Nos. 13-1837-cr(L), 13-1917-cr(CON)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

TODD NEWMAN and ANTHONY CHIASSON,

Defendants-Appellants.

MOTION OF DEFENDANT-APPELLANT ANTHONY CHIASSON FOR RELEASE PENDING APPEAL

Appeal from the United States District Court
for the Southern District of New York, No. 12 Cr. 121
Before the Honorable Richard J. Sullivan

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Pursuant to Federal Rules of Appellate Procedure 9(b) and 27 and 18 U.S.C. §§ 3141(b) and 3143(b), Anthony Chiasson moves for an order granting bail pending his appeal from his criminal conviction for insider trading. On May 13, 2013, following a jury trial before the Honorable Richard J. Sullivan (SDNY), Chiasson was sentenced to 78 months' imprisonment.[1] Judge Sullivan denied Chiasson's application for bail pending appeal, and set a surrender date of August 13, 2013.[2] Chiasson filed a Notice of Appeal to this Court on May 15, 2013.

PRELIMINARY STATEMENT

This is a paradigm case for bail pending appeal. Anthony Chiasson undisputedly poses no risk of flight or danger to the community. He intends to raise on appeal an important question relating to the proof required to convict a remote and passive "tippee" for insider trading. That question has explicitly and recently divided SDNY judges. If resolved in his favor, his conviction would be reversed. It is, therefore, precisely the kind of substantial question that warrants bail.

Chiasson, the co-founder of a hedge fund, was convicted of insider trading relating mainly to the fund's trades in two stocks. The government alleged that the

[1] The sentence also included a $5 million fine, a term of supervised release, a special assessment, and a forfeiture amount yet to be determined.

[2] The jury also convicted Chiasson's co-defendant Todd Newman. Newman's application for bail pending appeal is pending before this Court. We have requested that both applications be heard together by the same panel. We adopt Newman's argument and refer to his bail application herein as "Newman Mot."

trades were based on confidential financial information provided by insiders in breach of their fiduciary duties to the issuers. Chiasson never met, spoke, or communicated with those insiders; the government alleged that he received confidential information fourth- or fifth-hand, after it passed through various intermediaries. Chiasson did not participate in the "tipping" by the insiders; on the government's evidence, he was the passive recipient of information who then traded on it. He did not know who the insiders were, who they initially "tipped," or the circumstances under which the insiders provided information. According to the government's case, he knew only that some of the information came from sources within the issuers. Most importantly, there was no evidence that Chiasson knew that the "tippers" had fraudulently breached their duties by disclosing the information for personal gain. Though the government claimed that the insiders had disclosed information for personal gain,[3] it did not prove and the jury was not required to find that Chiasson knew this.

The government's failure to prove Chiasson's knowledge that the tippers exchanged information for a personal benefit is fatal to his conviction. The Supreme Court has held that, under the "classical theory" of insider trading,

[3] The government claimed that the original tippers were Rob Ray, a Dell employee, and Chris Choi, who worked at NVIDIA. Neither Ray nor Choi testified at the trial, and neither has been charged. The proof that either man disclosed information for personal benefit was extremely weak. However, what matters here is Chiasson's lack of knowledge of the tippers' purported personal gain, assuming for argument's sake that the government's proof of their gain sufficed.

insiders fraudulently breach their fiduciary duties only when they disclose material nonpublic information for the "improper purpose of exploiting the information for their personal gain." *Dirks v. SEC*, 463 U.S. 646, 659 (1983). "Absent some personal gain, there has been no breach of duty to stockholders. And absent a breach by the insider, there is no derivative breach" by any tippee. *Id.* at 662.

We will argue on appeal that Chiasson could not be guilty of insider trading unless he knew that the original tippers were acting for personal gain. There is no "general duty . . . to forgo [trading] based on material, nonpublic information." *United States v. O'Hagan*, 521 U.S. 642, 661 (1997) (internal quotation marks omitted). The Securities Exchange Act criminalizes only conduct done "willfully," *i.e.*, with a realization that one's actions violate the securities laws. *United States v. Cassese*, 428 F.3d 92, 98 (2d Cir. 2005). Accordingly, the government had to prove that Chiasson knew that the information he obtained was the product of illegal conduct, that is, of a fraudulent fiduciary breach by an insider acting for personal gain.

