UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

RAJ RAJARATNAM, and
GALLEON MANAGEMENT, LP,

Defendants.

09 Civ. 8811 (JSR)

ECF CASE

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANTS RAJ RAJARATNAM AND GALLEON MANAGEMENT, LP

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Plaintiff Securities and Exchange Commission (the "Commission") respectfully submits this memorandum, together with its Statement of Material Facts Pursuant to Local Civil Rule 56.1 ("SMF"), in support of its motion for partial summary judgment pursuant to Rule 56(a) of the Federal Rules of Civil Procedure against defendants Raj Rajaratnam ("Rajaratnam") and Galleon Management, LP ("Galleon").[1]

PRELIMINARY STATEMENT

The Commission filed this action against Rajaratnam, Galleon, and nineteen other defendants alleging widespread and repeated insider trading in the securities of at least fourteen different companies, generating over $52 million in illicit profits and losses avoided, in violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78j(b)] and Exchange Act Rule 10b-5 [17 C.F.R. § 240.10b-5] and Section 17(a) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. § 77q(a)]. In particular, the Commission charged Rajaratnam and Galleon, the multi-billion dollar hedge fund complex founded and controlled by Rajaratnam, with trading on material nonpublic information about market moving events, including quarterly earnings announcements, takeovers, and material contracts, in the securities of ten different companies, including Intel Corp. ("Intel"), Clearwire Corp. ("Clearwire"), Akamai Technologies, Inc. ("Akamai"), ATI Technologies Inc. ("ATI"), and PeopleSupport, Inc. ("PeopleSupport"). *See* SMF ¶ 1 (Ex. A-1 (Complaint)).

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[1] Factual citations are made to the relevant numbered paragraph(s) of the accompanying SMF. Each numbered paragraph in the SMF sets forth material facts not in dispute in accordance with Local Civil Rule 56.1, and in turn each paragraph of the SMF cites to the exhibits attached to the accompanying Declaration of John Henderson, dated October 7, 2011 ("Henderson Decl."). Where appropriate, direct citations are made to the exhibits attached to the Henderson Declaration.

In a parallel case, *United States v. Rajaratnam,* 09 CR 1184 (RJH), the United States Attorney's Office for the Southern District of New York charged Rajaratnam with nine counts of securities fraud, alleging conduct identical to that alleged by the Commission concerning Rajaratnam's trading in the securities of Clearwire, Akamai, ATI, PeopleSupport, and Intel. SMF ¶¶ 6-7 & Ex. A-4. The Second Superseding Indictment (the "Indictment") also charged five counts of conspiracy to commit securities fraud, alleging conduct that substantially overlaps many of the Commission's allegations against Rajaratnam involving Clearwire, Akamai, ATI, PeopleSupport, and Intel and certain other stocks charged in the Complaint, as well as certain additional conduct not included in the Commission's allegations. SMF ¶ 8 & Ex. A-4. On May 11, 2011, after an eight-week jury trial, Rajaratnam was convicted on all fourteen counts. SMF ¶¶ 9-10. He is scheduled to be sentenced on October 13, 2011.

The Commission moves for partial summary judgment based on the preclusive effect of Rajaratnam's criminal convictions stemming from his trades in the securities of Clearwire, Akamai, ATI, PeopleSupport, and Intel. Summary judgment is appropriate because the conduct for which Rajaratnam was found guilty forms the basis for the Commission's claims against Rajaratnam involving these five securities. Since Rajaratnam had a full and fair opportunity to litigate these claims, he is now collaterally estopped from relitigating the claims' factual underpinnings. Accordingly, there is no genuine issue of material fact remaining as to the Commission's claims relating to Rajaratnam's trading in these five securities. Furthermore, since Rajaratnam's conduct can be imputed to Galleon, judgment should be entered against both Rajaratnam and Galleon as a matter of law.[2]

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[2] Given that the Commission anticipates that this Court will not decide this motion until after judgment is entered in Rajaratnam's criminal case, following his sentencing currently scheduled (Cont.)

The Commission seeks an order granting partial summary judgment against Rajaratnam and Galleon, permanently enjoining Rajaratnam and Galleon from future violations of the federal securities laws, ordering Rajaratnam and Galleon jointly and severally liable for disgorgement of $31,563,661 and prejudgment interest of $9,703,724.96, for a total of $41,267,385.96, and imposing the maximum three-time civil penalty against Rajaratnam and Galleon pursuant to Section 21A of the Exchange Act.

STATEMENT OF UNDISPUTED MATERIAL FACTS

The Commission refers the Court to the accompanying SMF for a complete recitation of all relevant, undisputed facts that warrant partial summary judgment against Rajaratnam and Galleon. Undisputed facts pertinent to the analysis are referenced in the Commission's Argument.

ARGUMENT

A. Standard for Summary Judgment

Rule 56(a) of the Federal Rules of Civil Procedure provides that a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed R. Civ. P. 56(a). To defeat summary judgment, the disputed fact must be material to the outcome of the litigation and must be backed by evidence that would allow a rational trier of fact to find for the non-moving party. *Matsushita Elec. Indus. Co., v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). No genuine

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for October 13, 2011, a post-judgment decision by this Court on this motion will render moot cases suggesting that collateral estoppel applies only after judgment enters. Accordingly, the Commission will not address those cases at this time. Also, the fact that Rajaratnam may pursue an appeal does not remove the preclusive effect of his conviction. *Studer v. SEC*, 148 Fed. Appx. 58, 2005 U.S. App. LEXIS 19556, at **3 (2d Cir. Sept. 9, 2005) (unpublished) ("[P]ending appeals do not alter the finality or preclusive effect of a judgment.") (citing *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1104 n.6 (D.C. Cir. 1988)).

issue of material fact is in dispute with respect to the insider trading in the securities of Clearwire, Akamai, ATI, PeopleSupport, and Intel that overlap the charges on which Rajaratnam was convicted. As to those claims, the Commission is entitled to summary judgment.

