UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. NELSON J. OBUS, et al., Defendants.	No. 06 Civ. 3150 (GBD) ECF

THE SECURITIES AND EXCHANGE COMMISSION'S
OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

COUNTER STATEMENT OF FACTS 3

A. Strickland's Role And Responsibilities As A GE Senior Underwriter 4

B. GE's Rules And Duties Of Confidentiality 5

C. Strickland Learned Material Inside Information About The Allied Acquisition While On The Job 7

D. Strickland Was Obligated To Keep Quiet About The Allied Acquisition 9

E. The Tip 10

F. Obus Admitted He Was Tipped -- The First Time 11

G. The Trade 13

H. Obus Admitted He Was Tipped -- The Second Time 14

I. Strickland's Discussion With Black About SunSource Was Not A Legitimate Due Diligence Exercise 14

J. GE Sanctioned Strickland Based Solely On His Claimed Innocent Explanation Of His Conduct 16

K. Black, Obus, and Strickland Met in 2002 To Discuss SunSource 17

ARGUMENT 17

I. STANDARD OF REVIEW 18

A. Summary Judgment Standards 18

B. Element Of Insider Trading 19

C. Importance Of Circumstantial Evidence To Prove Insider Trading 19

II. STRICKLAND OWED A FIDUCIARY DUTY TO HIS CLIENTS, SUNSOURCE AND ALLIED CAPITAL 20

III. STRICKLAND OWED A FIDUCIARY DUTY TO HIS EMPLOYER, GE 24

IV. STRICKLAND BREACHED HIS FIDUCIARY DUTIES BY TIPPING BLACK 24

V. OBUS AND BLACK KNEW WHAT THEY AND STRICKLAND DID WAS WRONG 26

VI. STRICKLAND BENEFITTED FROM THE TIP 28

VII. THE "DECEPTION" ELEMENT IS SATISFIED BY THE BREACH, TIP, AND TRADE 28

CONCLUSION 29

TABLE OF AUTHORITIES

FEDERAL CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 18

Design Strategy, Inc. v. Davis, 469 F.3d 284 (2d. Cir. 2006) 24

Dirks v. SEC, 463 U.S. 646 (1983) 3, 20, 21, 23, 26, 27, 28

Dube v. State University of New York, 900 F.2d 587 (2d Cir. 1990) 18

Elysian Federal Savings Bank v. First Interregional Equity Corp.,
713 F. Supp. 737 (D.N.J. 1989) 19

Gallo v. Prudential Residential Services, Ltd., 22 F.3d 1219 (2d Cir. 1994) 18

Herman & MacLean v. Huddleston, 459 U.S. 375 (1983) 26

Patrick v. LeFebrue, 745 F.2d 153 (2d Cir. 1984) 18

Quaak v. Dexia, S.A., 445 F. Supp. 2d 130 (D. Mass. 2006) 21

SEC v. Alexander, 160 F. Supp. 2d 642 (S.D.N.Y. 2001) 19

SEC v. Cuban, 2009 WL 2096166 (N.D. Tex. July 17, 2009) 29

SEC v. Franco, 253 F. Supp. 2d 720 (S.D.N.Y. 2003) 19

SEC v. Gaspar, 1985 WL 521 (S.D.N.Y. Apr. 16, 1985) 21, 26

SEC v. Geon Industries, 531 F.2d 39 (2d Cir. 1976) 27

SEC v. Lund, 570 F. Supp. 1397 (C.D.Cal. 1983) 21, 22, 23, 24

SEC v. Materia, 745 F.2d 197 (2d Cir. 1984) 22, 27

SEC v. Musella, 578 F. Supp. 425 (S.D.N.Y. 1984) 26

SEC v. Musella, 678 F. Supp. 1060 (S.D.N.Y. 1988) 20, 27

SEC v. Musella, 748 F. Supp. 1028 (S.D.N.Y. 1989),
aff'd, 898 F.2d 138 (2d Cir. 1989) 20, 25

SEC v. Sekhri, 1998 WL 259932 (S.D.N.Y. May 21, 1998) 27

SEC v. Singer, 786 F. Supp.1158 (S.D.N.Y. 1992) 2, 19, 20, 22, 24, 25, 27

SEC v. Softpoint, Inc., 958 F. Supp. 846 (S.D.N.Y. 1997) 22

SEC v. Svoboda, 409 F. Supp. 2d 331 (S.D.N.Y. 2006) 22, 27

SEC v. Texas Gulf Sulfur Co., 401 F.2d 823 (2d Cir. 1968) 29

SEC v. Thrasher, 152 F. Supp. 2d 291 (S.D.N.Y. 2001) 2, 18-20, 25, 26, 27

SEC v. Tome, 638 F. Supp. 596 (S.D.N.Y. 1986) 22, 24

SEC v. Universal Exp., Inc., 475 F. Supp. 2d 412 (S.D.N.Y. 2007) 4

SEC v. Research Automation Corp., 585 F.2d 31 (2d Cir. 1978) 4

SEC v. Warde, 151 F.3d 42 (2d Cir. 2004) 2, 19, 20, 21, 26

Shapiro v. Merrill Lynch,, 495 F.2d 228 (2nd Cir. 1974) 22

U.S. v. Chestman, 947 F.2d 551 (2d Cir. 1991) 22

U.S. v. Libera, 989 F.2d 596 (2d Cir. 1993) 24

U.S. v. Newman, 664 F.2d 12 (2d Cir. 1981) 22, 26

U.S. v. O'Hagan, 521 U.S. 642 (1997) 3, 21, 28, 29

U.S. v. Victor Teicher & Co., L.P., 785 F. Supp. 1137 (S.D.N.Y. 1992) 22

Virgin Atlantic Airways, Ltd. v. National Mediation Board,
956 F.2d 1245 (2d Cir. 1992) 2

MEMORANDUM OF LAW

Plaintiff U.S. Securities and Exchange Commission ("Commission" or "SEC") hereby submits its opposition to the motions for summary judgment filed by defendants Nelson Obus [Docket No. 65], Peter Black [Docket No. 63], and by joinder, T. Bradley Strickland.

PRELIMINARY STATEMENT

Defendants' summary judgment motions are premised entirely on one critical disputed factual question: what did Brad Strickland say to Peter Black in their telephone discussion on the morning of May 24, 2001? Did Strickland speak only in high-level, vague, general terms about General Electric ("GE") doing "some kind of business" with SunSource, as Black, and only Black, contends? (Strickland does not remember the May 24th telephone call). Or, did Strickland give more details about the nature of the business GE was doing, namely, financing a leveraged buy-out in which SunSource was going to be sold to a financial buyer?

This question must go to the jury. If the jury believes Black, trusts his memory, his credibility, overlooks his bias, his changing depiction of events, and the influence of his employer, Nelson Obus, then the defendants will win. The jury would find there was no tip of material inside information. Obus just got lucky when he bought a huge block of SunSource stock less than two weeks before the public announcement of the SunSource purchase by Allied Capital (the "Allied Acquisition"), after not buying a single share of SunSource stock for months.

But, *if* the jury believes Maurice Andrien, the CEO of SunSource, or *if* the jury believes Dan Russell, the CFO of Allied Capital ("Allied"), or *if* the jury makes a reasonable inference from the circumstantial evidence, then the SEC will win. The jury would find that

there was a tip of material inside information. Strickland did violate the duties of trust and confidentiality that he admittedly owed to his clients and employer. Obus did not just get lucky. He had help. Regardless of whether Strickland acted with "malicious intent" (the SEC need only establish recklessness), the jury would find, based on probative, credible, corroborated evidence, that Strickland's call to Black had nothing to do with "due diligence" -- an incredible notion under the circumstances -- and everything to do with a casual call to a good friend, to let him in on a valuable secret that he learned, and misappropriated, while on the job.

