SECURITIES AND EXCHANGE COMMISSION
New York Regional Office
3 World Financial Center, Suite 400
New York, New York 10281-1022
(212) 336-1100

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, -against- 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.	09 Civ. 8811 (JSR) ECF CASE

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

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A. The SEC Is Entitled To Immediate Discovery of the Relevant Intercepts

Defendants argue that the Court should defer its decision on the SEC's motion until after the criminal trials because they anticipate the government will seek to utilize the relevant intercepts in its case in chief and they may utilize the intercepts in cross-examining witnesses or otherwise. (Rajaratnam Brief at 5.)[1] Rajaratnam also states: "to the extent that relevant wiretapped communications are not placed into evidence, [he] undertakes to produce those to the SEC no later than the conclusion of the criminal trial." (Rajaratnam Br. at 5-6.) Rajaratnam further argues that to the extent there remains a dispute as to the relevance of any intercepts beyond the 240 that he claims are relevant, the criminal trial will place this Court in a better position to make determinations of relevance and privacy. (Rajaratnam Br. at 6.)

First, Defendants do not set forth any authority why they should be permitted to delay production of the 240 intercepts they have conceded are relevant.[2] And, given Defendants' commitment to produce them to the SEC at some point because they are relevant, there are no legitimate privacy interests implicated by ordering their immediate production. Defendants argue that their right to a fair trial will be prejudiced by production of these communications to the SEC before trial (Rajaratnam Br. at 8-9), but those rights can be more than adequately protected by the Court's current protective order, which prevents the SEC and any other party receiving the materials from disclosing them publically. Accordingly, the 240 intercepts should be produced immediately.

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[1] Chiesi has incorporated Rajaratnam's brief and adopted his arguments.

[2] It is unclear whether the 240 communications are calls only on Rajaratnam's telephone or whether they include calls on Chiesi's telephones. It is also unclear, even as to communications over Rajaratnam's telephone, whether he is excluding relevant communications in which he discusses stocks with which other defendants, aside from him, are charged with insider trading.

Second, Defendants' claim that the criminal trial will place this Court in a better position to rule on the relevance and privacy issues relating to those intercepts that are not introduced at the criminal trial makes no sense. The wiretaps of Rajaratnam's and Chiesi's telephones resulted in 18,150 intercepted communications. *See SEC v. Rajaratnam,* 622 F.3d 159, 165 (2d Cir. 2010). Clearly, there is a dispute as to how many intercepts are relevant beyond the 240, and the criminal trial will shed no light on this matter.[3] Defendants' only explanation for how this Court will "be in a better position to reach determinations of relevance and privacy" is that "[m]any of the participants in these calls will testify at the criminal trial." (Rajaratnam Br. at 6.) But Defendants offer no explanation as to how a witness's testimony regarding tapes that are introduced into evidence at trial will help this Court determine the relevance of the possibly hundreds or thousands of additional intercepts that are not introduced at trial. Certainly, the fact that either the Government or the Defendants choose not to introduce an intercept at the criminal trial has no bearing on whether that intercept is relevant for purpose of production in this case pursuant to Rule 26(b)(1). The criminal trial will shed no light on the parties to, substance of, and relevance of intercepts not introduced at trial.

Similarly, while the criminal trial will obviate any need for the Court to rule on privacy interests as to intercepts that are played at trial, it will not provide this Court with any information whatsoever regarding privacy concerns as to intercepts that are not introduced at the criminal trial, and the criminal trial will shed no light on how the Court should balance the SEC's legitimate interest in obtaining these intercepts against any cognizable privacy interests implicated by such intercepts.

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[3] Rajaratnam claims that only 240 of those communications are relevant, namely only those that relate to the stocks with which he is charged with insider trading. (Rajaratnam Br. at 6.) The SEC disputes that narrow interpretation of relevance as inconsistent with Rule 26(b)(1) for the reasons set forth in more detail below in Section C.

