UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION Plaintiff, v. GALLEON MANAGEMENT, LP, et al. Defendants.	§ § § § § § § § § §	No. 09-CV-8811-JSR ECF CASE

DEFENDANT'S OPPOSITION TO PLAINTIFF'S
MOTION IN LIMINE TO PRECLUDE EXPERT TESTIMONY

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Dated: June 3, 2011
New York, New York

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I. INTRODUCTION

Defendant Raj Rajaratnam, through undersigned counsel, hereby opposes Plaintiff Securities and Exchange Commission's motion in limine to preclude certain expert testimony of Professor Gregg A. Jarrell ("Professor Jarrell") because the proffered testimony is highly relevant to the SEC's allegations against Mr. Rajaratnam, including those allegations that are unique to the SEC's complaint and not litigated during Mr. Rajaratnam's criminal trial; is based on reliable and widely-accepted scientific methodologies presented by a qualified expert; and will be helpful for the fact-finder.[1]

On April 29, 2011 Mr. Rajaratnam provided notice to the SEC that he intends to call Professor Jarrell as an expert witness. Professor Jarrell is a Professor of Economics and Finance at the University of Rochester and the former Chief Economist at the SEC from 1984-87. In this case, Professor Jarrell is expected to testify about changes in stock price in response to company-specific events, impoundment and the related concept of economic materiality, the custom and practice of securities professionals, and the economics of various market behaviors. Professor Jarrell was permitted to give extensive testimony on those subjects in Mr. Rajaratnam's criminal trial, which the SEC observed. Professor Jarrell has previously qualified as an expert in complex securities fraud cases and has provided expert testimony about issues similar to those in this case on numerous prior occasions.

The SEC now moves to exclude Professor Jarrell's testimony because it claims the testimony: (1) concerns matters that a jury is capable of understanding on its own without expert

[1] Galleon Management LP concurs with and adopts the arguments set forth in this Opposition.

assistance; (2) is irrelevant, confusing, and prejudicial; and (3) is based on unreliable and/or unscientific principles. Mot. at 4. All of these claims are meritless, repetitive of nearly identical *and unsuccessful* claims made by the United States Attorney's Office in the parallel criminal case, and are merely an attempt to preclude appropriate expert testimony that the SEC realizes is unfavorable to it.

As the SEC well knows, having observed his testimony during the course of the criminal trial, Professor Jarrell is expected to opine on the results of event studies he and persons working at his direction performed. The event studies performed in this case involved extensive analysis of the price movement of stocks in response to the events at issue during relevant periods, including events exclusive to the SEC's complaint in this case that were not litigated during Mr. Rajaratnam's criminal trial. Professor Jarrell's analysis included a review of publicly available information concerning the relevant events and whether the events in question were in the public domain such that they were already reflected, or impounded, in the stock price of the relevant security prior to certain company announcements. Professor Jarrell performed statistical regression analyses to determine whether company announcements about relevant events caused statistically significant movements in the relevant securities. Professor Jarrell also formed opinions as to whether, based on information publicly available in the market, it would have been reasonable for a well-informed, professional investor to trade the relevant securities in a particular manner. Although Professor Jarrell has reviewed many Galleon records and is quite familiar with Galleon's investment practices and trading, including Mr. Rajaratnam's trading, he will not present opinion testimony on those subjects. Rather, to the extent he mentions them at all, it will simply be to provide brief and helpful background or to summarize voluminous records.

II. ARGUMENT

The SEC objects to portions of Professor Jarrell's testimony on several grounds, nearly all of which were previously and unsuccessfully raised by the United States Attorney's Office during Mr. Rajaratnam's criminal proceeding. None of those objections are any more persuasive now. Professor Jarrell's proposed expert testimony meets all the requirements set forth in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). It is relevant and reliable, will assist the trier of fact in understanding a complex set of facts and issues, and Professor Jarrell is eminently qualified to provide it. The other areas of Professor Jarrell's proposed testimony should also be admitted as summary testimony pursuant Rule of Evidence 1006.

