upon by the Fifth Circuit in *Credit Suisse*, nor the district court in *Dorozhko*, consider affirmative misrepresentations.¹⁴⁶ In each case, the Supreme Court answered only the question of whether silence in the face of a duty to disclose is deceptive within the meaning of Section 10(b).¹⁴⁷ Therefore, the fiduciary duty requirement limiting Section 10(b) liability for silence or nondisclosure should be limited solely to instances of “deceptive silence.”¹⁴⁸ Accordingly, courts should not interpret Supreme Court precedent examining Section 10(b) liability to establish a fiduciary duty requirement for every violation of Section 10(b).¹⁴⁹

B. Defining “Deceptive”

Thus far, this Part inquired into whether the Supreme Court has limited the meaning of “deceptive” by creating a fiduciary duty requirement for all Section 10(b) violations. Having answered that

¹⁴³ See *Chiarella v. U.S.*, 445 U.S. 222, 234-235 (1980). The Court held: Section 10(b) is aptly described as a catchall provision, but what it catches must be fraud. When an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak. We hold that a duty to disclose under § 10 (b) [sic] does not arise from the mere possession of nonpublic market information.

Id.

¹⁴⁴ *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 474 (1977) (stating that this case reached the Supreme Court “on the premise that the complaint failed to allege a material misrepresentation or material failure to disclose.”); *Basic, Inc. v. Levinson*, 485 U.S. 224, 240 n.18 (1988) (distinguishing breach of fiduciary duty cases from affirmative misrepresentation cases, yet finding liability for both).

¹⁴⁵ *SEC v. Dorozhko*, 574 F.3d 42, 50 (2d Cir. 2009) (quoting the Appellant’s Brief, at 44).

¹⁴⁶ *Id.* at 48-49.

¹⁴⁷ *Id.*

¹⁴⁸ See *id.* at 50.

¹⁴⁹ The Supreme Court has viewed the basic concepts of Section 10(b) fraud models to be useable, but disposable, where unnecessary. See e.g., *Affiliated Ute Citizens of Utah v. U.S.*, 406 U.S. 128, 153-54 (1972) (holding that in cases involving primarily a failure to disclose, positive proof of reliance is not a prerequisite for recovery in a 10b-5 private cause of action, and all that is necessary is a showing of the materiality of the withheld facts).

question in the negative, it may now be possible for non-fiduciaries to violate Section 10(b)'s prohibitions. However, the breadth of the meaning of "deceptive" under Section 10(b) still remains unclear. The remainder of this Part will argue that a broad, ordinary meaning of "deceptive" is most in line with the remedial purposes of the provision.

When interpreting the text of Section 10(b) to ascertain the meaning of "deceptive," the starting point is the language of the statute itself.¹⁵⁰ If the statutory language is clear and unambiguous, then judicial inquiry must cease¹⁵¹ because "the sole function of the courts is to enforce [the statute] according to its terms."¹⁵² In the event that statutory language is ambiguous,¹⁵³ the court may "provide definitive interpretations."¹⁵⁴ However, if binding precedent in the form of definitive interpretation does not exist, then the Supreme Court has held that "[w]hen terms used in a statute are undefined, we give them their ordinary meaning."¹⁵⁵ The ordinary meaning of statutory terms is typically found by consulting dictionaries used at the time of the drafting and enactment of the statute.¹⁵⁶

¹⁵⁰ Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197 (1976) (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975)).

¹⁵¹ Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997).

¹⁵² United States v. Ron Pair Enters., Inc. 489 U.S. 235, 241 (1989) (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)).

¹⁵³ "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson*, 519 U.S. at 341.

¹⁵⁴ *In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978) (quoting *Comm'r v. Brown*, 380 U.S. 563, 571 (1965)). The Supreme Court held:

This Court, in interpreting the words of a statute, has "some 'scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purpose of the statute' . . . [b]ut it is otherwise 'where no such consequences would follow and where . . . it appears to be consonant with the purposes of the Act'"

Id.

¹⁵⁵ *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995); see also *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 476 (1994) ("The term 'cognizable' is not defined in the Act. In the absence of such a definition, we construe a statutory term in accordance with its ordinary or natural meaning."); *Gollust v. Mendell*, 501 U.S. 115, 124 (1991) (using the "commonly understood" meaning of the term "instituted"); *Pinter v. Dahl*, 486 U.S. 622, 642-43 (1988) ("common parlance"); *Int'l Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 559 (1979) ("commonly held understanding"); *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65, 71-73 (1959) ("popular understanding and usage").

¹⁵⁶ See *Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 874 (1999); *Austin v. United States*, 509 U.S. 602, 614 n.7 (1993).

