

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT

3 -----

4 August Term, 2012

5 (Argued: May 21, 2013

Decided: March 25, 2014)

6 Docket No. 12-4448

7 \_\_\_\_\_  
8 UNITED STATES OF AMERICA,

9 Appellee,

10 - v. -

11 RAJAT K. GUPTA,

12 Defendant-Appellant.  
13 \_\_\_\_\_

14 Before: NEWMAN, KEARSE, and POOLER, Circuit Judges.

15 Appeal from a judgment of the United States District Court for the Southern District  
16 of New York, Jed S. Rakoff, Judge, convicting defendant of securities fraud, see 15 U.S.C. §§ 78j(b)  
17 and 78ff, and conspiracy to commit securities fraud, see 18 U.S.C. § 371, based on insider trading.

18 Affirmed.

19 RICHARD C. TARLOWE, Assistant United States Attorney, New  
20 York, New York (Preet Bharara, United States Attorney for the  
21 Southern District of New York, Damian Williams, Edward B. Diskant,  
22 Justin S. Weddle, Assistant United States Attorneys, New York, New  
23 York, on the brief), for Appellee.

1 SETH P. WAXMAN, Wilmer Cutler Pickering Hale & Dorr,  
2 Washington, D.C. (Paul R.Q. Wolfson, Megan Barbero, Daniel  
3 Aguilar, Wilmer Cutler Pickering Hale & Dorr, Washington, D.C.;  
4 Gary P. Naftalis, David S. Frankel, Alan R. Friedman, Robin M.  
5 Wilcox, Kramer Levin Naftalis & Frankel, New York, New York;  
6 Peter G. Neiman, Alan E. Schoenfeld, Wilmer Cutler Pickering Hale  
7 & Dorr, New York, New York, on the brief), for Defendant-Appellant.

8 KEARSE, Circuit Judge:

9 Defendant Rajat Gupta ("Gupta") appeals from a judgment entered in the United States  
10 District Court for the Southern District of New York on November 9, 2012, following a jury trial  
11 before Jed S. Rakoff, Judge, convicting him on three counts of securities fraud, in violation of 15  
12 U.S.C. §§ 78j(b) and 78ff, and one count of conspiracy to commit securities fraud, in violation of 18  
13 U.S.C. § 371. Gupta was sentenced principally to 24 months' imprisonment, to be followed by a one-  
14 year term of supervised release, and was ordered to pay a fine of \$5,000,000. In an amended  
15 judgment entered in February 2013, Gupta was also ordered to pay restitution in the amount of  
16 \$6,218,223.59, an order that is the subject of a separate appeal that has been held in abeyance pending  
17 decision of the present appeal. In the present appeal, Gupta challenges his conviction, contending  
18 principally that he is entitled to a new trial on the grounds that the trial court erred (1) by admitting  
19 statements of a coconspirator, recorded in wiretapped telephone conversations to which Gupta was  
20 not a party, and (2) by excluding relevant evidence offered by Gupta. For the reasons that follow, we  
21 conclude that Gupta's contentions lack merit, and we affirm the judgment.

1 I. BACKGROUND

2 At the times pertinent to this prosecution, Gupta was a member of the board of  
3 directors of The Goldman Sachs Group, Inc. ("Goldman Sachs" or "Goldman"), the global financial  
4 services firm headquartered in New York. Gupta was also involved in several financial ventures with  
5 Raj Rajaratnam (or "Raj"), founder of The Galleon Group ("Galleon"), a family of hedge funds that  
6 invested billions of dollars for its principals and clients. The present prosecution arose out of a  
7 multiyear government investigation of insider trading at Galleon which included court-authorized  
8 wiretaps of Rajaratnam's cell phone, see United States v. Rajaratnam, 719 F.3d 139, 144-45 (2d Cir.  
9 2013).

10 During its investigation, the government discovered evidence indicating, inter alia, that  
11 Rajaratnam was receiving inside information about Goldman Sachs from Gupta and trading on that  
12 information. Eventually, Gupta was charged with six counts of securities law violations. Count One  
13 of the superseding indictment on which Gupta was tried (the "Indictment") alleged, inter alia, that  
14 Gupta, Rajaratnam, "and others . . . conspire[d] . . . to commit . . . securities fraud" (Indictment ¶ 30);  
15 that "GUPTA disclosed . . . Inside Information" about Goldman Sachs "to Rajaratnam, with the  
16 understanding that Rajaratnam would use the Inside Information to purchase and sell securities" (id.  
17 ¶ 12(b)); and that Rajaratnam, knowing the information he received from Gupta was confidential,  
18 "shared the Inside Information with other coconspirators at Galleon and caused the execution of  
19 transactions in the securities of Goldman Sachs" (id. ¶ 12(c)). The object of the conspiracy was the  
20 "purchase and sale of securities" in order to "receive illegal profits and/or illegally avoid losses" (id.  
21 ¶¶ 31 and 32(b)) based on "GUPTA[']s disclos[ure of] Inside Information obtained from Goldman

1 Sachs" to Rajaratnam, which information "Rajaratnam shared . . . with other coconspirators at  
2 Galleon" (id., ¶¶ 32(a) and (d)). Gupta was convicted on the conspiracy count and on three substantive  
3 counts of securities fraud (Counts Three, Four, and Five), all relating to trades of Goldman Sachs  
4 stock by Rajaratnam based on confidential inside information Rajaratnam received from Gupta in the  
5 fall of 2008.

6 A. Evidence Supporting the Counts of Conviction

7 All of the government's evidence that Gupta passed confidential information about  
8 Goldman Sachs to Rajaratnam, on the basis of which Rajaratnam made purchases or sales of Goldman  
9 stock, was circumstantial. Most of the evidence described below was presented through testimony  
10 from employees of Galleon or Goldman, wiretapped telephone calls between Rajaratnam and other  
11 Galleon employees, records of calls made to or from telephones used by Gupta or Rajaratnam, and  
12 records as to the timing of trades by Galleon in Goldman Sachs stock.

13 1. Galleon Trades of Goldman Sachs Stock on September 23, 2008

14 At 3:15 p.m. on September 23, 2008, Goldman Sachs held a special meeting of its  
15 board of directors. The purpose of the meeting was to approve an investment of \$5 billion in  
16 Goldman by Warren Buffett. The imminent investment was highly confidential, as it was likely to  
17 have "a meaningful impact" on Goldman's stock price. (Trial Transcript ("Tr.") 1590.) It was to be  
18 announced to the public after the 4 p.m. close of trading on the New York Stock Exchange.

19 Gupta, a former managing director of the consulting firm McKinsey & Company  
20 ("McKinsey"), participated in the Goldman Sachs board meeting via telephone from a conference

1 room at McKinsey's New York office. Telephone records indicated that Gupta was on the Goldman  
2 Sachs conference call from 3:13 p.m. until 3:53 p.m.

3 At approximately 3:54 p.m., Gupta's assistant, Renee Gomes, dialed Rajaratnam's  
4 direct line; the McKinsey conference room telephone from which Gupta had participated in the  
5 Goldman Sachs board meeting was then connected to the call to Rajaratnam's line. The connection  
6 between Rajaratnam's line and the telephone Gupta used lasted approximately 30 to 35 seconds.

7 Caryn Eisenberg, Rajaratnam's assistant in 2008-2009, testified that on September 23,  
8 2008, she answered a call on his direct line at about 10 minutes before the 4:00 p.m. market close.  
9 As a general rule Eisenberg was not to put calls through to Rajaratnam near the end of the trading day,  
10 but she put the caller on hold, located Rajaratnam, and put the call through. Although at the time of  
11 trial Eisenberg no longer remembered the name of the man who was on the line, she testified that she  
12 put this call through because his name was on the short list of persons whose calls Rajaratnam would  
13 accept near the end of the trading day; she recognized his voice as that of a frequent caller; and the  
14 man said it was "urgent" that he "speak to Raj." (Tr. 238-39.)

15 Rajaratnam took the call in his office and was on the telephone only briefly. Eisenberg  
16 testified that Rajaratnam thereafter summoned Galleon cofounder Gary Rosenbach into his office and  
17 the two had a closed-door conversation. Rosenbach then "went back to his desk," picked up his  
18 telephone, "and started saying buy Goldman Sachs." (Id. at 254.)

19 Galleon trader Ananth Muniyappa testified that at approximately 3:56 p.m. on  
20 September 23, Rajaratnam, as he was hanging up his telephone, instructed Muniyappa, who was at  
21 his own desk nearby, to purchase 100,000 shares of Goldman Sachs stock. When Muniyappa  
22 determined that he would probably be unable to buy as many as 100,000 shares before the market's

1 close (he managed to buy only a total of 67,200 shares), he quickly informed Rajaratnam, who  
2 promptly instructed Rosenbach to buy Goldman stock.

3 Rosenbach proceeded to buy 200,000 shares of the stock, 150,000 for Rajaratnam's  
4 portfolio--which specialized in technology stocks--and 50,000 for Rosenbach's own portfolio.  
5 Rosenbach also bought 1.5 million shares (1,000,000 for Rajaratnam's portfolio and 500,000 for his  
6 own) of a financial-sector index fund made up of stocks of several institutions, including Goldman.  
7 Each of these trades was made in the final "three to four minutes" of the trading day (Tr. 401), i.e.,  
8 between approximately 3:56 p.m. and 4:00 p.m. In all, the Goldman Sachs stock purchased by  
9 Muniyappa and Rosenbach at the behest of Rajaratnam in the final minutes of the trading day on  
10 September 23--excluding the shares of the index fund--cost more than \$33 million.

11 Warren Buffett's \$5 billion investment in Goldman Sachs was announced at  
12 approximately 6:00 p.m. on September 23. The next morning, Goldman's stock price rose to a high  
13 nearly 7% above its September 23 closing price. A government witness testified that the profits on  
14 the above Galleon purchases of Goldman stock at the end of the trading day on September 23  
15 exceeded \$1 million.

16 Eisenberg testified that after Rajaratnam took the urgent call near the close of trading  
17 on September 23 he was smiling more than usual. (See Tr. 259.) But not everyone at Galleon was  
18 happy. Leon Shaulov was a Galleon trader and portfolio manager. Muniyappa did not buy any  
19 Goldman Sachs stock for Shaulov on September 23. Muniyappa testified that that evening, shortly  
20 after Goldman announced the Warren Buffett investment, Shaulov sent Rosenbach an email saying,  
21 "Thanks for the heads up, by the way. I'm short 170 million in financials. Not one word from anyone.  
22 Thank you very much. All I get is sick dilution. Zero help. Zero." (Id. at 441-42; see also id. at 439

1 (a "short" position is one speculating that the market price will go down).)