A. Expert Testimony Concerning Stocks That Are the Subject of the Substantive Counts of the Parallel Criminal Case Is Relevant to the Disgorgement Amount in This Case, if Any, and Should Be Admitted.

The SEC disputes the relevance of expert testimony about transactions outside its so-called "non collaterally-estopped transactions" category. There are at least two problems with the SEC's objection to expert testimony about those transactions. First, the SEC will presumably seek disgorgement of gains associated with transactions that are the subject of Mr. Rajaratnam's criminal conviction. As a result, expert testimony about those transactions is relevant to this Court's analysis of potential disgorgement amounts, if any, and should be permitted on that basis. Second, the SEC's arguments concerning the relevance of event studies conducted on transactions that fall outside the "non collaterally-estopped" category are premature. The SEC has not filed a motion for summary judgment as to any issue. Mr. Rajaratnam's motion for judgment of acquittal is still pending in the parallel criminal case, and may result in acquittal on some (or all) counts of conviction; no final judgment has been entered against him; and he has not yet been sentenced. Until a final judgment is entered in the criminal case at sentencing, and

until this Court rules on any motion for summary judgment filed by the SEC, there is no way to know which transactions Mr. Rajaratnam is truly estopped from litigating here. *See, e.g.*, *SEC v. Haligiannis*, 470 F. Supp. 2d 373, 382 n.8 (S.D.N.Y. 2007) (a judgment is final for estoppel purposes only if it is sufficiently definite enough to acquire conclusive effect). The SEC agrees. *See* Letter from SEC to Your Honor (May 27, 2011).

B. Professor Jarrell Should Be Permitted to Provide Summary Testimony Pursuant to Rule of Evidence 1006.

Mr. Rajaratnam does not anticipate that Professor Jarrell will provide any opinion testimony, lay or expert, about Galleon's research, trading, or business practices or Mr. Rajaratnam's trading. To the extent Professor Jarrell mentions those subjects, it will merely be to provide helpful background about a complex business or to summarize voluminous records pursuant to Rule of Evidence 1006. For example, Professor Jarrell may provide brief background testimony about Galleon, how securities trades are typically executed, Galleon's Order Management System (Galleon's trade database), trading volume, and the frequency of certain market events like takeovers and other corporate actions. Professor Jarrell will also summarize the voluminous trading records he reviewed. The Second Circuit has held that background and summary testimony is permissible and is not lay opinion. *United States v. Daly*, 842 F.2d 1380, 1388 (2d Cir. 1988) ("Background evidence may be admitted to show, for example, the circumstances surrounding the events…."); *United States v. Mulder*, 273 F.3d 91, 101 (2d Cir. 2001) (expert testimony about the structure and workings of a group is permissible). The SEC's objection under Rule of Evidence 702 is therefore misplaced.

The SEC then argues that Mr. Rajaratnam should be required to call a separate summary witness instead of presenting summary testimony through Professor Jarrell. The SEC does not

cite a single case, however, that would preclude Professor Jarrell from testifying as both a fact witness and an expert witness, particularly when the facts he will discuss are related to, and provide helpful context for, his expert testimony. The Second Circuit has repeatedly approved the use of dual fact and expert testimony. *See, e.g., United States v. Feliciano*, 223 F.3d 102, 121 (2d Cir. 2000) (finding no error in district court's decision to allow witness to testify as both an expert and a fact witness and noting that "[s]uch dual testimony is not objectionable in principle."); *United States v. Faison*, 393 Fed. Appx. 754, 758-59 (2d Cir. 2010) (approving of the government's use of a dual fact/expert witness). There is no dispute about the trading records, so there is no reason the summary of those records should be in dispute. As to undisputed facts, it does not make sense for the SEC to suggest it is somehow at a disadvantage if Professor Jarrell presents the summary.