As a result of its breadth, the language of Section 10(b) is doubtlessly ambiguous. Resultantly, the Supreme Court has previously resolved ambiguities in the language of Section 10(b) by consulting the 1934 edition of Webster's International Dictionary.¹⁵⁷ After having correctly determined that the Supreme Court has not authoritatively restricted the term "deceptive" under Section 10(b) to a more limited meaning than its ordinary meaning, the Second Circuit in *Dorozhko* correctly consulted the 1934 edition of Webster's International Dictionary to locate the ordinary meaning of "deceptive."¹⁵⁸ Here, "deceptive" is described as any declaration, artifice, or practice having the power to mislead, to cause to believe the false, or to disbelieve the true, as by falsification, concealment, or cheating; an attempt to lead into error; a trick or a fraud.¹⁵⁹ By defining "deceptive" broadly, using its ordinary meaning, the Second Circuit remained in line with the Supreme Court's prior determination that "Section 10(b) should be construed not technically and restrictively, but flexibly."¹⁶⁰ While it still may remain unclear precisely and exhaustively which conduct is "deceptive" within the meaning of Section 10(b), the provision is not intended to prohibit particular fraudulent acts or practices, but rather it is "designed to encompass the infinite variety of devices by which undue advantage may be taken of investors and others."¹⁶¹ Therefore, utilizing a broad, ordinary definition of "deceptive" is vital to "effectuate [Section 10(b)'s] remedial purposes."¹⁶²

¹⁵⁷ See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976) (defining "device" and "manipulate"); see also *In re Parmalat Secs. Litig.*, 376 F. Supp. 2d 472, 502 (S.D.N.Y. 2005) (defining "deceptive" using the 1934 edition of Webster's International Dictionary).

¹⁵⁸ *SEC v. Dorozhko*, 574 F.3d 42, 50 (2d Cir. 2009) (concluding that the "ordinary meaning of 'deceptive' covers a wide spectrum of conduct involving cheating or trading in falsehoods").

¹⁵⁹ "Deceptive" means "[t]ending to deceive, having power to mislead, as a deceptive appearance." "Deceive" means "[t]o cause to believe the false, or to disbelieve the true." "Deceit" is the "[a]ct of deceiving, as by falsification, concealment, or cheating; deception; an attempt to deceive or lead into error; any declaration, artifice, or practice, which misleads another, or causes him to believe what is false; a wily device; a trick; a fraud. *Law* Any trick, collusion, contrivance, false representation, or underhand practice, used to defraud another." WEBSTER'S INT'L DICTIONARY 679 (2d ed. 1934).

¹⁶⁰ *SEC v. Dorozhko*, 574 F.3d 42, 47 (2d Cir. 2009) SEC (internal citations omitted) (quoting *SEC v. Zandford*, 535 U.S. 813, 819 (2002)).

¹⁶¹ *Cady, Roberts & Co.*, 40 S.E.C. 907, 911 (1961), 1961 WL 60638, at *12.

¹⁶² *Zandford*, 535 U.S. at 819 (internal citations omitted) (quoting *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972)).

V. COMPUTER HACKERS & SECTION 10(B) LIABILITY

The preceding Part concluded that the Supreme Court has not limited the meaning of “deceptive” by requiring a pre-existing fiduciary duty for all violations of Section 10(b). Furthermore, it argued that a broad, ordinary meaning of “deceptive” is appropriate for determining liability under the provision. Drawing from these conclusions, it is possible to explore Section 10(b) liability for non-fiduciary outsider traders. This Part will analyze potential liability for non-fiduciary outsider traders and assert that computer hackers who engage in certain types of hacking should be liable for fraud under Section 10(b).

A. *The Common Thief*

The Supreme Court has taken the position that Section 10(b) “prohibit[s] *all* fraudulent schemes in connection with the purchase or sale of securities, whether the artifices employed involve a garden type variety of fraud, or present a unique form of deception.”¹⁶³ However, while Section 10(b) is “aptly described as a catchall provision . . . what it catches must be fraud.”¹⁶⁴ The common thief is thought to fall outside of Section 10(b)’s prohibitions because common thieves generally do not deal in deception.¹⁶⁵ Consider a thief who breaks into a corporation and steals confidential information. The thief will be guilty of burglary and theft, but subsequent securities transactions made on the basis of the stolen information will not be a violation of Section 10(b).¹⁶⁶ Since the common thief is a non-fiduciary outsider with no pre-existing duty to disclose or abstain from trading, the classical and misappropriation theories will be of little use in the prosecution of the thief because silence

¹⁶³ *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 11 n.7 (1971) (quoting *A.T. Brod & Co. v. Perlow*, 375 F.2d 393, 397 (2d Cir. 1967)) (emphasis added).

¹⁶⁴ *Chiarella v. United States*, 445 U.S. 222, 234-35 (1980).