B. Rajaratnam Is Collaterally Estopped from Disputing Liability as to the Insider Trading Violations Concerning Clearwire, Akamai, ATI, PeopleSupport and Intel (Q1 2007)

1. Rajaratnam's Conviction on Counts Six through Fourteen of the Indictment Relate to the Same Offenses and Facts Charged in the Complaint Concerning Clearwire, Akamai, ATI, PeopleSupport, and Intel (Q1 2007)

Claims I and II of the Complaint allege that Rajaratnam, Galleon and others violated the antifraud provisions of the federal securities laws because they traded while in possession of material, non-public information concerning, *inter alia*, (i) Intel's investment in Clearwire in 2008; (ii) Akamai's July 30, 2008 earnings announcement; (iii) Advanced Micro Devices' ("AMD") 2006 acquisition of ATI; (iv) the Essar Group's 2008 acquisition of PeopleSupport; and (v) Intel's April 17, 2007 earnings announcement. *See* SMF ¶ 1, Ex. A-1, ¶ 165.

The Indictment charged Rajaratnam with nine counts of securities fraud in violation of Title 15, U.S.C., Sections 78j(b) and78ff (Section 10(b) of the Exchange Act); Title 17, C.F.R., Sections 240.10b-5 and 240.10b5-2 (Exchange Act Rule 10b-5), and Title 18, U.S.C., Section 2, in connection with insider trading in the securities of Clearwire (Counts Six and Seven); Akamai (Counts Eight, Nine and Ten); PeopleSupport (Counts Eleven and Twelve); ATI (Count Thirteen) and Intel (Count Fourteen). SMF ¶ 7. The Indictment also charged Rajaratnam with five counts of conspiracy to commit securities fraud in violation of Title 18, U.S.C., Section 371. SMF ¶ 8. The jury convicted Rajaratnam on all fourteen counts. SMF ¶ 9.

2. Rajaratnam's Conviction on Counts Six Through Fourteen Collaterally Estops Him from Contesting Liability as to the Commission's Charges Relating to the Same Trading in Clearwire, Akamai, ATI, PeopleSupport, and Intel

The doctrine of collateral estoppel precludes Rajaratnam from disputing the facts that formed the basis for his criminal convictions. It is settled law that once an issue of law or fact necessary to a judgment has been decided, the doctrine of collateral estoppel precludes "relitigation of [that same issue] in a suit on a different cause of action involving a party to the first case." *Burgos v. Hopkins*, 14 F.3d 787, 789 (2d Cir. 1994) (*quoting Allen v. McCurry*, 449 U.S. 90, 94 (1980)). Where, as here, a motion for partial summary judgment is based on a defendant's prior criminal conviction, the facts underlying the conviction may be given preclusive effect. *See SEC v. Freeman*, 290 F. Supp. 2d 401, 404 (S.D.N.Y. 2003); *see also United States v. Podell*, 572 F.2d 31, 35 (2d Cir. 1978) (citing cases) ("[I]t is well-settled that a criminal conviction, whether by jury verdict or guilty plea, constitutes estoppel in favor of the United States in a subsequent civil proceeding as to those matters determined by the judgment in the criminal case.").[3] Collateral estoppel applies even if the causes of action are not identical so long as a defendant's convictions establish the requisite elements of the violations. *See, e.g., SEC v. Shehyn*, No. 04 CV 2003, 2010 U.S. Dist. LEXIS 84882, at *9 (S.D.N.Y. Aug. 9, 2010)

[3] Courts in this Circuit routinely find that, where a criminal action precedes the resolution of the SEC's enforcement action, a defendant is collaterally estopped from relitigating the issues in the SEC action. *See SEC v. Namer*, 183 Fed. Appx. 120, 121, 2006 U.S. App. LEXIS 13772, at **2 (2d Cir. June 1, 2006) (concluding district court properly granted partial summary judgment after determining that defendant was collaterally estopped from relitigating the liability issues presented during the course of his criminal trial and conviction); *SEC v. Dimensional Ent. Corp.*, 493 F. Supp. 1270 (S.D.N.Y. 1980); *SEC v. Everest Mgmt. Corp.*, 466 F. Supp. 167 (S.D.N.Y. 1979).

(defendant's admissions by guilty plea to mail and wire fraud charges establish requisite elements of securities fraud charges); *SEC v. Roor*, No. 99 CV 3372, 2004 U.S. Dist. LEXIS 17416, at * 24 (S.D.N.Y. Aug. 30, 2004) ("[I]t matters not what the precise charges in the indictment and civil complaint are, so long as they are predicated on the same factual allegations."); *Dimensional Ent. Corp.*, 493 F. Supp. at 1277 (factual allegations underlying wire fraud convictions sufficient to establish violation of securities law provisions).

