11-4416

To Be Argued By:
REED BRODSKY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-4416

UNITED STATES OF AMERICA,

Appellee,

—v.—

RAJ RAJARATNAM,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Raj Rajaratnam appeals from a judgment of conviction entered on October 25, 2011, in the United States District Court for the Southern District of New York, following an eight-week trial before the Honorable Richard J. Holwell, United States District Judge, and a jury.

Indictment S2 09 Cr. 1184 (RJH) was filed on January 20, 2011, in 14 counts. Counts One through Five charged Rajaratnam with five separate conspiracies to commit securities fraud, in violation of Title 18, United States Code, Section 371. Counts Six through Fourteen charged

Rajaratnam with securities fraud, in violation of Title 15, United States Code, Sections 78j(b) and 78ff; Title 17, Code of Federal Regulations, Sections 10b-5 and 10b5-2; and Title 18, United States Code, Section 2.

Trial commenced on March 8, 2011, and ended on May 11, 2011, when the jury convicted Rajaratnam on all counts.

On October 13, 2011, Judge Holwell sentenced Rajaratnam to a term of 132 months' imprisonment, to be followed by two years' supervised release. Judge Holwell also ordered Rajaratnam to pay a $1,400 special assessment, a fine of $10,000,000, and forfeiture in the amount of $53,816,434.

Rajaratnam is currently serving his sentence.

Statement of Facts

A. The Government's Case

The evidence at trial established that Rajaratnam was the head of Galleon Group ("Galleon"), which operated a family of hedge funds. Rajaratnam led multiple conspiracies to trade securities of 19 public companies based on material, nonpublic information ("Inside Information").

From 2003 through 2009, Rajaratnam participated in five insider trading conspiracies. First, Rajaratnam led a multi-year conspiracy with Anil Kumar, a senior partner at McKinsey & Company, Inc. ("McKinsey"), and traded based on illegal tips from Kumar about Advanced Micro Devices, Inc. ("AMD"), ATI Technologies Inc. ("ATI"), eBay Inc. ("eBay"), Business Objects, and other compa-

nies. (*See* Counts Four and Thirteen, A. 283-87, 294-95).[*] Second, Rajaratnam led a multi-year conspiracy with Rajiv Goel, an Intel Corporation ("Intel") executive, and traded based on illegal tips from Goel about Intel and Clearwire Corporation ("Clearwire"). (*See* Counts Three, Six, Seven, and Fourteen, A. 278-82, 292-94). Third, Rajaratnam led a multi-year conspiracy with former and current employees of Galleon, including Adam Smith, and traded based on illegal tips from multiple insiders at public companies. (*See* Count One, A. 268-73). Fourth, Rajaratnam conspired with Danielle Chiesi, a portfolio manager at another hedge fund, and exchanged illegal tips with Chiesi relating to AMD, Akamai Technologies, Inc. ("Akamai"), and other companies. (*See* Counts Five, Eight, Nine, and Ten, A. 287-93). Fifth, Rajaratnam led a multi-year conspiracy with Roomy Khan, a former Galleon employee, and exchanged illegal tips with Khan relating to multiple stocks, including Hilton Hotels Corporation ("Hilton") and Google Inc. ("Google"). (*See* Count Two, A. 273-78). The evidence at trial demonstrated that, as a result of these

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[*] "Tr." refers to the trial transcript; "GX" refers to a Government trial exhibit; "Franks Tr." refers to the transcript of the *Franks* hearing; "Michaelson Ex." refers to an exhibit from the *Franks* hearing; "Sent Tr." refers to the sentencing transcript; "Br. refers to Rajaratnam's brief on appeal; "A." refers to the joint appendix that Rajaratnam submitted with his brief on appeal; "SA" refers to the special appendix that Rajaratnam submitted with his brief on appeal; "Blakely Br." refers to the amicus brief filed by G. Robert Blakely.

schemes, Rajaratnam's Galleon hedge funds reaped tens of millions of dollars in illicit profits and avoided losses.

The evidence at trial against Rajaratnam included (1) wiretap recordings of Rajaratnam's telephone conversations with Kumar, Goel, Smith, Chiesi, and others demonstrating that Rajaratnam schemed repeatedly to obtain and to trade based on Inside Information; (2) Kumar's testimony about his agreement to provide Rajaratnam with multiple illegal tips, including tips regarding AMD's acquisition of ATI in 2006, and Rajaratnam's elaborate schemes to conceal the bribes he paid to Kumar for these tips; (3) Goel's testimony about his agreement to provide Rajaratnam with multiple illegal tips relating to Intel's earnings in April 2007 and Intel's investment in Clearwire in 2008; (4) Smith's testimony about his agreement to share Inside Information with Rajaratnam and others at Galleon, and Rajaratnam's directives to conceal their crimes; (5) testimony of various executives at public companies and other firms regarding the confidentiality of information Rajaratnam obtained from many sources; and (6) summary charts reflecting Rajaratnam's telephone calls with sources of Inside Information, and the extensive trading by Rajaratnam and others based on that information.

1. Rajaratnam's Conspiracy with Anil Kumar

From 2003 through 2009, Rajaratnam traded securities based on illegal tips from Kumar. This conspiracy started shortly after Rajaratnam agreed to pay Kumar approximately $500,000 a year for information. (Tr. 264, 279-80). Rajaratnam knew that McKinsey prohibited Kumar from

disclosing corporate secrets or receiving outside money. Accordingly, Rajaratnam concocted a plan pursuant to which Rajaratnam wired money to Kumar's offshore account, and Kumar reinvested the money back into Galleon in the name of Kumar's housekeeper. (Tr. 264-67, 283-84, 391-95).

In return, Kumar repeatedly provided Rajaratnam with confidential information about Kumar's clients relating to earnings, strategic plans, and mergers and acquisitions. For example, Kumar tipped Rajaratnam about AMD's secret planned acquisition of ATI in 2006. (Tr. 350-87). Based primarily on Kumar's illegal tips, Rajaratnam purchased approximately $89,400,000 in ATI stock. Rajaratnam earned nearly $23,000,000 after the public announcement of the deal. (Tr. 3425; A. 477-79). After the deal was announced, Rajaratnam thanked Kumar for the information and said Kumar was a "hero." (Tr. 387). Later that year, Rajaratnam gave Kumar a $1,000,000 bonus. (Tr. 387-88).

Wiretap recordings captured Rajaratnam's ongoing insider trading scheme with Kumar in operation. (*See, e.g.*, A. 646-53). For example, during a May 2, 2008 conversation, Kumar told Rajaratnam about a potential acquisition of Spansion. (A. 680-82). Rajaratnam, in turn, directed his employees to create a cover "email trail" to justify any future trades in Spansion should regulators ask any questions. (A. 700-01). Subsequent wiretap recordings showed that Kumar tipped Rajaratnam repeatedly about corporate secrets relating to a multi-billion dollar investment in AMD, and that Rajaratnam traded based on this information. (A. 480, 737-47, 756, 768-70, 771-90,

794-97, 854, 856-63). The evidence also showed that Kumar tipped Rajaratnam about massive layoffs at eBay prior to the company's public announcement, and that Rajaratnam traded based on that tip. (A. 481-83, 811-12).

2. Rajaratnam's Conspiracy with Rajiv Goel

Goel provided Rajaratnam with Inside Information from 2007 through 2009. (Tr. 1568, 1636-43, 1647-58, 1675-82, 1911-2002, 2005-07). Goel tipped Rajaratnam because (1) they were close friends, (2) Rajaratnam had given Goel hundreds of thousands of dollars in cash, and (3) Rajaratnam executed profitable trades in Goel's brokerage account. (Tr. 1576-77). For example, in April 2007, Goel obtained highly secret information about Intel's earnings from a friend in the company's investor relations department. (A. 459-60; Tr. 1642). At first, Goel learned negative information about Intel's performance, and Rajaratnam shorted Intel stock (*i.e.*, placed a bet that the stock price would decline) based on that information. (Tr. 1651-52, 1675-76; A. 459-60; GX 200, 1070). Days later, Goel learned positive information about Intel's outlook and updated Rajaratnam. (Tr. 1652-53, 1677-78; A. 459-60; GX 200). Based on Goel's new information, Rajaratnam reversed his short position and purchased two million shares of Intel, reaping over $2 million in profits. (A. 461-63).

Wiretap recordings in 2008 also captured Goel revealing secret information to Rajaratnam about Intel's investment in Clearwire, and showed that Rajaratnam executed trades based on Goel's tips. (A. 464-68, 624-43, 656-58; Tr. 1911-72). Additional recordings and other evidence

demonstrated that Rajaratnam purchased and sold shares of PeopleSupport in Goel's brokerage account based on Inside Information that Rajaratnam had learned through Galleon's seat on that company's board of directors. (A. 476, 730-32, 825-28; Tr. 1978-98; GX 1106, 1107R, 1117, 1120-21).