2 On the morning of September 24, 2008, before the stock markets opened, Rajaratnam  
3 placed two calls from his cell phone (which was wiretapped) to Ian Horowitz, his principal trader.  
4 In the first call, at 7:09 a.m., Rajaratnam began to tell Horowitz about the events of the previous  
5 afternoon:

6 RAJ RAJARATNAM: . . . . So, big drama yesterday, but I have to ....

7 IAN HOROWITZ: Yeah, I, I, I heard.

8 RAJ RAJARATNAM: Hum.

9 IAN HOROWITZ: I heard a little, um, you mean the last three minutes  
10 of the day?

11 RAJ RAJARATNAM: No, I got a call at 3:58, right?

12 IAN HOROWITZ: Yeah.

13 RAJ RAJARATNAM: Saying something good might happen to  
14 Goldman. Right?

15 IAN HOROWITZ: So it is what it is. Everything's, everyone's fine,  
16 I saw it cross the board....

17 RAJ RAJARATNAM: No I saw, I, so, I told Ananth [Muniyappa] to  
18 buy some, he was fucking around, he can't, you know. So I went to Gary  
19 [Rosenbach] and said just buy me, right?

20 IAN HOROWITZ: Mm hmm.

21 RAJ RAJARATNAM: Because you were not there. It happens all the  
22 fucking time, you know you're there every day of the year, right? . . . .

23 (Government Exhibit ("GX") 21-T ("First Rajaratnam-Horowitz Call"), at 1-2 (emphases added).)

24 Rajaratnam called Horowitz again at 7:56 a.m. After asking how much Goldman Sachs  
25 stock Galleon currently owned, Rajaratnam continued his report on the previous afternoon's events:

1                   RAJ RAJARATNAM: Okay, yeah, let me tell you what happened,  
2 honestly, right?

3                   IAN HOROWITZ: Yeah, no, I looked at our price, I looked at our  
4 price, and I looked at what happened.

5                   RAJ RAJARATNAM: Yeah.

6                   IAN HOROWITZ: Someone had this before us, someone, whatever  
7 went on, something happened, someone, they ...

8                   RAJ RAJARATNAM: I got a call, right, saying something good's  
9 gonna happen.

10                  IAN HOROWITZ: We'll talk about, how 'bout this, we'll talk when  
11 you come in.

12                  RAJ RAJARATNAM: Okay.

13                  IAN HOROWITZ: We'll talk when you come in, okay?

14                  RAJ RAJARATNAM: But I didn't do anything, you were not there,  
15 I asked Ananth to buy some.

16                  IAN HOROWITZ: You did nothing.

17                  RAJ RAJARATNAM: Then I went to Gary ... and ...

18                  IAN HOROWITZ: You did nothing wrong.

19                  RAJ RAJARATNAM: Yeah at 3:58, I can't, I can't yell out in the  
20 fucking halls.

21                  IAN HOROWITZ: No. You did nothing wrong, we'll talk about it  
22 when you come in, nothing's wrong.

23                  RAJ RAJARATNAM: It is, I guess, Leon [Shaulov] was very upset.  
24 You know, fuck him, look, I've kept my mouth shut when he gave me WaMu,  
25 right?

26                  IAN HOROWITZ: Get, get upset about what? You got nothing, this  
27 is at 3:58.

1                   RAJ RAJARATNAM: Yeah, if it was, one o'clock, I always am good  
2 with him, I always call him in, I tell him everything, you know? AMD, IBM,  
3 everything, right?

4                   IAN HOROWITZ: He's not in, so I'm, he hasn't said anything. Listen,  
5 if something comes in, I'll let you know.

6 (GX 22-T ("Second Rajaratnam-Horowitz Call"), at 2-3 (emphases added).)

7                   2. Galleon Trades of Goldman Sachs Stock on October 24, 2008

8                   On October 23, 2008, more than halfway through the fourth quarter of Goldman  
9 Sachs's fiscal year, Goldman's chairman convened an unofficial board meeting by conference call to  
10 bring the directors up-to-date on company events. At that time, Wall Street analysts were projecting  
11 that Goldman--which, since becoming a public company, had never reported a quarterly loss--would  
12 continue to report profits. In the conference call, which began at 4:15 p.m., Goldman's management  
13 informed the board that the company's fourth-quarter result would be a loss.

14                  Records were introduced to show that Gupta, on a telephone in his home office,  
15 participated in the Goldman Sachs conference call for approximately 33 minutes and disconnected  
16 at 4:49 p.m. At 4:50 p.m., a call was placed from the telephone of Gupta's assistant Renee Gomes to  
17 the direct office line of Rajaratnam; Gupta's home office line was conferenced in to that call, and  
18 Gomes's line was disconnected. Gupta's home office telephone was connected to Rajaratnam's direct  
19 line for some 12½ minutes, until 5:03 p.m.

20                  The next morning, October 24, 2008, in three transactions, Rajaratnam sold a total of  
21 150,000 shares of Goldman Sachs stock. The first 50,000 shares were sold at 9:31 a.m., one minute  
22 after the stock market opened--the first opportunity to trade in Goldman shares since the board

1 meeting the previous day. Another 50,000 shares were sold at 10:09 a.m.; and the final 50,000 shares  
2 were sold at 10:37 a.m. Goldman Sachs's fourth-quarter losses were not announced to the public until  
3 December 16. Based on the decline in Goldman's stock price after that announcement, the  
4 government introduced calculations showing that Rajaratnam, by selling his shares on October 24,  
5 avoided a loss of more than \$3.8 million.

6 At 12:12 p.m. on October 24, Rajaratnam returned a call to David Lau, a Singapore-  
7 based portfolio manager for Galleon International, one of Galleon's hedge funds. Lau had sought to  
8 reach Rajaratnam for general investment advice. Galleon International invested in non-U.S. securities  
9 primarily (see Tr. 1467), but not exclusively (see *id.* at 2415); and it had in the past owned stock in  
10 Goldman (see GX 90). The conversation began with Rajaratnam advising that, as a general matter,  
11 it would be safer to invest in United States companies than in emerging market countries:

12 RAJ RAJARATNAM: Hey David, you called?

13 DAVID LAU: Yeah, just to give me, give me a, find the pulse because  
14 we are quite shocked overseas and uh long bonds, I mean quite shocked in  
15 relative for the VAR ... because VAR broke out, blew out and our positions are  
16 the same so I just want to find out what you guys are thinking.

17 RAJ RAJARATNAM: Yeah, I mean, I think, ah we think that the US  
18 is um relatively the safe haven, right.

19 DAVID LAU: Um.

20 RAJ RAJARATNAM: Because all of these um emerging market ah  
21 countries, many of them have to reduce interest rates, which is bad for their  
22 currencies, right.

23 DAVID LAU: Um um um.

24 RAJ RAJARATNAM: And, I mean today for example there is a  
25 reasonable calmness in the market you know the market is only down 2 or 3%,  
26 right.

1 DAVID LAU: Yeah, that's why I'm surprised. I thought it would go  
2 nuts.

3 RAJ RAJARATNAM: Yeah I mean our risk here is ah hedge fund  
4 redemption risk, right Citadel I hear is in trouble, you know, and things like  
5 that but I think generally, not that I want to be long equities, but generally I  
6 think one trade in equities would be, you know, buy the Spiders and short the  
7 EEMs or something, you know.

8 DAVID LAU: Hmm Hmm.

9 RAJ RAJARATNAM: But it looks like here the most cyclical  
10 companies the semi equipment companies, and the home builders are the ones  
11 that are leading the way out right.

12 DAVID LAU: Right.

13 (GX 29-T ("Rajaratnam-Lau Call"), at 1-2 (emphasis added).)

14 Rajaratnam then proceeded to describe to Lau the confidential negative information  
15 he had received the previous day "from somebody who's on the Board of Goldman Sachs," which  
16 "they don't report until December." (GX 29-T, at 2.) Rajaratnam noted the current optimistic view  
17 of Wall Street analysts of Goldman Sachs's likely profits, and he described the potential for selling  
18 the stock short:

19 RAJ RAJARATNAM: Um, now I, I heard yesterday from somebody  
20 who's on the Board of Goldman Sachs, that they are gonna lose \$2 per share.  
21 The Street has them making \$2.50.

22 DAVID LAU: Really?

23 RAJ RAJARATNAM: You know. Yeah. Now I can get that number,  
24 you know, one, they don't report until December, they, I think their quarter  
25 ends in November, but (UI [i.e., unintelligible]) one more, but you know they  
26 have these huge marks in ICBC and all of that stuff right. That uh is getting  
27 absolutely clobbered. You know.

28 DAVID LAU: Right.

1                   RAJ RAJARATNAM: So what he was telling me was that uh,  
2 Goldman, the quarter's pretty bad. They have zero revenues because their  
3 trading revenues are offset by asset losses, and to date they have lost \$2 per  
4 share, they just announced a 10% cut and uh you know, the basic business is  
5 ok but uh you know this is uh tough for them. I don't think that's built into  
6 Goldman Sachs stock price. So if it gets to \$105, I'm gonna, it's \$99 now, it  
7 was at \$102. I was looking for \$105, I'm gonna whack it you know.

8                   DAVID LAU: (Laughs) Okay. Okay. Okay (UI) ...

9                   RAJ RAJARATNAM: Okay, I don't think it makes sense to take  
10 longer term views right now. . . .

11 (GX 29-T, at 2 (emphases added).)

12                   3. The Relationship Between Gupta and Rajaratnam

13                   The government also presented evidence that Gupta and Rajaratnam had a close  
14 relationship. Gupta described Rajaratnam as a "close friend[]" (GX 1905)--indeed, "a very close  
15 friend" (GX 1922)--and was in frequent communication with him. Rajaratnam's address book noted  
16 Gupta as a "Good friend." (Tr. 223.) Rajaratnam had instructed Eisenberg that there were only five  
17 people she was authorized to connect with him near the end of the trading day; Gupta was one of  
18 them. (See id. at 210, 213-14; see also id. at 273 (during the two years when Eisenberg was  
19 Rajaratnam's assistant, the list was expanded to about 10 names).)

20                   Gupta and Rajaratnam were also involved in several business ventures together. In  
21 2005, they, along with a third partner, formed Voyager Capital Partners Ltd. ("Voyager"), an  
22 investment fund capitalized with \$50 million, \$5 million of which was contributed by Gupta and  
23 \$40 million by Rajaratnam; Gupta later borrowed \$5 million from Rajaratnam in order to buy out the  
24 third partner's share (see Tr. 1858-59), giving Gupta a \$10 million stake in Voyager. Other

1 collaborations were discussed in a July 29, 2008 call from Gupta to Rajaratnam (see GX 9-T ("Gupta-  
2 Rajaratnam Call"))--the only call between these two that was captured in the wiretaps. In 2007,  
3 Gupta, Rajaratnam, and two others launched another investment fund, New Silk Route, in which  
4 Rajaratnam invested \$50 million (see id. at 8); Gupta was the chairman (see GX 2164). Gupta was  
5 also heavily involved in Galleon itself. He had invested several million dollars in Galleon funds; he  
6 was involved in the planning of a new Galleon fund called Galleon Global (which ultimately was not  
7 created); he had a keycard allowing him access to Galleon's New York offices; and he regularly  
8 worked on Galleon's behalf in seeking potential investors (see GX 9-T, at 13-14). In early 2008,  
9 Gupta was made chairman of Galleon International, which, as of April 2008, managed assets totaling  
10 some \$1.1 billion and could earn "performance fees" (Tr. 1696). Gupta was given a 15 percent  
11 ownership stake. (See, e.g., id.; GX 9-T, at 6; id. at 13 (Gupta: "you've given me . . . a position in  
12 Galleon International").)