Rajaratnam's argument that the SEC "will not suffer significant prejudice in waiting until the criminal trial for the wiretapped communications" (Rajaratnam Br. at 6) also fails. First, the SEC is entitled to production of the relevant intercepts immediately. Rule 26(b)(1) does not condition production of otherwise relevant materials upon a showing that a party will be substantially prejudiced if it does not immediately receive the materials. Second, the SEC does not concede that it is only entitled to 240 intercepts. There are likely hundreds, if not thousands, of additional relevant intercepts to which it is entitled and it is unclear how long it will take the SEC to review them to properly prepare for depositions and pursue additional discovery to which it is entitled.[4]

The SEC has already suffered substantial prejudice given that the Defendants have had more than one year's head start to listen to, analyze, conduct further discovery and prepare their defense based on these intercepts. There is no telling how much additional material will be contained on the intercepts that warrants follow up by the SEC -- including tracking down and interviewing potential witnesses, requesting, receiving and reviewing additional documents, and preparing to rebut any anticipated defenses arising from the intercepts. The SEC continues to suffer substantial prejudice every day that passes without equal access to these materials.

B. The SEC's Right to The Relevant Intercepts Outweighs Any Identified Privacy Interests

Defendants' conclusory claim that, "[a]t this point in the proceedings, the privacy interests at stake continue to outweigh the SEC's right to access" (Rajaratnam Br. at 7) is unsupported by any showing as to what those privacy concerns are. By failing to identify how many intercepts fall within the SEC's discovery request (aside from the 240 intercepts Defendants concede are relevant), which

[4] Similarly, Chiesi's argument that she should not be required to produce any relevant intercepted communications until after her criminal trial commences on April 25, 2011 (Chiesi Br. at 2-3), fails for the same reason. Indeed, if the Court adopts Defendants' proposal, the SEC would not receive the potentially large volume of additional tapes not played at the criminal trials until well after Chiesi's trial ends in May or June of 2011.

individuals are intercepted, what the communications consist of, and whether there are any non-relevant portions of such intercepts, Defendants fail to assert any privacy interests that would outweigh the SEC's "significant" "right of access" to these communications as recognized by the Second Circuit. *Rajaratnam*, 622 F.3d at 182.[5]

Rajaratnam's reliance upon the Second Circuit's concern with infringing the privacy rights of "hundreds of individuals . . . without furthering any legitimate countervailing interest," (Rajaratnam Br. at 8 (quoting *Rajaratnam*, 622 F.3d at 187)), is misplaced. As is clear from the actual quote in *Rajaratnam*, the Second Circuit was concerned with disclosure that is not limited to relevant conversations: "ordering the disclosure of *all* the conversations without limiting discovery to relevant material could infringe the privacy rights of hundreds of individuals, whose irrelevant, and potentially highly personal, conversations with the Appellants would needlessly be disclosed . . . without furthering any legitimate countervailing interest." *Rajaratnam*, 622 F.3d at 187. The SEC's request for intercepts relevant to the claims and potential defenses in this case implicates none of the privacy concerns the Second Circuit identified concerning "irrelevant, and potentially highly personal conversations." *See id.*

In addition, now that the interceptions have been found to be legal, to the extent that the Defendants have any cognizable privacy interests in those communications different from those privacy interests routinely implicated by the production of personal communications by defendants in civil discovery (such as emails, letters and other personal communications), Defendants have failed to establish that such privacy interests outweigh the SEC's significant right of access to such communications relating to the charges and defenses in this case.

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[5] Contrary to Defendants' claim (Rajaratnam Br. at 7), the SEC acknowledged that this Court will still need to engage in a balancing test. (*See* SEC Br. at 11.)