3. Rajaratnam's Leadership of the Galleon Conspiracy

From 2003 through 2009, Rajaratnam encouraged and promoted the use of Inside Information at Galleon, rewarded employees who obtained it for him, and caused countless securities trades to be executed based on Inside Information. (*See, e.g.*, A. 683-704, 757-67, 834-37). For example, in 2005, Smith provided Rajaratnam with Inside Information from a Morgan Stanley investment banker about the acquisition of Integrated Circuit Systems, Inc. ("ICST"). (Tr. 2484-85, 2489-98, 2501-14). Smith sent Rajaratnam coded email messages with updates. (A. 912-14). Rajaratnam purchased over one million shares of ICST stock based on those tips, and Rajaratnam reaped $2,678,211 in illegal profits. (Tr. 3456-58; A. 485-86). Wiretap recordings and other evidence also showed that Rajaratnam traded based on Inside Information from a member of the Board of Directors of Goldman Sachs & Co. relating to Warren Buffett's investment in September 2008 and negative earnings in October 2008. (A. 528-31, 798-801, 829-31). During one conversation, Rajaratnam expressly stated he "heard yesterday from somebody who's on the Board of Goldman Sachs, that they are gonna lose $2 per share" and that he planned to trade based on that information. (A. 830).

4. Rajaratnam's Conspiracy with Danielle Chiesi

Evidence of Rajaratnam's ongoing insider trading conspiracy with Chiesi in 2008 was frequently captured on the wiretaps. During numerous recorded conversations, Rajaratnam and Chiesi exchanged Inside Information relating to AMD, Akamai, and other public companies. (*See* A. 498-503, 706-09, 733-36, 752-55, 768-70, 794-97). They discussed how Chiesi feared being investigated, and Rajaratnam provided advice on how to avoid detection by trading in and out of a stock. (*See, e.g.*, A. 769, 804). Rajaratnam also thanked Chiesi for an illegal inside tip that Akamai was going to publicly announce a reduction in its earnings guidance. (A. 733).

5. Rajaratnam's Conspiracy with Roomy Khan

In 2006 and 2007, Rajaratnam exchanged Inside Information with Khan. Evidence about Rajaratnam's conspiracy with Khan came from multiple witnesses, trading records, phone records, and instant messages. (A. 505-27; Tr. 1223-24, 1588-89, 3077-79, 3135-51). The following pattern repeated itself over and over again: Khan obtained Inside Information from someone breaching a duty of confidentiality; Khan traded based on that information; Khan communicated the information to Rajaratnam; and Rajaratnam executed timely trades on the basis of Khan's information. (A. 505-27). For example, on July 2, 2007, Khan learned from an insider at Moody's Investor Service that Hilton was going to be acquired. (Tr. 1223-24; A. 505-06). Khan immediately traded based on that tip. (A. 506). Later that day, Khan told Rajaratnam,

who then purchased $14,000,000 of Hilton stock and made millions of dollars hours later when Hilton announced the deal. (A. 505-07, 511). Similarly, on July 13, 2007, Khan told Rajaratnam that she learned from an insider that Google was going to announce unexpectedly poor financial results. (A. 514-15; Tr. 3135-51). At the end of that call, Rajaratnam instructed his trader to sell all of his Google stock and then he took a $25,000,000 short position. (A. 514, 517). When Google announced its earnings, its stock plummeted and Rajaratnam made millions of dollars in illegal profits. (A. 518).

6. Rajaratnam's Use of Multiple Methods to Conceal His Crimes

Rajaratnam used sophisticated methods to conceal his crimes, including the following:

- Rajaratnam directed others to create false emails and instant messages that he could later point to as justification for trades based on Inside Information. (A. 514, 700-01; Tr. 2630-31, 2636-40).

- Rajaratnam instructed portfolio managers to both buy and sell securities while in possession of Inside Information to create the false impression that they did not have Inside Information. (A. 478, 480, 485, 768-70, 803-07; Tr. 2642-43).

- Rajaratnam instructed Chiesi to remain "radio silent" when they exchanged Inside Information. (A. 706-09, 752-55, 768-70).

- Rajaratnam disguised his payments to Kumar. (Tr. 391-92).

- Rajaratnam encouraged an employee to pay a McKinsey consultant for Inside Information through that consultant's spouse. (A. 761-64).

- Rajaratnam executed trades based on Inside Information in Goel's brokerage account using Goel's identification and password, and he offered to do the same thing for Kumar. (Tr. 545, 1613-31).

- Rajaratnam suggested that a coconspirator use a prepaid cellular telephones to contact him because Rajaratnam suspected that a former employee was cooperating with the Government. (Tr. 576-77).

B. The Defense Case

Rajaratnam called five witnesses and introduced hundreds of analyst reports and news articles in his defense. His first witness testified that Smith admitted after his guilty plea that he committed insider trading with respect to some stocks but Smith said that did not commit or did not execute trades based on Inside Information with respect to other stocks. (Tr. 3838, 3846-47). The second witness was one of Rajaratnam's attorneys who worked on Rajaratnam's defense. (Tr. 3850-51). He testified that Smith told Rajaratnam's counsel prior to Smith's guilty plea that Smith was not aware of any insider trading at Galleon. (Tr. 3854).

Rajaratnam's third witness was the former president of Galleon's domestic business, Richard Schutte. (Tr. 3910). Schutte testified generally about Galleon's investment philosophy and research process. (Tr. 3925-34). Through Schutte, the defense introduced a large volume of research reports and news articles that were available to the public,

including Galleon, at the time of the alleged crimes. On cross-examination, Schutte admitted that Rajaratnam's defense team showed him only a small portion of the analyst reports relating to each public company (Tr. 4376), that the analyst reports had conflicting views (Tr. 4377), and that he did not know whether the newspaper articles were in Galleon's files or seen by anyone at Galleon prior to Rajaratnam's arrest. (Tr. 4405-08, 4476). In addition, Schutte admitted that Rajaratnam had provided Schutte with $25,000,000 of the $35,000,000 under management in Schutte's new hedge fund shortly before the trial began. (Tr. 4654-55).

Rajaratnam called an expert as his final witness. This expert testified generally about the number of trades Rajaratnam made at Galleon, the leakage of confidential information into the marketplace, and event studies suggesting that some of the alleged illegal tips were already public and impounded into the stock price. (Tr. 4686, 4702, 4714-21). On cross-examination, the expert acknowledged that he had only analyzed public information that was consistent with the alleged illegal tips; that he excluded public stories inconsistent with the alleged tips; and that the consulting firm he worked for was paid hundreds of thousands of dollars for his work. (Tr. 4936-38, 5102).

C. The Verdict and Sentencing

After deliberating for 12 days, the jury returned a verdict of guilty on all 14 counts. (Tr. 5712-13).

On October 13, 2011, the District Court sentenced Rajaratnam to a term of 132 months' imprisonment, to be

followed by two years' supervised release. The District Court also ordered Rajaratnam to pay a fine of $10,000,000, a $1,400 special assessment, and forfeiture in the amount of $53,816,434.

In determining Rajaratnam's advisory sentencing range under the United States Sentencing Guidelines, the District Court concluded that a two-level enhancement for obstruction of justice was appropriate because Rajaratnam "acted with the specified intent to obstruct the SEC's investigation" during his June 7, 2007 deposition before the United States Securities and Exchange Commission (the "SEC"). The District Court found that Rajaratnam's deposition testimony was "clearly false," "obviously pertained to an issue material both to the SEC's proceeding and to the crimes for which he has been convicted in this case," and "unambiguously perjurious." (Sent. Tr. 27; *United States* v. *Rajaratnam*, 2012 WL 362031, at *19, 21 (S.D.N.Y. Jan. 31, 2012)). In addition, the District Court imposed a four-level enhancement because Rajaratnam was "the organizer and leader" of criminal activity with at least five participants. (Sent. Tr. 27).

D. The Wiretap on Rajaratnam's Cellular Telephone

The evidence at Rajaratnam's trial included numerous telephone conversations intercepted pursuant to a court-authorized wiretap on Rajaratnam's cellular telephone (the "Rajaratnam Phone"). From March through November 2008, six different judges of the United States District Court for the Southern District of New York authorized the interception of wire communications over the Rajaratnam Phone. Each of these six judges found, among

other things, that there was probable cause to believe that Rajaratnam and others were committing the offenses of wire fraud and/or money laundering in connection with an insider trading scheme; that the interception of these wire communication would reveal evidence of these offenses; and that the wiretaps were necessary because normal investigative techniques had been tried and failed or were not likely to succeed. The issuing judges' findings were validated by the wiretap investigation, which uncovered highly incriminating evidence of wide-ranging insider trading schemes involving Rajaratnam and others.

1. The Initial Rajaratnam Wiretap Application

On March 7, 2008, representatives of the United States Attorney's Office for the Southern District of New York and the Federal Bureau of Investigation (the "FBI") (collectively, the "Criminal Authorities" or the "Government") applied to the Honorable Gerard E. Lynch for authorization to intercept wire communications over the Rajaratnam Phone. The sworn application by then-Assistant United States Attorney ("AUSA") Lauren Goldberg (A. 55-64) included as exhibits (1) a memorandum from an official designated by the Attorney General authorizing the interception of wire communications (*see* A. 56), and (2) a 53-page affidavit of FBI Special Agent B.J. Kang. (A. 65-117). As stated in the application, the goals of the wiretap were to identify Rajaratnam's network of inside sources and co-conspirators, to learn the means by which the network operated, and to develop evidence for criminal prosecutions of Rajaratnam and others. (A. 72).