13 In the July 2008 Gupta-Rajaratnam Call, Rajaratnam asked Gupta about a rumor that  
14 Goldman Sachs might seek to buy a commercial bank. Gupta responded that there had been "a big  
15 discussion" of that possibility, in particular with respect to "Wachovia," as well as of the possibility  
16 of buying an insurance company, in particular "AIG." (GX 9-T, at 2-3.) Gupta said the Goldman  
17 board was divided and that such purchases were unlikely to be "imminent," but that if certain banks  
18 were "a good deal . . . it's quite conceivable they'd come and say let's go buy" one. (Id. at 3-4.) The  
19 board's discussions were confidential. (See, e.g., Tr. 856-58.) Even the matter of whether or not a  
20 subject had been discussed at a Goldman board meeting was confidential. (See, e.g., id. at 2048.)

1       B. The Defense Case

2                   Gupta called several witnesses in his defense. Most were character witnesses who  
3 testified that they believed Gupta to be an honest person; Gupta also sought to have them testify that  
4 he had "integrity" and thus would not have been inclined to share inside information with Rajaratnam.  
5 Gupta's daughter Geetanjali Gupta ("Geetanjali") testified about certain conversations Gupta had with  
6 her about Rajaratnam, and sought to indicate that Gupta would not have been inclined to share inside  
7 information with Rajaratnam because Gupta believed Rajaratnam had cheated him out of money with  
8 respect to the Voyager investment. Gupta also sought to introduce documentary evidence suggesting  
9 that a different Goldman Sachs insider was giving Rajaratnam confidential information about  
10 Goldman Sachs, and that Gupta contemplated leaving a substantial portion of his wealth to charity.  
11 As discussed in greater detail in Part II.B. below, the trial judge imposed limitations with respect to  
12 each category of Gupta's proposed evidence.

13       C. The Verdict

14                   The jury found Gupta guilty on four of the six counts against him: Count One,  
15 conspiracy to commit securities fraud in violation of 18 U.S.C. § 371, and three substantive counts  
16 of securities fraud in violation of 15 U.S.C. §§ 78j(b) and 78ff. The substantive securities fraud  
17 convictions were on Count Three, based on Rosenbach's purchase of 150,000 shares of Goldman  
18 Sachs stock for Rajaratnam on September 23, 2008; Count Four, based on Muniyappa's purchase of  
19 67,200 shares of Goldman Sachs stock for Rajaratnam on September 23, 2008; and Count Five, based  
20 on Rajaratnam's sale of 150,000 shares of Goldman Sachs stock on October 24, 2008.



1 hearsay. The government contended that Rajaratnam's statements either were nonhearsay because  
2 they were statements in furtherance of a conspiracy of which Rajaratnam and Gupta were members,  
3 see Fed. R. Evid. 801(d)(2)(E), or were hearsay statements within the exception for declarations  
4 against penal interest, see Fed. R. Evid. 804(b)(3), or within the residual hearsay exception, see Fed.  
5 R. Evid. 807.

6 The district court found that the government had sufficiently established the existence  
7 of a conspiracy among Gupta, Rajaratnam, and others (see Tr. 430-31, 434-35, 440), and that  
8 Rajaratnam's statements in each of the three conversations were in furtherance of the conspiracy. The  
9 court thus ruled that all three conversations were admissible under Rule 801(d)(2)(E). (See  
10 Tr. 633-35, 695; see also Hearing Transcript, May 16, 2012 ("Hearing Tr."), at 4, 24-25.)

11 The district court rejected outright the government's contention that Rajaratnam's  
12 statements were admissible under the residual hearsay exception. And the court stated that it was  
13 "dubious" as to whether the statements could be admitted as statements against penal interest but that  
14 it need not resolve that issue in light of its ruling that they were admissible as nonhearsay statements  
15 in furtherance of a conspiracy of which Rajaratnam and Gupta were members. (Hearing Tr. 4.)

16 Gupta challenges the rulings that Rajaratnam's statements to Lau and Horowitz were  
17 in furtherance of a conspiracy of which Gupta was a member. He contends that Lau was not alleged  
18 to be a coconspirator and that Rajaratnam's statements to Horowitz were in furtherance only of a  
19 separate conspiracy between Rajaratnam and Shaulov. The government defends the court's admission  
20 of the Rajaratnam statements as coconspirator statements in furtherance of a conspiracy of which  
21 Rajaratnam and Gupta were not the only members; in addition, it argues that Rajaratnam's statements  
22 could properly have been admitted as statements against his penal interest. We conclude that, under

1 Rules 801 and 804 of the Federal Rules of Evidence, Rajaratnam's statements in all three  
2 conversations were admissible both as nonhearsay statements in furtherance of the Rajaratnam-Gupta  
3 conspiracy and under the exception for statements against penal interest. We address these issues  
4 separately with respect to the statements to Horowitz and those to Lau.

5 1. Statements in Furtherance of a Conspiracy

6 Under Rule 801(d), an out-of-court statement offered for the truth of its contents is not  
7 hearsay if "[t]he statement is offered against an opposing party and" it "was made by the party's  
8 coconspirator during and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E). Thus, "[i]n  
9 order to admit a statement under this Rule, the court must find (a) that there was a conspiracy, (b) that  
10 its members included the declarant and the party against whom the statement is offered, and (c) that  
11 the statement was made during the course of and in furtherance of the conspiracy." United States v.  
12 Maldonado-Rivera, 922 F.2d 934, 958 (2d Cir. 1990), cert. denied, 501 U.S. 1233 (1991). In  
13 determining the existence and membership of the alleged conspiracy, the court must consider the  
14 circumstances surrounding the statement, as well as the contents of the alleged coconspirator's  
15 statement itself. See Fed. R. Evid. 801(d)(2); see also Bourjaily v. United States, 483 U.S. 171,  
16 176-81 (1987).

17 "To be in furtherance of the conspiracy, a statement must be more than 'a merely  
18 narrative' description by one co-conspirator of the acts of another." United States v. SKW Metals &  
19 Alloys, Inc., 195 F.3d 83, 88 (2d Cir. 1999) ("SKW Metals") (quoting United States v. Beech-Nut  
20 Nutrition Corp., 871 F.2d 1181, 1199 (2d Cir.) ("Beech-Nut"), cert. denied, 493 U.S. 933 (1989)).

1 While idle chatter between co-conspirators does not further a conspiracy, see  
2 United States v. Paone, 782 F.2d 386, 390 (2d Cir.), cert. denied, 479 U.S. 882,  
3 107 S.Ct. 269, 93 L.Ed.2d 246 (1986), we have recognized that "[s]tatements  
4 between conspirators which provide reassurance, serve to maintain trust and  
5 cohesiveness among them, or inform each other of the current status of the  
6 conspiracy, further the ends of [a] conspiracy."

7 United States v. Simmons, 923 F.2d 934, 945 (2d Cir.) (quoting United States v. Rahme, 813 F.2d 31,  
8 35-36 (2d Cir. 1987) (other internal quotation marks omitted)), cert. denied, 500 U.S. 919 (1991); see,  
9 e.g., United States v. Maldonado-Rivera, 922 F.2d at 958-59.

10 "A finding as to whether or not a proffered statement was made in furtherance of the  
11 conspiracy should be supported by a preponderance of the evidence, and such a finding will not be  
12 overturned on appeal unless it is clearly erroneous." United States v. Thai, 29 F.3d 785, 814 (2d Cir.),  
13 cert. denied, 513 U.S. 977 (1994); see, e.g., United States v. James, 712 F.3d 79, 105-06 (2d Cir.),  
14 petition for cert. filed, No. 13-632 (U.S. Nov. 22, 2013). "Where there are two permissible views of  
15 the evidence, the factfinder's choice between them cannot be clearly erroneous." Beech-Nut, 871 F.2d  
16 at 1199 (quoting Anderson v. Bessemer City, 470 U.S. 564, 574 (1985)). The court's ultimate  
17 decision to admit or exclude a proffered statement is reviewed for abuse of discretion. See, e.g.,  
18 United States v. Persico, 645 F.3d 85, 99 (2d Cir. 2011), cert. denied, 132 S. Ct. 1637 (2012); SKW  
19 Metals, 195 F.3d at 87-88.

20 a. Rajaratnam's in-Furtherance Statements to Horowitz

21 We see no error or abuse of discretion in the district court's admission of the statements  
22 by Rajaratnam in his two telephone conversations with Horowitz. Although Gupta insists that  
23 Rajaratnam had a "separate conspiracy with Shaulov" (e.g. Gupta brief on appeal at 38, 39), that

1 Rajaratnam's statements to Horowitz were "focus[ed] on placating Shaulov" (id. at 37), and that  
2 "Rajaratnam's conversation with Horowitz was not 'in furtherance of' the alleged Rajaratnam/Gupta  
3 conspiracy" (id. at 36; see id. at 37 ("placating Shaulov had nothing to do with furthering the alleged  
4 conspiracy between Rajaratnam and Gupta")), that argument suffers from multiple flaws. First, the  
5 Indictment did not allege a conspiracy only between Rajaratnam and Gupta; it alleged that the  
6 conspiracy also encompassed "other coconspirators at Galleon" (Indictment ¶¶ 12(c), 32(d)). Second,  
7 so long as a coconspirator statement was in furtherance of the conspiracy, there is no requirement that  
8 it have been in furtherance of the interests of the defendant himself or of any particular coconspirator.  
9 Third, there was ample evidence that the conspiracy of which Gupta and Rajaratnam were members  
10 included Horowitz, Rosenbach, and Shaulov.