Rajaratnam's reliance upon *In re New York Times*, 828 F.2d 110, 116 (2d Cir. 1987), for the proposition that a defendant's privacy interest merits protection even after much of the Title III material at issue have been publicized is misplaced. In that case, the Second Circuit actually criticized the district court for its unnecessary wholesale sealing of motion papers referring to Title III materials after much of Title III interceptions referenced in those papers had been made public. It remanded the case with instructions to reconsider what if any portions of the materials in question should remain sealed and to consider limited redaction of names and "perhaps portions of Title III materials . . . as opposed to wholesale sealing of the papers." *Id.* at 116. Here, Defendants have failed to even identify which relevant intercepts implicate privacy rights of third parties, have failed to propose anything other than a wholesale denial of disclosure of such intercepts to the SEC, and have failed to cite any authority to support their claim that the Defendants' privacy interests in communications relating to the charges and defense in this case outweigh the SEC's right of access to these materials.

Finally, Rajaratnam's argument that the Federal Rules make no distinction between business-related and personal communications (Rajaratnam Br. at 9) is beside the point. To the extent that Rajaratnam retains any cognizable privacy interests in lawfully obtained intercepts, the Court can properly take into account the business-related nature of the intercepts sought by the SEC in balancing whether the SEC's right of access outweighs Defendants' and third parties' privacy interests in such conversations. Given the highly regulated nature of the industry in which Rajaratnam was involved, and the non-personal nature of most if not all of the requested intercepts, any privacy interests implicated by the intercepts are outweighed by the SEC's right of access to them, which will allow it to prove its claims of insider trading against the Defendants in furtherance of the public interest in enforcing the nation's securities laws.

C. The SEC's Renewed Motion to Compel Seeks Only Relevant Intercepts

The SEC seeks only "relevant wiretapped communications in [Defendant Rajaratnam's and Chiesi's] possession, custody or control." (See SEC Brief at 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.

(SEC Br. at 1.) The SEC is not seeking irrelevant materials. It has not sought, for example, privileged communications or sensitive or personal communications unrelated to stock trading. The enumerated categories are not overbroad, and their relevance to this action is plain.

The first category seeks communications about the companies and stocks at issue in this action. Such communications clearly are relevant to the reasons for the trades defendants allegedly conducted, and to defendants' knowledge of information concerning the companies alleged. Defendants concede the relevance of this category. The third category seeks communications concerning the relationships between and among the defendants and their sources. Communications in this category relate to the nature and extent of their contacts, which is relevant to establishing, among other things, the confidences they placed in each other, the meaning and import of words they conveyed, and the benefit the alleged tippers and traders received, promised, or expected from the passing of information. Categories two, four, five, and six seek evidence relevant to a defense that communications regarding the trading at issue here was consistent with lawful information gathering incident to stock trading and to whether defendants' conduct with respect to these communications and the trading deviated with their past patterns and practices.

Category seven is relevant to defendants' respective states of mind, i.e., whether they were aware of any investigations into their own conduct or the conduct of those they communicated with that would color the meaning of their communications, and what their respective understanding was of insider trading and the lawfulness of particular conduct.

Defendants' complaint that the SEC's request is "severely overbroad" and their assertion that the SEC "has no legitimate claim to broader discovery than that which is received into evidence in the criminal case" is preposterous. (Rajaratnam Br. at 3-4.) The SEC is asking for nothing more than what is required of every civil litigant under Rule 26(b)(1), that is, the production of materials "relevant to any party's claims or defenses,"[6] and those that "appear[] reasonably calculated to lead to the discovery of admissible evidence." Fed.R.Civ.P. 26(b)(1). Nowhere in the civil rules or case law is relevance conditioned upon evidence that is received in a parallel criminal case. And, no such constraints were placed by the SEC on its production to defendants when it responded to their discovery requests.

Defendants rely on *Weinstein v. Erenhaus*, 199 F.R.D. 355, 357 (S.D.N.Y. 1988), for the proposition that "one of the purposes of discovery is to narrow, not expand the issues." (*See* Rajaratnam Br. at 11.) The full text from the *Weinstein* opinion reads:

> The discovery process under the Federal Rules of Civil Procedure is designed to allow parties to narrow the issues, obtain evidence for use at trial, and secure information about the existence of evidence. ... Conducted properly, it avoids a trial in which the victor is determined by surprise and concealment rather than by the merits of the cause.