Special Agent Kang's affidavit described his background and experience, the Rajaratnam Phone, the target subjects, the target offenses of wire fraud and money laundering, and the prior applications to intercept communications of any target subject. (A. 65-75). Special Agent Kang's affidavit further described evidence demonstrating probable cause to believe that target subjects would use the Rajaratnam Phone in furtherance of an illegal insider trading scheme. (A. 75-102). The evidence supporting probable cause included background of the criminal investigation started by Special Agent Kang and other FBI agents in or about 2007; Rajaratnam's past inculpatory conversations with cooperating witness Roomy Khan (identified in the affidavit as "CS-1"); Rajaratnam's recorded conversations with Khan, including incriminating conversations over the Rajaratnam Phone; the criminal conversations of two Rajaratnam associates (Craig Drimal, who worked in Galleon's office space, and Zvi Goffer, who worked for Rajaratnam at Galleon); Special Agent Kang's review of "trading records and other information provided by the SEC"; and a toll analysis of calls between January 7, 2008, and February 21, 2008, over the Rajaratnam Phone. (*Id*.). Special Agent Kang's affidavit stated seven different times that the SEC had provided relevant information and documents, including trading records, instant messages, and phone records, upon which the application was partially based. (A. 79, 80, 95, 99, 101-02, 108).

Both AUSA Goldberg's application and Special Agent Kang's affidavit stated that "normal investigative techniques" had been tried and had "failed or reasonably appear[ed] unlikely to succeed if tried." (A. 58, 102-03).

Special Agent Kang's affidavit discussed the following investigative techniques used by law enforcement during investigations of federal crimes: "physical surveillance," "telephone records," "federal grand jury," "review of trading records," "witness interviews," "use of confidential informants," "undercover agents," "search warrants," "arrests," and prior "wire surveillance." (A. 103-12).

Based on the AUSA's application and Special Agent Kang's affidavit, Judge Lynch authorized the interception of wire communications over the Rajaratnam Phone.

2. The Subsequent Wiretap Applications

On or about March 10, 2008, the FBI began to intercept wire communications over the Rajaratnam Phone. Many of the intercepted communications constituted evidence of Rajaratnam's criminal conduct. For example, the FBI intercepted numerous conversations between Goel and Rajaratnam discussing "the Sprint thing," referring to Intel's and Sprint's investment in an entity named Clearwire. Notably, Goel testified that he provided confidential information about the Clearwire transaction to Rajaratnam (Tr. 1916-55), and the jury found Rajaratnam guilty of conspiracy and substantive counts relating to the use of material, nonpublic information about Intel's investment in Clearwire. (*See* A. 237-42, 260-61).

Based on, among other things, these and other intercepted wire communications showing that Rajaratnam was obtaining nonpublic information from corporate insiders, the Criminal Authorities applied for permission to intercept wire communications over the Rajaratnam Phone for

a second 30-day period. On April 8, 2008, the Honorable Denise L. Cote granted the application. This process was repeated six additional times, and each subsequent application was based substantially on the incriminating wire interceptions over the Rajaratnam Phone. Ultimately, six different judges in the Southern District of New York granted a total of eight applications to intercept communications over the Rajaratnam Phone. The applications were granted by the Honorable Gerard E. Lynch, the Honorable Denise L. Cote, the Honorable Deborah A. Batts, the Honorable Laura Taylor Swain, the Honorable Richard J. Sullivan, and the Honorable Denny Chin.

E. Rajaratnam's Motion to Suppress the Wiretaps

On May 7, 2010, Rajaratnam moved to suppress the wiretaps over the Rajaratnam Phone, and requested a hearing pursuant to *Franks* v. *Delaware*, 438 U.S. 154 (1978). (SA 4). In relevant part, Rajaratnam made two arguments. First, Rajaratnam argued that the Government made false statements and omissions in establishing there was probable cause that Rajaratnam and others were committing wire fraud and/or money laundering. (Memorandum of Law dated May 7, 2010 ("May 7 Mem."), at 41-56). Specifically, Rajaratnam argued that the Government failed to state that the cooperating witness Khan had a prior felony conviction in 2001 in connection with an insider trading scheme with Rajaratnam, and that the Government distorted summaries of consensually recorded conversations between Rajaratnam and Khan. (*Id.*). Second, Rajaratnam argued that the Government made false statements and omissions regarding the necessity for

a wiretap. (May 7 Mem. at 65-69). Specifically, Rajaratnam alleged that the Government omitted that the SEC had been conducting an investigation of Rajaratnam and others for a long period of time, that the SEC had obtained and analyzed millions of pages of documents, that the SEC had deposed Rajaratnam and others, and that the Criminal Authorities had access to these documents and depositions. (*Id.*).*

On August 12, 2010, the District Court ordered a *Franks* hearing to determine whether there were misstatements or omissions regarding the necessity for the wiretap in the Government's application and, if so, whether they were material. (*See* A. 21-22). The District Court rejected Rajaratnam's argument that any of the alleged misstatements and omissions were material to the existence of probable cause. (*See* SA 5).

F. The *Franks* Hearing

The District Court held a *Franks* hearing from October 4 to October 7, 2010. Because Rajaratnam bore the burden of proof of demonstrating that there were material misstatements and omissions, he called all four of the witnesses: (1) Linda Beaudreault, counsel to Galleon, Rajaratnam, and other Galleon employees during the SEC's investigation; (2) Andrew Michaelson, an SEC staff attorney who became a Special Assistant United States

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* Rajaratnam also argued that Title III did not authorize wiretaps to investigate insider trading crimes. The District Court rejected this argument. (SA 6-13). Rajaratnam has not challenged this ruling on appeal.

Attorney after the Criminal Authorities first received authorization to intercept wire communications over the Rajaratnam Phone; (3) Special Agent Kang; and (4) former AUSA Goldberg, who drafted the first wiretap application for the Rajaratnam Phone.

1. The SEC Investigation

The evidence at the *Franks* hearing established that in September 2006, the SEC's Division of Enforcement (the "SEC Staff") commenced an investigation into insider trading at Sedna Capital Management LLC ("Sedna"), a hedge fund managed by Rajaratnam's brother. (Franks Tr. 92-94). Within a short period of time, the SEC Staff also focused on insider trading by Rajaratnam at Galleon. (Franks Tr. 92, 343). The SEC Staff had access to documents obtained by the SEC's Office of Compliance Inspections and Examinations ("OCIE") and the multiple interviews conducted by OCIE during its four-month examination of Galleon in 2007. (Franks Tr. 35-36, 46, 62-69, 81, 112-20, 367). The SEC Staff also obtained approximately four million pages of documents from Galleon and subpoenaed records from prime brokers, telephone companies, public companies, and other entities. (Franks Tr. 38-40, 195-97). From October 2006 through August 2007, the SEC Staff deposed four Sedna employees and a sell-side analyst. (Franks Tr. 62, 439). The SEC Staff also deposed Rajaratnam. (Franks Tr. 347-48).

The SEC Staff found limited evidence of insider trading. The SEC Staff found documents suggesting that Rajaratnam was receiving and passing Inside Information over the telephone. (Franks Tr. 398-02, 406-08). The SEC Staff also believed Galleon resisted multiple, specific

requests to identify investors who were officers or directors of public companies, and ultimately never provided an adequate response. (Franks Tr. 382-95). Not surprisingly, not one person questioned by the SEC Staff or OCIE admitted to knowing about or suspecting that there was insider trading at Galleon. (Franks Tr. 65-68, 72, 87, 190-93, 346-48, 368-75).

In his SEC deposition on June 7, 2007, Rajaratnam swore under oath that he did not have any sources of Inside Information. (Franks Tr. 347-48; Michaelson Ex. 45). Rajaratnam flatly denied "ever com[ing] into possession of material nonpublic information." (Franks Tr. 348). Rajaratnam denied ever engaging in insider trading (Franks Tr. 347, 351-54), and he testified that he never suspected and Galleon never made a trade based on nonpublic information (Franks Tr. 184). When asked to identify "any investors in Galleon who are consultants to" publicly traded companies, Rajaratnam stated that he knew of none and failed to identify Kumar, whom Rajaratnam was paying hundreds of thousands of dollars for Inside Information. (Michaelson Ex. 45 at 84). Rajaratnam specifically denied communicating about AMD with anyone who had access to Inside Information and denied having any reason to believe AMD was going to acquire ATI before the public announcement of that deal. (Michaelson Ex. 45 at 114, 141). The SEC Staff believed at the time that Rajaratnam was not truthful. (Franks Tr. 353-55).

As of March 2008, when the Criminal Authorities submitted the wiretap application to Judge Lynch, the SEC Staff's investigation, "which had been ongoing for a year-

and-a-half, had not resulted in any direct evidence and . . . a handful of weak [circumstantial] cases." (Franks Tr. 464). The SEC Staff suspected Rajaratnam had engaged in insider trading in the securities of 28 companies, but the SEC Staff had not identified any possible inside sources for many of the companies and had little evidence of the inside sources for many others. (Franks Tr. 420-26; A. 193).