This argument is plainly "substantial," as it has been accepted by three judges of the Southern District of New York: Following *Dirks*, courts in three other cases have held that a tippee can be guilty of insider trading only if the tippee knew that confidential information was disclosed by a corporate insider *for personal benefit*. *See United States v. Whitman*, 12 Cr. 125 (JSR), 2012 WL

5505080, at *6 (S.D.N.Y. Nov. 14, 2012); *United States v. Rajaratnam*, 802 F. Supp. 2d 491, 498-99 (S.D.N.Y. 2011); *State Teachers Ret. Bd. v. Fluor Corp.*, 592 F. Supp. 592, 594-95 (S.D.N.Y. 1984). Although the defense cited these authorities, Judge Sullivan refused its request to instruct the jury that the government had to prove such knowledge. In rejecting the proposed jury instruction, the judge relied on this Court's decision in *SEC v. Obus*, 693 F.3d 276 (2d Cir. 2012). But the issue Chiasson raised was neither presented nor decided in *Obus*, and Judge Rakoff's decision in *Whitman* post-dated and cited *Obus*.

At a minimum, the conflict between Judge Sullivan's rulings and those of other judges demonstrates that the issue is debatable, and therefore raises a substantial question warranting bail. Furthermore, *Obus* was decided nearly four years after Chiasson's alleged crimes. While we do not believe that *Obus* announced a new rule of law, the district court's holding raises a separate issue: The application of a new, more expansive rule of insider trading liability to Chiasson's case would deprive him of due process and fair notice, and would still warrant reversal. Accordingly, Chiasson is entitled to bail pending appeal.

FACTUAL BACKGROUND

A. The Government's Insider Trading Allegations

The government alleged that Chiasson, co-defendant Todd Newman, and others engaged in criminal insider trading relating primarily to transactions in

securities of Dell, Inc. ("Dell") and NVIDIA Corporation ("NVIDIA"). The indictment charged Chiasson with one count of conspiracy to commit securities fraud and five substantive counts under Section 10(b) and SEC Rule 10b-5.

At trial, the government contended that an insider at Dell and another at NVIDIA had leaked inside information regarding those companies' quarterly financial results in advance of public earnings announcements, and that through a "tipping chain" this information reached a close circle of friends working as analysts at different hedge funds and financial institutions. The Dell and NVIDIA insiders did not know that their information made its way to these analysts, and they knew nothing of Anthony Chiasson, who learned the information fourth- and fifth-hand from an analyst who worked at Level Global, his hedge fund. There was no evidence that Chiasson received confidential information directly from anyone at Dell or NVIDIA, or that he did anything to facilitate the insiders' leaks.

As to Dell, the government contended that Rob Ray of Dell's investor relations department gave information to Sandy Goyal, an analyst at Neuberger Berman. Ray allegedly shared information with Goyal because Goyal was providing Ray with "career advice." (Tr. 3343).[4] Goyal in turn gave the information to Diamondback Capital analyst Jesse Tortora, who relayed it to others including Level Global analyst Sam Adondakis. (Tr. 52-53). The government

[4] All cited transcript pages and trial exhibits are attached to the declaration of Alexandra A.E. Shapiro ("Shapiro Decl.") as Exhibits F and G, respectively.

contended that Adondakis then passed the Dell information to Chiasson. (Tr. 53). Similarly, the government contended that Chris Choi of NVIDIA's finance unit allegedly gave information to Hyung Lim, who was a family and church friend. (Tr. 3031-33). Lim in turn passed the information to Danny Kuo, an analyst at Whittier Trust, who circulated the information to Adondakis (among others), who gave the information to Chiasson. (Tr. 61-63).

B. The Lack of Evidence Regarding Chiasson's Knowledge

At trial, there was no evidence that Chiasson knew whether Ray or Choi had expected or received any personal gain in exchange for their tips. Chiasson never met Rob Ray or Chris Choi. There was no evidence that he knew who they were, and or had any dealings with the individuals they supposedly tipped. There was no evidence that Chiasson knew anything about the tippers' initial disclosures: He was entirely ignorant of the relationship between the tippers and their tippees, or why the insiders provided the information.

Whatever Chiasson knew about the source of the information came from his analyst, Sam Adondakis, and Adondakis himself did not know anything about the relationship between the insiders and their immediate tippees. Adondakis knew only that Sandy Goyal had a "contact" at Dell. He did not know the insider's position or what, if anything, he was receiving in exchange for providing Goyal with information. (Tr. 1705, 2210-12, 2249-50, 2504-05).