Rajaratnam's criminal convictions on Counts Six through Fourteen of the Indictment relate to the same insider trading offenses and the same conduct alleged in this action. Rajaratnam had a full and fair opportunity to litigate those issues in the criminal case and was found guilty of each of the counts beyond a reasonable doubt, a higher standard than the preponderance of the evidence standard applicable to this case. As set forth below, the facts underlying Rajaratnam's convictions on Counts Six through Fourteen of the Indictment, and the elements of each such count, as to which the jury found Rajaratnam guilty beyond a reasonable doubt, are more than sufficient to establish the requisite elements of the very same securities violations alleged against Rajaratnam and Galleon in the Complaint with respect to Clearwire, Akamai, ATI, PeopleSupport, and Intel (Q1 2007). Accordingly, Rajaratnam is estopped from challenging his liability for such violations.[4] And, Rajaratnam's liability for his violations is properly imputed to Galleon.

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[4] Although not necessary to support summary judgment as to the five stocks in question given the collateral estoppel effect of Rajaratnam's convictions, the Court should draw a negative inference against Rajaratnam and Galleon for Rajaratnam's invocation of the Fifth Amendment during the discovery phase of this action. Henderson Decl. ¶ 4. The invocation of the Fifth Amendment right against self-incrimination allows a court in a civil action to draw an adverse inference against the person invoking such right. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *U.S. v. Ianniello*, 824 F.2d 203, 208 (2d Cir. 1987). Here, Rajaratnam's invocation of the Fifth Amendment prevented the Commission from determining key facts, such as

(Cont.)

3. The Offenses Charged in the Complaint

Claim I of the Complaint alleges that Rajaratnam and Galleon violated Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5. SMF ¶ 1(Ex. A-1 (Complaint)) ¶¶ 164-174 . Claim II of the Complaint alleges that Rajaratnam and Galleon violated Section 17(a) of the Securities Act. *See id.* ¶¶ 175-177.

Section 17(a) of the Securities Act prohibits fraud in connection with the offer or sale of a security. 15 U.S.C. § 77q. Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5 prohibit similar conduct in connection with the purchase or sale of a security. 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5. The antifraud provisions are violated "when a corporate insider trades in the securities of his corporation on the basis of material, nonpublic information. Trading on such information qualifies as a 'deceptive device' . . . because 'a relationship of trust and confidence [exists] between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation.'" *United States v. O'Hagan*, 521 U.S. 642, 651-52 (1997) (brackets in original) (quoting *Chiarella v. United States*, 445 U.S. 222, 228 (1980)).

The prohibition "on insider trading extends beyond the insiders who themselves have a fiduciary duty, but also to the 'tippee' recipients of insider information from those who are insiders." *SEC v. Ballesteros Franco,* 253 F. Supp. 2d 720, 726 (S.D.N.Y. 2003). An individual is liable as a tippee if: (1) the tipper possessed material nonpublic information regarding a

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Rajaratnam's purported reasons for trading or other defenses. *See SEC v. Dibella*, 2007 U.S. Dist. LEXIS 33951, *7 (D. Conn. May 8, 2007) (inference appropriate where invocation prevents necessary fact-finding). The Court may also draw an adverse inference as to Galleon from Rajaratnam's invocation of the privilege, because the invocation of the Fifth Amendment by an officer provides the basis for a permissive adverse inference against the entity. *United States v. District Council of New York City United Brotherhood of Carpenters*, 832 F. Supp. 644, 651 (S.D.N.Y. 1993).

publicly traded company; (2) the tipper disclosed this information to the tippee; (3) the tippee traded in securities while in possession of the information; (4) the tippee knew that the tipper had violated a fiduciary duty by providing the information to the tippee; and (5) the tipper benefitted from the disclosure of the information to the tippee. *SEC v. Warde*, 151 F.3d 42, 47 (2d Cir. 1998).

Information is material if "there is a substantial likelihood that a reasonable [investor] would consider it important in deciding how to [invest]." *Basic Inc. v Levinson,* 485 U.S. 224, 231 (1988). "Information becomes public when disclosed 'to achieve a broad dissemination to the investing public generally and without favoring any special person or group,' ... or when, although known only by a few persons, their trading on it 'has caused the information to be fully impounded into the price of the particular stock.'" *SEC v. Mayhew,* 121 F.3d 44, 50 (2d Cir. 1997) (quotations omitted).

As for the required benefit to the insider/tipper, it can be financial or tangible: "there may be a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the particular recipient." *Dirks v. SEC,* 463 U.S. 646, 664 (1983). However, "[t]he elements of fiduciary duty and exploitation of nonpublic information also exist when an insider makes a gift of confidential information to a trading relative or friend." *Id.* In that case, "[t]he tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient." *Id.*

The Court in *Rajaratnam* instructed the jury that, in order to find Rajaratnam guilty, they must find him guilty beyond a reasonable doubt as to each of the above elements as they related to the particular offense under consideration. *See* Henderson Decl. Ex. A-6 at 5616-627; *see also U.S. v. Rajaratnam*, No. 09 CR 1184, 2011 U.S. Dist. LEXIS 91365, *4-12 (S.D.N.Y. Aug. 16,

2011) (discussion of each of the elements of the offenses of conspiracy and insider trading charged against Rajaratnam).[5]

4. The Evidence Supporting Rajaratnam's Guilty Verdicts on Counts Six through Fourteen Supports this Court's Imposition of Summary Judgment as to the Same Five Stocks