2. The Criminal Investigation

In March 2007, the SEC Staff briefed the Criminal Authorities about the SEC's investigation into Sedna and Galleon. (Franks Tr. 124-25). The Criminal Authorities had access to the SEC's entire investigative file. (Franks Tr. 124). The SEC Staff provided the Criminal Authorities with regular updates regarding the SEC's investigation (Franks Tr. 132-33, 732, 828-29); identified specific documents of interest suggesting, among other things, that Rajaratnam was using the phone to receive and to transmit Inside Information (Franks Tr. 631); provided several chronologies relating to suspicious trading by Galleon in certain public companies (Franks Tr. 488, 529, 541); informed the Criminal Authorities that Galleon was not entirely cooperative with its investigation and failed to produce key documents in a complete or timely fashion (Franks Tr. 630-31); and provided transcripts of the SEC Staff's depositions, including Rajaratnam's deposition. (Franks Tr. 354-58, 807-08). The SEC Staff told the Criminal Authorities that neither Rajaratnam nor his brother were truthful in their depositions. (Franks Tr. 354-55, 358, 807-08).

The Criminal Authorities used grand jury subpoenas to obtain additional documents, including phone and bank records. (Franks Tr. 828-29). By late 2007, the Criminal Authorities decided to approach Khan to obtain her cooperation. (Franks Tr. 636-37, 813, 828-29). The Criminal Authorities targeted Khan because (1) there was enough evidence of her involvement in insider trading with Rajaratnam to make it a reasonable risk that she would cooperate, and (2) Khan's earlier agreement to cooperate in the late 1990s made her a good candidate to cooperate again. (Franks Tr. 812-13). After initially denying any involvement, Khan admitted engaging in insider trading with Rajaratnam and agreed to cooperate. (Franks Tr. 637, 839). Among other things, Khan admitted to receiving Inside Information from an investor relations consultant for Google and providing it to Rajaratnam, which the Criminal Authorities did not know about prior to her admission. (Franks Tr. 283-84). The Criminal Authorities then obtained phone records, trading records, and other documents that corroborated Khan's statements. (Franks Tr. 283-84). Khan also admitted to insider trading in numerous other stocks. (*See*, *e.g.*, Franks Tr. 609-10). As part of her cooperation, Khan had several consensually recorded conversations with Rajaratnam. (Franks Tr. 661).

During the time that the Criminal Authorities approached Khan and obtained her cooperation, the Criminal Authorities were also collecting evidence of a separate insider trading scheme that related to Galleon. (Franks Tr. 637-38). In late 2007, with the assistance of another cooperating witness, the Criminal Authorities had obtained court authorization to intercept wire communications over the telephones of two individuals who worked in Gal-

leon's office space, Drimal and Goffer. (Franks Tr. 638-39).

3. The Wiretap Applicants' State of Mind

At the time the Criminal Authorities applied for a wiretap over the Rajaratnam Phone in March 2008, the Criminal Authorities believed that the SEC's investigation had generated leads but weak circumstantial evidence of insider trading insufficient to support criminal charges. (Franks Tr. 646-47, 821-22). AUSA Goldberg testified that "we realized we had hit a bit of a wall and we weren't going to make any real progress unless we could actually get up on a wire and capture people's phone calls." (Franks Tr. 814). The only direct evidence of insider trading against Rajaratnam at the time came from Khan's cooperation, and Khan did not know the entirety of Rajaratnam's insider trading schemes. (Franks Tr. 421, 609, 814). The best evidence that the SEC's investigation had to offer related to Khan and Goel. (Franks Tr. 421, 424, 613). And that evidence was included within the Government's wiretap application. (A. 76-81, 101-02).

The Criminal Authorities believed that subjects of an investigation react very differently to an SEC interview than they do to a criminal inquiry. (*See, e.g.*, Franks Tr. 639-40, 654-55, 799-801). Special Agent Kang believed that subjects "take the SEC's case very lightly compared to if they knew that an FBI criminal investigation was afoot." (Franks Tr. 640). AUSA Goldberg also believed that targets did not take SEC investigations as seriously as criminal investigations, in part because the targets expected to be subject to SEC oversight. (Franks Tr. 800-01). AUSA Goldberg's belief was corroborated by

the fact that, during the SEC investigation, Khan was able to have incriminating conversations with Rajaratnam. (Franks Tr. 801). For this reason, the Criminal Authorities believed that, notwithstanding the overt SEC Staff investigation, the criminal investigation would be jeopardized if subjects learned of its existence. (Franks Tr. 639-40, 655).

AUSA Goldberg drafted the first wiretap application for the Rajaratnam Phone using as a template a recent wiretap application from the insider trading investigation of Rajaratnam associates Craig Drimal and Zvi Goffer. (Franks Tr. 724-25, 795-96). Special Agent Kang's affidavit in support of the application disclosed, among other things, information provided to the Criminal Authorities by the SEC and by Khan, consensually recorded calls between Khan and Rajaratnam, and wiretap calls between Goffer and Rajaratnam. (*See*, *e.g.*, Tr. 301, 424-25, A. 76-81, 99-100, 101-02). Special Agent Kang's affidavit referenced the Criminal Authorities' reliance on documents collected or information provided by the SEC in seven different places. (A. 79, 80, 95, 99, 101-02, 108). AUSA Goldberg testified that "[n]obody tried to hide" the SEC in the wiretap application, and that, in light of the affidavit's multiple references to the SEC, "it would be obvious to anyone reading the affidavit" that the Criminal Authorities were receiving information from the SEC. (Franks Tr. 773).

AUSA Goldberg, Special Agent Kang, and Michaelson (who prepared subsequent wiretap applications after he became a Special Assistant United States Attorney) did not intend to deceive the issuing judges about the SEC's investigation, nor did they intend to conceal that investiga-

tion. (Franks Tr. 434-35, 608, 822). It never crossed the mind of AUSA Goldberg, Special Agent Kang, or Michaelson to describe the SEC's civil investigation as an alternative investigative means available to law enforcement. (Franks Tr. 433-34, 570, 608, 819-20, 827). In fact, the Criminal Authorities took pains not to direct the SEC's investigative actions in light of adverse court decisions in *United States* v. *Scrushy*, 366 F. Supp. 2d 1134, 1138-39 (N.D. Ala. 2005), and *United States* v. *Stringer*, 408 F. Supp. 2d 1083, 1087-88 (D. Or. 2006), *rev'd*, 535 F.3d 929 (9th Cir. 2008). (Franks Tr. 337-40, 774, 817-19). Accordingly, the Criminal Authorities never asked, requested, or suggested that the SEC Staff take any person's testimony, conduct any interview, ask any question of a witness, or obtain any particular document. (Franks Tr. 337-40, 624-25, 817-19). For this reason, the individuals who submitted the wiretap application did not view the SEC Staff investigation as an alternative law enforcement means to investigate Rajaratnam and his associates. (Franks Tr. 570, 827).

Moreover, the Criminal Authorities' wiretap application was reviewed and approved by supervisors in the United States Attorney's Office who had received regular updates about the investigations by both the Criminal Authorities and the SEC. (Franks Tr. 796-98). The supervisors did not suggest that the wiretap application should disclose more details about the SEC's investigation. (Franks Tr. 797-98). Finally, AUSA Goldberg, Special Agent Kang, and Michaelson all believed that disclosure of additional details about the SEC's investigation in the wiretap application would have strengthened, not weak-

ened, the grounds for finding that wiretaps were necessary. (Franks Tr. 434-35, 622, 821-22).

G. The District Court's Ruling

In a Memorandum Opinion and Order dated November 24, 2010, the District Court denied Rajaratnam's motion to suppress the wiretaps. (SA 1-68). In relevant part, the District Court ruled that, although the Government's application omitted the fact that Khan had been convicted of wire fraud arising out of a scheme to provide Rajaratnam with Inside Information in the late 1990s and purportedly mischaracterized two consensually recorded telephone conversations, the remainder of the affidavit established probable cause. In addition, the District Court held that, although the wiretap application omitted information about the nature and extent of the SEC's investigation upon which the Criminal Authorities relied, disclosure of all details of the SEC's investigation would not have affected Judge Lynch's necessity finding.

1. Application of *Franks*

The District Court applied the *Franks* analysis to Rajaratnam's allegations of material misstatements and omissions in the wiretap application. The District Court held that "*Franks* instructs a district court to hold a hearing to determine if the misstatements or omissions were made intentionally or with reckless disregard, and if so, determine *de novo* whether, 'after setting aside the falsehoods, what remains of the warrant affidavit is insufficient to support a finding of probable cause.'" (SA 16 (quoting *United States* v. *Coreas*, 419 F.3d 151, 155 (2d Cir. 2005))). The District Court observed that "'[o]missions

from an affidavit that are claimed to be material are governed by the same rules.'" (SA 16 (quoting *United States* v. *Ferguson*, 758 F.2d 843, 848 (2d Cir. 1985))). Further, the District Court ruled that, although "Rajaratnam's brief implies" that suppression is required under Section 2518(1)(a)(i) of Title III, "that argument, for which [Rajaratnam's] brief cites no authority, is inconsistent with the law of this circuit." (SA 17 n.12 (citing *United States* v. *Bianco*, 998 F.2d 1112, 1125-26 (2d Cir. 1993))). Because "[t]he first 30 days of wiretapping Rajaratnam yielded enough evidence of criminal conduct to justify renewals of the wiretap," the District Court and the parties focused on the first wiretap application. (SA 17 n.11).