Summary testimony is particularly useful in a case like this one because, even if Galleon's trading records are introduced in evidence, they are so voluminous that it would be very difficult for a fact-finder to review and interpret them without the benefit of summary testimony of the type Professor Jarrell may provide. All of Galleon's trading records were loaded into a computer system to which Professor Jarrell had access. He is qualified to testify to the volume of Galleon's and Mr. Rajaratnam's trading based on his review of those records – a review that would have to be undertaken anew by a separate fact witness – and his testimony will assist the fact-finder in understanding the context in which the trades at issue took place.[2] In

[2] The SEC points out that Mr. Rajaratnam called Galleon's former head of domestic business as a fact witness in his criminal trial. Mot. at 11, n. 4. What the SEC neglected to mention was that the witness did not provide any testimony concerning Mr. Rajaratnam's trading because he was not personally familiar with it and the summary evidence was presented by Professor Jarrell.

light of Professor Jarrell's familiarity with Galleon records, there is no need to waste time calling a separate witness simply because the SEC does not want Professor Jarrell to mention facts about the case.

The SEC also objects to summary testimony about Mr. Rajaratnam's trading under Rule of Evidence 401, claiming that such testimony is irrelevant because, as far as the SEC is concerned, the remainder of Mr. Rajaratnam's trading does not bear on whether the accused trades were unlawful. Mot. at 12. Rule of Evidence 401 states that relevant evidence is that which has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. The SEC cannot distort the meaning of that rule to suit its own purposes. It cannot present select trading by Mr. Rajaratnam through a peephole while preventing the defense from opening the door to reveal other facts that have a tendency to inform the fact-finder's decision about the legality of the trades the SEC has alleged were unlawful. Mr. Rajaratnam seeks to present evidence of additional trades to clarify, not confuse, the trading the SEC put at issue. Professor Jarrell's proposed testimony will provide the fact-finder with a more complete picture of the trading at issue, presenting the trades in the overall context in which they occurred so that the fact-finder can evaluate the trading patterns surrounding the trades at issue. He will not opine about the motivation behind particular trades and will only present larger trading patterns as a factor for consideration. Mr. Rajaratnam's total trading in the relevant securities is clearly relevant and appropriate under the standards set forth in Rules of Evidence 401-403, is proper summary testimony of voluminous trading records pursuant to Rule of Evidence 1006, and should be admitted.

C. Expert Testimony Concerning Custom and Practice in the Securities Industry Is Admissible.

Any testimony Professor Jarrell provides concerning the general business practices of hedge funds and/or investment professionals is admissible as expert testimony about the custom and practice of the industry. *See, e.g., Marx & Co., Inc. v. Diners' Club, Inc.*, 550 F.2d 505, 508-09 (2d Cir. 1977) (expert testimony concerning the customary practice of those engaged in the securities business is admissible); *Highland Capital Mgmt, L.P. v. Schneider*, 551 F. Supp. 2d 173, 180 (S.D.N.Y. 2008) (approving of custom and practice testimony from an experienced expert witness and noting that such testimony is appropriate "[p]articularly in complex cases involving the securities industry…."); *SEC v. Zwick*, 317 Fed. Appx. 34, 35-36 (2d Cir. 2008) (affirming lower court's decision to permit testimony from an SEC expert concerning a custom and practice in the securities industry); *SR Int'l Bus. Ins. Co., Ltd. v. World Trade Center Prop., LLC*, 467 F.3d 107, 133-34 (2d Cir. 2006) (finding that the district court acted within its discretion in permitting expert custom and practice testimony).

The SEC's suggestion that Professor Jarrell is not qualified to provide expert testimony about the customs and practices of hedge funds and investment professionals because he has never worked at a hedge fund or as a trader is absurd. A witness is qualified to provide expert testimony, including custom and practice testimony, if he has obtained specialized knowledge not only through personal experience, but also through education and training. Fed. R. Evid. 702; *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999) (recognizing that expert testimony may be based on "professional studies"). Professor Jarrell has "more than sufficient expertise" to educate the fact-finder about the "sophisticated and difficult-to-understand" hedge fund industry. *United States v. Rajaratnam*, 09 CR 1184, Trial Tr. at 3803 (April 8, 2011). Professor Jarrell, although not a professional trader or hedge fund manager himself, is eminently qualified, both

through his work at the SEC and his decades-long study of the securities industry, to provide testimony about the customary practice of securities professionals. The SEC's baseless claim to the contrary should be rejected.