(a) Clearwire

Both the Complaint (Claim I) and the Indictment (Counts Six and Seven) charged that Rajaratnam caused the Galleon funds to purchase Clearwire stock on March 24 and 25, 2008, while in possession of material, non-public information that Intel was planning to invest in a joint venture involving Clearwire. *Compare* SMF ¶ 1, Ex. A-1, ¶¶ 2(vi-vii), 27, 34, 106-113, 165(vi), 166-168, 171-177 *with* SMF ¶ 6, Ex. A-4, ¶¶ 15-21, 37. The Complaint and the Indictment further charged that Rajaratnam received that information from Rajiv Goel, an Intel executive, that Rajaratnam knew that the information was disclosed to him in breach of Goel's duties of trust and confidence to Intel and that Goel disclosed that information with the expectation of receiving a benefit. *See id.*

The evidence at trial supported these allegations beyond a reasonable doubt. Goel and Rajaratnam were close friends who had studied together at business school and whose families

[5] Each of Counts Six through Fourteen of the Indictment also charged that Rajaratnam violated Section 10(b) and Rule 10b-5 "unlawfully, willfully and knowingly, directly and indirectly, by the use of the means and instrumentalities of interstate commerce, and of the mails and of the facilities of national securities exchanges. *See* Henderson Decl. 5, Ex. A-4, ¶¶ 37; 39; 41. Judge Holwell also instructed the jury that to find Rajaratnam guilty of these counts, they had to find that he acted " willfully, knowingly, and with the intent to defraud" and that he "knowingly used or caused to be used any means or instruments of transportation or communication in interstate commerce or the use of the mails or any facility of any national securities exchange in furtherance of the fraudulent conduct. Henderson Decl. 7, Ex. A-6, at 5616:18-23. Accordingly, the jury's guilty verdicts as to each of these counts collaterally estops Rajaratnam from contesting any of the elements necessary to prove insider trading concerning the Commission's claims relating to Clearwire, Akamai, ATI, PeopleSupport, and Intel (Q1 2007).

took vacations together. *See* SMF ¶¶ 18-21. Beginning in at least 2005, Rajaratnam helped Goel financially on multiple occasions, including gifting Goel money totaling $600,000 and trading stocks in Goel's brokerage account. *See id.* ¶¶ 24-28. Goel repaid Rajaratnam's friendship by conveying material non-public information to Rajaratnam that Goel learned in his position at Intel in breach of Goel's duties to Intel to keep the information confidential, including confidential information about Intel's plans in 2008 to invest in Clearwire. *See id.* ¶¶ 31-46; 94-106; 116. Sriram Viswanathan, the Intel executive managing Intel's investment, and the person from whom Goel learned the information, testified that this information was confidential. *See id.* ¶ 106. The government also introduced recorded calls between Rajaratnam and Goel on March 19 and 20, 2008, where the two discussed confidential information about Intel's planned investment in Clearwire, including the size of its investment, the share of that investment vis-a-vis the larger investment pool, and the identities of other investors in the venture. *See id.* ¶¶ 101-106. On March 24, 2008, the next trading day after the March 20 calls, Rajaratnam caused the Galleon Tech funds to purchase 185,000 shares of Clearwire stock. Rajaratnam added another 200,000 shares of Clearwire on March 25, 2008. *See id.* ¶¶ 107-113. Overall, the Galleon Tech funds realized illicit gains of $851,724 on their Clearwire trading described above. *See id.* ¶¶ 118-120. As Judge Holwell found, the evidence introduced at trial supported the jury's verdict as to Rajaratnam's insider trading in Clearwire. *See Rajaratnam*, 2011 U.S. Dist. LEXIS 91365, at *57-58.

(b) Akamai

Both the Complaint (Claims I and II) and the Indictment (Counts Eight to Ten) charged that Rajaratnam caused the Galleon funds to sell short Akamai stock and to purchase Akamai put options in July 2008, while in possession of material, non-public information concerning

Akamai's financial guidance that Rajaratnam obtained from Danielle Chiesi, who had obtained the information from an inside source at Akamai. *Compare* SMF ¶ 1, Ex. A-1, ¶¶ 2(x), 23, 119-124, 165-69, 171-74, *with* SMF ¶ 6, Ex. A-4 ¶¶ 30-35, 37. The Complaint and the Indictment further charged that Rajaratnam knew that the information was disclosed to him in breach of the Akamai source's duties of trust and confidence to Akamai and that the Akamai source disclosed that information with the expectation of receiving a benefit. *See id.*

The evidence at trial supported these allegations beyond a reasonable doubt. In the summer of 2008, Keiran Taylor was the senior director of marketing for Akamai. *See* SMF ¶¶ 196-98. In his position, Taylor had access to nonpublic financial information about Akamai, including the fact that in July 2008 Akamai anticipated lowering its revenue guidance for 2008. *See id.* ¶¶ 201-04. On or around July 24, 2008, in breach of his duties to Akamai, Taylor conveyed this information to his acquaintance Chiesi, who then conveyed it to Rajaratnam. *See id.* ¶¶ 199, 205-07. Specifically, in a wiretapped call, Chiesi told Rajaratnam that Akamai was going to guide down and that internal people at Akamai expected the company's stock price would drop to $25 per share. *See id.* ¶ 207. Rajaratnam told Chiesi that "nobody expects it" and to be "radio silent" about the information. *See* Henderson Decl. Ex. FF at 2:15-22; 3:23-26. On July 25, 2008, Rajaratnam caused the Galleon Tech fund to sell short 200,000 shares of Akamai. Rajaratnam shorted an additional 375,000 shares of Akamai on July 29 and 30, and bought 2,000 Akamai put options on July 30 as well. *See* SMF ¶¶ 208-17. On July 30, 2008, after the close of trading, Akamai publicly announced that it was lowering its guidance for 2008, causing Akamai's share price to decline. *See id.* ¶¶ 218-19. The same day, Rajaratnam spoke to Chiesi by phone and thanked her. *See id.* ¶¶ 220-21. On subsequent calls that the government intercepted, Rajaratnam told Chiesi that he had to defer to her on Akamai and again reminded