2. The District Court's Recklessness Standard

Before evaluating whether any statements or omissions were made intentionally or recklessly, the District Court discussed the legal standard for determining "recklessness." (SA 18-20). After analyzing differences in district court decisions, the District Court stated that there should not be an objective test for recklessness. (SA 18-20). But the District Court then proceeded to include an objective element within its own test. (SA 19-20). It held: "[W]ith respect to material omissions from the March 7, 2008 affidavit, Rajaratnam must prove that the drafters of the affidavit either intentionally omitted the information *or that the omitted information was clearly critical to the affidavit*, thereby raising an inference of recklessness." (SA 20 (emphasis added)). In the District Court's view, if omitted information was "clearly critical to the affidavit,"

even if the affiant did not intend to mislead or have serious doubts about excluding the information, then the affiant acted recklessly by omitting it. (SA 20, 44-45).

3. Probable Cause

The District Court held that Rajaratnam failed to make a substantial preliminary showing that misstatements in the probable cause section of the wiretap application were material to Judge Lynch's finding of probable cause. (SA 17).

The wiretap affidavit omitted that Khan had been convicted in 2001 of wire fraud arising out of a scheme to provide Rajaratnam with Inside Information about Intel (where Khan worked in 1998); that Khan cooperated with the Government's investigation at the time; and that the Government attempted to establish insider trading by Rajaratnam based on Khan's cooperation without success. (SA 21-22).

The District Court also ruled that the wiretap affidavit incorrectly paraphrased summaries of two consensually recorded conversations between Khan and Rajaratnam. In the first one, in response to Khan's question about whether Rajaratnam was "getting anything on Intel," the District Court ruled that the affidavit should have included the qualifying words "I think" before Rajaratnam's answer that Intel would be up 9 to 10%, then guide down 8%, and that margins would be good, and Rajaratnam's thoughts on why margins "will be below" the next quarter. (SA 23). In the second conversation, in response to Khan's question about whether he got Xilinx information from someone at the company, the District Court ruled that affidavit should

have said that Rajaratnam responded "[y]eah I mean, somebody who knows his stuff" instead of paraphrasing the response as yes, somebody who knows. (SA 24). The District Court stated Rajaratnam's exact responses were more equivocal than the paraphrases in the wiretap affidavit. (SA 23-24). At the same time, the District Court observed that other misstatements about Khan's recorded conversations "appear to be instances of simple carelessness on the government's part." (SA 24 n.18). In particular, the District Court noted that the affidavit left out Rajaratnam's inculpatory statement from a third conversation with Khan. (SA 24 n.18).

The District Court ruled that the omissions and misstatements were not material, because an affidavit revised to include Khan's prior conviction and cooperation and the corrected version of the two conversations would still establish probable cause. (SA 30). The District Court noted that, even with Khan's prior conviction, there were multiple indicia of reliability of Khan's statements to the Government about Rajaratnam. Khan was not anonymous; Khan made statements against her penal interest; and the Government corroborated some of Khan's statements with the consensually recorded conversations with Rajaratnam, trading records, and phone records. (SA 26-28). Further, Rajaratnam's own statements in the conversations with Khan were self-inculpatory. (SA 28). Finally, the affidavit's summaries of and quotations from interceptions over wiretaps of two individuals who worked in Galleon's offices established probable cause that Rajaratnam was knowingly receiving Inside Information from others. (SA 29-30).

4. Necessity

With respect to the necessity section of the wiretap application, the District Court stated: "Having heard the testimony of the government witnesses at the *Franks* hearing, the Court comfortably concludes that no one acted with the deliberate intent to mislead Judge Lynch." (SA 44). Nevertheless, the District Court ruled that the nature and scope of the SEC's investigation upon which the Criminal Authorities relied would have been "clearly critical" to assessing whether a wiretap was necessary and, for this reason alone, it was reckless to have omitted the SEC investigation and its conventional techniques from the affidavit. (SA 44-45).

The District Court stated that leaving out that the SEC had been conducting an extensive investigation of Rajaratnam's insider trading activities for several years using conventional techniques was a "glaring omission." (SA 36). The District Court also stated that the omission of additional details about the SEC's investigation made certain statements in the wiretap affidavit misleading. (SA 41-42).

The District Court observed, however, that "the government's omission is the beginning rather than the end of the Court's suppression inquiry." (SA 43). The Court then concluded that Rajaratnam had failed to prove that the omission of additional details regarding the SEC investigation was material to the necessity determination. (SA 47-55). The District Court rejected Rajaratnam's argument that, in assessing the materiality of the omission, it should not consider any information that did not appear in the original affidavit. (SA 46). That argument was inconsistent

with "the entire premise of the *Franks* approach." (SA 46-47).

To assess materiality under *Franks*, the District Court added the omitted information to the wiretap affidavit. (SA 47-48). The Court added the following: that Rajaratnam was under investigation for insider trading since 1998; that Khan pleaded guilty to providing inside information to Rajaratnam at that earlier time pursuant to a cooperation agreement; that the SEC's investigation years later of Sedna and Galleon involved 18 interviews and multiple depositions, including a deposition of Rajaratnam; that the SEC issued over 200 subpoenas and obtained millions of pages of documents; that the SEC shared all of the evidence with the Criminal Authorities; and that the Criminal Authorities and the SEC had developed circumstantial evidence of insider trading based, in part, on Khan's cooperation starting in late-2007. (SA 47-49). Of course, the wiretap affidavit disclosed information about Khan's cooperation and about the circumstantial case built through timing of calls between Rajaratnam and Goel and instant messages referencing Intel. (A. 76-81, 101-02).

The District Court then ruled that an affidavit amended to include the omitted information would have still established necessity. The Court found that "[m]any of the same documents that were used to compile the SEC chronologies strongly suggested that Rajaratnam had been careful to exchange nearly all of his inside information by telephone." (SA 49). The Court also found that a wiretap was necessary to "confirm" the existence of circumstantial evidence that certain individuals were sources of Inside

Information and to "fully uncover Rajaratnam's network of sources." (SA 49-50). Given that the SEC had obtained over four million pages of documents and its analysis "also confirmed what one would expect: insider trading is typically conducted verbally," the District Court ruled that "it seems reasonably unlikely that additional documents would have produced qualitatively different evidence." (SA 51). The District Court also found that additional interviews were not reasonably likely to succeed in uncovering additional evidence because "none of the people the SEC interviewed admitted any insider trading and the most useful piece of information they provided was that Rajaratnam was friends with Rajiv Goel." (SA 52-53). The Court observed that "[w]here an investigation develops strong circumstantial evidence of wrongdoing but then is confronted by 'stonewalling' by witnesses, the case for wiretapping is surely strengthened." (SA 53). Finally, as for Rajaratnam's argument that the Government should have tried to seek the cooperation of someone else in addition to Khan, the District Court concluded that the Government's contention that "Khan was a special case is not unreasonable." (SA 54). Unlike others, Khan was the only one against whom the Government believed that they had sufficient evidence to convince to cooperate, and her past cooperation against Rajaratnam made her a good candidate. (SA 53-54). Moreover, Rajaratnam had "not introduced any evidence other than the success of the Khan approach that attempting to flip other witnesses was a risk-free strategy that rendered a wiretap unnecessary." (SA 54).

Because the District Court concluded that none of the wiretap affidavit's misstatements or omissions were

material, it denied Rajaratnam's suppression motion. (SA 2-3).

ARGUMENT

POINT I

The District Court Properly Denied Rajaratnam's Suppression Motion

The District Court properly denied Rajaratnam's motion to suppress the wiretap evidence. Under the law of this Court and other circuits, a motion to suppress based on alleged errors and omissions in a facially valid wiretap affidavit may be granted only when (1) the errors and omissions were made intentionally or with reckless disregard for the truth and (2) the errors or omissions were material, that is, they would have changed the authorizing judge's findings. As the District Court correctly ruled, the Rajaratnam wiretap affidavit, which was sufficient on its face, did not contain errors or omit facts that would have changed Judge Lynch's findings of probable cause and necessity. Accordingly, suppression was not appropriate.

In addition, the District Court committed legal error in determining that the wiretap affiant acted with reckless disregard for the truth. Under the correct legal standard, the record establishes that, at most, the omission of additional details regarding the SEC's investigation was an innocent mistake rising to the level of negligence. For this reason, as well, Rajaratnam's motion to suppress should have been denied.

A. Applicable Law

1. The Wiretap Statute's Requirements

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2522 (hereinafter "Title III") "permits courts to authorize electronic surveillance by Government officers in specified situations." *Dalia* v. *United States*, 441 U.S. 238, 240 (1979). Title III authorizes the interception of wire communications in connection with the investigation of certain crimes, including wire fraud and money laundering. *See* 18 U.S.C. § 2516(1)(c). Title III also allows courts to authorize the use of wiretap recordings in the prosecution of crimes not listed in the statute. *See* 18 U.S.C. § 2517(5); *In re Grand Jury Subpoena*, 889 F.2d 384, 387 (2d Cir. 1989) ("We believe . . . that Congress intended that amended orders under Section 2517(5) could encompass federal crimes not listed in Section 2516.").