199 F.R.D. at 357 (citation omitted). Discovery accomplishes the goals identified above by granting each side equal access to the relevant evidence. *See Hickman v. Taylor*, 329 U.S. 495, 507 (1947) ("Mutual knowledge of all the relevant facts gathered by both parties is essential to proper

[6] To the extent Rajaratnam argues he should not be compelled to produce communications relating to the stocks charged against others but not him, the Federal Rules permit discovery of documents in Rajaratnam's possession that relate to *any* party's claim or defense in this action. *See* Fed.R.Civ.P. 26(b)(1).

litigation."). Indeed, in the *Weinstein* case, the court dismissed the case because plaintiff failed to comply with discovery, including ignoring a discovery request to turn over all tape recordings by plaintiff with any party, witness, potential witness, or any other person who was contacted by or on behalf of plaintiff in connection with the litigation. *Weinstein*, 199 F.R.D. at 358. Thus, in *Weinstein*, it was the failure of a party to produce relevant materials, including tape recordings, that the court found offensive to the discovery process. *Id.* at 359 ("Plaintiff's continued obstreperous conduct has prejudiced defendant's ability to develop his case and resulted in additional expense to the litigants and the court system.").

Rajaratnam's reliance on *Segan v. Dreyfus Corp.*, 513 F.2d 695 (2d Cir. 1975), is similarly unavailing. In that case, the plaintiff, who alleged only one fraudulent transaction and sought discovery of "virtually the entire business history of defendants for a period of several years." 513 F.2d at 696. Under those circumstances, the court held that the discovery request was improper. *Id.* Here, in contrast, the SEC has specifically pled a widespread insider trading scheme, involving numerous tippers, traders, and stocks, and has identified categories of materials relevant to its claims and to defendants' defenses. Under these circumstances, the discovery sought is appropriate. *See, e.g., SEC v. Roszak*, 495 F.Supp.2d 875, 891 (N.D. Ill. 2007) (court considered evidence of defendant's investment patterns to determine whether the alleged insider trading purchases were consistent with same).

D. The SEC Has Been Even-Handed In Discovery

Defendants complain that the SEC has limited the scope of its discovery production to the "four corners of the Complaint." (Rajaratnam Br. at 14.) That simply is not true and Defendants' assertion is baffling. Defendants are well aware that the discovery they have received from the SEC

in this case includes a plethora of materials relating to entities and individuals not charged and stocks not specifically alleged in this action.[7]

Defendants' specific examples of the SEC's alleged reticence in discovery belies their claim. Defendants point to the Roomy Khan computer search conducted by the SEC and state that the SEC only searched terms "it had crafted to retrieve those 'relevant' materials – each and every one of which pertained to the specific conduct alleged in its Complaint." (Rajaratnam Br. at 14.) What Defendants omit to state is that prior to the SEC's own search of the voluminous Khan forensic images, the SEC reached out to all defendants to solicit their input on proposed search terms. Rajaratnam could have proposed his own search terms but he refused, prompting this Court to grant a protective order over discovery of the forensic images themselves. *See SEC v. Galleon Mgmt., LP, et al.*, 09 CV 8811 (Order May 18, 2010) (Dkt. #166). And, subsequently, the SEC, Khan, and Rajaratnam reached an agreement, in which Rajaratnam expanded the search terms to include, among other terms, entities and individuals not charged in this action. *See SEC v. Galleon Mgmt., LP, et al.*, 09-CV-8811 (Order July 23, 2010) (Dkt. #167).

