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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

RAJ RAJARATNAM,

Defendant.

09 Civ. 8811 (JSR)

ECF CASE

PLAINTIFF'S POST-ARGUMENT SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANT RAJ RAJARATNAM

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INTRODUCTION

In its opening brief in support of its motion for summary judgment against Raj Rajaratnam ("Rajaratnam"), Plaintiff Securities and Exchange Commission ("Commission") requested civil penalties based on a profit gained/loss avoided calculation made by the Government in its parallel criminal action against Rajaratnam. The calculation essentially took the difference between the price at which Rajaratnam closed out a position and the price at which he had acquired it, and then multiplied that difference by the number of shares, on a first-in, first-out basis. The calculation accounted for Rajaratnam's actual, realized profit gained/loss avoided as a result of his insider trading.

At the hearing on Commission's motion for summary judgment, held October 28, 2011, the discussion focused on the specific language of Section 21A of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §78u-1, which provides for civil penalties for insider trading in an action by the Commission. In pertinent part, the statute reads:

> Amount of Penalty for Person Who Committed Violation. The amount of the penalty which may be imposed on the person who committed such violation shall be determined by the court in light of the fact[s] and circumstances, but shall not exceed three times the profit gained or loss avoided as a result of such unlawful purchase, sale, or communication.
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> * * *
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> Definition. For purposes of this section, "profit gained" or "loss avoided" is the difference between the purchase or sale price of the security and the value of that security as measured by the trading price of the security a reasonable period after public dissemination of the nonpublic information.

15 U.S.C. §78u-1(a)(2) and §78u-1(e) (2011).

At the hearing, the Commission informed the Court of the results of a Government's re-calculation of profit gained/loss avoided that was based, not on the prices at which Rajaratnam exited his positions, but rather on the price at which the relevant security closed at the end of the

first trading day following the announcement of non-public information (the "post-announcement closing price"). The Court observed at the hearing that using the post-announcement closing price to calculate Rajaratnam's profit gained/loss avoided was arguably the approach most consistent with Section 21A of the Exchange Act. Accordingly, at the conclusion of the hearing, the Court requested supplemental written submissions addressing this re-calculation.

ARGUMENT

I. The Government's Re-Calculations

By way of background, the Government re-calculated profit gained/loss avoided at the request of Judge Holwell during a sentencing hearing in the parallel criminal action. The Government's re-calculation compared the price at which Rajaratnam acquired his position with the security's first, post-announcement closing price. *See* Ex. A to the Declaration of John Henderson in Support of Plaintiff's Post-Argument Supplemental Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment against Defendant Raj Rajaratnam ("Henderson Supp. Decl.") at p. 2 of 6. The re-calculation relied on data from Galleon's Order Management System ("OMS"), an electronic system that kept track of Galleon's stock trading during the time period relevant to this action. *Id.* The OMS contained codes indentifying which portfolio managers and traders at Galleon were associated with particular stock trades. The Government's re-calculation was based on stock trades for two sets of these "manager codes": (1) those that Mr. Rajaratnam now concedes represent his trading (*see* Defendant's Rajaratnam's Post-Argument Supplemental Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment ("Def's Supp. Mem.") at 5); and (2) those that included one additional manager code: the "CRS" manager code, which relates to a Galleon fund known as the "Crossover" fund. As explained below, there is evidence that Rajaratnam was responsible for

directing trades in the Crossover fund. The inclusion of the CRS trades affects only two of the stocks at issue here, Akamai and Clearwire.

For the Collateral Estoppel Stocks (Akamai, ATI, Clearwire, Intel and PeopleSupport), the results of the various methodologies are summarized in the following table:

Stock	**Original Figure Based on Rajaratnam's Realized Profit Gained/Loss Avoided**	**Revised Figure (with CRS manager code trading)**	**Revised Figure (without CRS manager code trading)**
Akamai	$5,139,851	$5,509,395	$5,092,925
ATI	$22,938,866	$24,935,664	$24,935,664
Clearwire	$851,724	$1,159,207	$941,354
Intel Profit	$1,598,356	$818,500	$818,500
Intel Loss Avoided	$882,915	$934,665	$934,665
PeopleSupport	$151,949	$155,498	$155,498
TOTAL	$31,563,661	$33,512,929	$32,878,606

Rajaratnam's objections to the Government's re-calculation, as well as the other arguments set forth in Defendant's Supplemental Memorandum, are addressed below.

