SECURITIES AND EXCHANGE COMMISSION
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	:	
	:	**09 Civ. 8811**
Plaintiff,	:	**(JSR)**
	:	
-against-	:	**ECF CASE**
	:	
GALLEON MANAGEMENT, LP,	:	
RAJ RAJARATNAM,	:	
RAJIV GOEL,	:	
ANIL KUMAR,	:	
DANIELLE CHIESI,	:	
MARK KURLAND,	:	
ROBERT MOFFAT,	:	
NEW CASTLE FUNDS LLC,	:	
ROOMY KHAN,	:	
DEEP SHAH,	:	
ALI HARIRI,	:	
ZVI GOFFER,	:	
DAVID PLATE,	:	
GAUTHAM SHANKAR,	:	
SCHOTTENFELD GROUP LLC,	:	
STEVEN FORTUNA,	:	
and	:	
S2 CAPITAL MANAGEMENT, LP,	:	
	:	
Defendants.	:	
	:	

PLAINTIFF'S MEMORANDUM OF LAW
IN SUPPORT OF ITS RENEWED MOTION TO COMPEL PRODUCTION OF
RELEVANT, LEGALLY OBTAINED WIRETAPPED COMMUNICATIONS

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I.
SUMMARY

Plaintiff Securities and Exchange Commission (the "SEC") respectfully renews its motion pursuant to Federal Rules of Civil Procedure 26 and 34, and pursuant to the Second Circuit's opinion in *Securities and Exch. Comm'n v. Rajaratnam*, 622 F.3d 159 (2d Cir. 2010) ("*Rajaratnam")*, to compel defendants Raj Rajaratnam and Danielle Chiesi (the "Defendants") to produce all relevant wiretapped communications in their possession, custody or control. For the relevant communications, the SEC also seeks copies of all corresponding electronically searchable line sheets that provide the identity of the participants in such intercepts and all draft summaries and transcripts of such intercepts that were produced to the Defendants by the United States Attorney's Office for the Southern District of New York ("USAO").

For the purposes of this motion, relevant communications include all nonprivileged, wiretapped communications that are "relevant to any party's claims or defenses," as well as all wiretapped communications that "appear[] reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). This includes, but is not limited to, all communications: (1) concerning the companies and stocks alleged in the SEC's pleadings to have been subject to insider trading; (2) between, among or concerning any sources of information about public companies for any of the defendants named in the pleadings; (3) concerning any relationships between and among any of said defendants and between and among any of said defendants and any of their sources of information about public companies; (4) concerning any trading strategies and practices of any of said defendants; (5) concerning any trades made, directed, discussed or recommended by, or on behalf of, any of said defendants or their affiliates; (6) concerning any public company or its stock; and (7) concerning any federal,

state or local criminal, regulatory or other investigations or inquiries concerning any of the defendants or concerning insider trading generally.

In *Rajaratnam*, 622 F.3d 159, the Second Circuit held that the SEC "has a presumptive right to discovery of these materials from its adversary based on the civil discovery principle of equal information," *id.* at 180, and that the SEC's right of access is "significant," *id.* at 182. However, the Second Circuit held that the district court failed to balance properly the relevant privacy interests against the SEC's right of access: "(1) by ordering the disclosure of the conversations prior to a ruling on the legality of the interceptions, and (2) by failing to limit the disclosure order to relevant conversations." *Id.* at 185. Thus, the Second Circuit vacated this Court's February 9, 2010 Order and remanded the matter for further proceedings consistent with its opinion. *Rajaratnam* 622 F.3d at 188.

Subsequently, in the parallel criminal case against Defendants, Judge Holwell denied Rajaratnam's and Chiesi's respective motions for suppression of the conversations intercepted over their telephones pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A §§ 2510-2522 ("Title III"), and determined that the intercepts were in fact obtained legally. *See United States v. Rajaratnam*, No. 09 Cr. 1184 (S.D.N.Y. Nov. 24, 2010) ("Holwell Order"). Judge Holwell also concluded that the wiretap applications and supporting affidavits at issue demonstrated probable cause that Rajaratnam and Chiesi were engaged in an insider trading conspiracy constituting violations of the federal wire fraud and money laundering statutes, *id.* at 30, 32-33, that the intercepts could be introduced at their criminal trial even though securities fraud is not a predicate offense for which Title III authorizes interceptions, *id.*

at 13, and that the interceptions were necessary to accomplish the goals of the investigation, *id.* at 61.[1] The court also found that the interceptions were properly minimized. *Id.* at 64-67.

Given that the legality of the wiretaps has now been established, and given that the SEC is only seeking relevant intercepts, the SEC's "significant" right to obtain the relevant intercepts outweighs whatever arguable remaining privacy interest Defendants and others may have in conversations relevant to the defendants' illegal insider trading conspiracy. Moreover, any such arguable remaining privacy interests can be adequately protected by the protective order currently in place, entered by this Court on December 17, 2009.