Under Title III, a federal court may issue a wiretap order if it determines, on the basis of the facts submitted by the applicant, that there is probable cause to believe (a) that an individual was committing, had committed, or is about to commit a specified crime, (b) that communications concerning that crime would be obtained through the wiretap, and (c) that the premises to be wiretapped were being used for criminal purposes or were about to be used or owned by the target of the wiretap. *See* 18 U.S.C. § 2518(3); *United States* v. *Yannotti*, 541 F.3d 112, 124 (2d Cir. 2008). As it does for a search warrant, probable cause requires that the totality of the circumstances reflects a "fair probability that . . . evidence of a crime will be found." *Illinois* v. *Gates*, 462 U.S. 213, 238 (1983); *see,*

e.g., *United States* v. *Diaz*, 176 F.3d 52, 110 (2d Cir. 1999) (holding that the probable cause standard for a wiretap is the same as the probable cause standard to obtain a search warrant).

In addition to finding probable cause, before authorizing a wiretap under Title III, a judicial officer must find that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. § 2518(3)(c); *see also* 18 U.S.C. § 2518(1)(c) (requiring an application for a wiretap to include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous"). "Section 2518[(1)(c)] is simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." *United States* v. *Torres*, 901 F.2d 205, 231 (2d Cir. 1990) (internal quotations omitted). The legislative history lists some examples:

> Normal investigative procedure would include, for example, standard visual or aural surveillance techniques by law enforcement officers, general questioning or interrogation under an immunity grant, use of regular search warrants, and the infiltration of conspiratorial groups by undercover agents or informants.

S. Rep. No. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2190.

"[T]here is no requirement that any particular investigative procedures be exhausted before a wiretap may be authorized." *United States* v. *Young*, 822 F.2d 1234, 1237 (2d Cir. 1987) (internal quotations omitted). "Merely because a normal investigative technique is theoretically possible, it does not follow that it is likely. . . . What the provision envisions is that the showing be tested in a practical and commonsense fashion." S. Rep. No. 90-1097, *reprinted in* 1968 U.S.C.C.A.N. at 2190 (citations omitted); *see also United States* v. *Ruggiero*, 726 F.2d 913, 924 (2d Cir. 1984) (holding that affidavits in support of wiretap applications are viewed in a common sense and realistic fashion). "Even if traditional investigative procedures produce some results, 'the *partial* success of the investigation [does] not mean that there [is] nothing more to be done.'" *United States* v. *Cartagena*, 593 F.3d 104, 110 (1st Cir. 2010) (quoting *United States* v. *Cao*, 471 F.3d 1, 3 (1st Cir. 2006)) (emphasis in original).

Although "generalized and conclusory statements that other investigative procedures would prove unsuccessful" do not suffice, "the Government is not required to exhaust all conceivable investigative techniques before resorting to electronic surveillance." *United States* v. *Concepcion*, 579 F.3d 214, 218 (2d Cir. 2009) (internal quotations omitted). "'[T]he statute only requires that the agents inform the authorizing judicial officer of the nature and progress of the investigation and of the difficulties inherent in the use of normal law enforcement methods.'" *Id.* (quoting *United States* v. *Diaz*, 176 F.3d at 111); *see United States* v. *Miller*, 116 F.3d 641, 663 (2d Cir. 1997).

2. Review of Wiretap Authorizations and the *Franks* Analysis

A reviewing court should not lightly substitute its judgment for that of the authorizing judge, as it must grant "considerable deference" to the district court judge who authorized the wiretap. *United States* v. *Concepcion*, 579 F.3d at 217 & n.1; *see United States* v. *Yannotti*, 541 F.3d at 124; *Diaz*, 176 F.3d at 110. This Court's role "is not to make a *de novo* determination of sufficiency as if it were a district judge, but to decide if the facts set forth in the application were minimally adequate to support the determination that was made." *Yannotti*, 541 F.3d at 124 (internal quotations omitted); *see Concepcion*, 579 F.3d at 217, *United States* v. *Miller*, 116 F.3d at 663. "[I]n determining the sufficiency of the application a reviewing court must test it in a practical and commonsense manner." *United States* v. *Torres*, 901 F.2d at 231 (internal quotations omitted); *see Concepcion*, 579 F.3d at 218.

In a case where a defendant challenges a facially sufficient wiretap application on the ground that it allegedly contains false statements or omits information, this Court applies the analysis set forth in *Franks* v. *Delaware*, 438 U.S. 154, 155-56 (1978), and its progeny. *See Miller*, 116 F.3d at 664; *United States* v. *Fermin*, 32 F.3d 674, 676-77 (2d Cir. 1994); *United States* v. *Bianco*, 998 F.2d at 1125-26; *United States* v. *Ferguson*, 758 F.2d at 848; *accord United States* v. *Maynard*, 615 F.3d 544, 550-51 (D.C. Cir. 2010); *United States* v. *Cole*, 807 F.2d 262, 267-68 (1st Cir. 1986); *United States* v. *Guerra-Marez*, 928 F.2d 665, 670-71 (5th Cir. 1991); *United States* v. *Poulsen*, 655 F.3d 492, 504-05 (6th Cir. 2011); *United*

States v. *Williams*, 737 F.2d 594, 602 (7th Cir. 1984); *United States* v. *Milton*, 153 F.3d 891, 895-96 (8th Cir. 1998); *United States* v. *Ippolito*, 774 F.2d 1482, 1485 (9th Cir. 1985); *United States* v. *Small*, 423 F.3d 1164, 1172 (10th Cir. 2005).

Under the *Franks* analysis, a wiretap may be suppressed based on allegedly false statements or omissions in a wiretap application only if a defendant establishes "(1) that the inaccuracies were the product of a Government agent's 'deliberate falsehood' or 'reckless disregard for the truth' rather than innocent mistake, and (2) that, after setting aside the falsehoods, what remains of the warrant affidavit is insufficient to support" the relevant finding (*e.g.*, probably cause or necessity). *See United States* v. *Coreas*, 419 F.3d at 155 (quoting *Franks*, 438 U.S. at 171-72); *Miller*, 116 F.3d at 664 (applying *Franks* to alleged omissions regarding necessity); *Bianco*, 998 F.2d at 1125-26 (applying *Franks* to alleged omissions in connection with Title III requirement regarding necessity for roving bug); *accord, e.g.*, *United States* v. *Small*, 423 F.3d at 1172, 1176 (applying *Franks* to alleged omissions regarding necessity); *United States* v. *Guerra-Marez*, 928 F.2d at 670-71 (applying *Franks* to alleged misstatements regarding necessity); *United States* v. *Cole*, 807 F.2d at 267-68 (applying *Franks* to alleged omissions regarding necessity); *United States* v. *Ippolito*, 774 F.2d at 1485 (holding that "although *Franks* dealt specifically with probable cause, its reasoning applies to [Title III's necessity requirement] as well").

To determine whether alleged errors and omissions are material, a court should revise the affidavit (adding alleged

omissions and correcting alleged errors), and determine whether the revised affidavit supports a finding of probable cause or necessity. *See, e.g.*, *United States* v. *Canfield*, 212 F.3d 713, 719 (2d Cir. 2000) ("Our next step is to determine whether the corrected affidavit . . . with CI-1's criminal record revealed . . . nonetheless supports probable cause."). If the revised affidavit supports a finding of probable cause or necessity, then "the inaccuracies were not material" and "suppression is inappropriate." *See, e.g.*, *id.* at 718; *Bianco*, 998 F.2d at 1126 ("[E]ven if the judge had been advised of the anticipated induction ceremony at 34 Guild Street, the information would not have eliminated the need for a roving order . . . ."); *Ferguson*, 758 F.2d at 848 (applying this approach to omissions as well as misstatements in connection with motion to suppress wiretap).

When considering a challenge to the resolution of a suppression motion, this Court reviews findings of fact for clear error and legal questions *de novo*. *See, e.g.*, *United States* v. *Stewart*, 551 F.3d 187, 190-91 (2d Cir. 2009).

B. Discussion

1. The District Court Correctly Ruled that the *Franks* Analysis Applies to Wiretap Suppression Motions

On appeal, Rajaratnam renews his argument that the wiretap statute requires suppression based on the Government's alleged failure to provide the "full and complete statement" regarding probable cause and necessity called for in 18 U.S.C. §§ 2518(1)(b)-(c), and, therefore, that the *Franks* analysis does not apply. (Br. 28-29, 32). The

District Court properly rejected this argument. (SA 17 n.12). Indeed, this Court's decisions in *Bianco* and *Miller* foreclose Rajaratnam's argument that the *Franks* analysis does not apply to Title III suppression motions.