II. Rajaratnam's Objections to the Government's Re-Calculations Are Unpersuasive

Rajaratnam first complains that the Government's re-calculation for ATI yields greater profits because the closing price of the shares on the day following the public announcement is higher than the price at which Rajaratnam actually sold his shares earlier in the day. Indeed, with respect to certain stocks, Rajaratnam exited his position at a price that was less favorable to him than the post-announcement closing price. With respect to other stocks, Rajaratnam exited his position at a price more favorable to him (for example, Intel). *See* Henderson Supp. Decl. Ex. A at pp. 3-4 of 6. Should the Court choose to adopt a method that uses the stock price at the

close of the day after the announcement, for consistency, it should be applied to all five Collateral Estoppel Stocks.

Rajaratnam also objects to the fact that the Government's re-calculation includes 50,000 more ATI shares than its original calculation. *See* Def's Supp. Mem. at 3. However, Galleon's OMS data makes clear that these shares are appropriately included. The OMS data shows that, for trading by the manager codes with respect to which Rajaratnam concedes responsibility here, Galleon's position before the announcement was 5,725,000 shares, the figure the Government used in its re-calculation. *See* Henderson Supp. Decl. Ex. A at pp. 4-7 of 28. The exclusion of 50,000 shares from the Government's original calculation was likely an error. And, although Rajaratnam has highlighted this discrepancy, he does not dispute that these 50,000 shares are properly included.

Rajaratnam also adheres to his position that a plain reading of Section 21A of the Exchange Act provides for the factoring out of a civil penalty any stock price changes due to market forces. But, as recognized by the Court on October 28, such a view is contrary to the plain language of the statute. The statute does *not* state, for example, that the penalty "not exceed three times the profit gained or loss avoided *as a result of the market impact of the nonpublic information.*" Rather, the statute ties the profit gained/loss avoided to that resulting from the unlawful insider trading and, as such, essentially takes a "but-for" approach to the calculation. Had Congress intended Rajaratnam's interpretation, it could easily have drafted the statute differently.

Rajaratnam also disputes the inclusion of trading attributable to the CRS manager code. During sentencing, the Government attempted to show that Rajaratnam used a portfolio manager code, CRS (for the "Crossover" fund), that had not been included in its previous profit/loss

calculations because the Government was unaware of Rajaratnam's use of the code during its case-in-chief. *See United States v. Rajaratnam*, 09-CR-1184 (RJH), Dkt. # 305 (Government's Sentencing Memorandum), at 35-36 & n.15. At sentencing, Rajaratnam objected to the inclusion of that code's trading. *See* Def's Supp. Mem. at 5. Judge Holwell excluded any gains/losses relating to the Crossover fund because he concluded there was insufficient evidence before him to find that all the CRS trades originated with Rajaratnam and, in any event, their inclusion would have no impact on the offense level calculation at issue during sentencing. *See* Henderson Supp. Decl. Ex. C at 26-27.

There is sufficient evidence that Rajaratnam was responsible for directing trades in the CRS fund with respect to the Akamai and Clearwire trading at issue here. First, former Galleon portfolio manager Adam Smith testified at Rajaratnam's criminal trial that Rajaratnam was responsible for the Crossover Fund. *See* Declaration of John Henderson in Support of Motion for Summary Judgment ("Henderson Decl.") Ex. A-6 at 2453. Further, Galleon's OMS data shows that the CRS trades in question were executed in tandem with trades under manager codes that Rajaratnam here concedes he was responsible for, the TMT and TAM codes. *See* Def's Supp. Mem. at 5.

Specifically, Galleon's OMS data indicates that the CRS trades in question were executed by the same trader at virtually the same time and for the same price as the TMT and TAM trades. *See* Henderson Supp. Decl. Ex. A at pp. 2-3 of 28 (Akamai trades) and pp. 8-9 of 28 (Clearwire trades). At the criminal trial, former Galleon portfolio manager Adam Smith testified that, for each trade, the Galleon OMS data recorded certain information about the trade, including the initials of the Galleon trader who placed the trade, as well as the three-letter abbreviation representing the fund to which the trade was allocated. *See* Henderson Decl. Ex. A-6 at 2565:18-

2566:8. With respect to the Clearwire trades at issue, the OMS data shows that all the trades were placed by the trader "IH" and allocated to the TMT and CRS funds. *See* Henderson Supp. Decl. Ex. A at pp. 8-9 of 28. "IH" stands for Ian Horowitz, Rajaratnam's principal trader. *See id.* Ex. B at 2680:9-16. Rajaratnam concedes that the TMT trades were his. *See* Def's Supp. Mem. at 5. With respect to the Akamai trades at issue, the OMS data shows that all the trades were placed by the trader "AM" and allocated to the TAM and CRS funds. *See* Henderson Supp. Decl. Ex. A at pp. 2-3 of 28. During the period in question, Galleon employed a junior trader at Galleon who's initials were AM, Ananth Muryiappa. *See id.* Ex. B at 2681:5-14. Rajaratnam would rely on Muryiappa to execute his trades when Horowitz was unavailable. *See id.* Rajaratnam concedes that the TAM trades were his. *See* Def's Supp. Mem. at 5.