Accordingly, the SEC respectfully requests that the Court find that the SEC's right to discovery of the relevant intercepts outweighs any remaining privacy interests relating to those intercepts and order the Defendants to immediately produce all relevant intercepts, together with all corresponding line sheets and draft transcriptions or summaries of intercepts provided to Defendants by the USAO.

II.
PROCEDURAL HISTORY

On December 23, 2009, in connection with its parallel criminal action against Defendants, the USAO provided Defendants with wiretapped communications, together with electronically searchable line sheets that provide the identity of the participants in the calls and draft summaries and transcriptions of those recordings. The USAO provided these materials to Defendants in accordance with Title III and Rule 16 of the Federal Rules of Criminal Procedure, and without a protective order. Subsequently, the SEC timely propounded multiple discovery

[1] A motion to suppress is pending before Judge Richard Sullivan in a criminal case arising out of an investigation that also concerns defendants in this action, including Zvi Goffer (the "Goffer Suppression Motion"). Plaintiff does not seek to compel production of the wiretapped communications that are the subject of the Goffer Suppression Motion until such time as the legality of those interceptions has been determined.

requests to Defendants for the wiretapped conversations pursuant to Federal Rules of Civil Procedure 26 and 34. *See Securities and Exch. Comm'n v. Galleon Mgmt., LP, et al.,* 09 CV 8811 (S.D.N.Y. Feb. 9, 2010) (Mem. Order) ("Discovery Order") at 2.

After briefing and oral argument, this Court granted the SEC's initial motion to compel in a written opinion dated February 9, 2010. *Id.* The Court ordered Defendants to produce to the SEC copies of all wiretap recordings received by Defendants from the USAO. *Id.* at 6. This Court denied Defendants' motion for a stay pending appeal and certification of the ruling for immediate appeal pursuant to 28 U.S.C. § 1292(b), or in the alternative an administrative stay. *See Securities and Exch. Comm'n v. Galleon Mgmt., LP, et al.*, 09 CV 8811 (S.D.N.Y. Feb. 11, 2010) (Order). Defendants appealed to the United States Court of Appeals for the Second Circuit, which granted an administrative stay of the Court's Discovery Order pending a hearing, and later granted a stay of the Discovery Order pending appeal. *Securities and Exch. Comm'n v. Rajaratnam*, 10-462(L) (2d Cir. 2010) (Feb. 11, 2010 Order) (Mar. 24, 2010 Order). On July 8, 2010, the appeal was argued before the Second Circuit and, on September 29, 2010, the Second Circuit vacated the Discovery Order and remanded the case for further proceedings. *Rajaratnam*, 622 F.3d at 188.

III.
ARGUMENT

A. THE SEC HAS A PRESUMPTIVE, SIGNIFICANT RIGHT TO DISCOVERY OF THE INTERCEPTED COMMUNICATIONS

In *Rajaratnam*, the Second Circuit made clear that the SEC has a presumptive right to discovery of the intercepted communications: "Under the circumstances of this case, where the civil defendant has properly received the Title III materials at issue from the government, the SEC has a presumptive right to discovery of these materials from its adversary based on the civil

discovery principle of equal information." Id. at 180. The Court grounded its ruling on well-established Supreme Court precedent: "The Supreme Court has acknowledged the 'fundamental maxim of discovery that '[m]utual knowledge of all relevant facts gathered by both parties is essential to proper litigation.'" *Id.* at 180-181, citing *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for the S. Dist of Iowa,* 482 U.S. 522, 540 n.25 (1987), quoting *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). The Court also stated that Rule 26(b)(1) "embodies this principle by permitting parties to 'obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense.'" *Rajaratnam,* 622 at 181. It also noted that Rule 26(b)(1) further provides that: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." *Id.*

The Court further held that the SEC's right of access to the intercepts should be accorded "significant" weight.

> [Defendants'] unilateral access to this information in preparing for trial would surely be prejudicial to the SEC, because, even if [Defendants] do not use any of the recordings at the civil trial, they could still use the materials in preparation for trial – for example, by preparing to cross-examine witnesses at deposition or at trial, by attacking the credibility of witnesses, or by deciding how to structure their defense. Placing the parties on a level playing field with respect to such functions is the very purpose for which civil discovery exists. For this reason, we find that the SEC's right of access is significant.

Id. at 182.

The Court rejected Defendants' argument that Congress had acted to deny the materials at issue to the SEC. *Id.* at 182. It also rejected Defendants' argument that the SEC did not need the intercepts because it could simply depose the defendants if it wanted to learn about their telephone conversations. It noted that "any depositions of [the Defendants] would be unlikely to be fruitful given the likelihood that [the Defendants] would invoke their Fifth Amendment rights due to the pending parallel criminal proceeding." *Id.* It further noted that postponing the civil case until after the criminal trial – to the point when the defendants would lose their Fifth

Amendment right – would not remedy the prejudice to the SEC flowing from its lack of access to the intercepts:

> [Defendants'] deposition is not a perfect substitute for access to the wiretapped conversations even apart from any invocation of Fifth Amendment rights, given the likelihood that [Defendants] would not remember the contents of many potentially relevant conversations to which their attorneys, in possession of recordings of those conversations, would still have access. In any event, parties to litigation are not limited to their adversaries' recollections as to matters reduced to writing, recorded, or otherwise memorialized.