¹⁶⁵ *U.S. v. Finnerty*, 533 F.3d 143, 148 (2008) (“Theft not accomplished by deception (e.g., physically taking and carrying away another’s property) is not fraud absent a fiduciary duty.”) (quoting *In re Refco Capital Markets, Ltd. Brokerage Customer Sec. Litig.*, 2007 WL 2694469, at 8 (S.D.N.Y. Sept. 13, 2007)); see also Steinbuch, *supra* note 19, at 589 (noting that conventional wisdom has held that mere thieves are not liable under Section 10(b) for trading on stolen information because they do not deceive the source); Prakash, *supra* note 13, at 1526-27 (arguing that the misappropriation theory does not apply to mere thieves because they do not actually deceive anyone); Smith, *supra* note 13, at 1014 (“Under O’Hagan’s version of the misappropriation theory, a person may avoid liability by . . . obtaining the information by theft if one is not standing in a fiduciary relationship with the source . . .”).

¹⁶⁶ See Nagy, *Reframing the Misappropriation Theory*, *supra* note 13, at 1253.

is only deceptive when there is a pre-existing duty to disclose or abstain from trading.¹⁶⁷ Furthermore, because the thief did not affirmatively misrepresent himself while obtaining the inside information, his conduct was not “deceptive” within the meaning of Section 10(b).¹⁶⁸ On the other hand, at least one commentator has argued in favor of an implied duty to disclose any information obtained through any illegal act.¹⁶⁹ However, the Supreme Court has clearly held that Section 10(b)’s prohibitions require a *deceptive* device to be used in connection with the purchase or sale of securities,¹⁷⁰ absolving common thieves from liability.¹⁷¹

B. The Computer Hacker

Chiarella and *O’Hagan* focused not on how the inside information was obtained but upon whether, once the information was obtained, the defendant fraudulently traded in breach of either a duty to disclose or abstain from trading.¹⁷² In both cases, the defendant obtained inside information legally by way of his employment.¹⁷³ Computer hackers, on the other hand, illegally acquire inside information but owe no duty to disclose the information to the shareholders or the source prior to transacting.¹⁷⁴ Therefore, instead of determining whether *silence* is “deceptive” by searching for a breach of some duty to disclose, the question becomes whether the computer hacker’s *illegal procurement* of inside information is “deceptive” within the meaning of Section 10(b).

Generally, computer hackers are defined as persons who gain illegal or unauthorized access of a computer for exploitation.¹⁷⁵ While their

¹⁶⁷ *Chiarella*, 445 U.S. at 235 (“When an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak.”).

¹⁶⁸ See Prakash, *supra* note 13, at 1526 (“For instance, a thief who merely waltzes into the law school and steals candy from a desk without using any pretense does not deceive anybody.”).

¹⁶⁹ Victor Brudney, *O’Hagan’s Problems*, 1997 SUP. CT. REV. 249, 255-56 (1964) (arguing that attaching a duty to disclose on any information that was obtained unlawfully is more in line with the Congressional purpose of Section 10(b) than attaching a duty solely to fiduciaries).

¹⁷⁰ *United States v. O’Hagan*, 521 U.S. 642, 653 (1997).

¹⁷¹ See Prakash, *supra* note 13, at 1527 (“Rule 10b-5 simply does not bar the use of unlawfully acquired information. It prohibits deceptions in connection with a securities transaction.”).

¹⁷² *O’Hagan*, 521 U.S. at 656 (“[T]he fiduciary’s fraud is consummated, not when the fiduciary gains the confidential information, but when, without disclosure to his principal, he uses the information to purchase or sell securities.”).

¹⁷³ See *Chiarella v. United States*, 445 U.S. 222, 224-25 (1980); *O’Hagan*, 521 U.S. at 647-48 (1997).

¹⁷⁴ See Nagy, *Gradual Demise of Fiduciary Principles*, *supra* note 54, at 1370.

¹⁷⁵ Posthearing Memorandum of Law in Support of Plaintiff Securities and Exchange Commission’s Motion for Preliminary Injunction and other Equitable Relief and in Opposition to Defendant Dorozhko’s

methods are constantly evolving,¹⁷⁶ computer hackers generally circumvent code-based restrictions to gain unauthorized access or use of a computer system.¹⁷⁷ Computer hackers, who steal material, nonpublic information and subsequently trade on the basis of it, are essentially thieves,¹⁷⁸ but are they liable under Section 10(b)? Traditionally, commentators believe the answer to this question is “no.”¹⁷⁹ Since liability premised on the misappropriation theory is based on a breach of a duty to disclose, they argue that hackers lacking this pre-existing duty can steal information without violating federal securities laws.¹⁸⁰ Instead, the computer hacker would have to be prosecuted “via mail fraud, wire fraud, simple theft, or other comparable statutes.”¹⁸¹ However, even though a computer hacker’s failure to disclose is not “deceptive” under either traditional insider trading theory, the Supreme Court has recognized that Section 10(b) may be violated by *either* “a material misrepresentation or a material failure to disclose” in breach of a fiduciary duty.¹⁸²

1. *The Deceptive Thief*

In recent years, the SEC has attempted to address Section 10(b) liability for non-fiduciary outsider traders who deceptively acquire material, non-public information.¹⁸³ Specifically, the SEC has brought civil enforcement actions against computer hackers who unlawfully gain

Motion to Dismiss at 9, SEC v. Dorozhko, 606 F. Supp. 2d 321 (S.D.N.Y. 2008) (No. 07-CV-9606).