Thus, Galleon's own trading data establishes that the Clearwire and Akamai CRS trades were placed by the same trader, respectively, on or about the same time as the TMT and TAM trades for which Rajaratnam's responsibility has been established. The notion that the trades were ordered by the same trader, but one set was based on inside information and the other was not, is wholly implausible.

Moreover, nowhere does Rajaratnam deny responsibility for the CRS trades. Once the Commission has shown fraud, the defendant bears the burden of demonstrating that he received less than the full amount allegedly misappropriated. *See SEC v. Benson*, 657 F. Supp. 1122, 1133 (S.D.N.Y. 1987); *cf. SEC v. Patel*, 61 F.3d 137, 140 (2d Cir. 1995) (any uncertainty in calculating disgorgement falls on the wrongdoer) (citation omitted). Rajaratnam has not born his burden with respect to the CRS trades.

Should the Court accept the original methodology, which accounted for Rajaratnam's actual profits, the Commission requests that the CRS trades be included as well, which would

bring Rajaratnam's actual profits to $32,129,250. *See* Henderson Supp. Decl. Ex. A at p. 3 of 6 (summing Agent Barnacle's Gain Calculation, which included CRS trades, for Akamai, ATI, Clearwire, Intel and PeopleSupport).

III. Rajaratnam's Other Considerations Are Unpersuasive

Finally, Rajaratnam maintains that other factors favor the calculation of a lesser penalty. In this regard, Rajaratnam argues that investors in Galleon funds reaped the majority of the ill-gotten gains here and that Rajaratnam actually personally profited only by $4,725,150. However, the civil penalty statute does not contemplate that a penalty should be reduced to account for amounts of ill-gotten gains transferred by a defendant to other entities. Furthermore, cases relating to the calculation of disgorgement make this much clear: Rajaratnam is responsible for the profits paid out to Galleon. *See SEC v. Warde*, 151 F.3d 42, 49 (2d Cir. 1998) ("The value of the rule in preventing misuse of insider information would be virtually nullified if those in possession of such information ... were free to use the inside information on trades to benefit their families, friends, and business associates."); *SEC v. Grossman*, 1997 U.S. Dist. LEXIS 6225, at *28 (S.D.N.Y. May 6, 1997) (defendant insider tipper liable for disgorgement of unlawful proceeds of his tippees "regardless of whether he personally profited from the unlawful trading") (citing *Dirks v. SEC*, 463 U.S. 646, 664 (1983) and *Elkind v. Liggett & Myers, Inc.*, 635 F.2d 156, 165 (2d Cir. 1980)); *SEC v. Tome*, 638 F. Supp. 596, 624-25 (S.D.N.Y. 1986) (where firm receives gains through unlawful conduct and where its high ranking officer has collaborated in that conduct and profited from the violations, it is appropriate to award disgorgement against the firm and its officer on a joint and several basis); *SEC v. United States Envtl.*, 2003 U.S. Dist. LEXIS 12580, at *72 (S.D.N.Y. Jul. 21, 2003) (in securities manipulation case, holding defendant jointly and severally liable for ill-gotten gains of broker-dealer).

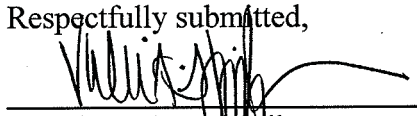
As for Rajaratnam's arguments concerning his charitable works, those were considered by Judge Holwell and credited towards a reduced sentence. In determining the issue of civil penalties under 21A of the Exchange Act, the Commission asks that the Court primarily consider Rajaratnam's conduct for which he was convicted, the effects of which ripple beyond the profit gained/losses avoided by Rajaratnam. Rajaratnam's crimes were serious and wrongful, and he continues to refuse to accept responsibility for them. His conduct had far-reaching consequences to the sanctity of fiduciary relationships, to the integrity of the marketplace, and to investor confidence.

CONCLUSION

For the above reasons and those presented in the Commission's motion papers and in its arguments to the Court, the Commission respectfully requests that the Court enter an order against Rajaratnam in the form attached hereto as Exhibit D to the Henderson Supplemental Declaration.

Dated: New York, NY
November 3, 2011

Respectfully submitted,



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