11 For example, after receiving the September 23 call at 3:54 p.m. from Gupta,  
12 Rajaratnam had a closed-door conversation with Rosenbach; Rosenbach immediately began buying  
13 Goldman Sachs stock and shares of an index fund that included Goldman stock; Rosenbach made  
14 those purchases not only for Rajaratnam's portfolio but for his own portfolio as well; and after the  
15 market closed, Rosenbach returned to Rajaratnam's office for another closed-door conversation (see  
16 Tr. 254-55). That evening, when Shaulov bitterly complained that he had not been given a "heads up"  
17 on the Buffett investment, he complained to Rosenbach. (Id. at 441-42.) The next morning,  
18 Rosenbach sent Rajaratnam an email stating "I spoke to Leon and believe I diffused [sic] him."  
19 (GX 1632.) Rajaratnam, in his conversations with Horowitz that morning, explained why he had not  
20 immediately informed Horowitz and Shaulov upon receipt of the September 23 Goldman Sachs  
21 information. In his first call, Rajaratnam pointed out that Horowitz, who was the head of the Galleon  
22 trading desk and the trader principally responsible for executing trades for Rajaratnam (see Tr. 205,

1 361), had not been in the office when the call came in. The district court found that this conversation  
2 was in furtherance of the conspiracy of which Gupta was a member because Rajaratnam needed to  
3 explain to Horowitz, his trader, why the purchases of Goldman stock were made (see Hearing  
4 Tr. 19-20); and the court found that the ensuing conversation between Rajaratnam and Horowitz  
5 "reeks of knowledge, intent, and the need of Mr. Rajaratnam to explain to his lieutenant why in his  
6 absence the significant trade occurred" (id. at 21). In that second conversation, Rajaratnam told  
7 Horowitz that Shaulov was upset but should not have been because the call about Goldman Sachs  
8 came in late, at "3:58"; had it come in at "one o'clock," Rajaratnam would have informed Shaulov  
9 because he "always" relayed "everything" to Shaulov. (GX 22-T, at 3.)

10 Thus, there was ample evidence to support findings (1) that the members of the  
11 conspiracy in which Gupta passed confidential Goldman Sachs information to Rajaratnam included  
12 not only Gupta and Rajaratnam but also Rosenbach, Horowitz, and Shaulov, and (2) that Rajaratnam's  
13 statements and explanations to Horowitz served to further the conspiracy by informing Horowitz, and  
14 eventually Shaulov, of the status of that conspiracy, reassuring them of its continuity, and preserving  
15 trust and cohesiveness among the coconspirators. Rajaratnam's statements in his telephone calls to  
16 Horowitz were properly admitted under Rule 801(d)(2)(E).

17 b. Rajaratnam's in-Furtherance Statements to Lau

18 Although the government concedes that Lau was not a member of the alleged  
19 conspiracy, the district court admitted under Rule 801(d)(2)(E) Rajaratnam's statements to Lau as  
20 well. While that Rule "requires that both the declarant and the party against whom the statement is  
21 offered be members of the conspiracy, there is no requirement that the person to whom the statement

1 is made also be a member." In re Terrorist Bombings of U.S. Embassies in East Africa, 552 F.3d 93,  
2 139 (2d Cir. 2008) ("Terrorist Bombings") (quoting Beech-Nut, 871 F.2d at 1199) (emphasis ours),  
3 cert. denied, 558 U.S. 1137 (2010). Statements designed to induce the listener's assistance with  
4 respect to the conspiracy's goals satisfy the Rule's in-furtherance requirement. See, e.g., Terrorist  
5 Bombings, 552 F.3d at 139; Beech-Nut, 871 F.2d at 1199 ("Coconspirator statements may be found  
6 to be 'in furtherance' of the conspiracy within the meaning of Rule 801(d)(2)(E) if they 'prompt the  
7 listener to respond in a way that facilitates the carrying out of criminal activity.'" (quoting United  
8 States v. Rahme, 813 F.2d at 35)).

9           Applying these principles, we conclude that there was no clear error in the district  
10 court's finding that Rajaratnam's statements to Lau were in furtherance of a conspiracy of which Gupta  
11 and Rajaratnam were members. Lau was a portfolio manager for Galleon International, seeking to  
12 make profitable investment decisions for his portfolio. The Rajaratnam-Lau Call resulted from Lau's  
13 solicitation of Rajaratnam's view of "the pulse" of the market. (GX 29-T, at 1.) The conversation  
14 took place on October 24, 2008, shortly after Rajaratnam had sold his Goldman Sachs stock in the  
15 wake of Gupta's call to Rajaratnam, a call placed one minute after the end of the Goldman Sachs  
16 board of directors conference call in which Gupta learned that Goldman in December would report  
17 a quarterly loss. Rajaratnam responded to Lau's request for guidance on the market by advising that  
18 "the US is . . . relatively the safe haven" and providing his opinion with respect to specific sectors (id.  
19 at 1-2); but Rajaratnam went on to say that he had nonpublic information that, contrary to the  
20 prevailing view of market analysts, Goldman's current quarter would not be profitable (see id. at 2 ("I  
21 heard yesterday from somebody who's on the Board of Goldman Sachs, that they are gonna lose \$2  
22 per share. The Street has them making \$2.50.")). Rajaratnam noted that Goldman would not report

1 its quarterly results until December; stated that if the stock price reached a certain level, he would sell  
2 short (see id. ("whack it")); and concluded, "I don't think it makes sense to take longer term views  
3 right now" (id.).

4 We see no error in the district court's finding that Rajaratnam's statements to Lau, "an  
5 important colleague and subordinate who had the ability to execute further trades in Galleon  
6 International" (Hearing Tr. 22), were in furtherance of the conspiracy of which Rajaratnam and Gupta  
7 were members. Although Gupta argues that in connection with these statements the government was  
8 required to "pro[ve] . . . not merely that Lau was theoretically capable" of trading in Goldman Sachs  
9 stock but that Rajaratnam's "purpose was to induce Lau to trade" (Gupta brief on appeal at 33  
10 (emphasis omitted)), this argument ignores the allegation and the proof that one of the goals of the  
11 conspiracy was to use inside information to avoid losses--a goal clearly pursued by Rajaratnam in  
12 dumping his Goldman Sachs shares as quickly as possible after learning that Goldman would later  
13 publicly announce a quarterly loss. Gupta had a 15 percent ownership stake in Galleon International,  
14 which was entitled to fees based on its performance. (See Tr. 1696.) Although Galleon International  
15 invested principally in securities of non-United States companies (see id. at 1467), it was not  
16 precluded from investing in domestic securities (see id. at 2415); and, indeed, it had in the past owned  
17 stock in Goldman (see GX 90). In light of this evidence, Rajaratnam's statements to Lau could have  
18 prompted Lau not to purchase Goldman shares for Galleon International in October 2008. This  
19 supports the district court's conclusion that such statements were in furtherance of the conspiracy of  
20 which Gupta was a member.

21 Although Gupta argues that Rajaratnam was simply "bragging" about his sources  
22 (Gupta brief on appeal at 35), this was at best an argument for the jury. Further, to the extent that it

1 could be permissible to view the conversation as Gupta urges, i.e., that it was merely a "casual  
2 conversation about past events," not one in which Rajaratnam's statements were in furtherance of the  
3 conspiracy (Gupta brief on appeal at 35-36 (citing United States v. Lieberman, 637 F.2d 95, 102 (2d  
4 Cir. 1980))), the clear-error standard for reversal has not been met. To the extent that there may be  
5 more than one permissible view as to Rajaratnam's purpose in making the October 24, 2008  
6 statements to Lau, the district court's determination that the statements about Goldman shares were  
7 made in furtherance of the conspiracy was a choice between or among permissible inferences and  
8 hence cannot be deemed clearly erroneous, see Anderson, 470 U.S. at 574. Gupta's contentions  
9 provide no basis for overturning the district court's finding that Rajaratnam's statements to Lau were  
10 in furtherance of the insider-trading, loss-avoidance conspiracy of which Gupta was a member and  
11 by which Gupta sought to profit, and thus were admissible.

## 12 2. Statements Against Penal Interest

13 Rule 804(b)(3) allows the admission of statements against a declarant's proprietary,  
14 pecuniary, or penal interest if the declarant is unavailable as a witness. A statement is against such  
15 an interest if it is a statement that:

16 (A) a reasonable person in the declarant's position would have made  
17 only if the person believed it to be true because, when made, it was so contrary  
18 to the declarant's proprietary or pecuniary interest or had so great a tendency  
19 to invalidate the declarant's claim against someone else or to expose the  
20 declarant to civil or criminal liability; and

21 (B) is supported by corroborating circumstances that clearly indicate  
22 its trustworthiness, if it is offered in a criminal case as one that tends to expose  
23 the declarant to criminal liability.

1 Fed. R. Evid. 804(b)(3) (emphases added). This Rule "is founded on the commonsense notion that  
2 reasonable people, even reasonable people who are not especially honest, tend not to make self-  
3 inculpatory statements unless they believe them to be true." Williamson v. United States, 512 U.S.  
4 594, 599 (1994).

5 In assessing whether a statement is against penal interest within the meaning of Rule  
6 804(b)(3), the district court must first ask whether "a reasonable person in the declarant's shoes would  
7 perceive the statement as detrimental to his or her own penal interest," United States v. Saget, 377  
8 F.3d 223, 231 (2d Cir. 2004) ("Saget"), cert. denied, 543 U.S. 1079 (2005), a question that can be  
9 answered only "in light of all the surrounding circumstances," Williamson, 512 U.S. at 604; see also  
10 Saget, 377 F.3d at 231 (an "adequately particularized analysis" is required). The proffered statement  
11 "[need] not have been sufficient, standing alone, to convict [the declarant] of any crime," so long as  
12 it would have been "probative" in a criminal case against him. United States v. Persico, 645 F.3d  
13 at 102.

14 If the court finds that the statement is against the declarant's penal interest, the court  
15 must then determine whether there are corroborating circumstances indicating "both the declarant's  
16 trustworthiness and the truth of the statement." United States v. Lumpkin, 192 F.3d 280, 287 (2d Cir.  
17 1999). Further, "the inference of trustworthiness from the proffered 'corroborating circumstances'  
18 must be strong, not merely allowable." United States v. Salvador, 820 F.2d 558, 561 (2d Cir.), cert.  
19 denied, 484 U.S. 966 (1987). In the context of assessing whether a statement against penal interest  
20 was sufficiently reliable to satisfy the Confrontation Clause of the Constitution, we have noted that

21 [a] statement incriminating both the declarant and the defendant may possess  
22 adequate reliability if . . . the statement was made to a person whom the  
23 declarant believes is an ally, and the circumstances indicate that those portions

1 of the statement that inculcate the defendant are no less reliable than the self-  
2 inculpatory parts of the statement.

3 Saget, 377 F.3d at 230 (internal quotation marks omitted).

4 The trial court's ultimate decision to admit such evidence is reviewed for abuse of  
5 discretion. See, e.g., United States v. Williams, 506 F.3d 151, 155 (2d Cir. 2007), cert. denied, 552  
6 U.S. 1223 (2008); Saget, 377 F.3d at 231; United States v. Salvador, 820 F.2d at 562.