¹⁷⁶ See Prentice, *supra* note 8, at 293-97.

¹⁷⁷ See Orin S. Kerr, *Interpreting “Access” and “Authorization” in Computer Misuse Statutes*, 78 N.Y.U. L. REV. 1596, 1644-45 (2003).

¹⁷⁸ See Prentice, *supra* note 8, at 296.

¹⁷⁹ *Id.* (“The answer to this question from a traditional point of view is ‘no.’”). See Nagy, *Reframing the Misappropriation Theory*, *supra* note 13, at 1255 (noting that “it is doubtful that securities trading by the computer hacker . . . would violate Section 10(b).”); Steinbuch, *supra* note 19, at 589 (“Conventional wisdom has held that mere thieves cannot be liable for trading on stolen information because they lack a fiduciary relationship to the source of the information and, therefore, do not deceive that source.”) (including computer hackers in the discussion of mere thieves).

¹⁸⁰ See Steinbuch, *supra* note 19, at 589; Nagy, *Gradual Demise of Fiduciary Principles*, *supra* note 54, at 1340-41.

¹⁸¹ Prentice, *supra* note 8, at 298.

¹⁸² Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 474 (1977) (emphasis added). See also Basic, Inc. v. Levinson, 485 U.S. 224, 241 n.18 (1988) (distinguishing between “situations where insiders have traded in abrogation of their duty to disclose or abstain . . . and another covering affirmative misrepresentations by those under no duty to disclose or abstain”); Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 159 (2008) (concluding that misstatements (oral, written, or conduct itself), omissions by one who has a duty to disclose, and manipulative trading practices are deceptive within the meaning of Section 10(b)).

¹⁸³ Nagy, *Gradual Demise of Fiduciary Principles*, *supra* note 54, at 1341.

access to corporations to obtain inside information and exploit this information in subsequent securities transactions.¹⁸⁴ The SEC has argued that computer hacking is deceptive conduct in violation of Section 10(b),¹⁸⁵ alleging computer hackers affirmatively misrepresent themselves when they “employ electronic means to trick, circumvent, or bypass computer security in order to gain unauthorized access to computer systems, networks, and information.”¹⁸⁶ Since the Supreme Court has held that conduct itself can be “deceptive” under Section 10(b),¹⁸⁷ it is entirely plausible that the hacker’s illegal acquisition of inside information could amount to a misrepresentation in violation of Section 10(b).¹⁸⁸

Consider the deceptive thief, an impostor, disguised as someone authorized to access confidential information, thereby tricking the source of the information into divulging a corporation’s secrets. As illustrated in *Chiarella* and *O’Hagan*, this non-fiduciary outsider’s failure to disclose this information prior to subsequent securities transactions cannot be “deceptive” under either the classical or misappropriation theories because “one who fails to disclose material information prior to the consummation of a transaction commits fraud only when he is under the duty to do so.”¹⁸⁹ By nature, the deceptive thief is under no duty to “disclose or abstain” from trading. Moreover, the Supreme Court has held that “a duty to disclose under Section 10(b) does not arise from the mere possession of nonpublic market information.”¹⁹⁰ Consequently, the deceptive thief must have fraudulently misrepresented himself to fit within the gamut of Section 10(b) liability.¹⁹¹ Here, the thief’s scheme

¹⁸⁴ See *SEC v. Dorozhko*, 574 F.3d 42 (2d Cir. 2009) (See discussion *supra* Part II.B.2. and Part III.B.); *SEC v. Lohmus Haavel & Viesemann*, No. 05-9259, 2005 WL 3309748 (S.D.N.Y. Nov. 8, 2005) (In *Lohmus*, the SEC alleged the defendants hacked into a website, stole material nonpublic information and traded on the basis of the information. The Southern District of New York issued a preliminary injunction in favor of liability, but did not issue a final disposition because the defendants settled without admitting or denying liability.); *SEC v. Blue Bottle Ltd.*, No. 07-1380, 2007 WL 580798 (S.D. N.Y. Feb. 26, 2007), (order granting temporary restraining order) (explaining, again, the SEC alleged the defendants hacked and stole material nonpublic information in violation of Rule 10b-5, and the case was decided by default judgment without opinion, but with a verdict of liability under Rule 10b-5.); *SEC v. Stummer*, No. 08-03671, 2008 WL 1756796 (S.D.N.Y. Apr. 17, 2008) (SEC settled case against an alleged computer hacker who traded on material nonpublic information).

¹⁸⁵ *Dorozhko*, 574 F.3d at 45.