Id. The Court further noted that if the Defendants had taped their own conversations, the argument that the SEC would have no interest in discovering the recordings because its lawyers could simply depose the Defendants would be "rejected out of hand." *Id.* at 183.

The Court also rejected Defendants' argument that the SEC did not need the intercepts because Defendants had ostensibly volunteered not to use the intercepts in the civil case. The Court stated:

> … even if [Defendants] do not use any of the recordings at the civil trial, they could still use the materials in preparation for trial – for example, by preparing to cross-examine witnesses at deposition or at trial, by attacking the credibility of witnesses, or by deciding how to structure their defense. Placing the parties on a level playing field with respect to such functions is the very purpose for which civil discovery exists. For this reason, we find that the SEC's right of access is significant.

Id. at 182.

It also noted that Defendants do not maintain that they would be legally precluded from introducing the intercepts at their civil trial should it become tactically advisable to do so and, therefore, it "cannot be said that this imbalance would be insignificant." *Id.* Indeed, it would gut the very purpose of Rule 26 if a party were permitted to deny its opponent access to relevant information detrimental to its case simply by making the self-serving decision not to use that detrimental information in its own case.

Finally, while the Court was not in a position, on the record before it, to evaluate Defendants' claim that the intercepts are not relevant, it stated that if the intercepts are relevant, "then [Defendants'] possession of the conversations would put the SEC at a disadvantage, and the SEC has a presumptive right to discover them." *Id.* at 184 (*also citing* Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense."). Given the clear relevance of the intercepts excerpted in the unsealed criminal complaint, including discussions by Rajaratnam and Chiesi concerning their insider trading in various stocks charged in this action, as well as the fact that the USAO was authorized, and did, intercept hundreds of conversations relating to the defendants' insider trading conspiracy, any argument that a substantial number of the intercepts are not relevant is frivolous. *See* discussion regarding relevance and need, *infra*, at Section C.

The Court concluded its discussion of the SEC's right to access the intercepts by stating:

> In sum, despite [Defendants'] arguments to the contrary, the SEC clearly has an interest in access to these wiretap conversations insofar as they create an informational imbalance prejudicing its preparation for the civil trial.

Rajaratnam, 622 F.3d at 184.

B. THE PRIVACY CONCERNS UNDERLYING THE VACATUR AND REMAND OF THE DISCOVERY ORDER NO LONGER WEIGH AGAINST DISCLOSURE OF THE INTERCEPTS.

The *Rajaratnam* Court stated that although the SEC has a right of access to the intercepts, that right must be balanced against the privacy interests at stake. The Court held that the district court: "exceeded its discretion in failing to balance properly the relevant privacy interests against the SEC's right of access in two major ways: (1) by ordering the disclosure of the conversations prior to a ruling on the legality of the interceptions; and (2) by failing to limit the disclosure order to relevant conversations." *Id.* at 185.

Those two concerns are no longer relevant. Because the district court in the criminal case has now ruled that the interceptions were lawful, and because the SEC's current request is limited to only relevant intercepts in accordance with its rights under Rule 26(b)(1), the two concerns that the Second Circuit relied upon in reversing this Court's initial discovery order now weigh in favor of the SEC's discovery requests and the SEC's right to, and need for, the intercepts outweighs any remaining privacy interests relating to the intercepts.

i. Judge Holwell's Recent Ruling that the Interceptions Were Legal Eliminates the *Rajaratnam* Court's Primary Concern with this Court's Discovery Order

On November 24, 2010, Judge Holwell issued a Memorandum Opinion and Order in one of the parallel criminal cases, denying Rajaratnam's and Chiesi's motions to suppress all Title III intercepts obtained on their respective telephones. Holwell Order at 1. Judge Holwell also denied Chiesi's motion to suppress evidence that the government obtained pursuant to Title III wiretaps on the telephones used by co-conspirators C.B. Lee and Ali Far. *Id.* at 68. The Court held that the government presented sufficient probable cause to the judge who authorized the initial Title III interceptions that the Defendants' telephones were being used by them and others to engage in an insider trading conspiracy in violation of the federal wire fraud and money laundering statutes, that the government established sufficient need to justify use of the wiretaps, and that the evidence of the wiretaps was admissible in the criminal case. *Id.* at 1-3. The court also held that "the government complied with its statutory responsibility to minimize recording calls unrelated to the crimes the government had probable cause to suspect." *Id.* at 3.