7 a. Rajaratnam's Self-Incriminating Statements to Horowitz

8 Even if Rajaratnam's statements in his conversations with Horowitz on the morning  
9 after his September 23 purchases of Goldman Sachs stock were not in furtherance of the Rajaratnam-  
10 Gupta conspiracy, the pertinent statements were contrary to Rajaratnam's penal interest and therefore  
11 could properly have been admitted pursuant to Rule 804(b)(3). In the First Rajaratnam-Horowitz  
12 Call, Rajaratnam said, "I got a call at 3:58 . . . . [s]aying something good might happen to  
13 Goldman. . . . [S]o, I told Ananth to buy some" and "I went to Gary and said just buy me" (GX 21-T,  
14 at 1-2). In the Second Rajaratnam-Horowitz Call, Rajaratnam's statements included the following:

- 15 ■ I got a call, right, saying something good's gonna happen.
- 16 ■ I asked Ananth to buy some.
- 17 ■ Then I went to Gary . . . .
- 18 ■ Yeah at 3:58, I can't, I can't yell out in the fucking halls.
- 19 ■ Leon was very upset. You know, fuck him, look, I've kept my mouth shut  
20 when he gave me WaMu . . . .
- 21 ■ [I]f it was, one o'clock, I always am good with him, I always call him in, I  
22 tell him everything, you know? AMD, IBM, everything . . . .

23 (GX 22-T, at 2-3.)

1           The corroborating evidence included proof that Rajaratnam did receive a call minutes  
2 before the close of trading on September 23; that the call was from Gupta, who had said it was  
3 "urgent"; that Gupta was a Goldman Sachs board member who had just received confidential  
4 Goldman information; and that something quite good for Goldman did in fact happen and was  
5 announced after the close of trading that very day. And Rajaratnam's reference to having shared  
6 information with respect to "AMD" provided additional corroboration of Rajaratnam's knowing  
7 wrongdoing, as Anil Kumar--who was on Rajaratnam's list of five people to whom he would speak  
8 near the close of trading (see Tr. 210, 213-14)--testified at trial that he had "pled guilty to one count  
9 of securities fraud for giving insider information to Mr. Rajaratnam about a company called ATI and  
10 AMD's acquisition of it in 2006" (id. at 1767). Thus, it would have been well within the bounds of  
11 discretion for the district court to conclude that the statements by Rajaratnam were contrary to his  
12 penal interest because they exposed him to criminal liability for trading on the basis of inside  
13 information, and that they were sufficiently reliable to be admitted in evidence under Rule 804(b)(3).

14           b. Rajaratnam's Self-Incriminating Statements to Lau

15           We reach the same conclusion with respect to Rajaratnam's statements about his inside  
16 information on Goldman Sachs to Lau. In his conversation with Lau, Rajaratnam's statements  
17 included the following:

- 18           ■ I heard yesterday from somebody who's on the Board of Goldman Sachs,  
19           that they are gonna lose \$2 per share. The Street has them making \$2.50.
- 20           ■ [T]hey don't report until December . . . .

1                   ■ So what he was telling me was that uh, Goldman, the quarter's pretty  
2 bad. . . . I don't think that's built into Goldman Sachs stock price. So if it gets  
3 to \$105, I'm gonna, it's \$99 now, it was at \$102. I was looking for \$105, I'm  
4 gonna whack it you know.

5 (GX 29-T, at 2.)

6                   Given that this conversation occurred on October 24, 2008, less than two hours after  
7 Rajaratnam unloaded his Goldman Sachs stock--beginning one minute after the market opened--  
8 Rajaratnam's statement that he had "heard yesterday" from a Goldman board member that Goldman  
9 would lose money and would not report its losses until December clearly exposed him to criminal  
10 liability for trading on inside information. Moreover, Rajaratnam's statement that if the stock reached  
11 a certain level he planned to sell it short was an admission of a plan to engage in additional unlawful  
12 insider trading in the future.

13                   Although Gupta argues that these statements were not sufficiently reliable to satisfy  
14 the statement-against-penal-interest exception, we disagree. The evidence as to the timing of the  
15 Goldman Sachs board's after-hours conference call on October 23, which ended at 4:49 p.m. and was  
16 followed by a 4:50 p.m. call from Goldman board member Gupta to Rajaratnam, coupled with  
17 Rajaratnam's commencing to dump his Goldman stock one minute after the market opened the next  
18 morning, provided ample corroboration for the October 24 statement that Rajaratnam had received  
19 information "yesterday" of Goldman's yet-to-be-announced "\$2 per share" losses from "somebody  
20 who's on the Board of Goldman Sachs."

21                   Again, Gupta argues that Rajaratnam was merely attempting to impress Lau. That was  
22 a contention that could be argued to the jury; but as "reasonable people, even reasonable people who  
23 are not especially honest, tend not to make self-inculpatory statements unless they believe them to be

1 true," Williamson, 512 U.S. at 599, it would have been within the district court's discretion to find  
2 that Rajaratnam, as founder and head of Galleon, would have had no need to attempt to impress his  
3 subordinates and that he would not have made these self-incriminating statements without a  
4 foundation of truth.

#### 5 B. Limitations on Gupta's Defense Evidence

6 Gupta also contends that he is entitled to a new trial on the ground that the district  
7 court unduly limited evidence proffered by the defense to show that any communication by Gupta of  
8 inside information to Rajaratnam in the fall of 2008 was improbable. For the reasons that follow, we  
9 conclude that none of the challenged rulings constituted an abuse of the court's discretion and that a  
10 new trial is unwarranted.

##### 11 1. Testimony by Gupta's Daughter

12 The "linchpin" of the defense (Gupta brief on appeal at 46) was the proposition that  
13 in mid-September 2008, Gupta was angry with Rajaratnam for having withdrawn \$25 million from  
14 the Voyager fund (in which Gupta had invested \$10 million and Rajaratnam had invested \$40 million)  
15 without informing Gupta of the withdrawal and without alerting Gupta to withdraw some of his own  
16 capital--so angry that Gupta would not have shared inside information about Goldman Sachs with  
17 Rajaratnam. To establish Gupta's state of mind--and to suggest that his September 23 and October  
18 23 calls to Rajaratnam were merely efforts to obtain information about Voyager--the defense  
19 proffered testimony from Gupta's daughter Geetanjali that on September 20 Gupta was angry with  
20 Rajaratnam, believing that Rajaratnam had cheated him. Gupta argues that

1 [s]pecifically, Geetanjali would have testified:

2 He told me that he was upset about Voyager. He told me that he was  
3 worried about the performance of the fund and that he was frustrated  
4 that he couldn't get information from Raj about it.

5 He also told me he was angry that Raj had taken money out of the fund  
6 without telling him and that he thought that that--he didn't understand  
7 why he had taken the money out of the fund, and why if he had taken  
8 money out of the fund, he had not gotten any of it.

9 (Gupta brief on appeal at 47 (quoting Tr. 3079 (Geetanjali's statement in response to questioning by  
10 the court outside the presence of the jury) (emphases in brief).))

11 The government objected that this testimony would be hearsay; Gupta argued that it  
12 was admissible under Rule 803(3)'s "state of mind" exception to the hearsay rule. After exploring  
13 Geetanjali's proposed testimony in the absence of the jury and hearing arguments from both sides (see  
14 Tr. 2971-74, 3071-89), the district court ruled that Geetanjali could testify to Gupta's "attitude towards  
15 Rajaratnam" with respect to Voyager, "at a given point or maybe two or three points" in time, but that  
16 Geetanjali could not testify to the "substantive" details of what Gupta said, i.e., that Gupta stated that  
17 he believed Rajaratnam had cheated him (id. at 3087; see id. at 3086-89).

18 Accordingly, Geetanjali testified that on September 20, 2008, she had a "conversation  
19 with [her] father relating to an investment that [he] had with Mr. Rajaratnam called Voyager" (id. at  
20 3093) and in that conversation Gupta expressed "significant concern" about his investment in Voyager  
21 (id. at 3094). Geetanjali continued as follows:

22 THE COURT: And in relating this to you, what was his demeanor?

23 THE WITNESS: He was upset. He was stressed. He was running his  
24 hands through his hair, which he often does when he's stressed. He was  
25 walking about. He was quite upset. He's normally a very calm and collected  
26 person.

1 THE COURT: Was it your understanding, if you had one, that this was  
2 because of how the investment was doing or because of how Mr. Rajaratnam  
3 was treating the investment or what?

4 THE WITNESS: It was more because of how Mr. Rajaratnam was  
5 treating the investment. My father had been very upset that--

6 THE COURT: No. You've answered the question.

7 (Tr. 3094.) Geetanjali also testified that Gupta was frustrated by the difficulty he was having in  
8 getting information from Rajaratnam about Voyager. (See id. at 3095; see also id. at 3100 (testifying  
9 that at Thanksgiving Gupta was still upset at Rajaratnam about the Voyager investment).) The court  
10 instructed the jury that Geetanjali's testimony was to be considered "only on the issue of what bearing  
11 it has, if at all, on Mr. Gupta's attitude toward Mr. Rajaratnam during the period of time in question"  
12 (id. at 3095), and that "the limited purpose for which" Geetanjali's testimony was admitted was "not  
13 for . . . whatever may or may not have been going on at Voyager, but only for what Mr. Gupta's state  
14 of mind was with respect to Mr. Rajaratnam at this particular time" (id. at 3100).

15 Gupta contends that the district court erred in preventing Geetanjali from testifying that  
16 Gupta believed Rajaratnam had cheated him, because

17 Gupta did not seek to introduce Geetanjali's testimony to prove that  
18 Rajaratnam had in fact stolen from him (a point that was undisputed anyway);  
19 rather, he wanted to show that he believed Rajaratnam had stolen from him at  
20 a particular point in time.

21 (Gupta brief on appeal at 48 (emphasis in original); see id. at 49 ("Gupta sought to establish that he  
22 believed at the time that Rajaratnam was defrauding him" (emphasis in original)).) Gupta argues that  
23 Rule 803(3) provides an exception to the hearsay rule for a declarant's then-existing state of mind and  
24 that "Geetanjali's testimony--that on September 20, Gupta told her 'he was angry that Raj had taken  
25 money out of the fund without telling him' [Tr. 3079]--was classically admissible evidence

1 establishing Gupta's state of mind, and directly relevant to his motive for calling Rajaratnam." (Gupta  
2 brief on appeal at 48-49 (emphasis added); see id. at 49 ("his statement was admissible as evidence  
3 of [his] belief" that Rajaratnam was defrauding him (emphasis added)).)

4 We disagree with the thrust of Gupta's arguments, as we think it clear from the record  
5 that the court's limitation on Geetanjali's testimony was not based on a view that the testimony was  
6 being offered for its truth but rather was based on its view that the jury would likely be unable to  
7 comprehend that the statement could be considered only to show Gupta's belief and not to show the  
8 truth of what he believed. For the reasons that follow, we conclude that the limitation imposed was  
9 within the court's discretion, and that, in any event, if it was error to have thus limited Geetanjali's  
10 testimony, the error was harmless.