Chiesi to be "radio silent" about Akamai. *See id.* ¶¶ 222-23, 226-27. The government also intercepted calls between Taylor and Chiesi where they discussed Akamai, and where Taylor told Chiesi that he had a "major present" of information for her. *See id.* ¶¶ 224-25, 228-30. Overall, the Galleon Tech funds realized illicit gains of $5,139,851 on the Akamai trades. *See id.* ¶¶ 231-234. As Judge Holwell found, the evidence introduced at trial supported the jury's verdict as to Rajaratnam's insider trading in Akamai. *See Rajaratnam*, 2011 U.S. Dist. LEXIS 91365, at *59-60.

(c) PeopleSupport

The Commission's Complaint (Count I) and the Indictment (Counts Eleven and Twelve) charged that Rajaratnam committed securities fraud when he purchased PeopleSupport stock in Goel's brokerage account in July and October 2008 while in possession of material, non-public information about PeopleSupport's pending acquisition by another company that Rajaratnam obtained from a source at PeopleSupport. *Compare* SMF ¶ 1, Ex. A-1 ¶¶ 114-118, 165(vii), 168, 170-71, 173-174, *with* SMF ¶ 6, Ex. A-4 ¶¶ 17, 37. Rajaratnam executed the profitable trades in Goel's personal brokerage account, thus providing Goel a benefit for the inside information that Goel provided Rajaratnam about Intel and Clearwire. *See id.*

The evidence at trial supported these allegations beyond a reasonable doubt. In 2008, Galleon was a large investor in PeopleSupport and designated Krish Panu to serve on PeopleSupport's board. *See id.* ¶¶ 128-32. In July 2008, in breach of his obligations to PeopleSupport, Panu conveyed confidential information to Rajaratnam about PeopleSupport's pending acquisition by the Essar Group. *See id.* ¶¶ 133-158. On two occasions in July 2008, after communicating with Panu, Rajaratnam bought a total of 30,000 PeopleSupport shares in Goel's Charles Schwab brokerage account, in which Rajaratnam traded on Goel's behalf from

time to time from 2005 to 2009. *See id.* ¶¶ 124, 150, 159. On July 30, in a call that the government intercepted, Rajaratnam told Goel that the owners of the Essar Group had made a bid for PeopleSupport and the amount of the bid. *See id.* ¶¶ 160-63. Goel made $102,143 on the sale of the 30,000 PeopleSupport shares. *See id.* ¶¶ 166-70.

In October 2008, Panu learned that the Essar Group had told PeopleSupport that it needed an extra two weeks to close the deal, which caused PeopleSupport's share price to drop after it announced this information. By the end of the day on October 7, 2008, PeopleSupport worked out a revised agreement with the Essar Group, and PeopleSupport's stock price went back up on October 8, 2008. *See id.* ¶¶ 171-76. Panu conveyed these confidential developments about the acquisition to Rajaratnam, who purchased 30,000 PeopleSupport shares in Goel's account on October 7. *See id.* ¶¶ 175-82. Mid-day October 7, in a call that the government intercepted, Rajaratnam told Goel about the delay in PeopleSupport closing the deal with the Essar Group, saying "[w]e know because one of our guys is on the board," and informing Goel that he had bought shares of PeopleSupport in Goel's Schwab account. *See id.* ¶¶ 179-81. Goel made $49,806 on the sale of the 30,000 PeopleSupport shares. *See id.* ¶¶ 183-87. As Judge Holwell found, the evidence introduced at trial supported the jury's verdict as to Rajaratnam's insider trading in PeopleSupport. *See Rajaratnam*, 2011 U.S. Dist. LEXIS 91365, *62-66.

(d) ATI

Both the Complaint (Claim I) and the Indictment (Count Thirteen) alleged that Rajaratnam caused the Galleon funds to purchase securities of ATI between March and July 2006, on the basis of material, nonpublic information regarding AMD's planned acquisition of ATI. *Compare* SMF ¶ 1, Ex A-1 ¶¶ 132-138, 165(viii)-168, 171-74, *with* SMF ¶ 6, Ex. A-4 ¶¶ 23-24, 27-28, 38-39. Rajaratnam obtained the information from his friend Anil Kumar, a senior

partner and director of McKinsey, in violation of Kumar's obligations to McKinsey and its clients, and Rajaratnam paid Kumar for the information. *See id.*

The evidence at trial supported these allegations beyond a reasonable doubt. Kumar testified that he and Rajaratnam knew each other from business school. In 2003, Rajaratnam agreed to pay Kumar as a consultant for information that Kumar acquired through his work at McKinsey. An entity was established with a Swiss bank account through which Kumar could receive money from Rajaratnam, and, in addition, Kumar used the name of his housekeeper to set up an off-shore account at Galleon for receipt of illicit payments. In 2004 and 2005, Rajaratnam paid Kumar between $1.1 and $1.2 million. *See id.* ¶¶ 243-56. In 2005, Kumar learned that his client AMD was looking to partner with a graphics chip company. AMD identified ATI as a candidate for partnership. As McKinsey advised AMD on the potential acquisition through the first half of 2006, Kumar provided confidential information to Rajaratnam about the deal in violation of Kumar's obligations to McKinsey and its clients. *See id.* ¶¶ 236-42, 257-70. After the deal was announced on July 24, 2006, Rajaratnam thanked Kumar, saying "That was fantastic. We are all cheering you right now." After Thanksgiving 2006, Rajaratnam told Kumar he was going to pay him $1 million, which Kumar understood was payment for information about the AMD/ATI deal. *See id.* ¶¶ 272-76.