At this stage, the Court must assume the facts cited by the SEC are true, and it must draw all reasonable inferences from these facts in favor of the SEC. The Court must believe Dan Russell, who testified that Obus called him and admitted ***"he was tipped off about the deal."*** The Court must believe Maurice Andrien, who testified that Obus called him and said ***"a little birdie told me that you guys are planning to sell the company to a financial buyer… a little birdie in Connecticut…GE…."*** The only reasonable inference from these admissions is that Strickland tipped Black who tipped Obus, who then traded while in possession of material inside information.

The ample circumstantial evidence surrounding the tip and trade -- the close friendship between Black and Strickland, at least three peculiar phone calls on May 24 involving SunSource, the uncharacteristic nature of the June 8 trade, the guilt-conscious behavior of defendants after the tip, their furtive meetings in 2002 ("right out of the movie Wall Street") -- independently establishes liability. *See SEC v. Warde,* 151 F.3d 42, 48-49 (2d Cir. 2004) (upholding jury verdict based solely on circumstantial evidence); *SEC v. Singer,* 786 F. Supp. at 1158, 1164-66 (S.D.N.Y. 1992); *SEC v. Thrasher,* 152 F.Supp.2d 291, 305 (S.D.N.Y. 2001) (both denying summary judgment based largely on circumstantial

evidence).

Strickland's breaches of his fiduciary duties, and the derivative liability of Black and Obus, arise necessarily out of Strickland's tip. As this Court already has ruled, following *Dirks v. SEC*, 463 U.S. 646 (1983), and as all knowledgeable witnesses, including Strickland, confirm, Strickland undoubtedly owed a duty of confidentiality to GE and to its clients, SunSource and Allied. Black and Obus knew, or should have known as professionals in the financial industry and directors of public companies, that Strickland should not have disclosed material inside information, that (a) he learned on the job, (b) from a public company client, (c) about that client's forthcoming acquisition. Obus himself admitted, "I would not have made that call." There is no need to prove any independent deceit or malice by the defendants. Strickland's fiduciary breaches, and Wynnefield's insider trading, satisfy the "deceptive device" element under Exchange Act Section 10b and Rule 10b-5. *U.S. v. O'Hagan*, 521 U.S. 642, 652 (1997).

For these reasons, the summary judgment motions should be denied.

COUNTER STATEMENT OF FACTS

The defendants have skipped some of the most important evidence in this case. They ignore testimony from Strickland, GE, SunSource, and Allied witnesses defining the duties of confidentiality that Strickland owed to GE and his clients. They never mention GE's code of conduct that Strickland violated, summarized in *The Spirit & Letter*. They omit Obus's admission to Dan Russell, CFO of Allied, that Obus was *"tipped off"* about the Allied Acquisition. They leave out important details of Obus's "*little birdie"* call to Maurice Andrien, CEO of SunSource on May 24, 2001. They fail to mention investor Alan Weber's strikingly similar call to Andrien that same day. They skip Black's outraged reaction after overhearing Obus's call to Andrien ("What are you doing? … You're going to get my friend

fired."). They miss the ensuing apologetic discussion between Black and Obus, in which Obus, "ashen and very upset," stated he would help Strickland find a new job if he was fired. They overlook details of defendants' suspicious meetings in the summer of 2002, after the SEC issued subpoenas. These facts, outlined below, and the record as a whole, create genuine issues of fact that preclude the entry of summary judgment.

A. Strickland's Role and Responsibilities As a GE Senior Underwriter

GE Capital, financial services arm of GE, was a lender to SunSource (Hillman) on the taking-private merger and acquisition by Allied Capital (the "Allied Acquisition"). GE Capital submitted proposals to be the lead "agent" lender on the $95 million acquisition, and to finance the related buyout of the SunSource subsidiary, STS Industries. *See* deposition of T. Bradley Strickland ("Strickland Dep.") [Dunning Decl., Exh. J] at 70-71; deposition of Maurice Andrien ("Andrien Dep.") [Dunning Decl., Exh. Q] at 804-05.

Strickland worked for GE Capital. Strickland was the senior underwriter on both SunSource transactions. *See* deposition of GE senior vice president (and originator of SunSource relationship), Karl Slosberg ("Slosberg Dep.") [Dunning Decl., Exh. L] at 113; deposition of former SunSource CFO, Joseph Corvino ("Corvino Dep.") [Dunning Decl., Exh. G] at 567-68; Strickland Dep. at 70-71. Strickland was the "front person" or "point person" for the underwriting team in his dealings with SunSource and Allied. Slosberg Dep. at 129:5-14; SEC testimony of Strickland ("Strickland Test.") [Dunning Decl., Exh. HH] at 138.[1] *See also,* deposition of GE Rule 30(b)(6) witness, William J. Brasser ("Brasser Dep.") [Dunning Decl., Exh. I] at 59-60 (describing Strickland's responsibilities as underwriter).

GE Capital's (and Strickland's) clients on the SunSource transactions were the

[1] SEC testimony transcripts may be used to oppose summary judgment. *See SEC v. Universal Exp., Inc.*, 475 F.Supp.2d 412, 416 n. 1 (S.D.N.Y. 2007), *citing SEC v. Research Automation Corp.*, 585 F.2d 31, 34 n. 5 (2d Cir. 1978).

borrowing entities, SunSource, SunSource's management, and Allied Capital. Corvino Dep. at 583-84; deposition of GE senior vice president (and Strickland's former supervisor), Michael Lustbader ("Lustbader Dep.") [Dunning Decl., Exh. U] at 64-65, 161-62; deposition of GE senior vice president (and Slosberg's former supervisor), Joseph Wiles ("Wiles Dep.") [Dunning Decl., Exh. K] at 171-72; Strickland Dep. at 85; Slosberg Dep. at 131:4-18.

B. GE's Rules And Duties Of Confidentiality

At all relevant times, GE (and its subsidiary, GE Capital) and its employees owed (and continue to owe)[2] a duty of trust and confidentiality to their clients and potential clients. *See* Slosberg Dep. at 132-33; Wiles Dep. at 172:18-21; Strickland Dep. at 82; Lustbader Dep. at 140:2-11, 145-46; Brasser Dep. at 114 (GE wants to maintain confidentiality with borrowers and prospective borrowers). GE employees likewise owed a fiduciary duty to GE, which included a duty to avoid conflicts of interest and illegal activities, to make sound business decisions, to protect GE's assets, and to keep confidential information confidential. *See* Declaration of Paul W. Kisslinger ("Kisslinger Decl."), Exh. 1 at GE 21414, 434, and discussion below.

To enforce these duties, GE has strict rules in place, summarized in a code of conduct entitled *The Spirit & Letter*, that, *inter alia*, preclude an employee from misusing or disclosing material confidential information learned on the job, or from engaging in any tipping or trading activities based on such information. *See* Kisslinger Decl., Exh. 1 (Policy 20.13) at GE 21437-45; *see also*, Brasser Dep. at 17, 22-23, 37-38; Lustbader Dep. at 141:7-21; Wiles Dep. at 148-49; Slosberg Dep. at 99-102, 105; Strickland Dep. at 57-58.[3]

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[2] Hereinafter, the present tense discussion of GE's policies and rules includes those existing in 2001.