D. The Public Nature of Information is Part of a Reliable Event Study Analysis and a Proper Area of Expert Testimony.

The SEC erroneously claims that Professor Jarrell should be precluded from testifying about the public nature of certain information the SEC alleges was material and nonpublic. Mot. at 12-14. But the SEC does not understand the function of public information in an event study analysis and misconstrues the purpose of Professor Jarrell's proposed discussion of public information at trial.

Professor Jarrell conducted event studies to determine whether particular events had an economically material impact on relevant stock prices. An event study, by its very nature, takes into account information already in the market about a relevant event and the market's view of it, making testimony about public information concerning that event both relevant and necessary. *In re Alstom SA Securities Litig.*, 253 F.R.D. 266, 280 (S.D.N.Y. 2008) (accepting Professor Jarrell's event study comparing day-to-day percentage changes in relevant share prices resulting from disclosures of new information). In other words, it is appropriate for an expert like Professor Jarrell to opine on the impact of information "leakage" into the market, from whatever source, to make a statistical determination about whether such information was already impounded into a stock price. *In re Flag Telecom Holdings, Ltd. Securities Litig.*, 574 F.3d 29, 40 (2d Cir. 2009) (citing *Lentell v. Merrill Lynch*, 396 F.3d 161, 175 (2d Cir. 2005)) (accepting the validity of "leakage theory" and rejecting the notion that disclosures of information to the market must come from the company itself). *See also United States v. Blackwell*, 459 F.3d 739,

751 (6th Cir. 2006) (Professor Jarrell provided expert testimony about "leakage theory," opining that "information about mergers and buyouts will often 'leak' to the public without insider trading. Companies about to buy out or be bought will give off signals indicating a future buyout will occur. Sophisticated investors, especially analysts and research companies looking for these signals, often learn of buyouts before they are publicly announced.").

Unlike the cases the SEC cites, Professor Jarrell will not opine about matters a lay person is readily capable of understanding without the assistance of expert testimony. A determination about what information was publicly available for the purposes of an event study is much more than simply describing "what a news article or analyst report stated or the date it was published." Mot. at 14. The SEC misunderstands the way Professor Jarrell utilized the news stories and analyst reports he considered. While a lay person may be able to understand the content of a Wall Street Journal article, for example, a lay person cannot determine the statistical impact that information may have had on the price of a particular security on a particular day. That conclusion requires specialized knowledge of statistics and complex market behavior in response to company specific events. The SEC does not dispute Professor Jarrell's expertise in those areas and his testimony about the statistical impact of certain publicly available information on stock prices is admissible expert opinion.

The SEC also misunderstands the purpose of Professor Jarrell's potential discussion of public information at trial. In this case, the word "public" has both a practical meaning for the purposes of an event study analysis and a legal meaning for the purposes of Section 10(b). Professor Jarrell will not opine about whether information was public for the purposes of the

securities laws, distinguishing this case from *United States v. Libera*, 989 F.2d 596 (2d Cir. 1993), cited by the SEC.[3]

Instead, Professor Jarrell will testify as to what relevant information was in the market as a practical matter, and must do so in order to explain the conditions of his event studies, his conclusions about the statistical significance of changes in stock price, if any, and what trading patterns the information may have supported. Event studies involve subjective elements and expert testimony about them is permissible, including testimony categorizing events as fraud or non-fraud related. *RMED Int'l, Inc. v. Sloan's Supermarkets, Inc.*, No. 94 Civ. 5587 PKL RLE, 2000 WL 310352 at *8 (S.D.N.Y. March 24, 2000) (denying defendant's motion to exclude plaintiff's damages expert and approving of expert testimony concerning subjective elements of event studies). Whether a piece of information was public such that it was impounded into a stock price on a particular day is proper expert opinion and is different from whether the public nature of the information satisfies the "non-public" element of an insider trading allegation. The latter will be for the fact-finder to decide and Mr. Rajaratnam expects that a proper jury instruction will be given to that effect should the need arise.