Defendants also point to Galleon's interrogatories to the SEC seeking information about public companies not alleged in this civil action. (See Rajaratnam Br. at 14.) Those interrogatories request that the SEC:

> Identify the existence, custodian, location, and general description of relevant documents and things considered or reviewed by the SEC or made available to the SEC in any manner concerning allegations in the Amended Complaint (or any parallel or related criminal complaint, information, or indictment) relating to Avaya Inc.[, Axcan Pharma Inc., 3Com Corporation, Alliance Data Systems Corporation, Adesa, Inc., and EMC Corporation.]

(*See* Def. Br. Ex. C at 17-22 (Interrogatories 14-20)). The SEC objected to these Interrogatories for several reasons, not the least of which was that there were no allegations in the Amended Complaint concerning the companies listed in the Interrogatories; therefore, the Interrogatories made no sense.

[7] *See, e.g.*, SEC v Galleon Disc 1-3; SEC Disc Nos. 1-5, 40-43, 45, 47-49, 54-62, 67, 77, 78, 84-89, 91, 93, SEC_0067184-SEC_0552782.

Moreover, Defendants are not entitled to discovery that has nothing to do with the claims or defenses in this action. The SEC, however, is entitled to discovery concerning the intercepts relating to trading in companies not alleged because they relate to a defense that the defendants' information gathering and trading was consistent with their practices during this time period. [8]

CONCLUSION

Accordingly, the SEC respectfully requests that the Court 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
January 11, 2011

Respectfully submitted,

s/Kevin P. McGrath
s/Valerie A. Szczepanik
Securities and Exchange Commission
3 World Financial Center, Suite 400
New York, NY 10281-1022
Telephone: (212) 336-1100
Fax: (212) 336-1317

[8] Defendants fail to object to or otherwise address the SEC's request for "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..." (SEC Br. at 1). Accordingly, the Court should order that all such accompanying materials be produced simultaneous with the corresponding relevant intercepts.

CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2011, the foregoing document was filed with the Clerk of the Court and served via ECF and email upon counsel to the following parties and participants:

Adam S. Hakki
Shearman & Sterling LLP
599 Lexington Ave.
New York, NY 10022

William White
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

Norman A. Bloch
Thomson Hine LLP
335 Madison Avenue, 12th floor
New York, NY 10017-4611

Robert G. Morvillo
Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, P.C.
565 Fifth Avenue
New York, NY 10017

Alan R. Kaufman
Kelley Drye & Warren LLP
101 Park Avenue
New York, NY 10178

Ted Altman
DLA Piper LLP
1251 Avenue of the Americas, 27th Floor
New York, NY 10020

Kenneth I. Schacter
Bingham McCutchen LLP
399 Park Avenue
New York, NY 10022

Steven R. Glaser
Skadden, Arps, Slate, Meagher & Flom LLP
Four Times Square
New York, NY 10036

David Wikstrom
26 Broadway, 19th Floor
New York, New York 10004

Francisco J. Navarro
Kobre & Kim LLP
800 3rd Ave.
New York, NY

Jeffrey L. Bornstein
K&L Gates LLP
Four Embarcadero Center, 12th Floor
San Francisco, CA 94111

Harlan J. Protass, Esq.
Law Offices of Harlan J. Protass, PLLC
305 Madison Avenue
Suite 1301
New York, NY 10165

Cynthia M. Monaco
Anderson Kill & Olick, P.C.
1251 Avenue of the Americas
New York, New York 10020

Roland G. Riopelle, Esq.
Sercarz & Riopelle, LLP
152 W. 57th Street, Suite 24C
New York, NY 10019

Frederick L. Sosinsky
45 Broadway, 30th Floor
New York, NY 10006-3007

Kenneth Breen
Paul, Hastings, Janofsky & Walker LLP
75 East 55th Street
New York, NY 10022

Adler Bernard
Dornbush Schaeffer Strongin & Venaglia, LLP
747 Third Avenue, 11th Floor
New York, NY 10017

s\Valerie A. Szczepanik

VALERIE A. SZCZEPANIK