[3] Policy 20.13 of *The Spirit & Letter* speaks directly to preventing insider trading activities:

> **Insider Trading or Dealing & Stock Tipping**
> GE is committed to fair and open markets for publicly traded securities throughout the world. We have established standards of conduct for employees and others who obtain material or price-sensitive non-public information (inside information)

Pursuant to GE policies, GE employees are not to share inside information to third parties learned on the job unless (a) there is an actual business need; and (b) appropriate safeguards are taken. *See id.* at GE 21437; Brasser Dep. at 37-39, 48:5-13, 62-63; Lustbader Dep. at 139:5-11; 174-175 ("You don't disclose inside information to third parties. And if there is a need, okay, then you take specific safeguards and you talk to counsel…"); Slosberg Dep. at 105 ("Any material nonpublic information, they require that it be maintained within the business unit."); Wiles Dep. at 158:22-159:7.

In addition to these general rules of confidentiality, applicable in every GE business dealing, GE employees have a heightened duty of confidentiality when working on a financing of a public company that involve the most confidential and sensitive types of information. Brasser Dep. at 47:17-23 (providing financing for public company are "most sensitive situations." "We have a heightened sense of confidentiality when working with public company"); *see also*, Deposition of Daniel Russell ("Russell Dep.") [Kisslinger Decl., Exh. 2] at 302 (transactions with public company warranted extra precautions because of dangers of insider trading).[4]

Moreover, Strickland, as a member of a GE Capital corporate lending team, was designated a transactional restricted employee (TRE) because he had regular access to sensitive financial information from clients. As a TRE, Strickland had special training, and was under special trading restrictions and obligations, concerning public companies with whom he did business. *See* Brasser Dep. at 44-45, 62:6-19; Wiles Dep. at 154-55; Lustbader Dep. at 142-43.

A GE employee's duty of confidentiality begins as soon as "the employee realizes he

> through their work for GE. Insider trading, insider dealing and stock tipping are criminal offenses in most countries where GE does business….

[4] The cover page of *The Spirit & Letter*, Protecting GE Assets, emphasizes, "As GE employees … [w]e must also safeguard company property, whether it is a piece of equipment, an electronic file, a GE trademark or confidential information about an upcoming deal."). Kisslinger Decl., Exh. 1 at GE 21434 (emphasis added).

or she has received confidential information….the duty always exists." Lustbader Dep. at 140:1-14; *see* Wiles Dep. at 157:5-9 ("once I'm aware of a transaction being considered, even the fact that something is being considered is confidential."); Slosberg Dep. at 109 (duty to keep information confidential starts "from the very first discussion."); Strickland Dep. at 83:20-22 ("all information on any deal that we receive or we received was to be treated as confidential.").

Strickland's duty of confidentiality to a client or potential client, like SunSource, thus existed in the absence of a written confidentiality agreement. Strickland Dep. at 85:11-14 ("I don't think it would change how I handled … the information, I mean everything was to be held confidential"); Slosberg Dep. at 110-111 ("It really shouldn't matter…materials should have been and was, from my standpoint, treated the same."); Wiles Dep. at 155-56 ("if you have confidential information it is illegal to disclose it."); Lustbader Dep. at 145-46 (absence of a written confidentiality agreement does not affect duty of confidentiality).[5]

In addition, Strickland's duty of confidentiality existed even if an issuer was not posted on GE's restricted (TRE) list. Wiles Dep. at 157:18-23 ("it doesn't matter one way or the other."); *see e.g.,* Strickland Dep. at 91-92 (company being listed on TRE is not the "line in the sand." "If you know about it, then no you're not allowed to trade.")

C. Strickland Learned Material Inside Information about the Allied Acquisition While on the Job

GE Capital received material nonpublic information about the Allied Acquisition from Allied and SunSource, beginning from their initial discussions and meetings. Slosberg Dep. at 108-10, 115-116, 133:3-5; Corvino Dep. at 572-73; 576-77. Strickland, in turn, learned material inside information about the Allied Acquisition from GE, SunSource, and

[5] In 2001, confidentiality agreements were more of an exception than the norm. Slosberg Dep. at 111. *See also,* Corvino Dep. at 572-73, 599-600; Andrien Dep. at 782-83 (though written confidentiality agreements not always executed, expectation of confidentiality remained).

Allied in the course of his underwriting duties. *See* Strickland Test. at 137:7-14 (discussing receipt of due diligence binders prepared by Allied), 138 (personally called Allied and SunSource to answer questions), 146; Strickland Dep. at 83, 90-92.

In particular, on May 14, 2001, Strickland received the "Deal Book," prepared by Allied, that laid out the proposed terms of the merger. Slosberg Dep. at 121; Wiles Dep. at 104:9-23, 106:23-107:2; Strickland Dep. at 79-80. The Deal Book contained the words *"extremely confidential"* on every page, and stated, *"[t]his memorandum is covered by a confidentiality agreement between your institution and Allied Capital Corporation." "Your institution"* meant every lender or potential lender that received and accepted the Deal Book. Corvino Dep. at 273, 575-76; *see* Russell Dep. at 307-08 (recipients of deal books are often lenders; Allied expected all lenders, including GE, to keep information in Deal Book confidential).

There is no question that the Deal Book -- laying out the terms of the Allied Acquisition -- contained material nonpublic information about SunSource. Strickland Dep. at 83-84, 90:13-21; 92:6-13; Wiles Dep. at 165:20-67:3, 169:3-9; Lustbader Dep. at 167-69; Slosberg Dep. at 109:11-20; Corvino Dep. at 572-73; 576-77; Russell Dep. at 300:7-16. Indeed, the very idea that Allied was considering taking over SunSource was material inside information. Strickland Dep. at 83-84; Wiles Dep. at 157:21-158:9. A merger and acquisition concerning a public company is a prime example of material information. *See* Lustbader Dep. at 142:4-11; His Corvino Dep. at 544; Strickland Dep. at 84 ("merger and acquisition would be extremely confidential information"); Andrien Dep. at 774:15-24 (mergers, acquisitions, divestitures, bank financing material if significant enough); Obus Dep. at 26-27; Black Dep. at 18-19.

Strickland also learned other confidential information about SunSource while

performing his underwriting services. For example, he learned confidential details about the company's inventory, top customers, product level margins, structure, and projections. *See* Slosberg Dep. at 118:2-8 (inventory list is nonpublic), 121 ("financial information on a projected basis and structural basis would not be public information."); Wiles Dep. at 169; Corvino Dep. at 572-73. *See also*, Strickland Test. at 137:7-14 (discussing due diligence binder received from Allied); Strickland Dep. at 42-44 (discussing nonpublic information he ordinarily obtained when performing due diligence on public company).

D. Strickland Was Obligated To Keep Quiet About The Allied Acquisition

All knowledgeable witnesses that testified in this case, employed by SunSource, Allied, and GE, even Strickland, testified that GE and GE employees were expected, required, and obligated to keep the information they learned about the Allied Acquisition confidential.

- Strickland: Strickland Test. at 146:8-10 ("Q At that time, did you believe that the work you were doing was confidential? A Yes, I did."); Strickland Dep. at 90-91:

> Q Did you understand that information concerning the Allied taking private transaction was material nonpublic information?
> A I think I would have understood that.
> Q And you understood you had an obligation to keep that information confidential?
> A I think I would have understood that.

- GE Capital: Lustbader Dep. at 167-69 (expected members of his deal team to keep information in Deal Book confidential), 174:4-75:4 (GE employees told not to share inside information unless there is a need, and appropriate safeguards are taken); Wiles Dep. at 152, 56, 65-66 (information about Allied Acquisition was material inside information, to be kept confidential), 72 (information from Allied to be kept confidential); Slosberg Dep. at 109-111 (understood GE and SunSource expected him to keep information confidential), 132-33; Brasser Dep. at 61-63 (Strickland was required to comply with GE policies, to keep

confidential information confidential, and not tip or trade on confidential information).