In *Bianco*, the Government had obtained court authorization under Title III to place a "roving bug" in an unspecified location at an unspecified time to intercept the oral communications of suspected organized crime members. To obtain this authorization, Title III required that the Government's application include a "full and complete statement" as to why the specification of the place of interception was "not practical." 18 U.S.C. § 2518(11)(a)(ii). The district court in *Bianco* found that the Government's application did not include the "full and complete statement" required by Section 2518(11)(a)(ii), because the application failed to disclose that the Government "had probable cause to believe that the conversations it wanted to intercept would occur on a particular date, October 29, 1989, and at a particular location, 34 Guild Street." 998 F.2d at 1120. Nevertheless, the district court applied the *Franks* analysis and denied the defendants' suppression motion because (1) the affiant had acted in good faith and (2) a fully informed judge would have nevertheless authorized surveillance at the 34 Guild Street address. *Id.*

On appeal, the defendants argued that "the court should look directly to the exclusionary rule of the statute, rather than to focus on fourth-amendment considerations or a *Franks* analysis." 998 F.2d at 1125. This Court squarely rejected that argument, holding that "the *Franks* analysis is consistent with the purposes of § 2515" and applies to

"alleged falsehoods or omissions in wiretap affidavits and applications under Title III." *Id*. at 1126. This Court ruled that "[w]hile the government should have disclosed to the court the information relating to 34 Guild Street, its failure to do so does not require suppression of the evidence in this case." *Id.* Suppression was not warranted because the district court correctly determined (1) that "the information was not essential for permitting the interceptions" and (2) that "even if the judge had been advised of the anticipated induction ceremony at 34 Guild Street, the information would not have eliminated the need for a roving order." *Id.*[*]

Rajaratnam's attempt to distinguish *Bianco* on the ground that it addresses only "the parameters of an otherwise authorized wiretap's use (*i.e.*, whether a 'roving intercept' order was justified)" is unfounded. (Br. 32). The

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[*] The assertion in the Blakely amicus brief that *Bianco* has been "abrogated" is misleading at best. (Blakely Br. 22 n.21). The portion of *Bianco* that was abrogated by *Groh* v. *Ramirez*, 540 U.S. 551 (2004), related to a search warrant for a house and shed and not to a Title III interception. *See Bianco*, 998 F.2d at 1116-17 (holding that search warrant could be narrowed by supporting affidavit). The Blakely amicus brief's insertion of the words "Title III" in brackets into a quote from *United States* v. *Rosa*, 626 F.3d 56, 58 (2d Cir. 2010), is simply wrong. *Rosa* did not mention Title III, and the relevant holding in *Bianco* did not relate to Title III. *Bianco*'s holding regarding the applicability of *Franks* to Title III suppression motions remains good law.

"full and complete statement" language in Section 2518(11)(a)(ii) (relating to roving bugs) is identical to the "full and complete statement" language in Section 2518(1)(b) and Section 2518(1)(c) (relating to, among other things, probable cause and necessity). Moreover, Title III's requirement that a roving bug application include a "full and complete statement" as to why specification of the place of interception "is not practical" was designed to address the Fourth Amendment's particularity requirement. *See Bianco*, 998 F.2d at 1123. Accordingly, alleged falsehoods or omissions relating to probable cause and necessity should be reviewed under the same standard as alleged falsehoods or omissions relating to the need for a roving bug.

Indeed, in *Miller* — a decision glaringly omitted from Rajaratnam's brief on appeal and from the amicus briefs — this Court applied *Franks* directly to omissions regarding necessity, notwithstanding Title III's "full and complete statement" requirement. *See Miller*, 116 F.3d at 663-64. The *Miller* defendants had moved to suppress the fruits of a wiretap "on the ground that the affidavits supporting the application for that tap omitted material information that had been provided by informants who were cooperating with the State." *Id.* at 664. The briefs on appeal to this Court make clear that the defendants contended that the omissions were material to the finding of necessity. *See, e.g.*, Reply Brief for Defendant-Appellant Gerard Miller at 27-28, 1996 WL 33421545 (arguing that "the material omissions and misstatements in the affidavits submitted in support of the *Douglas*, *Miller* and *Graham* wiretaps . . . precluded the state court judge from making an accurate determination of whether traditional investigative tech-

niques would suffice to expose the crime"). The district court denied the suppression motion, and this Court affirmed. 116 F.3d at 664. This Court held that the *Franks* analysis applied and that, because the district court had found that the state officials "did not seek to deceive the state court, nor did they act in a suspiciously careless manner," suppression was not warranted. *Id.*

This Court's holding that the *Franks* analysis applies to suppression motions based on a wiretap application's alleged falsehoods or omissions regarding probable cause and necessity is in accordance with the holdings of every Court of Appeals that has considered the issue. *See, e.g.*, *United States* v. *Maynard*, 615 F.3d at 550-51; *Cole*, 807 F.2d at 267-68; *Guerra-Marez*, 928 F.2d at 670-71; *United States* v. *Poulsen*, 655 F.3d at 504-05; *United States* v. *Williams*, 737 F.2d at 602; *United States* v. *Milton*, 153 F.3d at 895-96; *Ippolito*, 774 F.2d at 1485; *Small*, 423 F.3d at 1172. It is also consistent with the principle that, when the conduct of law enforcement is at issue, the exclusionary rule should be applied only where it "results in appreciable deterrence" and where the "benefits of deterrence . . . outweigh the costs." *Herring* v. *United States*, 555 U.S. 135, 141 (2009) (internal quotations and brackets omitted); *see United States* v. *Julius*, 610 F.3d 60, 66 (2d Cir. 2010).

In light of the controlling decisions from this Court in *Miller* and *Bianco*, the District Court correctly rejected Rajaratnam's argument (echoed on appeal in the Blakely amicus brief) that the *Franks* analysis does not apply to Title III's "statutory suppression" remedy. (SA 17 n.12). As the District Court correctly noted, Rajaratnam cannot

cite a single case holding that *Franks* does not apply in Title III cases. (*Id.*). On appeal, Rajaratnam attempts to support his argument by citing to *United States* v. *Giordano*, 416 U.S. 505 (1974) — a Supreme Court decision issued prior to *Franks* that neither analyzes Title III's "full and complete statement" requirement nor provides a framework for considering suppression motions based on allegedly false statements and omissions in a wiretap application. *Giordano* holds only that when a wiretap is not authorized by one of the individuals designated in Title III, the fruits of the wiretap must be suppressed. 416 U.S. at 524.* *Giordano* is not inconsistent with this Court's decisions holding that the *Franks* analysis applies to Title III suppression motions. Rajaratnam's reliance on *United States* v. *Gigante*, 538 F.2d 502 (2d Cir. 1976), is also misplaced. *Gigante* addressed Title III's requirement that wiretap recordings be sealed immediately; the decision did not address Title III's requirements for wiretap applications. *See id.* at 507.

2. The District Court Correctly Ruled that Any Misstatements or Omissions Regarding Probable Cause Were Not Material

Applying *Franks*, the District Court correctly ruled that the alleged misstatements and omissions in the wiretap application relating to probable cause were not material; that is, an affidavit with the errors corrected and the

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* After *Giordano* was decided, Congress amended Title III to expand the roster of officials who could approve wiretap applications. *See* 18 U.S.C. § 2516(1).

omissions included would have still supported a finding of probable cause. *See, e.g.*, *United States* v. *Canfield*, 212 F.3d at 718-19 (describing test for materiality under *Franks*).

Rajaratnam asserts that the "the probable cause determination comes up short" in light of (1) the omission from the wiretap application of (a) Khan's prior conviction for providing nonpublic information to Rajaratnam and (b) Khan's cooperation with the Government in the late 1990s, and (2) the alleged mischaracterization of two consensually-recorded telephone conversations between Khan and Rajaratnam. (Br. 50-52). The District Court properly rejected this argument, ruling that, after correcting the alleged errors, the affidavit fully supported a finding of probable cause. (SA 30).

As the District Court found, the corrected affidavit included descriptions of (1) recorded calls that "independently show that [Rajaratnam] intended to get information about stocks from company insiders" in advance of public announcements (SA 28); (2) statements on separately wiretapped calls by two individuals who worked at Galleon's offices (Craig Drimal and Zvi Goffer) indicating that they had shared inside information with Rajaratnam (SA 29-30); (3) telephone records showing Rajaratnam calling Rajiv Goel, an executive at Intel, repeatedly before earnings announcements (SA 28); (4) trading records showing that Rajaratnam traded heavily in the stock of two companies right after Khan told him inside information about those companies (SA 27-28); and (5) Khan's statements that she engaged in insider trading with Rajaratnam — statements that were corroborated by the

recorded phone calls described in the affidavit and that were against Khan's penal interest (SA 26-27). In addition, the affidavit included descriptions of (1) the fact that shortly after one of the calls from Goel (the Intel executive), Rajaratnam sent Khan an instant message stating that Intel was "tracking worse than [its prior public] pre announcement" (A. 101-02); and (2) the fact that after Rajaratnam had spoken to Goel on another occasion, Rajaratnam spoke by telephone with Khan, and Khan then sent an email stating in part that she had spoken to Rajaratnam and "this is what I got . . . [Intel] dn 10%" (A. 102). As the District Court correctly concluded, this was more than sufficient to establish probable cause, *i.e.*, a "fair probability that . . . evidence of a crime will be found." *Illinois* v. *Gates*, 462 U.S. at 238; *Walczyk* v. *Rio*, 496 F.3d 139, 156-57 (2d Cir. 2007) ("While probable cause requires more than 'mere suspicion' of wrongdoing, . . . it focuses on 'probabilities,' not 'hard certainties[.]'. . . It requires only such facts as make wrongdoing or the discovery of evidence thereof probable."(citations omitted)).