11 a. The Exercise of Discretion Under Rule 403

12 Generally, a statement made by a person while not testifying at the current trial, offered  
13 by that person to prove the truth of the matter asserted in his statement, is hearsay. See Fed. R. Evid.  
14 801(a)-(c). Hearsay generally is inadmissible if it does not fall within an exception provided by Rule  
15 803 or 804. See Fed. R. Evid. 802. Rule 803 provides an exception for "[a] statement of the  
16 declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or  
17 physical condition (such as mental feeling, pain, or bodily health), but not including a statement of  
18 memory or belief to prove the fact remembered or believed . . . ." Fed. R. Evid. 803(3) (emphasis  
19 added).

20 However, the fact that a statement falls within an exception to the hearsay rule does  
21 not mean that the statement is not to be classified as hearsay; nor does it mean that the statement is

1 automatically admissible. It means simply that the statement--assuming that the criteria specified in  
2 the exception are met--is "not excluded by the rule against hearsay," Fed. R. Evid. 803, 804(b)  
3 (emphasis added); see, e.g., Li v. Canarozzi, 142 F.3d 83, 88 (2d Cir. 1998). "The court retains its  
4 normal discretion to exclude the evidence on other grounds such as lack of relevance, see Fed.R.Evid.  
5 402, improper purpose, see, e.g., Fed.R.Evid. 404, or undue prejudice, see Fed.R.Evid. 403." Li v.  
6 Canarozzi, 142 F.3d at 88; cf. United States v. Detrich, 865 F.2d 17, 21 (2d Cir. 1988) (for  
7 admissibility, it is not sufficient that a proffered statement is not hearsay: "To be admissible it must  
8 also be relevant.").

9 Under Rule 403, even if proffered evidence is relevant, it may be excluded "if its  
10 probative value is substantially outweighed by a danger of one or more of the following: unfair  
11 prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly  
12 presenting cumulative evidence." Fed. R. Evid. Rule 403; see, e.g., Huddleston v. United States, 485  
13 U.S. 681, 687-88 (1988); United States v. Reifler, 446 F.3d 65, 91 (2d Cir. 2006); United States v.  
14 Salameh, 152 F.3d 88, 122-23 (2d Cir. 1998) ("Salameh"), cert. denied, 525 U.S. 1112 (1999).

15 In reviewing Rule 403 challenges, we "accord great deference" to the district  
16 court's assessment of the "relevancy and unfair prejudice of proffered  
17 evidence, mindful that it sees the witnesses, the parties, the jurors, and the  
18 attorneys, and is thus in a superior position to evaluate the likely impact of the  
19 evidence."

20 United States v. Quinones, 511 F.3d 289, 310 (2d Cir. 2007) (quoting United States v. Paulino, 445  
21 F.3d 211, 217 (2d Cir.), cert denied, 549 U.S. 981 (2006)), cert denied, 555 U.S. 910 (2008). "A  
22 district judge's" ruling following a "Rule 403 analysis is reversible error only when it is a clear abuse  
23 of discretion." Salameh, 152 F.3d at 122. "To find such abuse, we must conclude that the challenged  
24 evidentiary rulings were arbitrary and irrational." United States v. Quinones, 511 F.3d at 307-08

1 (internal quotation marks omitted); see, e.g., United States v. Scott, 677 F.3d 72, 83-84 (2d Cir. 2012);  
2 Salameh, 152 F.3d at 110.

3 We see no arbitrariness or irrationality in the present case. In limiting Geetanjali's  
4 testimony, the trial court made a Rule 403 assessment that the admission of testimony that Gupta  
5 believed Rajaratnam had cheated him--which the court observed would be "cumulative," given that  
6 the court had (as discussed in Part II.B.1.b. below) admitted other evidence to the same effect  
7 (Tr. 3085)--would be unduly prejudicial. Noting that, unlike the other witnesses whose similar  
8 testimony had been admitted, Geetanjali had no personal knowledge about Voyager, the court  
9 reasoned the jury would have undue difficulty in distinguishing between the aspect of Geetanjali's  
10 testimony that could be considered for its truth as to Gupta's state of mind and the aspect that  
11 indicated that Gupta had been cheated. When Gupta's counsel argued that the defense would be  
12 prejudiced if it could not have Geetanjali testify that Gupta thought Rajaratnam had cheated him, the  
13 court responded,

14 I think the prejudice is the other way.

15 The jury is going to, I think, draw from this, because the government  
16 can't cross-examine the witness in any meaningful way, that Rajaratnam, in  
17 fact, cheated Gupta, that Gupta knew it and that Gupta, therefore, was  
18 completely outraged; and, hence, it carries a danger here that no other witness  
19 carries for the reasons that I've already elaborated on the record.

20 (Tr. 3086 (emphasis added); see, e.g., id. at 2972-73 ("[T]here is no way the jury can make th[e]  
21 distinction" between the belief and the substance of what was said to have been believed. "They are  
22 going to inevitably think if they accept this testimony at all that he is telling the truth to his own  
23 daughter, and they will be taking it for its truth, and I don't see how under 403 that gross violation of  
24 the hearsay rule can be avoided." (emphases added).) Thus, the court limited Geetanjali's testimony

1 not on the ground that it was offered to prove that Rajaratnam had in fact cheated Gupta but rather  
2 because the court's view was that, if admitted, the jury would likely be unable to comprehend that it  
3 was not admitted for that purpose. We see no basis for second-guessing the district court's view as  
4 to the likely effect on the jury. Although it would have been within the court's discretion to admit the  
5 proposed Geetanjali testimony along with a clear and detailed limiting instruction to the jury if it  
6 believed such an instruction would be effective, we see no abuse of discretion in the court's decision  
7 to limit the testimony in light of its conclusion that there was "no way" such an instruction in this case  
8 would be effective.

9 We note that although Gupta perhaps would have us classify the court's ruling as  
10 arbitrary on the ground that Geetanjali was not allowed to state that Gupta was "angry" (Gupta brief  
11 on appeal at 22), the record does not support that contention. The court ruled that she would be  
12 allowed to testify to Gupta's "attitude" toward Rajaratnam; the record does not indicate that the court  
13 placed any restriction on the words she could use to describe his attitude. Geetanjali described Gupta  
14 as "quite upset" (Tr. 3094) and "frustrated" (*id.* at 3095) by his inability to get information from  
15 Rajaratnam about Voyager--descriptions likely sufficient to imply anger; and there was no ruling  
16 barring her from expressly describing him as "angry."

17 Gupta's additional contention that the limitation on Geetanjali's testimony made it seem  
18 "only that Gupta was upset in September 2008 about the performance of the Voyager investment"  
19 (Gupta brief on appeal at 22 (emphasis in original)) is belied by the testimony itself. The court asked  
20 whether Gupta was upset "because of how the investment was doing or because of how Mr.  
21 Rajaratnam was treating the investment or what"; Geetanjali responded "It was more because of how  
22 Mr. Rajaratnam was treating the investment." (Tr. 3094.)

1           Finally, Gupta suggests that allowing Geetanjali to testify that Gupta believed  
2           Rajaratnam had cheated him by taking money out of Voyager without alerting Gupta also to withdraw  
3           some of his capital from that venture would have been no more prejudicial than similar evidence that  
4           the court had previously admitted, because "the excluded statement did no more than confirm  
5           undisputed facts" (Gupta reply brief on appeal at 21). But this very argument substantiates the district  
6           court's view that this aspect of the Geetanjali testimony, with its potential for the jury to infer that  
7           Gupta had in fact been cheated, would have been cumulative. We cannot conclude that the court  
8           abused its discretion in viewing the potential for jury confusion and undue prejudice as substantially  
9           outweighing the cumulative evidence's probative value.

10                           b. Harmless Error

11           The fact that "the excluded statement did no more than confirm undisputed facts"  
12           (Gupta reply brief on appeal at 21) also contributes to our conclusion that, if the limitation on  
13           Geetanjali's testimony was error, the error was harmless. A party may gain relief for an "error in a  
14           ruling to admit or exclude evidence only if," inter alia, "the error affect[ed] a substantial right of the  
15           party." Fed. R. Evid. 103(a); see, e.g., Fed. R. Crim. P. 52(a) ("Any error . . . that does not affect  
16           substantial rights must be disregarded."). Thus, "[u]nder harmless error review, we ask whether we  
17           can conclude with fair assurance that the errors did not substantially influence the jury." United States  
18           v. Oluwanisola, 605 F.3d 124, 133 (2d Cir. 2010) ("Oluwanisola") (internal quotation marks omitted);  
19           see, e.g., Kotteakos v. United States, 328 U.S. 750, 764-65 (1946). If defense evidence has been  
20           improperly excluded by the trial court, we normally consider such factors as

1 (1) the importance of . . . un rebutted assertions to the government's case; (2)  
2 whether the excluded material was cumulative; (3) the presence or absence of  
3 evidence corroborating or contradicting the government's case on the factual  
4 questions at issue; (4) the extent to which the defendant was otherwise  
5 permitted to advance the defense; and (5) the overall strength of the  
6 prosecution's case.

7 Oluwanisola, 605 F.3d at 134; see also United States v. Miller, 626 F.3d 682, 690 (2d Cir. 2010)  
8 (focusing principally on the overall strength of the prosecution's case), cert. denied, 132 S. Ct. 379  
9 (2011); United States v. Song, 436 F.3d 137, 139-40 (2d Cir. 2006) (focusing principally on the extent  
10 to which the defendant was otherwise able to present the defense and on the presence of evidence  
11 corroborating the government's case); United States v. Lawal, 736 F.2d 5, 9 (2d Cir. 1984) (focusing  
12 principally on the overall strength of the prosecution's case and on the cumulative nature and marginal  
13 probative value of the excluded evidence).

14 All five of the factors set out in Oluwanisola lead us to conclude that, if there was  
15 error, it was harmless. First, as to the assertions in the government's case that Gupta sought to rebut,  
16 he pointed to testimony by Kumar suggesting that Gupta did not learn of Rajaratnam's withdrawal of  
17 capital from Voyager until 2009 (see Tr. 1858-64); Gupta argued that the singular importance of the  
18 proposed evidence as to his conversation with Geetanjali was its timing--i.e., that Gupta told her he  
19 was upset with Rajaratnam on September 20 (several days prior to his September 23 call to  
20 Rajaratnam upon learning of the imminent Buffett investment) rather than not becoming upset until  
21 2009. (See, e.g., id. at 3086 ("Your Honor, this proof is pretty critical and crucial because they put  
22 Kumar on there to try and move the date to fit their theory."); see also Gupta brief on appeal at 46-47.)  
23 Thus, "Geetanjali's statement that Gupta told her he was angry that Rajaratnam had impermissibly and  
24 covertly redeemed money from the Voyager fund . . . was offered to prove when Gupta formed his

1 belief about the redemptions." (Gupta reply brief on appeal at 20 (emphasis in original).) "The  
2 importance of this timing question cannot be overstated." (Id. at 19.)