- SunSource: Corvino Dep. at 572-73 ("They're a lender and [we] expect all conversations regarding the lending activities to be kept confidential. We also marked various documents to be confidential … . So, there's a basic premise in dealing with lenders that have confidentiality in place"); 575-76 (any lender receiving Deal Book was obligated to keep information confidential); 579-80 (expected GE to keep information confidential); 584, 599-600 (clarifying earlier answer -- he expected GE not to tip or trade on information in Deal Book, and to keep confidential); Andrien Dep. at 782-83 ("we expect professionals to act like professionals); 775-76 (material nonpublic information was to be kept with "absolute confidentiality"); Slosberg Dep. at 111-112 (understood from nature of dealings with SunSource that SunSource would expect information to be kept confidential).

- Allied: Russell Dep. at 306, 308-09 (Russell and Allied expected all lenders, including GE, to keep information in Deal Book confidential).

E. The Tip

Peter Black and Strickland were very good friends in 2001. Strickland Test. at 141:5-6; Strickland Dep. at 113-114; defendants' Rule 56.1 Statement, ¶¶ 8-11. They regularly socialized and communicated with each other by phone and email, about business and social matters. *See id.* Black worked for the hedge fund, Wynnefield Capital Management ("Wynnefield"). *Id.*, ¶ 2; Strickland Dep. at 115. Wynnefield specializes in investing in domestic small cap value publicly-traded companies (SunSource being an example). Obus Dep. at 38:15-17.

One day, while Strickland was performing his GE underwriting duties on the Allied Acquisition, Strickland learned that Wynnefield was a large shareholder of SunSource. *Id.* at 138-141. Strickland was surprised when he found out that information. Strickland Test. at

141:4. His discovery lead him to reach out to Black, who he knew worked for Wynnefield.

On the morning of May 24, 2001, Strickland called Black to discuss SunSource. Deposition of Peter Black ("Black Dep.") [Dunning Decl., Exh. D] at 116, 133. *See* defendants' Rule 56.1 statement at ¶ 98. The call occurred before the public announcement of the Allied Acquisition, and while Strickland was underwriting the financing. *See* Black Dep. at 111:5-9; Black Dep. at 107.

Strickland does not remember the call on May 24, 2001. Strickland Dep. at 119:7-11 ("I don't remember making a call about SunSource to him.") Strickland does admit, however, that he spoke with Black about SunSource at some point before the Allied Acquisition was announced, while he was underwriting the loans. Strickland remembers the conversation taking place at a restaurant while he and Black were waiting for a table, drinking a beer. Strickland Dep. at 121 ("we were waiting for a table at a restaurant one night"), 123; Strickland Test. at 143:7-10 ("I picture us at a restaurant waiting for a table standing, drinking a beer"). This evidence establishes that there could have been more than one instance in which Strickland tipped Black, or updated him on the status, about the SunSource deal.

F. Obus Admitted He Was Tipped -- The First Time

Very soon after Strickland's call to Black, Black spoke with his boss, Nelson Obus, about the call. Black Dep. at 118:20-25; Black SEC Testimony ("Black Test.") [Dunning Decl., Exh. E] at 149 ("when I put the phone down…"). Very soon after Black told Obus about Strickland's call, Obus picked up the phone and called Maurice Andrien, the CEO of SunSource. SEC Testimony of Nelson Obus ("Obus Test.") [Dunning Decl., Exh. GG] at 51:10 ("I didn't let a lot of time go by"); Obus Dep. at 169:9 ("shortly afterwards"). Andrien described the conversation as follows:

> Mr. Obus -- it was a very funny conversation, and he said that he never had a conversation like this before and didn't know whether he should be

> having it. He said, I always knew you guys would sell SunSource Technology Services if you could, but I never figured you'd sell the whole company.
>
> And I said, Nelson, that's just not the kind of thing I could ever discuss under any circumstances with you whether we did or whether we didn't. I just refused to comment about that.
>
> He said, well, a little birdie told me that you guys are planning to sell the company to a financial buyer.
>
> I said, a little birdie?
>
> He said, a little birdie in Connecticut.
>
> I said, a little birdie in Connecticut?
>
> And he said I might have even said, who would tell you something like that? And he said, GE.
>
> And I said, Nelson, look. I don't want to go here. This is nothing I can comment about ….

SEC Testimony of Maurice Andrien ("Andrien Test.") [Kisslinger Decl., Exh. 3] at 134-35; *see also,* Andrien Dep. at 542-43, 835-37.[6]

Black overhead the call to Andrien as it was happening. Black Test. at 147:7-8. When Black realized what Obus was saying, and to whom, he became shocked and alarmed. Black Test. at 166. Black described his thoughts quite vividly:

> I am just thinking I can't believe he just compromised my friend. The first thing that is going to happen is Maurice is going to call GE and say, "Wait a second. You guys, you know, you are supposed to be my financial advisors and you guys have got some guy on your team who is talking about it."

Black Test. at 149:15-19.

So, Black immediately jumped out of his seat. Black Test. at 147 ("I jumped out of my seat."); 166:4-5. He waived his arms to get Obus' attention. Black Test. at 150:18; Black Dep. at 126 ("I stood up from the desk to look over the monitor, as I do basically any time I'm trying to get his attention since we can't see each other ... and I looked down and I believe I moved my hands or something to the effect of 'that's my friend you're talking about.'") Black said to Obus: "Nelson, what are you doing? You are going to get my friend fired…You realize, you know, my friend is going to be fired…What was the purpose of that

[6] Obus contends that he called Andrien to complaint about a PIPE. *See* Obus Br. at 7-8. Andrien contradicts this claim. *See* Andrien Dep. at 542:6-13, 844, 847-48. Andrien did not even know what a PIPE was when he testified. Andrien Dep. at 176:11-23 ("I don't know the term."), 540:11-17.

call. You know, it doesn't make sense?" Black Test. at 150-51. Needless to say, Black was upset with Obus. Black Test. at 166:6-12.

After Black explained his concerns to Obus -- that Obus was going to get his friend fired -- Obus likewise became "ashen and very upset." Black Test. at 151. Obus said, "Well, if that does happen, we will, you know, we will offer your friend a job here or I will try, you know, try to put him somewhere else on Wall Street." Black Test. at 151:6-9.

Earlier that same day, Andrien had received another call from a large investor, Alan Weber, a business acquaintance of Obus. Obus Test. at 229 (had many conversations with Weber about SunSource); Weber Dep. at 194-95 (discussed SunSource many times with Obus). Weber told Andrien that he hoped SunSource would never consider selling SunSource to a financial buyer, and recommended that a strategic buyer would pay more for the company. Andrien Test. at 125-27. Obus's call, coming on the heels of Weber's call, with the same general theme -- selling to a financial buyer -- alarmed Andrien. Andrien became concerned there was a leak about the Allied Acquisition. *Id.* Andrien spoke with his CFO and counsel. Andrien Dep. at 839-40.

G. The Trade

On June 8, 2001, Obus directed Wynnefield to purchase 287,200 shares of SunSource stock -- approximately 5 percent of outstanding common stock. *See* Kisslinger Decl., Exh. 4 (Wynnefield Funds' Transactions in SunSource Common Stock, attached to report of defendants' expert, Tsvetan N. Beloreshki). Wynnefield nearly doubled its ownership of SunSource with that purchase, going from owning 5.9 to 10.1 percent of SunSource common stock. *Id.*

The transaction represented Wynnefield's largest purchase of SunSource stock. *Id.* Wynnefield had bought only one large block of SunSource stock before, in October 2000. *Id.*

Wynnefield had not purchased any SunSource stock for four months before the June purchase (February 16, 2001), though the stock price was lower. *See id*. Wynnefield had no apparent regular buying pattern or practice with respect to SunSource. *See id.* Moreover, as Obus admitted, "we were not jumping out of our skin" to buy the stock at the time. Obus Test. at 247:1. Wynnefield was not "proactively seeking the stock." *Id.* at 247:15-16.