¹⁸⁶ *Id.* at 50.

¹⁸⁷ *Stoneridge*, 522 U.S. at 158.

¹⁸⁸ *Dorozhko*, 574 F.3d at 51.

¹⁸⁹ *Chiarella v. United States*, 445 U.S. 222, 228 (1980).

¹⁹⁰ *Id.* at 235.

¹⁹¹ See *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 474 (1977) (recognizing that Section 10(b) may

should be thought of as “deceptive” within the ordinary meaning of the word: the impostor illegally acquires a corporation’s secrets by disguising, i.e. affirmatively misrepresenting, himself as one of the few people privy to the information.¹⁹²

Similarly, computer hackers can be thought of as deceptive thieves who disguise themselves as persons privy to material, nonpublic information. As one commentator has observed, computer hackers either: (1) “engage in false identification and masquerade as another user who has greater privileges,”¹⁹³ or (2) “exploit a weakness in the code within a program to cause the program to malfunction in a way that grants the [hacker] greater privileges.”¹⁹⁴ In either instance, the system is “tricked into letting the [hacker] access the computer through a misrepresentation,” resembling fraud in the factum.¹⁹⁵ In *Dorozhko*, the SEC has argued that “[b]y its very nature, computer hacking involves deceptive . . . conduct.”¹⁹⁶ The Commission posited that computer hacking is “deceptive” within the ordinary meaning of Section 10(b)

be violated by either “a material misrepresentation or a material failure to disclose” in breach of a fiduciary duty) (emphasis added); *Basic, Inc. v. Levinson*, 485 U.S. 224, 241 n.18 (1988) (distinguishing between “situations where insiders have traded in abrogation of their duty to disclose or abstain . . . and another covering affirmative misrepresentations by those under no duty to disclose or abstain”); *Stoneridge*, 522 U.S. at 158-59 (concluding that misstatements (oral, written, or conduct itself), omissions by one who has a duty to disclose, and manipulative trading practices are deceptive within the meaning of Section 10(b)); see also *Chiarella*, 445 U.S. at 227-28 (“At common law, misrepresentation made for the purpose of inducing reliance upon the false statement is fraudulent.”); RESTATEMENT (SECOND) OF TORTS § 525 cmt. b. (1977) (“‘Misrepresentation’ is used . . . to denote not only words spoken but also any other conduct that amounts to an assertion not in accordance with the truth.”).

¹⁹² 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, 895 (2003) (“[I]f the ‘mere thief’ is an impostor . . . the thief engages in deception, whether or not the thief owes a fiduciary duty to anyone.”).

¹⁹³ Kerr, *supra* note 177, at 1644-45 (“For example, the user can use another person’s password, and trick the computer to grant the user greater privileges that are supposed to be reserved for the true account holder.”).

¹⁹⁴ *Id.* at 1645.

¹⁹⁵ *Id.* at 1655 (“The computer may ‘believe’ that the user is someone else, as in the case of a defendant utilizing another person’s username and password. The computer may be tricked into unwittingly giving access to the user, as in the case of a hacking exploit such as a buffer overflow attack. Both cases resemble fraud in the factum because the computer does not recognize that it is consenting to access by that particular user. The fraud in the factum voids the authorization, and the access is legally ‘without authorization.’”).

¹⁹⁶ Posthearing Memorandum of Law in Support of Plaintiff Securities and Exchange Commission’s Motion for Preliminary Injunction and other Equitable Relief and in Opposition to Defendant Dorozhko’s Motion to Dismiss at 8, SEC v. Dorozhko, 606 F. Supp. 2d 321 (S.D.N.Y. 2008) (No. 07-CV-9606), 2007 WL 5042909 [hereinafter *Posthearing Memorandum*].

“because it involves employing electronic means to trick, circumvent, or bypass computer security in order to gain unauthorized access to computer systems, networks, and information . . . and to steal such data.”¹⁹⁷ Moreover, before remanding the case back to the district court, the Second Circuit in *Dorozhko* stated generally that “misrepresenting one’s identity in order to gain access to information that is otherwise off limits, and then stealing that information is plainly ‘deceptive’ within the ordinary meaning of the word.”¹⁹⁸ Therefore, a computer hacker’s theft of information by deceiving a computer system into believing that the hacker is actually someone authorized to access confidential information should satisfy Section 10(b) requirement of a “deceptive device.”¹⁹⁹

Consider again the facts in *Dorozhko*.²⁰⁰ The SEC alleged that the defendant illegally gained access to a publicly traded corporation’s secure server by tricking and deceiving a “highly complex computer security system into providing him access as if he were one of those few persons with authorized access.”²⁰¹ Here, the defendant picked a specific date, time, issuer, and source to perpetrate his hack.²⁰² The hack was “highly sophisticated,”²⁰³ and after probing the secure server, Dorozhko was eventually able to download inside information as if he were an “authorized recipient.”²⁰⁴ After acquiring the information, the defendant inconspicuously fled the server; it took server administrators days “to detect the system had been compromised.”²⁰⁵ The SEC summarized the

¹⁹⁷ SEC v. Dorozhko, 606 F. Supp. 2d 321, 329 (S.D.N.Y. 2008), *vacated*, 574 F.3d 42 (2d Cir. 2009).