Accordingly, now that the intercepts have been found to have been legally obtained, the first of the two factors the *Rajaratnam* Court relied upon in holding that this Court did not properly balance the SEC's right to the intercepts against the privacy interests of the interceptees has been eliminated. *See Rajaratnam*, 622 F.3d at 185. Indeed, that a determination of the

legality of the tapes would alleviate the primary concern of the Second Circuit is evident throughout the Court's opinion. *See, e.g., id.* at 185 ("If the legality of the wiretaps is upheld, any privacy rights against interception would have been infringed lawfully and with good purpose."); *id.* at 186 ("[A] determination that the wiretaps were legal would reduce the privacy concerns, and would make it all but inevitable that some or all of the most relevant conversations would be publicly played at the criminal trial."); *id.* at 186 ("[I]f the wiretaps were found to be legal, the privacy interests would be less weighty … ."). Id.

ii. The SEC's Motion for Only Relevant Intercepts Eliminates the *Rajaratnam* Court's Only Other Concern with the Discovery Order

The *Rajaratnam* Court also held that the district court exceeded its discretion by failing to limit the disclosure of the intercepts to relevant conversations. *See, e.g., id.* at 187. More specifically, the Court was concerned that the Discovery Order "could infringe the privacy rights of hundreds of individuals, whose irrelevant, and potentially highly personal, conversations with the [Defendants] would needlessly be disclosed to the SEC and other parties, without furthering any legitimate countervailing interest." *Id.* at 187. By expressly limiting its discovery request to only relevant conversations, most if not all of which will involve conversations between and among the Defendants, their co-conspirators, and other business associates, regarding the heavily regulated and monitored business of securities trading, the SEC has addressed and eliminated the *Rajaratnam* Court's concern with unnecessarily infringing the privacy rights of innocent individuals concerning highly personal conversations. By limiting its request to relevant communications, it is highly unlikely that any intercepts of innocent parties regarding highly personal matters will be subject to discovery.

Moreover, it now appears that the concerns Defendants raised in their appeal regarding the alleged 18,150 calls involving 550 individuals and hundreds of innocent parties concerning

highly personal matters, (Rajaratnam Appeal Brief, filed April 26, 2010, at 9), were overstated. Judge Holwell rejected both Rajaratnam's and Chiesi's arguments that the government did not properly minimize these interceptions. Indeed, before Judge Holwell, Rajaratnam cited only 150 calls that he claimed were "non-pertinent" and Chiesi complained that only 155 calls "pertained solely to personal matters." Judge Holwell rejected both Defendants' arguments and found the government's conduct "objectively reasonable under the circumstances." Holwell Order at 67. Thus, few if any relevant calls will involve innocent third parties or involve non-business related conversations.

Moreover, any relevant calls involving "innocent" parties are unlikely to implicate, far less infringe upon, any substantial privacy interests since they will perforce involve business discussions regarding securities trading and will leave little if any time, within the short duration of most calls, for discussion of "highly personal" matters.[2] If there are tapes that contain both relevant communications and highly personal conversations involving innocent parties, the SEC would not object to court-approved redaction of any such communications. *See, e.g. In re New York Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987) (recommending redaction, rather than wholesale sealing, of Title III materials to protect privacy interests; "where privacy interests in wiretapped conversations are asserted, the court should consider 'whose privacy interests might be infringed, how they would be infringed, what portions of the tapes might infringe them, and what portions of the evidence consisted of the tapes.'") citing *Waller v. Georgia*, 467 U.S. 39, 48 (1984); *see also In re New York Times Co.*, 834 F.2d 1152, 1154 (2d Cir. 1987) (same).

[2] More than 50 percent of the calls over the Rajaratnam telephone, and more than 60 percent of the calls over the Chiesi telephones, were either of no duration – because the caller hung up – or were less than one minute. *See* Government's Status Report, dated February 16, 2010, at 3, *U.S. v. Rajaratnam*, 09 CR 1184, Dkt # 46.

Thus, given that the SEC only seeks relevant intercepts, most of which will consist of brief conversations relating to business matters -- and many of which will be illegal in nature -- the privacy concerns relating to such intercepts will be minimal at best and outweighed by the SEC's significant right of access to these communications.

C. THE SEC'S RIGHT TO, AND NEED FOR, THE REQUESTED INTERCEPTS OUTWEIGHS THE DIMINISHED PRIVACY INTERESTS IMPLICATED IN PRODUCING ONLY INTERCEPTS RELEVANT TO THE DEFENDANTS' INSIDER TRADING SCHEME

The only two aspects of this Court's order that the *Rajaratnam* Court criticized – disclosure prior to a ruling on the legality of interceptions and overbroad disclosure of irrelevant intercepts – have now been eliminated. Accordingly, the SEC's significant right of access to relevant, legally intercepted communications relating to the defendants' insider trading scheme, and the substantial prejudice it will suffer if deprived of these intercepts, clearly outweighs any remaining, diminished privacy interests implicated in disclosing the relevant intercepts. This is particularly true where Defendants can designate as "Confidential" appropriate materials under the existing protective order in this action. Further, materials that may contain both relevant and "highly personal" non-relevant matters can be subject to any court approved redactions of any irrelevant portions of otherwise relevant intercepts that unduly infringe on legitimate privacy interests.

i. The Requested Intercepts Are Highly Relevant to this Case.

Under *Rajaratnam*, a proper balancing of interests requires "an analysis of the degree of relevance of the conversations at issue." *See Rajaratnam, 622* F.3d at 187, n.29. The SEC seeks only relevant intercepts. Pursuant to Fed. R.Civ. P. 26(b)(1), the SEC is clearly entitled to "discovery of any nonprivileged matter relevant to any party's claim or defense" and any matter that "appears reasonably calculated to lead to the discovery of admissible evidence." This

relevance parameter serves to severely limit the impact production would have on any remaining privacy interests now that the wiretaps have been upheld by Judge Holwell.