Strickland certainly did not expect Wynnefield to trade SunSource stock after his discussion with Black, and he was surprised when he learned that they had. Strickland Dep. at 133-34, 140.

H. Obus Admitted He Was Tipped -- The Second Time

Sometime after the SunSource acquisition was announced, approximately in June or July 2001, Obus called Dan Russell, CFO of Allied Capital, and admitted he was *"tipped off to the deal."* Russell described the call as follows:

> A Okay, he told me he had bought shares of stock in SunSource in I believe it was November of 2000. He I believe bought more shares of stock in I want to say May 2002 and he called me to asked me if there was any way that we could postpone the transaction of buying SunSource to a later date, November of 2001, so that he could get long-term capital gains treatment on his stock.
> Q Is that all you remember from the conversation?
> **A *At some point in the discussion with him, he made the comment to me that he had been tipped off to the deal.***
> ***Matter of fact, I believe he said, well, you know, I've been -- I was tipped off to the deal. …***
> Q Do you remember anything that you said in the call?
> A I do.
> Q After he commented that he had been tipped off to the deal I remember saying to him, what did you just say, or what did you say?
> A That's it … My recollection is that he didn't respond to that question and changed the subject.

Russell Dep. (Kisslinger Decl., Exh. 2) at 202:10-203:17 (emphasis added).

I. Strickland's Discussion With Black About SunSource Was Not A Legitimate Due Diligence Exercise

Strickland was not authorized to check with any third-parties on the SunSource acquisition. Lustbader Dep. at 153-54. He also did not ask permission, and was not

authorized, to do any due diligence on SunSource management. *Id.* As Corvino testified:

> Q Do you know if GE Capital was authorized to perform, as part of its due diligence, a reference check on SunSource's management?
> A I'm not aware of them having an obligation to do that. Or a policy in that regard.
> …
> Q Did GE Capital ever seek permission to perform any reference checks on SunSource management?
> A I don't believe I've ever had that request from him, nor did I sign anything to authorize such a background check.
> Q Did you know that GE Capital, as part of its due diligence, was going to call a large shareholder of SunSource?
> A I don't recall that -- having any knowledge of that.

Corvino Dep. at 602-04; *see also,* Strickland Dep. at 106 ("Q Did you tell [Corvino] that you would be -- did you ask his consent to do any background checks on SunSource management? A I don't remember that."); Strickland Test. at 145:12-15 (Lustbader did not give him permission to call Black), 147:7-9 (Strickland never asked anyone if it was permissible to make a phone call of that nature).

It is also clear that Strickland's discussion with Black was not needed to enable GE to carry on its business properly and effectively. Brasser Dep. at 75-76. Strickland admitted that his call to Black (or their discussion in the restaurant) was not a formal part of his due diligence. Strickland Dep. at 129:10-14 ("I would say more informal, yes.") Strickland did not make any record of the conversation, did not take any notes, or even have a pad and paper with him. Strickland Dep. at 130 (made no record), 135:14-16 (no pad or paper).

Reaching out to a large shareholder was not part of the due diligence process that Strickland would ordinarily go through when working on a deal like SunSource. Brasser Dep. at 77. Not one testifying witness, including Strickland, could give another example of an underwriter ever reaching out to a shareholder for due diligence purposes. *See* Strickland Test. at 139:19 ("I can't remember ever contacting a shareholder"); Strickland Dep. at 134-35; Wiles Dep. at 162:21-163:3; Russell Dep. at 313-14 ("I can't think of a situation where

we called a shareholder for a reference check.")

If Strickland did indeed decide to reach out to a third party to engage in due diligence, there were precautions and procedures he should have followed to prevent the information from being misused, but did not. *See* Brasser Dep. at 63:6-16, 120-21; 75:13-22, 123-24, 131:19-132:2; Wiles Dep. at 158:22-59:7, 186-87. Strickland did not even tell Black to keep the information in confidence, or not to repeat it to anyone. Black Test. at 155:1-4.

J. GE Sanctioned Strickland Based Solely on His Own Claimed Innocent Explanation of His Conduct

GE sanctioned Strickland for his discussion with Black. Based only on Strickland's self-serving description of his conversation with Black (presumably, the conversation he remembers at the restaurant, not the May 24 call that he does not remember), GE determined that Strickland did not disclose the nature of the transaction to his friend, and it believed Strickland's story that the purpose of the conversation was to obtain due diligence. Brasser Dep. at 70, 125-126.

Although GE's investigation was on-going, and there were important facts that the company did not know at the time (e.g., Obus's "little birdie" call to Andrien), GE nevertheless found that Strickland violated his duty of trust and confidentiality to GE as set forth in Section 20.13 of *The Spirit & Letter*. Brasser Dep. at 76:2-12. Of course, if GE Capital understood the facts differently, i.e., if Strickland did indeed give details about the nature of the transaction to Black, or if the intent of the call was not to obtain due diligence, GE likely would (a) have considered the matter to be more serious, (b) found that Strickland acted with culpable intent, and (c) subjected Strickland to more severe sanctions. Brasser Dep. at 70 (Q "If the facts you learned were different from those as written here, was it possible he could have been subject to different sanctions?" A "Depending on the additional facts, certainly"), 73 ("it would have made the matter more severe…I think it is intent."), 125

(Q "Would it have been a more serious violation of GE's policies if Mr. Strickland … did discuss the nature of the transaction being contemplated?" A I would have to say yes.")

K. Black, Obus, and Strickland Met In 2002 To Discuss SunSource

In the summer of 2002, the SEC issued subpoenas to GE and Wynnefield, and GE began an internal investigation. At this point, Strickland reached out to Black with some urgency. "He was jumping through hoops to see him." Obus Test. at 156:3. Strickland went to Black's apartment at 10:30 at night, and then called him early the next morning. Black Test. at 123-26. The two friends ended up meeting at the Bryant Park Grill at 4:00 p.m. on Friday, August 9, 2002. Before they met, Black was concerned. He characterized the meetings as being out of the ordinary, and "like out of the movie, Wall Street." Black Test. at 126:13. "Normal people don't do this." Black Test. at 143:13.

Black spoke with Obus about the upcoming meeting, to "work out a strategy in advance, which was not to say anything." Obus Test. at 158:6-11. Obus told Black what to say and not to say to Strickland. Obus Test. at 161:19-20 ("Talk about your girlfriends. Talk about where you're going to spend vacations together. … I said don't talk about anything involving SunSource."). At the Bryant Park meeting, Strickland told Black he didn't remember any discussion about SunSource. Black reminded Strickland that they had indeed discussed SunSource. Black Test. at 179-80. On the Monday after the meeting, Black and Obus met at a coffee shop to discuss Black's meeting with Strickland. *Id.*

ARGUMENT

The SEC has plead, and now proven in discovery, a compelling insider trading case against the defendants. A reader would never know this from the defendants' summary judgment briefing. The defendants selectively cite from the record and ignore critical facts that are against them. They reach factual inferences in their favor. They cite cases that are

not controlling and whose facts are distinct from this case (e.g., the *Cuban* case). They ignore on-point decisions from this Circuit. They devalue the importance of circumstantial evidence, and seek to hold the SEC to a standard of proof that would be nearly impossible to meet in any insider trading case. Above all, they seek to have this Court resolve disputed issues of fact that should go to the jury.