The SEC also argues that Professor Jarrell's analysis of the public nature of certain information should be excluded because it is "one-sided" and the result of selective culling of news articles and analyst reports. Mot. at 14. It should be noted, however, that Professor Jarrell and those assisting him reviewed many news articles and analyst reports regardless of their content. Professor Jarrell selected particular articles and reports for use in his event study

[3] Notably, in *Libera*, the court found that whether information was publicly in the market so as to impound the information into a stock price was appropriate evidence for the jury to consider in determining whether information was non-public for Section 10(b) purposes. 989 F.2d at 601.

analysis because, in his expert opinion, they contained information that was substantially similar to the information the SEC claims was inside information. Put another way, Professor Jarrell only utilized articles and reports that contained relevant information. Whether those articles and reports supported a particular thesis was not a factor Professor Jarrell considered. The SEC cannot support its claim that Professor Jarrell's methodology is misleading on that basis. To the extent the SEC disagrees with Professor Jarrell's methods or opinions, it is free to call its own expert to present a different opinion, but the SEC's mere disagreement with Professor Jarrell's analysis is not a basis to exclude his testimony.

E. Professor Jarrell's Opinion Concerning the Behavior of Reasonable, Well-Informed Investment Professionals is Permissible Expert Testimony.

The SEC objects to Professor Jarrell's proposed testimony concerning the trading positions of other reasonable, well-informed professional investors. The SEC's argument in support of this objection is circular, however, and does not justify excluding Professor Jarrell's proper testimony on this issue. Specifically, the SEC claims that "the fact that someone else might have made the same trade without the benefit of inside information that Rajaratnam made while in knowing possession of inside information is irrelevant." Mot. at 16. In order for that to be true, one would have to accept that Mr. Rajaratnam traded based on inside information, a fact the SEC has not proven. The SEC's argument should be rejected for that reason alone.

Moreover, Mr. Rajaratnam is entitled to present alternative bases for particular trading positions as a factor for the fact-finder to consider. Professor Jarrell is qualified to opine on reasonable trading strategies based on his extensive experience analyzing market behavior and

trading patterns.[4] Professor Jarrell will not attribute the behavior of other investors to Mr. Rajaratnam, will not opine about the bases for his trades, and will in no way attempt to usurp the function of the fact-finder by characterizing Mr. Rajaratnam's trading as lawful or unlawful. Because Professor Jarrell's testimony will not concern Mr. Rajaratnam's motivation for making particular trades, cases such as *United States v. Zafar* and *Kidder, Peabody & Co. v. IAG International*, cited by the SEC, are inapplicable.

F. Professor Jarrell's Proposed Testimony Concerning How Investment Professionals Gather Information Is Admissible Custom and Practice Testimony.

The SEC objects to what it characterizes as Professor Jarrell's views on the law and economic benefit. Mot. at 19-21. This objection is misplaced as Professor Jarrell will not testify about his interpretation of the insider trading laws, although he is familiar with them. He may testify about the lawful methods that investment professionals use to study the market and develop a mosaic of information that informs their trading decisions. The SEC's objection to this testimony is similar to its objection to other custom and practice testimony and should be rejected for similar reasons, as discussed above. *See supra* Section II.C.

[4] The SEC argues that testimony concerning an alternative basis for trading should be excluded and cites *United States v. Blackwell*, 459 F.3d 739 (6th Cir. 2006), in support. But the SEC's description of *Blackwell* is grossly misleading. Professor Jarrell did in fact testify about "leakage theory" in that case, opining that "information about mergers and buyouts will often 'leak' to the public without insider trading. Companies about to buy our or be bought will give off signals indicating a future buyout will occur. Sophisticated investors, especially analysts and research companies looking for these signals, often learn of buyouts before they are publicly announced." *Id.* at 751. Professor Jarrell was permitted to explain to the jury how news of a buyout will sometimes leak out, as evidenced by market behavior, without any improper disclosure by an insider. *Id.* at 753. The only portion of Professor Jarrell's testimony that was excluded was testimony related to the existence of trading by *persons with relationships to directors other than the defendant*. There are no such persons in this case and Professor Jarrell will not offer any such testimony.