In addition, in May 2006, Adam Smith, a Galleon portfolio manager, testified that he learned about the AMD/ATI transaction from Kamal Ahmed, a Morgan Stanley investment manager who had learned about the deal through his work at Morgan Stanley. Smith knew that Ahmed was not authorized to tell Smith about the AMD/ATI deal because Smith had worked at Morgan Stanley and knew that Morgan Stanley's code of conduct prohibited disseminating this type of material, non-public information about an impending merger. After Smith spoke to

Ahmed, Smith told Rajaratnam that Smith had met with Ahmed and heard about the ATI/AMD deal. *See id.* ¶¶ 277-83.

From March to July 2006, Rajaratnam purchased millions of shares of ATI, holding a position of approximately 5.4 million shares before the July 24, 2006 announcement. *See id.* ¶¶ 284-89. Overall, the Galleon funds that Rajaratnam controlled realized illicit gains of $22,938,866 in connection with trading in ATI. *See id.* ¶¶ 290-92. As Judge Holwell found, the evidence introduced at trial supported the jury's verdict as to Rajaratnam's insider trading in ATI. *See Rajaratnam*, 2011 U.S. Dist. LEXIS 91365, at *72-73.

(e) Intel

The Complaint (Claims I and II) and the Indictment (Count Fourteen) charged that Rajaratnam caused the Galleon funds to execute transactions in the securities of Intel on the basis of material, nonpublic information that he received from Goel concerning Intel's earnings announcement for Q1 2007.[6] *Compare* SMF ¶ 1, Ex. A-1 ¶¶ 93, 99-103, 165(v)-68, 171-74, *with* SMF ¶ 6, Ex. A-4 ¶¶ 16-21, 40-41.

The evidence at trial supported these allegations beyond a reasonable doubt. Goel testified that in April 2007, he learned confidential information about Intel's earnings, margins, and business outlook from a colleague of his at Intel, Alex Lenke. Because of their friendship, Goel shared this information with Rajaratnam. *See* SMF ¶¶ 48-56. Specifically, on April 9, 2007, approximately one week before Intel's earnings announcement, Lenke, who also testified, learned that Intel's quarterly revenue would be "significantly worse" than in prior years. *See id.*

[6] The Complaint, but not the Indictment, also alleges that Rajaratnam executed transactions in Intel securities while in possession of material, non-public information concerning Intel's Fourth Quarter 2006 Earnings Release, *see* Henderson Decl. Ex. A-1 ¶¶ 94-98, and Intel's Third Quarter 2007 Earnings Release. *See id.* ¶¶ 104-105. These trades are not the subject of the instant motion.

¶ 57. On the same day, Goel communicated with Rajaratnam, and Rajaratnam shorted 1 million shares of Intel. *See id.* ¶¶ 57-69. Lenke got updated information on subsequent days, including good news about gross margins, an important driver of Intel's stock price. Lenke provided the information to Goel, who in turn provided the information to Rajaratnam, even though Lenke had cautioned Goel that the information made him an insider. *See id.* ¶¶ 70-77. Rajaratnam thereafter eliminated his short position in Intel and took a long position, based on the updated information from Goel. *See id.* ¶¶ 78-79. After Intel announced its first quarter results on April 17, 2007, its stock price went up. The Galleon funds combined profit and loss avoidance on the Intel trades in advance of the April 17 announcement equaled $2,481,271, consisting of profits of $1,598,356 and avoided losses of $882,915. *See id.* ¶¶ 81-89. As Judge Holwell found, the evidence introduced at trial supported the jury's verdict as to Rajaratnam's insider trading in Intel. *See Rajaratnam*, 2011 U.S. Dist. LEXIS 91365, at *74-75.

C. Rajaratnam's Violations of the Securities Laws Warrant the Relief Requested

The collateral estoppel effect of Rajaratnam's convictions on Counts Six through Fourteen establish his liability for violating Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5, and Section 17(a) of the Securities Act. Accordingly, the Court should enter an order granting the Commission's motion for summary judgment on these claims based on Rajaratnam's trading in Clearwire, Akamai, ATI, PeopleSupport, and Intel(Q1 2007).

Galleon is liable for the acts committed by Rajaratnam. "Acts performed and knowledge acquired by a corporate agent within the scope of his or her employment are imputed to the corporation. The misconduct of an agent therefore is imputed to the corporation if committed within the scope of the agent's employment." *In re Parmalat Sec. Litig.*, 684 F. Supp. 2d 453, 471-72 (S.D.N.Y. 2010); *see also United States v. Koppers Co.*, 652 F.2d 290, 298 (2d Cir.

1981) (approving jury instruction charging that a corporation could be held criminally liable for the acts of its employees). The Second Circuit has "explicitly held that *respondeat superior* applies in federal securities cases." *In re Parmalat Sec. Litig.*, 474 F. Supp. 2d 547, 550 n.12 (S.D.N.Y. 2007) (citing *Marbury Mgmt., Inc. v. Kohn*, 629 F.2d 705, 712-16 (2d Cir. 1980)). Further, Rajaratnam's scienter is imputed to Galleon because an entity's state of mind may be imputed from that of individuals controlling it. *SEC v. Manor Nursing Ctrs. Inc.*, 458 F.2d 1082, 1096-97 n. 16-18 (2d Cir. 1972); *SEC v. Blinder Robinson & Co., Inc.*, 542 F. Supp. 468, 476 n.3 (D. Colo. 1982), *aff'd*, 1983 WL 20181 (10th Cir. Sept. 19, 1983).