I. STANDARD OF REVIEW

A. Summary Judgment Standards

The Second Circuit summarized the summary judgment rules in *Gallo v. Prudential Residential Services, Ltd.*, 22 F.3d 1219, 1222 (2d Cir. 1994) ("Considering how often we must reverse a grant of summary judgment, the rules for when this provisional remedy may be used apparently need to be repeated."):

> First, summary judgment may not be granted unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Second, the burden is upon the moving party to demonstrate that no genuine issue respecting any material fact exists. In considering that, third, all ambiguities must be resolved and all inferences drawn in favor of the party against whom summary judgment is sought. Fourth, the moving party may obtain summary judgment by showing that little or no evidence may be found in support of the nonmoving party's case. When no rational jury could find in favor of the nonmoving party because the evidence to support its case is so slight, there is no genuine issue of material fact and a grant of summary judgment is proper.

Id. (internal citations omitted).

A party who moves for summary judgment has the burden of outlining not one plausible account of the events in question, but the *only* possible account a reasonable jury could accept. *SEC v. Thrasher,* 152 F.Supp.2d 291, 303 (S.D.N.Y. 2001), *citing Anderson v. Liberty Lobby*, 477 U.S. 242, 249-50 (1986). "Summary judgment is typically inappropriate where subjective issues regarding a litigant's state of mind, motive, sincerity or conscience are squarely implicated." *See Dube v. State University of New York,* 900 F.2d 587, 599 (2d

Cir. 1990), *citing Patrick v. LeFebrue,* 745 F.2d 153 (2d Cir. 1984).

B. Elements Of Insider Trading

The Commission joins in defendants' reliance on *SEC v. Warde,* 151 F.3d 42, 47 (2d Cir. 1998), to set forth the applicable elements of insider trading.

C. Importance of Circumstantial Evidence To Prove Insider Trading

Defendants' briefing skips over a critical characteristic of insider trading cases -- the importance of indirect or circumstantial evidence. Insider trading cases are "profoundly secretive in nature," often involving deception of the participants who have sole control of the facts. *See SEC v. Alexander,* 160 F. Supp.2d 642, 649 (S.D.N.Y. 2001) ("to require the plaintiff to produce more concrete evidence of these details would put a heavy burden on plaintiff and would practically preclude the possibility of pleading an adequate complaint in cases, such as insider trading, that are profoundly secretive in nature"); *SEC v. Franco,* 253 F. Supp. 2d 720, 732 (S.D.N.Y. 2003) ("specific facts with respect to the insider tips are often within the control and knowledge of the defendants").

It is, of course, "very rare" for the tipper or tippee to admit they have engaged in insider trading. *Elysian Federal Savings Bank v. First Interregional Equity Corp.,* 713 F. Supp. 737, 744 (D.N.J. 1989). It is just as rare for the evidentiary record to include an eye witness, a listening device in the room, or a bugged phone line that may provide direct evidence of a tip. Circumstantial evidence is thus often the only evidence available to establish insider trading. *See Singer,* 786 F. Supp. 1158, 1164-65 ("[I]t is clear that proof of insider trading can well be made from through an inference from circumstantial evidence…. Courts in the Southern District have held that circumstantial evidence such as suspicious timing of trades, contacts between potential tippers, and incredible reasons for such trades provide an adequate basis for inferring that tipping activity has occurred.")

Nevertheless, insider trading cases based solely on circumstantial evidence are often powerful and compelling. Circumstantial evidence is often more "certain, satisfying, and persuasive than direct evidence." *Id.* Indeed, this Court has found circumstantial evidence to be sufficient to overcome direct contradictory testimony, e.g., to (a) support summary judgment for the SEC (*see SEC v. Musella*, 678 F.Supp. 1060, 1063-64 (S.D.N.Y. 1988); (b) support a bench-trial judgment for the SEC (*SEC v. Musella*, 748 F.Supp. 1028, 1038 (S.D.N.Y. 1989), *aff'd*, 898 F.2d 138 (2d Cir. 1989)); and (c) support a jury verdict in favor of the SEC (*see Warde*, 151 F.3d at 47-48). *See also, Singer*, 786 F.Supp. at 1164-1166; *Thrasher*, 152 F.Supp.2d 291, 303-05 (both denying summary judgment motions, based in large part on circumstantial evidence).

The Commission is fortunate in this action to have both direct and circumstantial evidence of defendants' insider trading activity.

II. STRICKLAND OWED A FIDUCIARY DUTY TO HIS CLIENTS, SUNSOURCE AND ALLIED CAPITAL

This Court has ruled, as a matter of law, that the lender-borrower relationship between GE and SunSource represents an enforceable duty of trust and confidentiality:

> I think that because in this day and age in the corporate world I think it is difficult to argue that those who participate in mergers and acquisitions and are given access to what is confidential information between the proposed merger and acquisition parties, and it is anticipated that the role to play is with regard to the financing of a proposed merger and acquisition … the inference under those circumstances does not support a conclusion that one is receiving the information that's designated confidential between the parties under circumstances where there is no fiduciary duty, that the inference is that that information is received under those same set of circumstances to participate in the transaction in a confidential manner in furtherance of the corporate purposes of the company for which the lender is being hired to assist…that that information is being provided with the expectation that there is a fiduciary business duty to not misuse that information or to disclose that information without authorization or to provide that information to others so that they can use that information for their own individual purposes and personal financial gain.
>
> ***
>
> And I think that the allegations here are sufficient to reach that conclusion. If the SEC proves these set of allegations that they have alleged in this case, that it can support a finding of liability on behalf of the defendants.

Transcript of Feb. 15, 2007 hearing ("Hearing Tr.") [Dunning Decl., Exh. JJ] at 60-65.

We are thus now well beyond the legal arguments, raised once again by defendants,[7] that a lender like GE does not or cannot owe a fiduciary duty to a borrower, like SunSource, in an insider trading case. *See Virgin Atlantic Airways, Ltd. v. National Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992) ("where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again.") Defendants point to no "good reason" to revisit the Court's legal decision. *See id.*, 956 F.2d at 1244.[8]

Indeed, the Court's ruling follows the law, letter, and logic of *Dirks*,[9] and its progeny, recognizing that an outsider of any style, kind, and profession -- including a friend, confidant, accountant, attorney, consultant, underwriter, printer, and even banker -- can become an insider by being provided access to confidential information, for a corporate purpose, with the expectation that he or she keep the information confidential. *See e.g., Quaak v. Dexia, S.A.*, 445 F.Supp.2d 130, 151 (D. Mass. 2006) (commercial bank deemed to be temporary insider); *SEC v. Svoboda*, 409 F.Supp.2d 331, 341 (S.D.N.Y. 2006) (NationsBank employee

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[7] Defendants raised the same legal arguments in their motion to dismiss briefing and oral argument that GE and SunSource could not be in a fiduciary relationship because they engaged in "arms-length" negotiations. *See* Obus MTD Br. [Docket No. 14] at 10-11; Hearing Tr. at 36. They similarly cited to the twenty-five-year-old *Moss* and *Walton* cases, while ignoring recent 2nd Circuit decisions.

[8] There has been no intervening change in controlling law, no new evidence before the Court (the Court did not previously review evidence), and "no need to correct a clear error or prevent manifest injustice." *Id.*, 956 F.2d at 1244.

[9] As the Supreme Court stated in *Dirks*:

> Under certain circumstances, such as where corporate information is revealed legitimately to an underwriter, accountant, lawyer, or consultant working for the corporation, these outsiders may become fiduciaries of the shareholders. The basis for recognizing this fiduciary duty is not simply that such persons acquired nonpublic corporate information, but rather that they have entered into a special confidential relationship in the conduct of the business enterprise and are given access to information solely for corporate purposes. For such a duty to be imposed, however, the corporation must expect the outsider to keep the disclosed nonpublic information confidential, and the relationship at least must imply such a duty.