As to NVIDIA, Adondakis testified that Kuo had a church friend who knew an accounting manager at NVIDIA. (Tr. 1884-85, 2107-08). Adondakis knew nothing about the relationship between the church friend and the NVIDIA insider, or about any benefit that the insider received. Adondakis merely told Chiasson that Goyal "was talking to someone within Dell," and that a friend of a friend of Tortora would be getting NVIDIA information. (Tr. 1708, 1878). Adondakis testified that he did not specifically tell Chiasson that the source of the NVIDIA information worked at NVIDIA. (Tr. 1878-79). Thus, Chiasson did not know who the Dell and NVIDIA insiders were, who they supposedly "tipped," or why they had done so. He did not know, and had no way of knowing, that the insiders had shared information for personal gain.

Adondakis testified that he told Chiasson that the information came from company insiders, sometimes described without elaboration as "sources" or "contacts." (*E.g.*, Tr. 1878). However, as an analyst, it was Adondakis' job to solicit information from companies, and Adondakis often provided Chiasson with nonpublic information from well-placed corporate employees who selectively disclosed information not for personal gain, but for corporate reasons. For example, Adondakis' job required him to contact investor relations departments at various companies, including Dell and NVIDIA. (Tr. 1830-31, 2029, 2187-88, 2196-97, 2216, 2336, 2345-46). Those departments are "responsible for

communicating to investors specifics about the company and what's going on in the company." (Tr. 1830). Adondakis often obtained specific, significant financial information from a company's investor relations group before that information was released publicly.[5] There was no plausible basis to infer that Chiasson knew that information he received had been disclosed in expectation of personal gain, rather than for some other purpose or even inadvertently or foolishly.

C. The District Court's Jury Instructions

In *Dirks*, the Supreme Court held that a tippee's insider trading is unlawful only if based on information received from a corporate insider who fraudulently breached his fiduciary duty by disclosing the information for a personal benefit, and only if the tippee knew of the breach. 463 U.S. at 660, 662.[6] Relying on

[5] For example, in November 2008 during the "blackout" period before the public disclosure of quarterly results, Adondakis told Chiasson that Dell's investor relations department was telling people "offline" that the company's earnings per share would be at least 30 cents. (Tr. 2149-51; DX 900; DX903). Additionally, Adondakis told Chiasson about conversations with NVIDIA's investor relations personnel who "did not flinch" when asked if a sell side analyst's estimates were reasonable and indicated that gross margin "should be flattish." (Tr. 2036-38, 2345; DX 2198; DX 2199). Adondakis also relayed nonpublic gross margin information from investor relations departments at other companies. (Tr. 2187-90, 2196-98; DX 5048; GX 1102). (*See also* Newman Mot. 7-8, nn. 5 & 6).

[6] *Dirks* and some other civil cases use the phrase "knows or should know." 463 U.S. at 660. But in criminal cases the standard is actual knowledge, because only "willful" violations of the securities laws can be criminal offenses. *See*, *e.g*, *United States v. Falcone*, 257 F.3d 226, 232 (2d Cir. 2001). This was undisputed below, and the district court so charged the jury. (*See* Tr. 3594, 4028). However, there was a sharp dispute about *what* the defendant needs to know. The government argued that Chiasson could be convicted if he knew of any breach of

Dirks, the defendants moved for a judgment of acquittal, arguing both that the evidence did not show that the Dell and NVIDIA insiders received a personal benefit, and that there was no proof that the defendants knew about any exchange of information for personal gain. (Tr. 3337-77). The defendants also sought an instruction that the jury must find that a defendant knew that an insider had disclosed information for personal gain to find him guilty. (Tr. 3346-53).

Judge Sullivan reserved decision on the dismissal motions, remarking that the legal issues "are interesting ones and don't come up in every insider trading case." (Tr. 3377). At the charge conference, the court described the knowledge-of-personal-benefit issue as an "interesting question," and acknowledged that the defendants' position was "supportable certainly by the language of *Dirks*." (Tr. 3595, 3604). But the court held ultimately that it was bound by this Court's decision in *Obus*, *supra*, which the district court read to allow tippee liability without knowledge of the insider's personal benefit. (Tr. 3595-96, 3604-05). Accordingly, the jury was not charged that it had to find that Chiasson knew that the insiders disclosed the information for personal gain.[7]

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confidentiality by an insider. The defense argued, based on *Dirks* and its progeny, that Chiasson had to know that the insider's breach occurred in contemplation of personal gain, for it is the expectation of personal gain that makes the insider's breach fraudulent and actionable under the securities laws. *See* pp. 12-14, *infra*.