Accordingly, the Court should order Rajaratnam and Galleon to pay, jointly and severally, disgorgement with prejudgment interest, relating to the profits and losses avoided in connection with the trading of Rajaratnam and Galleon in these securities, enter a permanent injunction, and impose a civil penalty against Rajaratnam and, based upon the agency principles articulated above, against Galleon.

1. Disgorgement and Prejudgment Interest

Disgorgement is an equitable remedy for violations of the federal securities laws that, unlike damages, is aimed at "'forcing a defendant to give up the amount by which he was unjustly enriched.'" *SEC v. Tome*, 833 F.2d 1086, 1096 (2d Cir. 1987) (quoting *SEC v. Commonwealth Chem. Secs., Inc.*, 574 F.2d 90, 102 (2d Cir. 1978)). "Thus, the measure of disgorgement need not be tied to the losses suffered by defrauded investors, and a district court may order disgorgement regardless of whether the disgorged funds will be paid to such investors as restitution." *SEC v. Fischbach Corp.*, 133 F. 3d 170, 175-76 (2d Cir. 1997) (citations omitted). In *SEC v. Patel*, 61 F.3d 137 (2d Cir. 1995), the Second Circuit observed that the amount of disgorgement ordered need only be "a reasonable approximation of the proceeds causally

connected to the violation" and that any risk of uncertainty in the calculation should fall on the wrongdoer whose illegal conduct created the uncertainty. *Id.* at 139-40 (internal quotations and citations omitted).

The appropriate amount of disgorgement is $31,563,661. *See* SMF ¶¶ 118-120 (Clearwire); ¶¶ 231-234 (Akamai); ¶¶ 290-92 (ATI); ¶¶ 166-170, 183-187 (PeopleSupport); ¶¶ 81-89 (Intel); Henderson Decl. 10, Ex. A-9. The disgorgement amount is based on calculations made by Federal Bureau of Investigation Special Agent James Barnacle, who testified at length at Rajaratnam's trial regarding his methodology for identifying the securities transactions engaged in by Rajaratnam while in possession of material, non-public information relating to the securities in question. *See* SMF Ex. A-6 at 3351-3611; 5128-39. In summary, he testified as to how he identified the trading codes used by Rajaratnam, that he prepared summary charts identifying the amount of securities purchased and sold by Rajaratnam based on those trading codes and prepared summary charts identifying the profits and losses attributable to those trades. Agent Barnacle verified the accuracy of those charts by reference to Galleon's brokerage statements. *See, e.g.,* SMF ¶¶ 63-69; 83-89.

Profits were arrived at by calculating the difference between the amount paid for shares and the price at which they were sold. In calculating insider trading losses avoided (in anticipation of negative announcements), Agent Barnacle calculated the difference between the price the shares were actually sold at and the opening price for those shares on the first trading day after the public announcement of the relevant news. Profits on short sales were arrived at by calculating the difference between the price at which any given share was sold, and the price at which covering shares were purchased. In calculating realized profits and losses avoided, Agent

Barnacle netted purchases and sales of shares against one another on a first in, first out, or FIFO, basis. *See, e.g.,* SMF ¶¶ 83-89.

Based on this methodology, Agent Barnacle determined that: 1) Rajaratnam purchased 385,000 shares of Clearwire during the relevant period (SMF ¶¶ 107-108) and realized a profit of $851,724. (SMF ¶118); 2) Rajaratnam sold short 575,000 shares of Akamai and bought 2,000 Akamai put options during the relevant period (SMF ¶¶ 208; 215-217) and realized a profit of $5,139,851 (SMF ¶ 231); 3) Rajaratnam, or someone working for him or acting at his direction, purchased 30,000 shares of PeopleSupport during the relevant period on behalf of Goel (SMF ¶¶ 150; 159; 182) and realized a profit of $151,949; 4) Rajaratnam took varying large positions in ATI during the relevant period, including holding approximately 5,400,000 shares of ATI shortly before the July 24, 2006 public announcement of its acquisition by AMD (SMF ¶¶ 285-289) and realized a profit of $22,938,866 (SMF ¶ 290); and 5) Rajaratnam caused Galleon to cover its 650,000 short position in Intel, buy an additional 500,000 shares, then purchase an additional 1,479,044 shares during the relevant period (SMF ¶¶ 78-79), realizing profits of $1,598,356 and avoiding losses of $882,915, for a total of $2,481,271. *See* SMF ¶ 81. Based on the forgoing, the total disgorgement is $31,563,661.

Rajaratnam and Galleon should also be held liable for prejudgment interest. Requiring a defendant to pay prejudgment interest serves to "prevent[] a defendant from obtaining the benefit of what amounts to an interest free loan procured as a result of illegal activity." *SEC v. Moran*, 944 F. Supp. 286, 295 (S.D.N.Y. 1996). To calculate prejudgment interest, courts use the delinquent interest rate imposed by the Internal Revenue Service for underpayment. *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1476 (2d Cir. 1996); 26 U.S.C. § 6621(a)(2). "That rate reflects what it would have cost to borrow the money from the government and therefore reasonably

approximates one of the benefits the defendant derived from its fraud." *First Jersey*, 101 F.3d at 1476. The Commission has demonstrated that the appropriate amount of prejudgment interest is $9,703,724.96. *See* Henderson Decl. 9, Ex. A-8, 10, Ex. A-9.