Additionally, mosaic theory is a well-recognized method for collecting and analyzing information to inform trading decisions and has been accepted as such by the Supreme Court in *Dirks v. SEC*, 463 U.S. 646 (1983) and by the Second Circuit in *SEC v. Monarch Fund*, 608 F.2d 938 (2d Cir. 1979). In *Dirks*, the Supreme Court acknowledged that "a duty to disclose arises from the relationship between parties…and not merely from one's ability to acquire information because of his position in the market….It is commonplace for analysts to ferret out and analyze information." *Dirks*, 463 U.S. at 657-58. In *Monarch Fund*, the Second Circuit similarly stated:

> All reasonable investors seek to obtain as much information as they can before purchasing or selling a security. Investors will usually consult a broker, having confidence that such a professional keeps abreast of the market, including the information circulated regarding specific securities, and will rely upon the information given to them by their broker. Therefore, investment advisors seek to obtain as much information including rumors regarding a security as they can so that they may properly advise their clients.

Monarch Fund, 608 F.2d at 942.

Professor Jarrell's explanation of mosaic theory serves as background for his testimony regarding how the market absorbs public information and how professional investors collect, and make trading decisions based on, a mosaic of information. Such testimony is appropriate and should be permitted. As the Second Circuit stated in *Marx & Co., Inc. v. Diners' Club, Inc.*, expert testimony concerning the customary practice of those in engaged in the securities business is admissible. 550 F.2d at 508. *See also Highland Capital Mgmt, L.P. v. Schneider*, 551 F. Supp. 2d 173, 180 (S.D.N.Y. 2008). Professor Jarrell, although not a professional trader himself, is eminently qualified, both through his work at the SEC and his decades-long study of the securities industry, to provide testimony about the customary practice of securities professionals.

In light of the actual nature of Professor Jarrell's testimony, the SEC's reliance on *United States v. Stewart*, 433 F.3d 273 (2d Cir. 2006), is easily distinguishable on at least two grounds. First, the proposed expert in *Stewart* was explicitly called to testify about a legal issue, *i.e.*, whether Stewart's trading constituted unlawful insider trading. *Id.* at 311. Second, the legality of Ms. Stewart's trading was irrelevant to the false statement charge against her, which was the only charge under consideration. *Id.* at 311-12. The other cases the SEC cites are no more helpful to its argument as they all stand for the undisputed, but totally inapposite, proposition that expert testimony cannot instruct the fact-finder on the law. For example, in *Marx & Co., Inc. v. Diners' Club, Inc.*, 550 F.2d 505 (2d cir. 1977), the court found error in the trial court's decision to permit expert testimony from an attorney concerning the legal obligations of the parties under a contract. *Id.* at 508. What the SEC has neglected to point out is that the court approved of expert testimony concerning the customary practice of those engaged in the securities business. *Id.* at 508-9. Similar statements of the law in *United States v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991), and *United States v. Bronston*, 658 F.2d 920 (2d Cir. 1981), are likewise irrelevant. Professor Jarrell's testimony concerning the behavior of investment professionals is admissible custom and practice testimony and his descriptions of mosaic theory are relevant to that proper testimony.

G. Professor Jarrell's Proffered Testimony is Based on a Reliable, Widely-Accepted Methodology.

The SEC does not object to Professor Jarrell's proffered testimony concerning event studies, correctly acknowledging that an event study is a scientific, reliable, and widely-accepted method for determining the impact of information on stock prices at certain times. Mot. at 23. *See, e.g., In re Northern Telecom Ltd. Securities Litig.*, 116 F. Supp. 2d 446, 460-61 (S.D.N.Y. 2000) (finding proposed expert testimony "fatally deficient" in a securities case when it did not

include an event study); *In re Flag Telecom Holdings, Ltd. Securities Litig.*, 245 F.R.D. 147, 170 (S.D.N.Y. 2007) (vacated in part on other grounds by *In re Flag Telecom Holdings, Ltd. Securities Litig.*, 574 F.3d 29 (2d Cir. 2009)) (noting that "numerous courts have held that an event study is a reliable method for determining market efficiency and the market's responsiveness to certain events or information.").