By and large, the relevant communications will include all communications: (1) concerning the companies and stocks alleged in the pleadings to have been subject to insider trading; (2) between, among or concerning any sources of information about public companies for any of the defendants named in the pleadings; (3) concerning any relationships between and among any of said defendants and between and among any of said defendants and any of their sources of information about public companies; (4) concerning any trading strategies and practices of any of said defendants; (5) concerning any trades made, directed, discussed or recommended by, or on behalf of, any of said defendants or their affiliates; (6) concerning any public company or its stock; and (7) concerning any federal, state or local criminal, regulatory or other investigations or inquiries concerning any of the defendants or concerning insider trading generally. Thus, most of the relevant communications will likely consist of conversations by market professionals and public company insiders about stock trading and publicly traded companies.

It is indisputable that the recordings capture communications highly relevant to the SEC's allegations that the Defendants provided, received and sought material nonpublic information for the purpose of insider trading. For example, the criminal complaints against Rajaratnam, Chiesi and other defendants contain numerous excerpts from incriminating wiretapped communications concerning insider trading in the same stocks alleged in this case. *See, e.g., United States v. Rajaratnam*, No. 09 CR. 1184 (S.D.N.Y.) Dkt. # 1 ("Rajaratnam Criminal Complaint" and "Chiesi Criminal Complaint"), Rajaratnam Criminal Complaint, ¶ 53(a)-(e), (h) (discussing Clearwire); ¶ 56(c),(f), (g) and (j) (discussing Akamai); ¶ 59(b-g), (j-m), (o-s) (discussing

AMD); ¶ 61 (e), (g), (j) (discussing PeopleSupport); *see* Chiesi Criminal Complaint, ¶ 23(d), (i), (j), 24(b-d) (discussing Akamai securities); ¶ 28(b-e), (g-r), (u-z), (aa -cc) (discussing AMD); ¶ 30(a, b and e) (discussing IBM); ¶ 31(d)-(e) (discussing Sun). *See also*, excerpts of certain disclosed intercepts discussed *infra*. Further, one can reasonably assume that the balance of relevant conversations that have not been publicly disclosed are extensions of, or provide context to, the publicly disclosed conversations, or are similar in content and subject matter to the publicly disclosed conversations.

The corresponding electronic line sheets and draft summaries and transcripts of the relevant intercepts are also relevant and necessary to the SEC's preparation of its case as they provide a roadmap to relevant conversations and identify the participants in those conversations. They also do not raise any privacy concerns beyond those arising from the production of the intercepts themselves.

ii. The SEC Needs the Intercepts Now in Order to Prosecute Its Case Effectively and Will Suffer Prejudice with any Further Delay

As discussed above, the *Rajaratnam* Court made clear that the SEC has a "presumptive" and "significant" right to the intercepts and it will suffer "substantial prejudice" if it is deprived access to what this Court has already found to be "some of the most important non-privileged evidence bearing directly on the case." *See Rajaratnam*, 622 F.3d at 184; Discovery Order at 4.

Indeed, possession of the wiretapped conversations is critical to the SEC's ability to prepare witnesses, depose witnesses, and use at trial as part of its case in chief or to rebut or impeach. Defendants' "unilateral access to this information in preparing for trial would surely be prejudicial to the SEC… ." *Rajaratnam*, 622 F3d at 182. Defendants will be able to use (and, presumably, have been using) the wiretapped conversations in fashioning their defense, preparing their witnesses, preparing to attack the SEC's witnesses on cross-examination, and at

trial, without the SEC having the benefit of the same information. This weighs heavily in favor of the SEC's discovery of the material, and is precisely the informational imbalance that this Court and the Second Circuit recognized should be avoided. *See Rajaratnam*, 622 F.3d at 182 ("Placing the parties on a level playing field with respect to such functions is the very purpose for which civil discovery exists."); Discovery Order at 4 ("[T]he notion that only one party to a litigation should have access to some of the most important non-privileged evidence bearing directly on the case runs counter to basic principles of civil discovery in an adversary system… .").

a. The Public Interest in the SEC's Effective Prosecution of Violations of the Federal Securities Laws in this Case Depends upon the SEC's Access to the Substantial and Crucial Evidence Contained in the Intercepts.

Although the SEC does not know the specific content of most of the recordings, select excerpts published in the criminal complaints relating to the Defendants in this case reveal the recordings to contain evidence highly probative of issues central to this action, and corroborative of the SEC's allegations. The intercepts not only comprise the best evidence of the actual communications between and among the Defendants and other key witnesses, they provide compelling evidence of defendants' unlawful trading practices, scienter and motivations for tipping and trading. The limited excerpts prove this to be true, and highlight how crucial the recordings will be to the SEC's ability to present its best case at trial, especially since it is likely that certain key witnesses – namely, non-cooperating defendants and alleged sources of inside information who may or may not already have been charged themselves – will exercise their right not to testify under the Fifth Amendment. Without the recordings, the SEC likely will be deprived of important admissions and in many instances the best, most direct evidence of wrongdoing.