¹⁹⁸ SEC v. Dorozhko, 574 F.3d 42, 51 (2d Cir. 2009).

¹⁹⁹ The fact that a computer system is being deceived, and not a living person in a face-to-face encounter, should not be relevant. The SEC has argued:

Computer hacking is no less deceptive simply because the hacker uses the internet to communicate his misleading conduct, or because that conduct is directed at obtaining confidential information that is stored on a computer. Rather, companies increasingly use computers to perform tasks that once would have been carried out by human beings, such as granting and denying access to confidential information. The ultimate target of the deception is the company that owns the information, and the fact that deception is communicated through a computer system is of no legal consequence.

Opening Brief of the Securities and Exchange Commission, Appellant at 24, SEC v. Dorozhko, 574 F.3d 42 (2d Cir. 2009) (No.08-CV-0201) [hereinafter *Opening Brief*].

²⁰⁰ See *supra* Part III.B.

²⁰¹ *Posthearing Memorandum*, *supra* note 196 at 10.

²⁰² *Id.* at 8.

²⁰³ *Id.*

²⁰⁴ *Opening Brief*, *supra* note 199.

²⁰⁵ *Id.* at 27-28 (“The hacker’s egress from the system was done in such stealth that the IP address still has not been tracked.”). See also SEC v. Warde, 151 F.3d 42, 49 (2d Cir. 1998) (affirming jury verdict where evidence that the defendant “intended to conceal” his “deceptive conduct” was “consistent with, and

defendant's conduct as "hacking deceptively to enter, plunder, and abscond."²⁰⁶ It would be hard to argue that the device employed by Dorozhko did not amount to "an assertion not in accordance with the truth,"²⁰⁷ making this misrepresentation "deceptive" within the ordinary meaning of the word and, consequently, Section 10(b).²⁰⁸

Courts have not clarified whether computer hacking is "inherently deceptive," as the SEC alleges, or if only certain types of hacking are deceptive. In *Dorozhko*, the Second Circuit warned, for example, that it is unclear as to whether "exploiting a weakness in an electronic code to gain unauthorized access is 'deceptive,' rather than being mere theft."²⁰⁹ Likewise, if the conduct used is similar to stealing a key from a locked file cabinet, then the hack does not involve deception.²¹⁰ Even if the conduct is analogous to making several thousand keys and trying each one until access is granted, it is not deceptive.²¹¹ On the other hand, at least one commentator believes exploiting a weakness in an electronic code is deceptive "because the computer does not recognize that it is consenting to access by that particular user" and is "tricked into letting the [hacker] access the computer through a misrepresentation."²¹² However, until the Supreme Court is willing to hold that computer hacking is inherently deceptive, the facts particular to each individual hack will be vital in determining whether a computer hacker dealt in deception.

2. Other Considerations

Public policy favors Section 10(b) liability for deceptive computer hackers. In *Dorozhko*, the district court urged the SEC to forego its

admissible to demonstrate" his liability); *United States v. Berger*, 473 F.3d 1080, 1085 (9th Cir. 2007) (affirming jury verdict where part of the defendant's deception was "to conceal the fraudulent nature" of financial misstatements); *United States v. Autunoff*, 1 F.3d 1112, 1115-17 (10th Cir. 1993) (same).

²⁰⁶ *Opening Brief*, *supra* note 199.

²⁰⁷ RESTATEMENT (SECOND) OF TORTS § 525, cmt. b (1977) ("'Misrepresentation' is used . . . to denote not only words spoken but also any other conduct that amounts to an assertion not in accordance with the truth.").

²⁰⁸ *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 522 U.S., 148, 158-59 (2008) (concluding that misstatements, oral, written, or conduct itself, are deceptive within the meaning of Section 10(b)); *see Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 474 (1977) (recognizing that material misrepresentations may violate Section 10(b)); *see also Basic, Inc. v. Levinson*, 485 U.S. 224, 241 n. 18 (1988) (recognizing that Section 10(b) may be violated by affirmative misrepresentations made by those under no duty to disclose or abstain).

²⁰⁹ *SEC v. Dorozhko*, 574 F.3d 42, 51 (2d Cir. 2009).

²¹⁰ *Quinn*, *supra* note 192, at 895.

²¹¹ *Id.*

²¹² *Kerr*, *supra* note 177, at 1655.