Dirks, 463 U.S. at 655 n. 14. *See also, O'Hagan*, 521 U.S. at 652 (reiterating theory).

breached fiduciary duties owed to bank "and its clients" by tipping and trading); *SEC v. Gaspar*, 1985 WL 521, *16 (S.D.N.Y., April 16, 1985) (officer of investment bank liable for misappropriating information from bank and as temporary insider of target company); *U.S. v. Victor Teicher & Co., L.P.*, 785 F. Supp. 1137, 1148 (S.D.N.Y. 1992) (Drexel Burnham employee liable as "temporary insider or fiduciary").[10]

Against this settled legal framework, the SEC has now established an evidentiary record establishing that Strickland, senior underwriter for GE on the Allied Acquisition, was indeed a temporary insider of SunSource (and Allied), which is an inherently fact-specific inquiry. *See Singer*, 786 F. Supp. at 1169: "In the final analysis, the assessment of the existence or absence of a confidential relationship invariably requires a series of factual findings and generally rests with the finder of fact, i.e., the jury, at trial."

First, SunSource and Allied provided confidential information to GE and Strickland solely for a corporate purpose. "It was not disclosed in idle conversation or for some other purpose." *Lund*, 570 F.Supp. at 1403; *see* Counter Statement of Facts, *supra* ("Facts") §§ A, C. *See also* Hearing Tr. at 60-61.

Second, the information was conveyed under mutual expectations, and acknowledgments, of confidentiality. *See* Facts §§ C, D. SunSource and Allied witnesses unanimously testified that they expected and trusted GE (and Strickland) to keep the

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[10] *See also, SEC v. Lund*, 570 F. Supp. 1397, 1403 (C.D.Cal. 1983) (Lund liable as a "temporary insider" (coining the term) of company with whom he had no formal ties, except through relationship with board member); *SEC v. Tome*, 638 F. Supp. 596, 603-05, 621 (S.D.N.Y. 1986) (friend of board member, and *informal* consultant to company liable as temporary insider, though board member "didn't think it was necessary" to caution him that information was confidential (605)); *SEC v. Softpoint, Inc.*, 958 F.Supp. 846, 864 (S.D.N.Y. 1997) (consultant liable to company as temporary insider); *Cf, U.S. v. Newman*, 664 F.2d 12, 15, 18 (2d Cir. 1981) (investment banking firm employees liable for tipping about firm clients); *SEC v. Materia*, 745 F.2d 197 (2d Cir. 1984) (employee of financial printing company liable for purchasing stock following receipt of confidential information from employer's clients); *Shapiro v. Merrill Lynch*, 495 F.2d 228, 237 (2nd Cir. 1974) ("investment banker had access to material information when working on a proposed public offering for the corporation.") *Shapiro*, *Newman*, and *Materia* were decided before *Dirks* recognized the temporary insider theory. The Court of Appeals in *Chestman*, 947 F.2d at 567, recognized that "a temporary insider trading theory might well have covered activities of the investment banker in *Newman* and printer in *Materia*," had the temporary insider theory been established at the time.

information about the Allied Acquisition confidential. Facts § D. GE witnesses, including Strickland, similarly testified that they knew they were obligated to keep the information about the Allied Acquisition confidential. Facts §§ B, C, D.

Third, these mutual expectations of confidentiality of the parties arose out of an obvious confidential relationship between GE and SunSource. *See* Hearing Tr. at 65. The confidential relationship arose not only out of the extremely-sensitive nature of a public company acquisition, but also the confidential discussions between the parties (*see* Slosberg Dep. at 109:11-20), and the "extremely confidential" Deal Book that Allied prepared and distributed to lenders and potential lenders, that GE accepted and reviewed. *See* Facts §§ B, C, D. Even Black admitted that SunSource must have trusted GE as a "financial advisor." Black Test. at 151:15-18.

Once again, defendants latch onto the absence of a written confidentiality agreement to support their argument that Strickland (and presumably every other GE employee, and every lender or potential lender on the deal) could have tipped and traded SunSource stock with impunity. This argument, besides being ludicrous, ignores the record. SunSource, Allied, and GE witness, including Strickland, all testified that the lack of a confidentiality agreement -- more of an exception than the norm in 2001 -- was unimportant to the existence of their duty of confidentiality. *See* Facts § B. Defendants also overlook the case law holding that a temporary insider relationship does not at all depend on a formal or written (or exclusive) agreement. *See Dirks*, 463 U.S. at 655, n. 14 (relationship must at least "imply" duty); *Tome*, 638 F. Supp. at 605 (relationship between Tome and company "not memorialized as a formal relationship"); *Lund*, 570 F. Supp. at 1403 (friendship and informal business association sufficient to "imply" information was to be kept confidential).

Nevertheless, in this case, the Deal Book issued by Allied, accepted and reviewed by

GE and Strickland, does represent a written confidentiality agreement that was binding on the recipients. *See* Corvino Dep. at 273, 575-76; Russell Dep. at 307-08. If there is any ambiguity that *"your institution"* covered GE, it must be read in favor of the SEC.

III. STRICKLAND OWED A FIDUCIARY DUTY TO HIS EMPLOYER, GE

Defendants do not dispute that Strickland owed a fiduciary duty to his employer, GE. Facts § B. That duty arises under hornbook fiduciary law, both in the insider trading context and under the common law. *See U.S. v. Libera*, 989 F.2d 596, 600 (2d Cir. 1993) (discussing employer-employee duty in insider trading cases); *Design Strategy, Inc. v. Davis*, 469 F.3d 284, 300 (2d. Cir. 2006) (discussing common law duty).

Here, Strickland's duty of trust and confidentiality to GE, heightened in the context of a public company transaction (Brasser Dep. at 302), mandated that Strickland was to refrain from disclosing any material confidential information obtained on the job, unless (a) there was a real business need; and (b) appropriate safeguards were taken. Facts § B. Neither of these elements existed to excuse Strickland's tip to Black. Facts § K.

IV. STRICKLAND BREACHED HIS FIDUCIARY DUTIES BY TIPPING BLACK

The direct and indirect evidence establish that Strickland knowingly or recklessly disclosed the nature of the Allied Acquisition to Black on the morning of May 24, 2001 (and perhaps on other occasions, including at a restaurant). As described above, Obus admitted on two separate occasions that he was tipped off to the Allied Acquisition: once to Andrien, CEO of SunSource; once to Russell, CFO of Allied Capital. Facts §§ F, H. Obus not only disclosed the source of his information to Andrien (*"GE"*), but a detail that he only could have learned from an insider -- that the buyer of SunSource was a *"financial buyer."* Andrien Test. at 134-35. This "financial buyer" detail was echoed in the call from fellow investor and Obus acquaintance, Alan Weber, corroborating the detail in the tip from

Strickland. Andrien Test. at 125-27.

The circumstantial evidence in the record independently establishes that Strickland tipped material inside information. *See Singer,* 786 F.Supp. 1158, 1165 (discussing circumstantial types of indirect evidence in insider trading cases). It includes: (a) the close friendship, and frequent communications, between Black and Obus; (b) Strickland's May 24 call to Black in which Strickland not only admittedly discussed SunSource, but also that GE was "working on a financing" for SunSource (Defendants' Rule 56.1 statement, ¶ 105); (c) the immediacy of Black's conversation with Obus about the Strickland call; (d) the immediacy of Obus's call to Andrien about the Strickland call -- a vague general call would not have prompted such immediacy; (e) Alan Weber's strikingly similar call to Andrien, on the same day, discussing a "financial buyer"; (f) Black's outraged reaction to Obus's call to Andrien ("you're going to get my friend fired"); (g) Obus's "ashen and upset" discussion with Black afterwards, in which Obus said he would find a job for Strickland if he was fired; (h) the proximity between the May 24 conversations and Obus's June 8 trade; (i) the uncharacteristic nature of the June 8 trade, which turned a quick $1.3 million profit; and (j) the unusual meetings between the defendants in 2002 ("like out of the movie Wall Street"). *See* Facts §§ E-H, K.