In the case of certain stocks alleged in the SEC's action, the recordings likely constitute the only direct evidence of inside information being communicated. For example, the criminal complaint filed against Chiesi and others recounts a wiretapped call from Chiesi to Rajaratnam as follows:

> Akamai.... I'm trading it tomorrow.... They're gonna guide down. I just got a call from my guy. I was talking about the family and everything, and then he said people think it's gonna go to 25 [dollars per share]. They print on Wednesday.

Chiesi Criminal Complaint ¶ 23d.

Based on the information passed in this call, as well as information on other wiretapped calls excerpted in the criminal complaint, Rajaratnam and Chiesi traded Akamai stock, garnering illegal trading profits of $3.2 million and $2.4 million, respectively. *See* Second Amended Civil Complaint, ¶¶ 121-23. Without the recordings of these wiretapped calls, the SEC has no direct evidence of the information that passed between Chiesi and Rajaratnam because, at present, it has no witness that will testify as to these communications. The SEC should not be tied to relying on circumstantial evidence alone when direct evidence exists and is in the hands of the Defendants.

Besides constituting the best evidence of the unlawful communications at issue in this case, the wiretapped recordings are highly probative of other key elements of the SEC's case. For example, the criminal complaint against Chiesi and others states the following with respect to Advanced Micro Devices, Inc. ("AMD"), also a stock alleged to have been traded in the SEC's action:

> On or about August 19, 2008, at approximately 2:52 p.m., Chiesi called Rajaratnam on the Rajaratnam Cell Phone. Chiesi indicated that she had spoken with [an] AMD Executive, who told her that "Wall Street will be shocked," [over a highly material and confidential business transaction] and that AMD will "definitely make the announcement... before they print [quarterly earnings], but it'll be end of September, probably." Later Rajaratnam said, "Between my guy and your guy we can nail this."

> Chiesi and Rajaratnam discussed the importance of keeping the information confidential. Chiesi said that "if it leaks, I think I'm out of business.... Because... who knows IBM? And who, who's in bed with AMD? Put Danielle's name on the fuckin' ticket."
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> On or about August 27, 2008, Chiesi used Chiesi Landline B to call a co-conspirator not named as a defendant herein (the "CC"). Chiesi said, "You just gotta trust me on this. Here's how scared I am about what I'm gonna tell you on AMD." Chiesi provided the CC with certain information regarding the AMD Reorganization. The CC asked when the announcement would take place, and Chiesi replied, "September." Chiesi said, "I swear to you in front of God .... You put me in jail if you talk." Later, Chiesi said, "I'm dead if this leaks. I really am .... and my career is over. I'll be like Martha fucking Stewart." After further discussion, the CC told Chiesi that s/he would buy shares of AMD.

Chiesi Criminal Complaint, ¶¶ 28j, 28t.

The quoted intercepts not only evidence the inside information communicated, but they are highly probative of scienter - an element of insider trading charges that is notoriously difficult to establish, especially when defendants are professional traders, as here. Such evidence will be crucial in rebutting any defense that the AMD stock at issue was traded for innocent reasons.

In another conversation concerning AMD between Chiesi and Rajaratnam, recounted in the Chiesi criminal complaint:

> Chiesi said that she "could get fucked if [AMD stock] is up 30 percent." … CHIESI asked Rajaratnam if she should be "showing a pattern of trading" AMD stock. Rajaratnam said, "I think you should buy and sell, and buy and sell." He also emphasized the importance of remaining quiet: "On Akamai or IBM, anything, be radio silent. Like, you know, I get shit on lots of companies .... " Chiesi replied, "I'm radio silent."

Chiesi Criminal Complaint, ¶ 28u. These communications are highly probative of Defendants' efforts to conceal their violative trading.

In the criminal complaint against Rajaratnam, there are excerpted wiretapped calls between Rajaratnam and Rajiv Goel, a co-defendant and cooperating witness who was a source of inside information for Rajaratnam:

> On or about Thursday, March 20, 2008, at approximately 9:11 p.m., Rajaratnam received an incoming call on the Rajaratnam Cell Phone from Goel. Goel asked Rajaratnam to get him a