Instead, the SEC argues that Professor Jarrell's methodology is unreliable because "[a]side from the event studies, Jarrell has applied no discernable technique or theory in forming his opinions." Mot. at 22. In other words, the SEC does not have a problem with the methodology Professor Jarrell used, but rather with unknown methodologies that he did not use. This objection is nonsensical. Professor Jarrell's proposed testimony contains expert opinions he formed by reviewing the results of event studies the SEC concedes are appropriate. As discussed above, those opinions necessarily include subjective analysis that is admissible expert testimony. *RMED Intern., Inc. v. Sloan's Supermarkets, Inc.*, No. 94 Civ. 5587 PKL RLE, 2000 WL 310352 at *8 (S.D.N.Y. March 24, 2000). The remainder of Professor Jarrell's proposed testimony is either summary or background testimony meant to assist the fact-finder, or custom and practice testimony about an industry Professor Jarrell has spent decades studying. All three categories of testimony are admissible for the reasons stated previously, and should be permitted.

The SEC's argument that Professor Jarrell's opinions cannot be tested is similarly bizarre. His event studies are mathematical calculations, the bases for which have already been provided to the SEC and, by extension, the SEC's own economists. Additionally, the SEC will presumably cross-examine Professor Jarrell about his opinions at trial and may, of course, put on its own expert to rebut those opinions with which it disagrees. *Highland Capital Mgmt, L.P. v. Schneider*, 551 F. Supp. 2d 173, 180 (S.D.N.Y. 2008) ("vigorous cross-examination, presentation

of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attack" and are preferred over "wholesale exclusion" as the "appropriate safeguards"). It is hard to see, then, how the SEC is unable to test Professor Jarrell's opinions.

H. Materiality is a Proper Area of Expert Testimony.

Finally, the SEC objects to Professor Jarrell's proposed testimony concerning the results of his admittedly proper event studies. Mot. at 23. Professor Jarrell's testimony explaining whether any of the information at issue was economically material is appropriate to support an event study that compares the "return" on a stock when the event is announced to the stock's normal volatility. Event studies are routinely done in securities fraud cases and even the SEC acknowledges that price "impoundment" (*i.e.*, economic materiality) is a proper area for expert testimony. Mot. at 23.

The Second Circuit and the Southern District of New York have repeatedly approved of expert testimony concerning materiality, especially in complex cases like this one where concepts at issue may be unfamiliar to the average juror.[5] Other courts agree.[6] Because

[5] *See, e.g.*, *United States v. Russo*, 74 F.3d 1383, 1395 (2d Cir. 1996) (holding that "particularly in complex cases involving the securities industry, expert testimony may help a jury understand unfamiliar terms and concepts" and concluding that the expert's description of certain stock transactions and his opinion *on their effect on the market* was appropriate) (emphasis added); *United States v. Schlisser*, 168 Fed. Appx. 483, 2006 WL 452005 at *3 (2d Cir. 2006) (allowing expert testimony that bore "on the materiality" of the defendant's misrepresentations to investors because the government had offered other evidence on the same point, including its own expert who testified as to materiality of the information); *United States v. Cohen*, 518 F.2d 727, 737 (2d Cir. 1975) (finding that expert testimony from an SEC branch chief concerning the concept of materiality was properly admitted, in part, because the case involved "complex questions involving the securities laws"); *RMED Inter., Inc. v. Sloan's Supermarkets, Inc.*, No., 2000 WL 310352 at *10 (S.D.N.Y. March 24, 2000) (permitting expert to testify on materiality in a Section 10(b) case);

[6] *United States v. Schiff*, 602 F.3d 152, 171-72 (3d Cir. 2010) (acknowledging that use of an expert on materiality is appropriate and noting that courts "often turn to economic experts to

materiality in a securities case is a mixed question of law and fact, Professor Jarrell may opine on the fact aspect of the materiality inquiry. *Press v. Chemical Inv. Servs. Corp.*, 166 F.3d 529, 538 (2d Cir. 1999) (whether information is material is a mixed question of law and fact); *SEC v. Mayhew*, 121 F.3d 44, 51 (2d Cir. 1997) ("The materiality of information is a mixed question of law and fact."); *RMED Intern., Inc. v. Sloan's Supermarkets, Inc.*, 185 F. Supp. 2d 389, 400 (S.D.N.Y. 2002) (same).