3 But the court placed no restriction at all on the defense's ability to bring out the timing  
4 of Gupta's conversation with Geetanjali. Geetanjali testified amply that the conversation occurred on  
5 September 20, 2008. She testified that she remembered the date because, inter alia, it was her 30th  
6 birthday, and it occurred on a trip to Connecticut to celebrate both her birthday and her mother's  
7 birthday which was the next day. (See Tr. 3092-93.) Further, after Geetanjali proceeded to describe  
8 Gupta's being upset with Rajaratnam on account of Rajaratnam's treatment of the Voyager investment,  
9 the court highlighted the fact that that testimony was relevant to the "time" of Gupta's anger at  
10 Rajaratnam: It instructed the jury that Geetanjali's testimony was to be considered "only on the issue  
11 of what bearing it has, if at all, on Mr. Gupta's attitude toward Mr. Rajaratnam during the period of  
12 time in question" (id. at 3095 (emphasis added)), and that "the limited purpose for which" Geetanjali's  
13 testimony was admitted was "not for . . . whatever may or may not have been going on at Voyager,  
14 but only for what Mr. Gupta's state of mind was with respect to Mr. Rajaratnam at this particular time"  
15 (id. at 3100 (emphasis added)). The government's assertions as to the timing of Gupta's animus  
16 toward Rajaratnam thus did not go unnoticed or unchallenged.

17 Second, the testimony that the basis for Gupta's attitude toward Rajaratnam was that  
18 Rajaratnam had made a concealed withdrawal from Voyager was plainly cumulative. The  
19 government had introduced the testimony of Kumar that Gupta told him that Gupta had discovered  
20 that Rajaratnam had withdrawn some of Rajaratnam's capital from Voyager, and that Gupta said that  
21 this was "just plain wrong" and wanted to sue Rajaratnam (Tr. 1863). In addition, Gupta had  
22 introduced the deposition testimony of Ajit Jain that Gupta had told him "that he had \$10 million

1 invested with Raj in some venture and he had been gipped [sic], swindled or cheated by Raj and he  
2 had lost his entire 10 million that he had invested with Rajaratnam." (Jain Deposition at 6; see  
3 Tr. 2722-24, 2775.)

4 As to the third Oluwanisola factor, "the presence or absence of evidence corroborating  
5 or contradicting the government's case on the factual question[] at issue," 605 F.3d at 134 (emphasis  
6 added), which was the timing of Gupta's anger at Rajaratnam, plainly Geetanjali's testimony  
7 contradicted the government's theory that Gupta was not angry about Rajaratnam's treatment of  
8 Voyager until early 2009. But there was also evidence corroborating the government's contention that  
9 Gupta was on friendly terms with Rajaratnam through the fall of 2008. The government introduced  
10 a voice mail message from Gupta to Rajaratnam on October 10, 2008, well after the September 20  
11 conversation with Geetanjali, saying "Hey Raj, Rajat here. Just, uh, calling to catch up. I know it  
12 must be an awful and busy week. I hope you are holding up well. Uh, and I'll, uh, try to give you a  
13 call over the weekend to just catch up. Uh, all the best to you, talk to you soon. Buh-bye."  
14 (GX 25-T; see also GX 2128-MCK (a January 2009 email from Gupta to Rajaratnam wishing him a  
15 "Happy New Year" and "a restful week," forwarding information about a possible Galleon hiree, and  
16 concluding "Let's catch up soon").)

17 Fourth, the record easily establishes that Gupta was able, based on the evidence that  
18 was introduced, to advance his defense. The explicit testimony of Kumar and Jain that Gupta believed  
19 Rajaratnam had cheated him, along with documentary evidence that Rajaratnam had in fact withdrawn  
20 \$25 million from Voyager and a tape-recorded conversation in which Rajaratnam stated he had not  
21 told Gupta about the withdrawal, were highlights of Gupta's summation to the jury, cited by his  
22 counsel Gary P. Naftalis as among Gupta's "badges of innocence" (Tr. 3266; see id. at 3270).

1 [A] second badge of innocence . . . . is Rajaratnam's defrauding of Mr. Gupta  
2 about the Voyager investment. . . . Remember Mr. Gupta invested \$10 million  
3 in this Voyager investment, and ultimately--and it's kind of undisputed--he lost  
4 all of his \$10 million. . . . We have heard testimony from a variety of sources  
5 about how Mr. Gupta was very upset about how he was treated with that  
6 investment, not only losing the money, but the conduct that he came to learn  
7 about which Rajaratnam engaged in which consisted of not giving him  
8 information.

9 (Id. at 3270 (emphasis added).) Naftalis argued:

10 [Kumar's] testimony is supportive of the fact that we were swindled, Mr. Gupta  
11 was swindled by Mr. Rajaratnam in his Voyager investment. If you remember,  
12 Mr. Gupta made this investment, put a lot of money, \$10 million in Voyager,  
13 and it turned out that he lost every dime in that investment, every dime. He  
14 lost \$10 million, and we also established, if you recall, that there was a  
15 schedule . . . .

16 . . . . This is what Government Exhibit 2105 shows, unbeknownst to  
17 Rajat Gupta, behind the back of Rajat Gupta, concealed from Rajat Gupta, that  
18 Raj Rajaratnam put his hands into the cookie jar and took \$25 million out . . . .

19 . . . .

20 . . . [Y]esterday we put in evidence, an October 2nd tape, wiretap  
21 conversation that the government captured of Rajaratnam speaking on October  
22 2nd with one of his colleagues, Mr. Santhanam, and in this conversation  
23 [Rajaratnam] admitted that he never told Rajat Gupta he had taken the equity  
24 out.

25 (Tr. 3258-59 (emphases added).)

26 MR. NAFTALIS: (Continued) Can you stop [the tape] for a second  
27 there? Go back to "I told him I didn't take the equity out."

28 "I didn't tell him, I didn't tell Rajat Gupta that I took the equity out. I  
29 didn't tell him I took the \$25 million out."

30 You recall that Mr. Kumar told us . . . in October he had conversations,  
31 he is one of the many witnesses who testified on this subject about how Rajat  
32 Gupta was very upset because he had lost his money and indeed came to learn  
33 that he had been swindled by Mr. Rajaratnam who took the money out,  
34 concealed it from him.

1 (Tr. 3260 (emphases added); see also id. at 3272 ("As we know, because we've just played it a few  
2 minutes ago, we know that Mr. Rajaratnam had taken \$25 million out of the fund and concealed it  
3 from Mr. Gupta.")) Counsel also cited the deposition of Jain:

4 He told us, Mr. Jain, he testified by videotape, that on January 12, 2009, he had  
5 lunch with Mr. Gupta, and Mr. Gupta told him that he had \$10 million invested  
6 with Rajaratnam, and he had been gypped, swindled and mistreated by Raj and  
7 lost his entire \$10 million.

8 (Id. at 3276 (emphasis added).)

9 Counsel also emphasized that "we learned that Mr. Gupta . . . was very upset about  
10 how he had been treated by Mr. Rajaratnam" with respect to Voyager "as early as September 20."  
11 (Tr. 3271.) He argued that Geetanjali "told you that on the 20th she had [the] conversation with her  
12 father" in which Gupta showed he was quite upset, and counsel pointed out, inter alia, that "that is a  
13 date that stuck in [Geetanjali's] mind" because she was "celebrating on September 20, 2008 her 30th  
14 birthday" and "her mother's birthday . . . was on the 21st of September." (Id.)

15 In sum, the evidence "from a variety of sources," as defense counsel said (id. at 3270),  
16 including an exhibit, a wiretapped conversation, and testimony from three witnesses, was clearly  
17 sufficient to enable Gupta to present his main defense.

18 Finally, the government's circumstantial evidence that Gupta in fact passed confidential  
19 information to Rajaratnam on September 23 and October 23 was strong. The timing of Gupta's calls  
20 to Rajaratnam--each placed approximately one minute after Gupta received extraordinary news about  
21 Goldman Sachs's finances--and the timing and nature of Rajaratnam's large trades in Goldman Sachs  
22 stock, i.e., purchases within minutes of the first such call in the wake of Gupta's receipt of favorable  
23 information, and sales a month later within the first possible minute of trading after the call following

1 Gupta's receipt of unfavorable information, were powerful evidence that Rajaratnam was given the  
2 confidential information by Gupta. And that evidence was supported by Rajaratnam's statements, in  
3 the wake of those trades, to Horowitz and Lau.

4 We see no basis for a conclusion that, if Geetanjali had been allowed to testify that  
5 Gupta believed Rajaratnam's actions with respect to Voyager had cheated him--rather than to testify  
6 (as she was allowed to) that Gupta was quite upset over Rajaratnam's treatment of the Voyager  
7 investment--that testimony would have had any substantial influence on the jury. If it was error for  
8 the court to limit Geetanjali's testimony as it did pursuant to Rule 403, we conclude that the error was  
9 entirely harmless.

## 10 2. Evidence To Suggest an Alternative Tipper

11 Gupta's "second defense" at trial was to suggest that Rajaratnam had received the  
12 confidential Goldman Sachs information from a person other than Gupta. (Gupta brief on appeal  
13 at 53.) The person specified was David Loeb, a Goldman vice president who was "one of the sales  
14 guys who would call" Rajaratnam "a lot" (Tr. 274-75). Gupta sought to make this showing by  
15 proffering two taped telephone conversations and several dozen emails between Loeb and Rajaratnam  
16 (collectively the "documents" or "Loeb documents") that Gupta contended showed that Loeb had  
17 obtained inside information about technology companies including Intel Corporation and Apple Inc.  
18 and immediately attempted to reach Rajaratnam to pass that information to him. (See, e.g., id.  
19 at 2982, 2999.)

20 The district court refused to admit the Loeb documents on grounds of hearsay,  
21 relevance, lack of foundation, and, given the absence of a proper foundation, the likelihood that the

1 documents would cause jury confusion. On appeal, Gupta argues that the trial court's exclusion of  
2 these documents was error because "the accused may introduce any legal evidence tending to prove  
3 that another person may have committed the crime with which the defendant is charged" (Gupta brief  
4 on appeal at 54 (quoting Holmes v. South Carolina, 547 U.S. 319, 327 (2006))), and that the proffered  
5 documentation showing "Loeb's history of providing Rajaratnam with inside information was  
6 sufficient to place an alternative-perpetrator theory before the jury" (Gupta brief on appeal at 53-54).  
7 Although Gupta's legal premise is sound, we disagree with his contention that his proffer was  
8 sufficient.