[7] The district court later denied the motions for acquittal. (Shapiro Decl. Ex. D).

Instead, Judge Sullivan charged the jury that the government must prove: (1) that the Dell and NVIDIA insiders had a "fiduciary or other relationship of trust and confidence" to their corporations; (2) that they "breached that duty of trust and confidence by disclosing material, nonpublic information"; (3) that the insiders "personally benefitted in some way" from the disclosure; (4) "that the defendant you are considering knew the information he obtained had been disclosed in breach of a duty"; and (5) that the defendant used the information to purchase a security. (Tr. 4028; *see also* Tr. 4033). These instructions erroneously communicated that insiders can breach their duty by disclosing inside information, even without a personal benefit motive, and that all a trading tippee needs to know to be guilty is that an insider disclosed information improperly, without any understanding that the insider's disclosure of confidential information was made for personal gain.

D. The District Court's Opinion With Respect To Todd Newman

The district court denied Newman's request for bail pending appeal. (Shapiro Decl. Ex. B). It stated that the appeal does not present a "substantial question" because *Obus* "makes clear" and "directly decided" that a tippee need not know that the tipper received a personal benefit; that requiring such knowledge would add "a totally new element"; and it dismissed the three other district court decisions reaching the opposite conclusion. (*Id.* at 2-4). The court denied Chiasson's request for bail, citing the Newman order. (Shapiro Decl. Ex. A).

ARGUMENT

A defendant is entitled to bail pending appeal if there is clear and convincing evidence that he is not likely to flee or pose a danger to public safety, and "that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in . . . reversal [or] an order for a new trial." 18 U.S.C. § 3143(b)(1)(B). As Chiasson does not present a risk of flight or danger to the community,[8] the issue is whether his appeal presents a "substantial question."

I. This Appeal Raises A Substantial Question Of Law

Entitlement to bail pending appeal does *not* require a finding that the district court erred, or that reversal is the most likely outcome on appeal. The Court need only find the presence of a substantial question that, *if* resolved in appellant's favor, would result in reversal or a new trial. *United States v. Randell*, 761 F.2d 122, 124-25 (2d Cir. 1985). A "substantial question" is "one of more substance than would be necessary to a finding that it was not frivolous. It is a 'close' question or one that very well could be decided the other way." *Id.* at 125 (quoting *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985)).

The question presented here—whether a tippee can be held criminally liable for insider trading absent knowledge that the insider disclosed information for

[8] (*See* PSR p. 31). The government has never suggested that Chiasson poses a risk of flight or danger. Chiasson is a US citizen who lives in New York City with his wife and two young children. He has fully complied with his conditions of release.

personal gain—plainly satisfies this standard.[9]

An important starting point is the recognition that not all "insider trading" violates the securities laws. The Supreme Court has repeatedly and soundly rejected the government's invitation to "recognize[e] a general duty between all participants in market transactions to forgo actions based on material, nonpublic information." *Chiarella v. United States*, 445 U.S. 222, 233 (1980); *see also Dirks*, 463 U.S. at 656 (rejecting SEC's argument "that anyone who knowingly receives nonpublic material information from an insider has a fiduciary duty to disclose before trading"). As the Court explained in *Chiarella*, "neither the Congress nor the Commission ever has adopted a parity-of-information rule." 445 U.S. at 233.[10] Thus, what the government arguably proved as to Anthony Chiasson—that he traded based on material nonpublic information that he knew came from an issuer—does not establish criminal liability.

More is required. "Insider trading" violates Section 10(b) and Rule 10b-5 only if it is fraudulent.[11] *Id.* at 234-35. And an insider's disclosure of material

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[9] Chiasson also intends to raise other appellate issues, but we do not discuss them here because the "knowledge of personal benefit" issue is plainly "substantial" within the meaning of the bail statute.

[10] *Id.* at 235 ("[A] duty to disclose under § 10(b) does not arise from the mere possession of nonpublic market information. The contrary result is without support in the legislative history of §10(b) and would be inconsistent with the careful plan that Congress has enacted for regulation of the securities markets.").