2. Injunctive Relief

Because of their violations of the antifraud provisions of the federal securities laws, the Court should permanently enjoin Rajaratnam and Galleon from future violations of Section 10(b) of the Exchange Act and Section 17(a) of the Securities Act. Section 21(d)(1) of the Exchange Act and Section 20(b) of the Securities Act entitle the Commission to obtain permanent injunctive relief upon a showing that: (1) violations of the securities laws occurred; and (2) there is a reasonable likelihood that violations will occur in the future.[7] *Commonwealth Chem.*, 574 F.2d at 99. In considering whether there is a reasonable likelihood that a defendant will commit future violations, courts in this Circuit weigh various factors, including: (1) the fact that the defendant has been found liable for illegal conduct; (2) the degree of scienter involved; (3) the isolated or repeated nature of the violations; and (4) the sincerity of the defendant's assurances against future violations. *SEC v. Cavanagh*, 155 F.3d 129, 135 (2d Cir. 1998).

Application of these factors to the facts here establish that Rajaratnam and Galleon should be enjoined. The serious nature and flagrancy of Rajaratnam's conduct is demonstrated by his criminal conviction. Rajaratnam's fourteen convictions for acting knowingly and willfully in violating the securities laws evidence a high degree of scienter. Indeed, Rajaratnam's conduct involved repeated and large-scale violations of the insider trading laws

[7] Unlike private litigants, the Commission need not show risk of irreparable injury, or the unavailability of remedies at law to obtain injunctive relief. *SEC v. Unifund SAL*, 910 F.2d 1028, 1036 (2d Cir. 1990).

over a number of years and the solicitation of numerous other individuals to commit securities violations. *See* SMF *passim*. Finally, Rajaratnam has not accepted any responsibility for his misconduct. He went to trial on the criminal case and continues to litigate and contest this action even though it is based on substantially the same facts for which he was found guilty based on a much higher standard of proof. An injunction against Galleon is appropriate because Rajaratnam's conduct is imputed to Galleon. The Commission has no assurances that Galleon will not seek to do business in the future. Given the egregious and repeated nature of the insider trading here, a permanent injunction against both Rajaratnam and Galleon is necessary to protect the public interest.

3. Civil Penalties

Section 21A of the Exchange Act authorizes district courts to assess civil penalties against persons who commit insider trading. 15 U.S.C. § 78u-1. The statute states that the amount of the penalty shall be determined by the Court "in light of the facts and circumstances." 15 U.S.C. § 78u-1(a)(2). The statute further provides for up to "three times the profit gained or the loss avoided." *Id.* Courts look to a number of factors to determine whether a fine should be imposed, including "(1) the egregiousness of the defendant's conduct; (2) the degree of the defendant's scienter; (3) whether the defendant's conduct created substantial losses or the risk of substantial losses to other persons; (4) whether the defendant's conduct was isolated or recurrent; and (5) whether the penalty should be reduced due to the defendant's demonstrated current and future financial condition." *SEC v. Haligiannis*, 470 F. Supp. 2d 373, 386 (S.D.N.Y. 2007) (citing *SEC v. Coates*, 137 F. Supp. 2d 413, 429 (S.D.N.Y. 2001)). Civil penalties are "designed to punish the individual violator and deter future violations of the securities laws." *Id.* (citing *Moran*, 944 F. Supp. at 296).

The SEC respectfully requests that the Court impose on Rajaratnam and Galleon the maximum penalty available under the law. A three time penalty is warranted in this case. Rajaratnam orchestrated a multi-year campaign of insider trading. As the record makes abundantly clear, Rajartanam corrupted numerous corporate insiders in the process, SMF ¶¶ 17-89, 235-292, and took highly deliberate steps in order to evade detection, SMF ¶¶ 248-253, 293-294. Moreover, when Rajaratnam testified in connection with the staff's investigation less than a year after the AMD/ATI announcement, he vehemently denied having any reason to believe that AMD was going to acquire ATI before the announcement of the acquisition, SMF ¶¶ 295-97, despite having garnered over $20 million in illicit profits trading in ATI on the basis of numerous, illicit communications with Anil Kumar about it.

Based solely on his insider trading in the five stocks at issue here, Rajaratnam garnered tens of millions in profits. He rigged our nation's capital markets and undermined public confidence in the fundamental fairness of those markets. He brought shame and disrepute upon the investment advisory and analyst communities, and he corrupted executives at the highest echelons of corporate America. And while it is difficult to ascertain the identity of those on the other side of each of Rajaratnam's illegal trades, there can be no doubt that his trading inflicted harm on those counterparties.

Third tier penalties are appropriate here in order to punish Rajaratnam and Galleon for Rajaratnam's brazen conduct, and to deter others from engaging in the same. The high profile nature of this case, and the egregious conduct it exposed, affords this Court a truly unique opportunity to send as strong a message as possible to the investment community, and indeed the world, that insider trading and corruption in connection with this nation's capital markets will not be tolerated.

CONCLUSION

For the reasons set forth above, the Commission's motion for partial summary judgment should be granted in its entirety.

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Respectfully submitted,

Kevin P. McGrath
Valerie A. Szczepanik
Attorneys for Plaintiff
Securities and Exchange Commission
3 World Financial Center
New York, New York 10281
Tel: (212) 336-0533
Fax: (212) 336-1352

Of Counsel
John Henderson
Matthew Watkins