Section 10(b) enforcement action and instead refer the case to the United States Attorney's Office to seek criminal penalties under other anti-fraud provisions.²¹³ However, even though computer hacking can concurrently violate other federal laws,²¹⁴ the SEC was created by Congress and given the specific responsibility of enforcing conduct in connection with securities transactions.²¹⁵ Computer hackers may be subject to stiff penalties under the broad anti-fraud provisions of the Computer Fraud and Abuse Act ("CFAA"), as well as the mail and wire fraud statutes.²¹⁶ Nevertheless, as the "civil regulatory body entrusted with overseeing our nation's securities markets,"²¹⁷ sound policy should discourage results that would skew security enforcement responsibility away from the SEC.²¹⁸

Computer hackers should still remain liable under the CFAA, as well as the mail and wire fraud statutes, but the availability of these provisions should not hinder the authority given to the SEC by Congress in Section 10(b). Congress granted the SEC the authority to petition the federal district courts, in civil enforcement actions, where they can seek injunctions, the imposition of monetary penalties, and the disgorgement of illegal profits.²¹⁹ Additionally, the SEC can seek enhanced civil penalties, in the form of treble damages, from any person who violates Section 10(b) "while in possession of material, nonpublic information."²²⁰ Moreover, the Department of Justice may seek criminal sanctions against

²¹³ SEC v. Dorozhko, 606 F. Supp. 2d 321, 324 (S.D.N.Y. 2008), *vacated*, 574 F.3d 42 (2d Cir. 2009).

²¹⁴ See, e.g., 18 U.S.C. § 1030(a)(4) (2007) (the Computer Fraud and Abuse Act); 18 U.S.C. § 1341 (2008) (the mail fraud statute); 18 U.S.C. § 1343 (2008) (the wire fraud statute).

²¹⁵ See 15 U.S.C. § 78a-78u (2000). For example, "in fiscal year 2007 alone, the Commission initiated 262 civil actions, 42 of which sought asset freezes, and 37 of which sought temporary restraining orders." *Posthearing Memorandum*, *supra* note 196, at 10 n.5.

²¹⁶ See 18 U.S.C. § 1030(a)(4) (2007) (fines and a prison sentence of up to 20 years); 18 U.S.C. § 1341 (2008) (fines and a prison sentence up to 20 years); 18 U.S.C. § 1343 (2008) (fines and a prison sentence up to 20 years).

²¹⁷ *Dorozhko*, 606 F.Supp. 2d at 343.

²¹⁸ See *United States v. O'Hagan*, 521 U.S. 642, 678 n.25 (1997).

²¹⁹ *Perez*, *supra* note 12, at 979.

²²⁰ 15 U.S.C. § 78u-1 (2000). However, since an enforcement action has yet to be fully litigated against a computer hacker, it is not clear whether the heightened penalties under Section 78u-1 are available to the SEC. Section 78u-1 allows for treble damages for insider traders. *Id.* The SEC has the authority to seek Section 78u-1 penalties "[w]hensoever it shall appear to the Commission that any person has violated any provision of this chapter or the rules or regulations thereunder by purchasing or selling a security . . . while in possession of material, nonpublic information." *Id.* (emphasis added). Computer hackers are not technically "insiders" with regards to either accepted theory of insider trading liability; however, Section 78u-1 does not mention either theory of insider trading, omissions, or fiduciary duty principles. See *id.* Therefore, according to the text of the provision, Section 78u-1's enhanced civil penalties should be available to the SEC to use against computer hackers who violate Section 10(b) while in possession of material, nonpublic information. *Id.*

violators of Section 10(b), either parallel or subsequent to an SEC enforcement action, and impose additional civil penalties and disgorgement.²²¹ Resultantly, the penalty scheme available to the SEC to prosecute violations of Section 10(b) allows for full enforcement, civilly and criminally, of Congress's prohibition against *any* person who employs *any* deceptive device in connection with the purchase or sale of securities.²²²

In *Dorozhko*, the district court declared that in the 74 years since Congress passed the Exchange Act, "no federal court has *ever* held that the theft of material nonpublic information by a corporate outsider and subsequent trading on that information violates Section 10(b)."²²³ However, despite the fact that a deceptive-acquisition-outsider-trader case has yet to be fully litigated in federal court under the Exchange Act, a lack of case law should not weigh dispositively against the possibility of computer hackers violating Section 10(b) for the same reason traditional insider trading eventually became judicially recognized under the provision over 30 years after the passage of the Act.²²⁴ Moreover, in 1961, the SEC explained that Section 10(b) is not intended to prohibit particular fraudulent acts or practices, but rather is "designed to encompass the infinite variety of devices by which undue advantage may be taken of investors and others."²²⁵ Likewise, the Supreme Court has taken the position that Section 10(b) "prohibit[s] *all* fraudulent schemes in connection with the purchase or sale of securities, whether the artifices employed involve a garden type variety of fraud, or present a unique form of deception."²²⁶ Clearly, this should include schemes that have yet to be

²²¹ Perez, *supra* note 12, at 986-87.