[11] Section 10(b) prohibits the use "in connection with the purchase or sale of any security . . . [of] any manipulative or deceptive device or contrivance in

nonpublic information is fraudulent only if the insider breached his fiduciary duty to shareholders in order to obtain a "personal gain." *Dirks*, 463 U.S. at 662; *id.* at 654 ("In an inside-trading case th[e] fraud derives from the inherent unfairness involved where one takes advantage of information intended to be available only for a corporate purpose and not for the personal benefit of anyone." (internal quotation marks omitted)).

A tippee's trading therefore is not unlawful unless the tipper committed fraud by providing the information for personal gain. "[T]he tippee's duty to disclose or abstain [from trading] is derivative from that of the insider's duty." *Dirks*, 463 U.S. at 659. Thus, a tippee breaks the law only if the tipper acted for personal benefit:

> [T]he test is whether the insider personally will benefit, directly or indirectly, from his disclosure. Absent some personal gain, there has been no breach of duty to stockholders. And absent a breach by the insider, there is no derivative breach.

Id. at 662. *See also id.* at 660. Accordingly, this Court and other Circuits have repeatedly held that the tipper's personal benefit motive is what separates legal

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contravention" of SEC rules. 15 U.S.C. § 78j(b). Rule 10b-5 in relevant part prohibits "employ[ing] any device, scheme, or artifice to defraud," or "engag[ing] in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5(a) & (c). The Supreme Court has noted that Section 10(b) and Rule 10b-5 are "catchall provision[s]," but has cautioned that "what [they] catch[ ] must be fraud." *Chiarella*, 445 U.S. at 235.

trading by a tippee from fraudulent insider trading.[12]

Because the tipper's personal gain is the key fact that determines whether a tippee's trading is illegal, knowledge of that fact is an essential element of the crime. There is no criminal liability for insider trading unless the defendant acted "willfully." 15 U.S.C. § 78ff(a); *see O'Hagan*, 521 U.S. at 665 (Congress intended willfulness standard to provide a "sturdy safeguard[ ]" in insider trading cases). Here, "willfulness" requires subjective knowledge of unlawful conduct: "'a realization on the defendant's part that he was doing a wrongful act' under the securities laws." *Cassese*, 428 F.3d at 98 (quoting *United States v. Peltz*, 433 F.2d 48, 55 (2d Cir. 1970)); *see also Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 n.9 (2007). Indeed, this Court applies a higher *mens rea* standard in insider trading cases than in other securities offenses: "Unlike securities fraud, insider trading does not necessarily involve deception, and it is easy to imagine an insider trader who receives a tip and is unaware that his conduct was illegal and therefore

[12] *See Falcone*, 257 F.3d at 230 (Sotomayor, J.) ("[T]he tippee could not be held liable for a federal securities fraud violation simply because he or she in fact traded in securities . . . based on material nonpublic information. Rather, the key factor was the tipper's intent in providing the information."); *SEC v. Yun*, 327 F.3d 1263, 1276 (11th Cir. 2003) ("[T]he Supreme Court has required that the only way to taint a tippee with liability for insider trading is to find a co-venture with the fiduciary, and that co-venture exists only if the tipper intends to benefit."); *SEC v. Maio*, 51 F.3d 623, 632 (7th Cir. 1995) ("An insider's disclosure is improper when corporate information, intended to be available only for corporate purposes, is used for personal advantage. . . . Absent such improper disclosure by the tipper, a *tippee* is not liable, because the tippee's duty is derivative." (emphasis in original)).

wrongful." *United States v. Kaiser*, 609 F.3d 556, 569 (2d Cir. 2010).

A defendant cannot act "willfully" if he is unaware of a *fact*—here the insider's personal benefit motive—that transforms otherwise innocent conduct into an illegal act. *E.g.*, *Safeco*, 551 U.S. at 57 n.9 ("'[W]illful' or 'willfully' . . . in a criminal statute . . . limit[s] liability to knowing violations."). Although *Dirks* was a civil case, the Supreme Court cited with approval those authorities that "have expressed the view that tippee liability exists only where there has been a breach of trust by an insider *of which the tippee had knowledge*." 463 U.S. at 660 n.20 (emphasis added). Even where criminal statutes do not require knowledge of unlawfulness, the Supreme Court requires proof that the defendant knew all the *facts* that "separate[e] legal innocence from wrongful conduct." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994) (requiring proof of defendants' awareness that performers in pornographic film were underage); *Staples v. United States*, 511 U.S. 600, 615 (1994) (requiring proof of knowledge that a semi-automatic rifle had been converted into an illegal machinegun).