> job with one of your powerful friends," adding that he was “tired" of working at Intel. Later, Goel and Rajaratnam continued their conversation about the possible business deal involving Intel, Sprint, Clearwire, and other companies. Goel told Rajaratnam that if Goel heard anything about Intel or, or even about that, you know, the, the deal, I'll give you." Rajaratnam responded: “April 1st , right?" Goel said, yeah but you know these deals. Don't hold me to that date because these deals they're so complex and so many parties involved they will all have their say right now. But yesterday our Board approved this deal.”
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> On or about March 24, 2008, at approximately 7:59 p.m., Rajaratnam received a call over the Rajaratnam Cell Phone from Goel. During the call they discussed the transaction involving Intel, Sprint, Clearwire, and other companies, and Goel told Rajaratnam he wanted to explain why he thought Rajaratnam's valuation was incorrect. Goel told Rajaratnam to call him in an hour at home because, “I don't like talking over cell phone on this."
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> On or about March 25, 2008, at approximately 8:22 p.m., Rajaratnam made an outgoing call over the Rajaratnam Cell Phone to [a Galleon Employee]. During the call, the Galleon Employee said to Rajaratnam: "We're fucked man .... It just hit the Wall Street Journal." Rajaratnam asked the Galleon Employee what s/he was referring to and the Galleon Employee replied: "the Clearwire stuff. It's all over the Wall Street Journal." Rajaratnam asked, "What price did they say?" The Galleon Employee answered: "They're short on details but they kinda say, you know, they're looking to raise as much as $3 billion but they don't have any of the equity splits. But they named Comcast, they named Time Warner, Clearwire and Sprint." Rajaratnam replied, "Okay, shit." The Galleon Employee then said "I don't know how much we got in today .... "

Rajaratnam Criminal Complaint, ¶¶ 53c, 53e, 53h. Again, these wiretapped calls evidence not only the communication of inside information, but also are probative of other elements of the SEC’s case, namely the relationship between the defendants, the benefit Goel hoped to receive by passing the information to Rajaratnam, and the defendants’ scienter.

The excerpted communications from the criminal complaints further reveal that the intercepts contain highly relevant evidence that will corroborate the anticipated testimony of certain cooperating witnesses regarding the defendants’ insider trading scheme. For example, in excerpts of calls between Rajaratnam and Goel, Goel discloses to Rajaratnam the continuing progress of a non-public business transaction involving Clearwire Corp., and with that information, Rajaratnam engaged in repeated profitable insider trading, extracting profits in excess of $780,000. *See* Rajaratnam Criminal Complaint, ¶ 53; Second Amended Civil

Complaint, ¶ 106 *et seq.* Although the SEC expects that Goel will testify as to his communications with Rajaratnam concerning Clearwire, the wiretapped recordings serve to corroborate Goel's testimony and refute any attacks on Goel's credibility as to these critical communications.

There is a compelling public policy supporting the SEC's access to the recordings: to assist the SEC in enforcing the nation's securities laws and protecting the integrity of its markets. *See United States v. Rural Elec. Convenience Cooperative Co.*, 922 F.2d 429, 440 (7th Cir.1991) ("The government's interest is in large part presumed to be the public's interest … ."); *Securities and Exch. Comm'n v. Dorozhko*, 606 F. Supp. 2d 321, 327 (S.D.N.Y. 2008) (describing the SEC as not an "ordinary litigant, but … a statutory guardian charged with safeguarding the public interest in enforcing the securities laws …"), vacated on other grounds, 574 F.3d 42 (2d Cir. 2008). The SEC has alleged serious charges of insider trading concerning stocks of well-known public companies and involving millions of dollars in fraudulent gains. Any further delay in the discovery of these recordings to the SEC will impair its ability to fulfill its statutory responsibilities in timely and effectively prosecuting its case. Public interest dictates that both the SEC and Defendants receive a fair trial in this action. The SEC will not receive a fair trial if Defendants are permitted the unfair advantage of sole access to substantial, crucial evidence in this action.

b. **The SEC Needs the Intercepts Immediately as it Continues to Suffer From an Unfair Informational Imbalance, Which Prejudices its Ability to Conduct Pretrial Discovery and Prepare for Trial**.

For almost a year, the SEC has been at an untenable informational disadvantage with regard to its pretrial discovery and trial preparation. The Defendants have had the intercepts over the Rajaratnam and Chiesi telephones since December 23, 2009. *See* Government's Status

Report dated February 16, 2010 at 3. They have also had the benefit of electronically searchable linesheets, draft summaries and transcripts of those recordings prepared by the USAO and disclosed to the Defendants since that time.

Defendants undoubtedly have been using the wiretap recordings in fashioning their defense, conducting document discovery and preparing their witnesses, while the SEC has had no access to these recordings. This imbalance is at odds with a fundamental principle of civil discovery under the Federal Rules, which is to permit each side access to all relevant evidence in its adversary's control prior to trial. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) ("Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.")

The intercepts sought by the SEC have been held to have been lawfully obtained, and the SEC may use the recordings at its civil trial pursuant to 18 U.S.C. § 2517(3).[3] As this Court noted:

> …this means, at a minimum, that in a civil enforcement action a government agency could call to the stand a criminal enforcement agent who had lawful access to the wiretaps to testify to their contents[;] it would be absurd for the civil attorneys preparing the witness not to have access to the wiretap recordings beforehand.

Discovery Order, at 4 (citations omitted).