²²² Additionally, as far as markets are concerned, the SEC is probably in a better position to prosecute computer hackers, who misappropriate material nonpublic information, under Section 10(b), than the United States Attorney's Office under the mail and wire fraud statutes or the CFAA. Arguably, the SEC has a better understanding of markets and its complicated transactions, as well as specialized investigators who can locate, track, and uncover fraud. Moreover, as previously mentioned, during or after a civil enforcement action, the SEC can properly turn over the case to the DOJ for criminal prosecution.

²²³ SEC v. Dorozhko, 606 F. Supp. 2d 321, 323 (S.D.N.Y. 2008), *vacated*, 574 F.3d 42 (2d Cir. 2009).

²²⁴ For example, the Second Circuit did not recognize its first insider trading case until 1968, about 34 years after the passage of the Exchange Act. See SEC v. Texas Gulf Sulfur Co., 401 F.2d 833 (2d Cir. 1968). See also United States v. Brown, 555 F.2d 336, 339-40 (2d Cir. 1977) ("The fact that there is no litigated fact pattern precisely on point may constitute a tribute to the cupidity and ingenuity of the malefactors involved but hardly provides an escape from [the remedies of] the securities fraud provisions.").

²²⁵ Cady, Roberts & Co., 40 S.E.C. 907, 911 (1961), 1961 WL 60638 at *12.

²²⁶ Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 10 n.7 (1971) (quoting A.T. Brod & Co., 375 F.2d 393, 397 (2d Cir. 1967)) (emphasis added).

imagined or acted upon.²²⁷ Notwithstanding the fact that there have not been previous cases involving computer hackers litigated under Section 10(b), “[n]ovel or atypical methods should not provide immunity from the securities laws.”²²⁸

Without a doubt, the harm to market integrity and investor confidence caused by computer hackers, who illegally acquire inside information, is of the same variety as the harm caused by those who legally obtain the information, but are liable under the classical and misappropriation theories of insider trading. Whether computer hackers are “misappropriators” is truly a “matter of semantics.”²²⁹ “An investor’s informational disadvantage vis-à-vis a misappropriator,” or deceptive thief “with material, nonpublic information[,] stems from contrivance, not luck; it is a disadvantage that cannot be overcome with research or skill.”²³⁰ If investors believed that the SEC, through enforcement of federal securities laws, could not sufficiently protect the market against the use of deceptively obtained inside information, market participation would be reduced, and Section 10(b) would “run afoul of Congress’s express concern for preserving fair and open markets.”²³¹

VI. CONCLUSION

Due to the split between the Second and Fifth Circuits on the issue of whether a fiduciary duty is required for every violation of Section 10(b), the Supreme Court has a golden opportunity to clearly hold that Section 10(b) can be violated by a misrepresentation or omission in breach of a duty to disclose. A clear determination that fiduciary principles are not essential to a Section 10(b) offense will enable courts to begin to separate themselves from the idea that the traditional insider trading theories outline the full scope of liability for all persons liable under the provision.

²²⁷ For example, Thomas Corcoran, a principal drafter of the Exchange Act, described Section 10(b) as the “[t]hou shall not devise any other cunning devices” provision. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 202 (1976) (quoting Securities Exchange Act of 1934: *Hearing on H.R. 7852 and H.R. 8720 before the H. Comm. on Interstate and Foreign Commerce*, 73d Cong. 115 (1934)). Mr. Corcoran also stated that Section 10(b) should give the SEC “the authority to deal with *new* manipulative devices.” *Id.* (emphasis added).

²²⁸ *Bankers Life*, 404 U.S. at 10 n.7.

²²⁹ DONALD C. LANGEVOORT, *INSIDER TRADING: REGULATION, ENFORCEMENT & PREVENTION* § 6.14 (2010).

²³⁰ *United States v. O’Hagan*, 521 U.S. 642, 658-59 (1997).

²³¹ *Posthearing Memorandum*, *supra* note 196, at 20. See also *O’Hagan*, 521 U.S. at 658 (“Although informational disparity is inevitable in securities markets, investors likely would hesitate to venture their capital in a market where trading based on misappropriated nonpublic information is unchecked by law.”).

The part has completely engulfed the whole, leaving traditional insider trading jurisprudence in dire need of extensive pruning. The relationship between the deceiver and the deceived is only important insofar as the theory of fraud is silence or omission. Otherwise, how one comes into possession of inside information, and whether the scheme was “deceptive” within the word’s ordinary meaning, is what should be relevant to a Section 10(b) analysis. Affirmative misrepresentations are deceptive regardless of whether the misrepresentation is perpetrated by an “insider” or an “outsider.” If computer hackers or any other non-fiduciary outsider traders affirmatively misrepresent themselves, thereby deceptively acquiring inside information, then a common sense reading of Section 10(b) would make them liable for fraud, so long as their deception coincided with the purchase or sale of securities.