Applying these principles, three SDNY judges have concluded that a tippee must know that the tipper acts for personal gain in order to commit insider trading. As Judge Rakoff reasoned most recently in *Whitman*:

> [I]f the only way to know whether the tipper is violating the law is to know whether the tipper is anticipating something in return for the unauthorized disclosure, then the tippee must have knowledge that such self-dealing occurred, for, without such a knowledge

> requirement, the tippee does not know if there has been an "improper" disclosure of inside information.

2012 WL 5505080, at *6; *see Rajaratnam*, 802 F. Supp. 2d at 499 ("[U]nless the tippee knew . . . that the tipper had satisfied the elements of tipper liability, the tippee cannot be said to be a knowing participant in the tipper's breach." (quoting *Fluor*, 592 F. Supp. at 595)). *See also Hernandez v. United States*, 450 F. Supp. 2d 1112, 1118 (C.D. Cal. 2006) ("[U]nder *Dirks*, an outsider who receives material nonpublic information (*i.e.*, 'tippee') can be liable under § 10(b) / Rule 10(b)-5 if the tippee had knowledge of the insider-tipper's personal gain.").

The court below relied on this Court's decision in *SEC v. Obus* to dispense with this critical *mens rea* element. This was wrong. *Obus* did not address whether knowledge of the insider's personal benefit is required to sustain a criminal insider trading case against a tippee. The issue was not before the Court, and the Court had no occasion to reach it. (*See* Newman Mot. at 15-16). The question in *Obus* was whether the SEC's civil case against an alleged tipper and two tippees could withstand summary judgment under the misappropriation theory of insider trading.[13] The SEC contended that Strickland, an employee of GE Capital, which was advising the prospective acquirer of another company,

[13] *Obus*' failure to address knowledge of personal benefit cannot be read to alter the elements of the crime in classical theory cases such as this, as to which the personal benefit requirement is well settled. *See generally Whitman*, 2012 WL 5505080, at *5; Newman Mot. at 16, n.11; *see also Obus*, 693 F.3d at 285 ("This appeal is concerned only with liability under the misappropriation theory.").

disclosed material nonpublic information about the transaction to his friend, Black, who in turn told his boss, Obus, who traded on the information. 693 F.3d at 279-80. After surveying the evolution of insider trading law in this Circuit, the Court determined that there was sufficient evidence to permit a jury to decide whether Strickland was liable for tipping Black. *Id.* at 289-91. The Court concluded that, "although the district court did not reach the issue, it is readily apparent that the SEC presented sufficient evidence that, if the tip occurred, Strickland made the tip intentionally and received a personal benefit from it" based on his friendship with Black. *Id.* at 291. The Court held that there was sufficient evidence that the tippee defendants knew or had reason to know that Strickland had breached a fiduciary duty to GE Capital, that Black tipped Obus with the intent "to curry favor with his boss," and that Obus traded with material nonpublic information. *Id.* at 292-93. The tippee defendants did not argue that they were unaware of Strickland's personal benefit, and it would have been futile for them to do so.[14] The Court thus had no reason to consider, much less decide, whether such knowledge is required.

In any event, *Obus* was a civil case and did not address what the government must prove to make out criminal willfulness. Judge Sullivan elided this issue, noting that *Dirks* is also a civil case and that he saw "no basis" for what he termed "an addition of a totally new element." (Shapiro Decl. Ex. B at 3). But no one was

[14] Black obviously knew that he and Strickland were friends, and there was evidence that Obus was aware of their friendship as well. *Id.* at 281.

asking him to add "a totally new element." As explained, longstanding precedents hold that there can be criminal liability for insider trading only if the defendant knew that his activity was unlawful, and that criminal statutes must be construed to require proof of the defendant's knowledge of all facts that convert otherwise innocent conduct into a crime. Here, the dividing line between innocent and criminal conduct is the insider's disclosure of confidential information for personal gain. Thus, the courts that had considered this issue after *Dirks* had required the government to prove that the tippee knew that the tipper was disclosing information for personal gain.