Professor Jarrell has previously provided expert testimony on complex securities matters, including the materiality of information as determined by event study analysis. In *In re Countrywide Financial Corp. Sec. Litig.*, No. CV-07-05295-MRP, 2009 WL 7322254 (C.D. Cal. Dec. 9, 2009), for example, Professor Jarrell was an expert for the plaintiffs and offered opinions that securities traded in an efficient market. The court agreed that he could so testify regarding

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determine whether a particular announcement had an appreciable effect on the stock price.") (internal citations omitted); *United States v. Nacchio*, 519 F.3d 1140, 1155 (10th Cir. 2008) (vacated in part on other grounds by *United States v. Nacchio*, 555 F.3d 1234 (10th Cir. 2009) ("expert economic testimony is routine when a materiality determination requires the jury to decide the effect of information on the market"); *SEC v. Koenig*, 557 F.3d 736, 743 (7th Cir. 2009) (SEC presented event study-based testimony of an economic expert on the question of materiality); *Harmsen v. Smith*, 693 F.2d 932, 941 (9th Cir. 1982) (finding jury verdict supported by expert's testimony on materiality); *Eliasen v. Hamilton*, No. 81 C 123, 1987 WL 7815 at *5 (N.D. Ill. March 9, 1987) ("It appears that much of the proof concerning materiality will be through expert testimony."). *See also*, 3 Alan R. Bromberg & Lewis D. Lowenfels, Bromberg & Lowenfels on Securities Fraud & Commodities Fraud § 6:153 (2d ed. 2007) ("Opinion evidence, *e.g.*, by experts…is admissible on whether information would have a substantial market impact."); *Id.* at § 6:159 ("Experts…should be able to testify that the information would have had a substantial effect on the market price or that reasonable investors would have considered it important."); 5 Business & Commercial Litigation in Federal Courts § 62:77 (Robert L. Haig ed. 2005) (In securities cases, "economic experts often play the most significant role of any witness" especially on "whether the disclosure of certain information had an effect on the market price and, if so, what amount" and whether it "was material."); 7-107 E. Michael Bradley & Anthony L. Paccione, Securities Law Techniques § 107.03 (Matthew Bender ed. 2007) ("In securities litigation, expert testimony has been found helpful and been admitted with respect to a wide variety of matters," including "to demonstrate materiality.").

the common stock, options, capital securities and some of the debt securities, finding that "Dr. Jarrell defined the events for study as every quarterly earnings release dated during the class period where earnings differed from analysts' consensus estimates. This is a fairly objective criterion. None of the three defense experts has any objection to the methodology used in Dr. Jarrell's event study on the common, at least 'in principle.'" *Id.* at *29. The court added: "Of course, many decision points in designing an event study require some subjectivity: identifying news, categorizing which news is 'material,' and determining whether news should have a certain (albeit rough) magnitude of positive or negative influence on price are all subjective determinations." *Id.*

Economic materiality refers to Professor Jarrell's expert interpretation of the analysis he performed as part of his event studies. It speaks to statistical significance, which is a quantitative, rather than legal, concept. Professor Jarrell's opinions about this economic factor have never been presented as the "sine qua non" of materiality, as the SEC accuses. Rather, they are presented to assist the fact-finder in evaluating the significance of information so that it can make a factual determination about materiality for the purposes of liability under the securities laws. Professor Jarrell's opinion about economic materiality is simply a factor to consider. Here again, if the SEC disagrees with Professor Jarrell's expert opinion on the economic materiality of any event, it is free to name its own expert to testify on that subject. The SEC's decision whether or not to do so hardly precludes the defense from offering its own expert testimony on materiality, however.

III. CONCLUSION

For the reasons stated herein, Plaintiff Securities and Exchange Commission's Motion in Limine should be denied.

Dated: June 3, 2011
New York, New York

Respectfully submitted,

By: ___/s/John M. Dowd_____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served on Plaintiff by causing a copy to be filed via the Court's CM/ECF system and sending a copy by email on this 3rd day of June 2011.

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