The SEC needs the intercepts now in order to prepare its case. It will need adequate time to review the recordings, which are voluminous. Although it has been diligently proceeding with document discovery, the recordings presumably will reveal any additional relevant

[3] Evidence intercepted pursuant to Title III may be introduced in "any proceeding held under the authority of the United States." 18 U.S.C. § 2517(3); *accord Fleming v. United States*, 547 F.2d 872 (5th Cir. 1977) (evidence derived from lawful intercepts in criminal investigation, and disclosed to IRS agents before and after guilty pleas and testimony, may be admitted in civil tax proceedings); *Griffin v. United States*, 588 F.2d 521 (5th Cir. 1979) (evidence of lawful intercepts was admissible in subsequent civil action brought by taxpayers for refund of money seized during law enforcement raids); *Spatafore v. United States*, 752 F.2d 415 (9th Cir. 1985) (district court properly denied plaintiff taxpayer's motion to suppress wiretap evidence obtained in a criminal investigation).

document discovery it will need to seek and will point it to witnesses it will need to prepare or depose. Accordingly, after reviewing the recordings, the SEC will need sufficient time to take any additional pretrial discovery and prepare and depose witnesses. Further, the SEC will need to prepare for the use of the communications themselves at trial. Aside from the logistical steps of culling out portions to be played at trial and preparing transcripts, the SEC will need to prepare its trial witnesses and to prepare to cross-examine defendants' trial witnesses with the communications.

Although the Court has adjourned the trial in this action pending resolution of the current motion, it has given every indication that it expects the parties to be prepared to proceed expeditiously to trial after that. Thus, by the time this motion is fully briefed, argued and decided, the SEC's time to review and make use of the wiretap recordings will have further diminished. With the SEC's staff and resources stretched thin, even a matter of weeks will make a considerable difference in its ability to complete its discovery and prepare an efficient and effective presentation of the evidence for trial.[4]

iii. The Relative Weight to Be Assigned to Privacy Concerns is Significantly Diminished Given that Most of the Relevant Intercepts Will Concern Business Rather Than Highly Personal Communications and a Substantial Number Have Already Been Made Public.

Excerpts from a significant number of relevant conversations have already been recounted in the criminal charging documents, which were unsealed over a year ago. *See* Rajaratnam Criminal Complaint; Chiesi Criminal Complaint; *see also* excerpts cited above at Section C. Any privacy interests Defendants would otherwise have in the Title III materials are

[4] The SEC informs the Court that Judge Holwell has now scheduled Rajaratnam's trial to commence on February 28, 2011 and Chiesi's trial to commence on April 25, 2011. This does not alleviate the SEC's need for the intercepts and other requested materials immediately given that deposition discovery and the trial of this case is expected to ensue shortly thereafter.

entitled to much less weight where there has already been a substantial public disclosure in criminal charging documents of key intercepted conversations by defendants going to the very heart of the charges in the SEC's civil case. For example, the criminal charging documents filed against Rajaratnam, Rajiv Goel and Anil Kumar and Chiesi, Mark Kurland and Robert Moffat contain detailed excerpts of numerous intercepted communications among these Defendants concerning their insider trading scheme. These intercepted conversations have received widespread publication in the national and international media. These disclosures serve to significantly lessen the weight this Court should afford to the privacy interests that might be impacted by Defendants' production of the relevant wiretapped conversations.

Also, by authorizing the interception and disclosure of wiretap conversations in accordance with the provisions of Title III, including Section 2517(3)'s specific authorization for the use of such intercepts in civil proceedings, Congress perforce authorized infringement on interceptee's privacy rights, as long as Title III's requirements had been complied with, as they have been here. The disclosure of the intercepts to the SEC will constitute no greater infringement on privacy rights than those infringed by the USAO's possession and use of the same intercepts.

The *Rajaratnam* Court stated that: " … while a civil discovery interest in material may weigh less heavily than a criminal discovery interest, it does not follow that the SEC's right to informational equality is outweighed by [Defendants'] privacy interests in the instant case." *Rajaratnam* at 184. Indeed, where the party seeking civil discovery is a federal enforcement agency responsible for preserving the integrity of the nation's securities markets and protecting investors, its right to discovery of clearly relevant, primarily business communications of individuals in a heavily regulated and monitored industry outweighs the privacy interests of

those engaged in communications in furtherance of or relevant to the charged insider trading scheme.

D. ANY REMAINING PRIVACY INTERESTS CAN BE ADEQUATELY ADDRESSED BY THE COURT'S CURRENT PROTECTIVE ORDER OR BY COURT-APPROVED REDACTIONS

Any portions of otherwise relevant intercepts relating to personal matters involving innocent parties can be addressed through court-approved redactions. Similarly, given that the Court's current protective order will prohibit disclosure of the intercepts to the public at large prior to the civil trial, Defendants will not be prejudiced by the disclosure to the SEC before their criminal trial takes place. Any other compelling reasonable privacy concerns can also adequately be addressed within this framework of the existing protective order and court-approved redactions.

IV.
CONCLUSION

In light of the foregoing, the balance of interests weighs heavily in favor of disclosure of the relevant intercepts, and corresponding linesheets, summaries and draft transcriptions to the SEC. The SEC respectfully requests that the Court therefore grant its renewed motion to compel Defendants to immediately produce to the SEC all relevant intercepts, and corresponding linesheets, summaries and draft transcriptions.

Dated: New York, NY
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Respectfully submitted,

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