Properly read, *Obus* did not change the law. The Court's opinion noted that under *Dirks* a tipper cannot be liable unless he acts for personal benefit, and recognized that tippee liability is derivative of the tipper's unlawful conduct. Thus, the Court commented, "a tippee must have some level of knowledge that by trading on the information the tippee is a participant in the tipper's breach of fiduciary duty." 693 F.3d at 287. Since the touchstone for the tipper's breach of duty is personal benefit, it follows that the tippee must know that tipper acts for personal gain. While the opinion in *Obus* does not spell this out in so many words, its reference to the tippee's "knowledge that the tipper breached a duty" makes sense only if it refers to a breach of duty as defined in *Dirks,* which requires the tipper to act for personal gain. Judge Rakoff expressly acknowledged *Obus* in his

opinion, 2012 WL 5505080, at *5, n.6, but nonetheless concluded that *Dirks* required the government to prove the tippee's knowledge of the insider's personal benefit in a criminal case. *Id.* at *5-6. At the very least, the conflict between the decision below and Judge Rakoff's ruling demonstrates that the issue is "fairly debatable." *Randell*, 761 F.2d at 125 (internal quotation marks omitted).

Finally, if indeed this Court's 2012 decision in *Obus* altered the substantive law of insider trading in this Circuit, there is a substantial question whether the district court's application of *Obus* to Chiasson violated his due process right to notice and fair warning. The trades at issue occurred in 2008 and 2009, when it was settled that under *Dirks*, there is no breach of fiduciary duty by a corporate insider who discloses material nonpublic information—and no derivative liability for tippees—unless the tipper acted for his personal benefit. Likewise, it was the law that the tippee had to know that the tipper was acting for personal gain. *See Fluor*, 592 F. Supp. at 594-95; *United States v. Santoro*, 647 F. Supp. 153, 170 (E.D.N.Y. 1986), *rev'd on other grounds*, 845 F.2d 1151 (2d Cir. 1988).

If *Obus* dispensed with this knowledge of personal benefit requirement, due process would bar its retroactive application to Chiasson. *See, e.g.*, *United States v. Lanier*, 520 U.S. 259, 266 (1997) ("[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope."); *Casillas v.*

Scully, 769 F.2d 60, 65 (2d Cir. 1985).[15]

II. Resolution In Chiasson's Favor Will Lead To A Reversal

Resolution in Chiasson's favor of the issue discussed above would lead to a reversal of his conviction.[16] There was no evidence that Chiasson knew that the Dell or NVIDIA insiders were providing inside information in exchange for personal gain. If the law requires such proof, Chiasson's conviction must be reversed. *See United States v. Rangolan*, 464 F.3d 321, 328 (2d Cir. 2006); *United States v. Londono-Villa*, 930 F.2d 994, 1001 (2d Cir. 1991). At a minimum, Chiasson would be entitled to a new trial with a properly instructed jury.

CONCLUSION

For foregoing reasons, this Court should grant release pending appeal.

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[15] The district court's reading of *Obus* would permit prosecution of conduct that is not fraudulent, raising constitutional vagueness concerns. This broad construction would violate the Supreme Court's teaching that due process requires courts to exercise "restraint" in interpreting criminal statutes "where the act underlying the conviction . . . is by itself innocuous." *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703 (2005). *See also Skilling v. United States*, 130 S. Ct. 2896, 2930-31 (2011) (due process prohibits expanding ambiguous or vague statutes beyond "solid core" of plainly encompassed conduct); *cf. Chiarella*, 445 U.S. at 234 ("[T]he 1934 Act cannot be read more broadly than its language and the statutory scheme reasonably permit." (internal quotation marks omitted)).

[16] A ruling that the district court erred by failing to require proof of Chiasson's knowledge that the insiders acted for personal benefit would require reversal of the conspiracy count as well as all the substantive counts. Conspiracy liability requires proof that "the defendant had the specific intent to violate the substantive statutes." *United States v. Lorenzo*, 534 F.3d 153, 159 (2d Cir. 2008) (internal quotation marks omitted). Therefore, the knowledge requirement is relevant "to a conspiracy charge to the same extent as it may be for conviction of the substantive offense." *United States v. Torres*, 604 F.3d 58, 65 (2d Cir. 2010) (same).

Dated: New York, New York
May 16, 2013

Respectfully submitted,

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