9 "Evidence is relevant if . . . it has any tendency to make a fact" that is "of consequence  
10 in determining the action" "more or less probable than it would be without the evidence." Fed. R.  
11 Evid. 401. The assessment of the relevance of evidence for the purpose of its admission or exclusion  
12 is committed to the sound discretion of the district court. See, e.g., George v. Celotex Corp., 914  
13 F.2d 26, 28 (2d Cir. 1990). The trial court also has considerable discretion in deciding whether an  
14 adequate foundation has been laid for the introduction of relevant documents. See, e.g., Kirsch v.  
15 Fleet Street, Ltd., 148 F.3d 149, 166 (2d Cir. 1998). We accord particular deference to the trial court's  
16 rulings as to foundation and relevance, and we will not overturn those rulings except for abuse of  
17 discretion. See, e.g., Krieger v. Gold Bond Building Products, 863 F.2d 1091, 1097 (2d Cir. 1988)  
18 (relevance); LaForest v. Former Clean Air Holding Co., 376 F.3d 48, 58 (2d Cir. 2004) (foundation).

19 At trial, in response to the government's contention that the Loeb documents were  
20 hearsay, Gupta argued that the information in the documents was "not being offered for the truth. It  
21 is being offered for the fact that Loeb is saying I have information for you urgently or information that  
22 is important, please give me a call or may I call you." (Tr. 2986.) The government pointed out,

1       however, that Gupta was seeking to introduce the documents without calling any witness to provide  
2       a foundation indicating that the information was in fact confidential. The government argued that to  
3       the extent that the documents themselves portrayed the information as confidential, they were, in the  
4       absence of other evidence to show confidentiality, necessarily being offered for the truth of that  
5       portrayal; otherwise the documents were not relevant to indicate that Rajaratnam received confidential  
6       information about Goldman finances from Loeb, and their admission could only confuse the jury.  
7       Likewise, as to documents in which Loeb referred to information characterized as important without  
8       stating that it was confidential, there was, in the absence of other evidence to establish confidentiality,  
9       no foundation for a finding that the documents--none of which related to information concerning  
10      Goldman Sachs--were relevant. (See id. at 2994-95.)

11               Although Gupta argued that "[t]here [wa]s substantial evidence that supports the  
12      argument that Mr. Loeb could well have been the source of the alleged tips[,] if they happened[,]  
13      relating to Goldman Sachs" (id. at 2998-99), he proffered no evidence to show that Loeb had access  
14      to the confidential information about Goldman finances that triggered Rajaratnam's trading following  
15      the September 23 and October 23 calls. To the contrary, there was evidence that Goldman kept its  
16      "securities division [of] salespeople and traders that interacted with investors" physically and  
17      technologically separated from its equity capital markets division (id. at 1588-89); the latter division  
18      was "privy to a lot of confidential information" (id. at 1589) and developed the Buffett investment,  
19      which was "extremely confidential" because of its potential impact on Goldman's share price (id.  
20      at 1590; see id. at 1588-95). Loeb was in the securities division, not the equity capital markets  
21      division. (See id. at 2873-75 ("Loeb was an institutional salesperson," whose job it was to attempt  
22      to sell securities based on research done by Goldman analysts).) And although there was evidence

1 that Loeb was on Rajaratnam's list of 10 important persons (see, e.g., id. at 273-75)--Loeb was in  
2 charge of Galleon's securities account at Goldman (see id. at 2875)--and that he called Rajaratnam  
3 "a lot" (id. at 274-75), Eisenberg, Rajaratnam's assistant, testified that the man who called asking  
4 "urgent[ly]" to speak to Rajaratnam near the close of the market on September 23 (id. at 238-39) was  
5 not Loeb (see id. at 327).

6 The district court concluded that the Loeb documents were replete with inadmissible  
7 hearsay (see Tr. 3000, 3065); that they "suffer[ed] from," inter alia, a "lack of foundation" (id.  
8 at 3000); and that in the absence of explanatory testimony by a witness the jury would be unable to  
9 understand the documents without representations by counsel or speculation, either of which would  
10 be improper (see id. at 3065). As Gupta insisted on relying solely on the documents themselves,  
11 choosing not to call a witness or to present other evidence to lay a foundation for his contention that  
12 the information referred to in the Loeb documents was "inside" information (Gupta brief on appeal  
13 at 54), we see no error in the trial court's rulings. See generally United States v. Harwood, 998 F.2d  
14 91, 97 (2d Cir.) (a "statement [that] is irrelevant unless it was true . . . would be hearsay[] and  
15 inadmissible"), cert. denied, 510 U.S. 971 (1993).

### 16 3. Evidence of Proposed Charitable Giving

17 During the government's case, a portion of the notes taken by Gupta's financial advisor  
18 during an April 2008 meeting with Gupta was admitted in evidence to show that Gupta had an  
19 ownership interest in Galleon International. Pursuant to the rule of completeness, see Fed. R. Evid.  
20 106, the court allowed Gupta to introduce other parts of those notes concerning other sources of his  
21 wealth. The court rejected, however, Gupta's attempt to introduce still other portions of the notes that

1 read, in part, "want to give to charity while alive" and "? 80% to charity & 20% to extended family?  
2 perhaps" (GX 5517) (the "wealth distribution notes"). The court ruled that, as offered by Gupta, the  
3 wealth distribution notes were inadmissible hearsay, that they would be unduly confusing and  
4 prejudicial, and that their admission was not justified under Rule 106. Gupta challenges this ruling,  
5 arguing that the portion of the notes that "recorded Gupta's intent to donate most of his wealth to  
6 charity" (1) "was not hearsay, as it went to Gupta's state of mind," and (2) in any event "should have  
7 been admitted to ensure a fair and impartial understanding of the admitted portion." (Gupta brief on  
8 appeal at 50-51.) Neither contention has merit.

9           Gupta's first argument is doubly flawed. To the extent that the above text reflected  
10 statements by Gupta, it was plainly hearsay when offered by Gupta. It did not become nonhearsay  
11 even if it reflected his state of mind; if it did so reflect, it merely had the potential to fall within an  
12 exception to the general rule that hearsay evidence is to be excluded. More importantly, as discussed  
13 in Part II.B.1.a. above, the fact that a hearsay statement falls within an exception does not make the  
14 statement admissible. It must meet the requirements of, inter alia, relevance, and it must not be  
15 excludable on the grounds of undue confusion or prejudice under Rule 403. Even if the wealth  
16 distribution notes--which were surrounded by question marks and followed by the word "perhaps"--  
17 reflected Gupta's actual intent to give 80 percent of his wealth to charity, such intentions were  
18 irrelevant to whether Gupta had achieved (or was about to achieve) some of his wealth unlawfully.

19           Nor were the wealth distribution notes admissible under Rule 106 for purposes of  
20 completeness. That Rule provides: "If a party introduces all or part of a writing or recorded  
21 statement, an adverse party may require the introduction, at that time, of any other part--or any other  
22 writing or recorded statement--that in fairness ought to be considered at the same time." Fed. R. Evid.

1 106 (emphasis added). "The completeness doctrine does not, however, require the admission of  
2 portions of a statement that are neither explanatory of nor relevant to the admitted passages." United  
3 States v. Johnson, 507 F.3d 793, 796 (2d Cir. 2007) (internal quotation marks omitted), cert. denied,  
4 552 U.S. 1301 (2008). We see no abuse of discretion, see, e.g., id., in the ruling that the wealth  
5 distribution notes were not necessary for completeness here. The notes as to Gupta's ownership  
6 interest in Galleon International were relevant to show that Gupta had a financial stake in the  
7 profitability of Galleon International; that stake was relevant to show that Rajaratnam's advising Lau  
8 in October 2008, just after learning that Goldman would report a quarterly loss, not to buy shares of  
9 Goldman was in furtherance of the conspiracy among Rajaratnam, Gupta, and others to profit and  
10 avoid losses by trading on the basis of inside information. Whatever thought Gupta may have had as  
11 to how to distribute his wealth was not relevant to whether or not he had a stake in Galleon  
12 International.

#### 13 4. Character Evidence

14 At trial, Gupta called several character witnesses who testified to their opinions that  
15 Gupta was an honest person. Gupta also sought to have the witnesses testify to their opinions that he  
16 had "integrity" (Tr. 2331). The government objected to the giving of opinions on "integrity" to the  
17 extent that the defense wanted to elicit testimony "that [Gupta] obeys the law." (Id.) The court noted  
18 that there were several dictionary definitions of integrity (see id. at 2331-32) and asked what, other  
19 than honesty, Gupta expected the jury to understand by the word "integrity" (id. at 2333). Defense  
20 counsel responded with the dictionary definition that read "moral soundness, honesty, uprightness."  
21 (Id.) The court upheld the government's objection, concluding that moral soundness and uprightness

1 themselves were unduly ambiguous and would convey concepts not pertinent to the present case. The  
2 court allowed Gupta's character witnesses to give their opinions only as to Gupta's honesty--the  
3 relevant aspect of the dictionary definition cited by defense counsel.

4 Gupta contends that the district court erred in not allowing him to question witnesses  
5 about his "integrity," arguing that his honesty was not at issue in the case because he was not charged  
6 with making any false statement. We reject his contention.

7 The trial court has broad discretion in its rulings on the admissibility of character  
8 testimony, and such decisions "will be reversed only upon a clear showing of prejudicial abuse."  
9 United States v. Morgan, 554 F.2d 31, 33-34 (2d Cir. 1977). We see no abuse of discretion in the  
10 court's conclusion that, other than honesty itself, the aspects of the "integrity" definition cited by  
11 defense counsel were not pertinent to this case.

12 Gupta also argues that the district court should have instructed the jury that "character  
13 testimony may in and of itself raise a reasonable doubt" as to a defendant's guilt of the charges against  
14 him (Tr. 3039). The district court declined to give such an instruction because it "artificially singles  
15 out one aspect of the proof and gives it sort of prominence above all others by implication," and noted  
16 that, although such an instruction is "commonly given," no case law required him to give it. (Id.  
17 at 3039-40.)

18 The district court's understanding of the law of this Circuit was correct. We have held  
19 that an instruction that character testimony may by itself raise a reasonable doubt is not required.  
20 See United States v. Pujana-Mena, 949 F.2d 24, 27-28 (2d Cir. 1991) ("Pujana-Mena"). Although  
21 Gupta asks us to "reconsider" Pujana-Mena, arguing, in part, that it is "contrary" to two Supreme  
22 Court cases (Gupta brief on appeal at 60-61), we decline to do so. Both of the Supreme Court cases

1 cited by Gupta--Edgington v. United States, 164 U.S. 361 (1896), and Michelson v. United States, 335  
2 U.S. 469 (1948)--preceded Pujana-Mena and were cited in and distinguished by Pujana-Mena, see 949  
3 F.2d at 28-30. Gupta has cited no intervening change in the law suggesting that Pujana-Mena was  
4 wrongly decided; and even if this panel had the authority to overturn a prior panel decision in another  
5 case, we would see no basis for concluding that Pujana-Mena's interpretation of those Supreme Court  
6 precedents was incorrect.

#### 7 CONCLUSION

8 We have considered all of Gupta's arguments on this appeal and have found them to  
9 be without merit. The judgment of the district court is affirmed.