The jury certainly is able to infer from these admissions and suspicious facts that insider tipping and trading occurred. At the very least, the evidence is sufficient under Second Circuit precedent to create a genuine issue of fact that Strickland knowingly or recklessly tipped Black, even in the face of Black's self-serving, hearsay-ridden claim that Strickland only shared "high-level stuff" with him on the May 24 call. *See Singer, Thrasher, Musella, Warde,* discussed *supra*. Only the jury is entitled to decide who is telling the truth.

Through the tip of material inside information, Strickland violated his fiduciary duty to

SunSource and Allied. Facts §§ C, D. *See also,* Black Test. at 149:15-19 ("Wait a second. You guys, you know, you are supposed to be my financial advisors and you guys have got some guy on your team who is talking about it.") Strickland also violated his fiduciary duty to GE. Facts § B. Strickland stole valuable information from GE, Allied, and SunSource, defrauded all three entities "as surely as if [he] took their money," and sullied the reputation of GE as a "safe repository of client confidences." *See Newman,* 664 F.2d at 17; *Gaspar,* 1985 WL at *17.

Though defendants' claim that Strickland's call arose out of some kind of due diligence effort by Strickland (a factual question), the evidence points to the contrary: The tip was not given for a legitimate business purpose. Facts § I. There was no business need for Strickland to chat informally with Black on the phone about his client, or at a restaurant, beer-in-hand. Strickland took no precautions. He was, at the very least, reckless that the material inside information would be misused by Black, an analyst at a hedge fun specializing in small-cap value companies, like SunSource. Obus Dep. at 38:15-18. The information was indeed misused by Wynnefield, to Strickland's surprise. Strickland Dep. at 133-34, 140.

V. OBUS AND BLACK KNEW WHAT THEY AND STRICKLAND DID WAS WRONG

The Commission also has established that Obus and Black were negligent (knew or should have known) that Strickland violated a fiduciary duty with his tip. As with the existence of a tip, a defendant's scienter is often established through circumstantial evidence, because "the SEC and the courts are not required to read the parties' minds." *Dirks*, 463 U.S. at 663-64; *SEC v. Musella*, 578 F.Supp. 425, 442 (S.D.N.Y. 1984), quoting *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983) ("The proof of scienter in fraud cases is often a matter of inference from circumstantial evidence. If anything, the difficulty of proving the defendant's state of mind supports a lower standard of proof than a preponderance of the

evidence. In any event, we have noted elsewhere that circumstantial evidence can be more than sufficient.")[11]

Here, there is no question that Obus and Black knew or should have known that Strickland's tip violated fiduciary duties owed by Strickland. As this Court opined, "[I]t was obvious, it's an obvious inference based on sufficient facts as alleged in this complaint, that they were clearly aware that the use of this information in the manner it was alleged … would have been in violation of a duty not to disclose this information in order to trade on this information." Hearing Tr. at 61.

Obus and Black are professionals in the securities and financial industries, and officers of public companies. Their livelihood is based on researching and investing in small public companies like SunSource. Obus Dep. at 38. They are well aware of the "quintessentially material" nature of mergers and acquisitions of public companies. *See Svoboda*, 409 F.Supp. at 342 (citations omitted); *SEC v. Geon Industries,* 531 F.2d 39, 47 (2d Cir. 1976) ("[A] merger in which it is bought out is the most important event that can occur in a small corporation's life, to wit, its death…")*; SEC v. Materia*,745 F.2d at 199 ("Because even a hint of an upcoming tender offer may send the price of the target company's stock soaring, information regarding the identity of a target is extremely sensitive and zealously guarded."); *see* Obus Dep. at 26-27 (merger and acquisition is material information); Black Dep. at 18-19 ("if someone said this company is for sale, and it had not been announced to

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[11] Defendants argue that Black did not know exactly what Strickland did at GE, or for whom. But even if true, such detailed knowledge is not necessary to establish scienter. The SEC does not need to show that Black or Obus knew what Strickland did for a living, how the fiduciary breach occurred, the source of the information, or even who the insider was. *See Thrasher*, 152 F.Supp.2d 291, 305 (citing cases). "To defeat a motion for summary judgment, the Plaintiff need only identify facts that could lead a reasonable jury to find the Defendant knew a breach had occurred." *Id.* Indeed, in *Musella*, 678 F.Supp. 1060, this Court granted summary judgment in favor of the SEC when the tippee did not even know who the tipper was. "It was enough that circumstantial evidence showed that defendants should have known that fiduciary duties were being breached with respect to confidential, non-public information." *Id.*, 678 F.Supp. at 1063. *See also, SEC v. Sekhri*, 1998 WL 259932, at *2 (S.D.N.Y. May. 21, 1998) ("it is not necessary to establish a direct link to the original tipper.")

the public yet, that would be material inside information which would preclude you from obviously buying the stock.")

Black himself admitted that Strickland's call, if it got back to GE, could get Strickland fired. Black Test. at 151. Black knew that SunSource trusted GE like a "financial advisor." Black Test. at 149:15-19. Obus admitted that "I wouldn't have made the call…." Obus Test. at 168:5. Finally, Obus's and Black's circumspect and unusual conduct after the tip and after the trade (*see* Facts §§ F, H, K) are "facts supporting the inference of defendants' consciousness of guilt." *See Singer*, 786 F.Supp. at 1165 n. 1.

VI. STRICKLAND BENEFITTED FROM THE TIP

Defendants do not appear to dispute that Strickland personally benefited from his tip to Black, vis-à-vis the goodwill and close friendship of Black, not to the mention the appreciation from Obus who said he would get Strickland a job if he was fired. *See Dirks*, 463 U.S. at 664 (personal benefit element exists when tipper makes gift of confidential information to a friend).

VII. THE "DECEPTION" ELEMENT IS SATISFIED BY THE BREACH, TIP, AND TRADE

In this case, the "deceptive conduct" element of Section 10b and Rule 10b-5 is satisfied by Strickland's breach of his fiduciary duties to GE and SunSource, and Wynnefield's trading while in possession of material inside information. *See O'Hagan*, 521 U.S. 642, 651-52 (1997). The SEC need not establish any additional deceit, malice, or deceptive conduct by any party.

Defendants reliance on the Texas district court decision, *SEC v. Cuban*, 2009 WL 2096166 (N.D. Tex. July 17, 2009), *on appeal*, is misplaced. *Cuban* is, of course, not controlling, has been appealed by the SEC (notice of appeal filed October 7, 2009), and its facts and holding are neither on-point, nor persuasive. There was no traditional fiduciary

duty, or breach, in *Cuban*, either by an employee to his employer, or by a temporary insider to his client. The court thus had to dig deeper to determine if Mark Cuban was under any other obligations to refrain from trading. This Court is not faced with such a challenge. Strickland's fiduciary breaches, and Wynnefield's insider trade, are inherently deceptive.[12]

CONCLUSION

For the foregoing reasons, defendants' motions for summary judgment should be denied, and the case set for trial.

Dated: October 13, 2009

Respectfully submitted,

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[12] As for Black's argument that Obus's "little birdie" call to Andrien eliminated all deceit surrounding Wynnefield's illegal trade, that argument has no basis in fact or law. The only way Obus or Wynnefield could have traded legitimately while in possession of material inside information would have been to make "full disclosure" before the trade to GE and the investing public. *See SEC v. Texas Gulf Sulfur Co.*, 401 F.2d 823, 848 (2d Cir. 1968); *Dirks*, 463 U.S. at 653, n. 12; *O'Hagan*, 521 U.S. at 2209. One cryptic call, to one person, does not satisfy Strickland's or Wynnefield's "abstain or disclose" obligations.