Rajaratnam suggests that because the affidavit omitted information about Khan's prior conviction and cooperation, Khan's statements that she and Rajaratnam engaged in insider trading together should have been discounted, even though, as noted above, the statements were highly corroborated. (Br. 51). This argument is contrary to decisions by this Court. *See Canfield*, 212 F.3d at 720-21 (holding omission of informant's criminal history did not have material effect on probable cause finding where information was partially corroborated); *United States* v. *Fermin*, 32 F.3d at 676-77 (holding that authorizing judge

still would have found probable cause for wiretaps even if "criminal history and time as an informant" had been accurately reported; judge would not "have completely discounted the evidence presented through" the informant given "past reliability" and "corroborating evidence in the affidavit"); *United States* v. *Levasseur*, 816 F.2d 37, 43-44 (2d Cir. 1987) (holding that failure of affidavit to properly outline informant's criminal history and other background information did not require a *Franks* hearing). The District Court correctly ruled that Khan's statements were entitled to weight regardless of the omissions about her criminal history since (1) she was not an anonymous tipper and (2) by implicating Rajaratnam she was also exposing herself to greater criminal sanctions. *See United States* v. *Gagnon*, 373 F.3d 230, 236 (2d Cir. 2004) (in person informant who participated in the crime more reliable than anonymous tipper); *United States* v. *Rowell*, 903 F.2d 899, 903 (2d Cir. 1990) (statements against penal interest carry indicia of reliability).

Moreover, Rajaratnam fails to mention that Khan's prior criminal conviction was for a crime *she committed with Rajaratnam* — namely sending confidential information of Intel (Khan's then-employer) to Rajaratnam so that he could trade on it. These facts were established through (1) a videotape of Khan faxing the materials and (2) phone records showing the materials went to Rajaratnam's fax number. (*See, e.g.*, Franks Tr. 616-17). A description of Khan's earlier criminal conduct would have helped to corroborate Khan's account of her more recent insider trading crimes with Rajaratnam. Accordingly, on balance, the inclusion of the facts of Khan's prior conviction in the affidavit would have supported the finding of probable

cause. For this reason, as well, the District Court correctly concluded that the prior conviction was not material to the finding of probable cause.

Rajaratnam's argument that the affidavit's purported omission of certain words from paraphrases of two consensually-recorded conversations between Khan and Rajaratnam negates probable cause is equally unfounded. As a preliminary matter, the affidavit stated that the summaries of telephone calls were "based on preliminary draft transcripts prepared of the recordings, which are subject to revision." (A. 79 n.7). Accordingly, although the District Court criticized (1) the wiretap affidavit's purported omission of the words "his stuff" following the phrase "someone who knows" from a summary of a conversation between Rajaratnam and Khan and (2) the affidavit's purported omission of the phrase "I think" from a second call summary (SA 23-24), it is difficult to see how these purported omissions could be attributed to anything more than possible transcription errors (particularly because the District Court concluded that other misstatements in call summaries "appear to be instances of simple carelessness on the government's part" (SA 24 n.18)). In any event, contrary to Rajaratnam's argument, the addition of the purportedly omitted phrases did not eliminate the calls' incriminating nature, nor did it undercut the ample other evidence of criminal activity set forth in the wiretap affidavit. Accordingly, the District Court correctly concluded that these omissions were not material, that is, a revised affidavit that included the omitted phrases would have still established probable cause. (SA 30).

Finally, Rajaratnam attempts to discount the significance of the Goffer and Drimal conversations on the ground that "there was nothing . . . to indicate that [Rajaratnam] *knew* this information was coming from insiders." (Br. 53 (emphasis in original)). But the District Court correctly concluded that these conversations, together with the other evidence in the wiretap affidavit (including the Intel-related telephone records, instant messages and emails), were sufficient to establish probable cause.

3. The District Court Correctly Ruled that Any Misstatements or Omissions Regarding Necessity Were Not Material

The District Court also correctly applied *Franks* and concluded that the alleged false statements and omissions relating to necessity were not material; that is, that an affidavit modified to include information omitted about the SEC investigation would have still supported a finding of necessity. (SA 3, 47-55). Rajaratnam cannot seriously question the District Court's conclusion that an affidavit amended to include additional information about the SEC's investigation would establish necessity. Instead, Rajaratnam challenges the District Court's ruling by mischaracterizing its factual findings and by attacking the long-standing procedure set forth in *Franks* and its progeny for assessing materiality. None of Rajaratnam's arguments provide a basis for reversal.

a. The Truthful Allegations in the Wiretap Affidavit Established Necessity

First, contrary to Rajaratnam's argument on appeal, the District Court did not find that any portion of the wiretap affidavit's necessity section was "outright false." (Br. 26). Rather, the District Court concluded that certain statements in the affidavit were misleading because the affidavit *omitted* additional details about the SEC's civil investigation of Rajaratnam. (SA 41). In fact, the wiretap affidavit's statements relating to necessity were accurate. That necessity section began by explaining that the principal goals of the investigation were to identify and develop evidence against the identified target subjects and other unknown participants in the criminal scheme. (A. 102-03). The affidavit then discussed the viability of various law enforcement techniques used by Criminal Authorities during investigations of federal crimes; the existence of the civil SEC investigation did not contradict these representations. The law enforcement techniques identified in the affidavit were as follows:

(1) *Physical Surveillance.* The wiretap affidavit accurately disclosed the FBI's physical surveillance of Rajaratnam, Goffer, Drimal, and Jason Goldfarb, and explained why additional surveillance would not be productive. (A. 103-06). On appeal, Rajaratnam does not dispute the accuracy of this portion of the affidavit. (*See* Br. 37-38).

(2) *Telephone Records*. The wiretap affidavit accurately stated that telephone toll records were being used in the investigation but would provide only limited

information. (A. 107). The affidavit stated that information from toll records alone would not enable law enforcement officers to identify with certainty the persons involved in the conversations or the significance of the communications. (*Id.*). Rajaratnam does not dispute the accuracy of this portion of the affidavit. Accordingly, Rajaratnam's assertion that this portion of the affidavit "must be disregarded" (Br. 38) (an assertion not adopted by the District Court) is nonsensical.

(3) *Federal Grand Jury.* The wiretap affidavit accurately described why subpoenaing subjects and targets to testify before a federal grand jury would not be a promising method of investigation — those "individuals would face prosecution themselves" and thus likely would refuse to "testify voluntarily." (A. 107). In addition, the affidavit accurately stated that issuing grand jury subpoenas to obtain testimony would alert the target subjects to "the pendency of this investigation," thereby jeopardizing the FBI's covert investigation. (A. 108; Franks Tr. 659-60). This portion of the affidavit was plainly cabined to the use of grand jury subpoenas to obtain *witness testimony*. (*See* A. 107). Indeed, the affidavit advised the issuing judge that the Government *had* obtained documents, including emails, instant messages, telephone records and trading records. (*See, e.g.*, A. 76-77, 79 n.6, 100-02, 107, 108). Accordingly, the District Court's assertion that the affidavit's statement about the use of the grand jury "blinks reality" because the Government had subpoenaed documents (SA 42 n.23) does not cast doubt on the affidavit's accurate statements about the potential effectiveness of subpoenaing witnesses to testify before a grand jury.

Taking the District Court's "blinks reality" comment out of context, Rajaratnam argues that the wiretap affidavit's statement about witnesses testifying in the grand jury was misleading, because the affidavit did not reveal that the SEC had "'interviewed numerous Galleon employees, including Rajaratnam himself, and had identified at least twelve other potential interviewees based on trading records, phone records, and IMs [Instant Messages].'" (Br. 11 (quoting SA 52)). But this is an argument that the affidavit omitted facts, and not that the affidavit's statements about the prospects for using the grand jury to obtain witness testimony were false. In light of the fact that the Criminal Authorities would not direct the SEC's investigative actions (Franks Tr. 337-40, 817-19), Rajaratnam's effort to conflate the Criminal Authorities and the SEC Staff (*see, e.g.*, Br. 37) should be rejected. Moreover, as the District Court noted, none of the individuals interviewed by the SEC admitted any insider trading (SA 52), and the evidence at the *Franks* hearing established that people react very differently to an SEC interview than they do to a criminal inquiry (*See, e.g.*, Franks Tr. 639-40, 654-55, 799-801; *see also* SA 53). Because nothing about the SEC interviews rendered false the wiretap affidavit's statements about use of the grand jury to obtain witness testimony, that portion of the affidavit should not be disregarded as part of the *Franks* analysis.

(4) *Review of Trading Records.* The wiretap affidavit accurately stated that the FBI had received trading records from the SEC, and truthfully stated that "[t]rading records can be used to identify suspicious trading activity, but they cannot identify the sources of any material, nonpublic information." (A. 108). This indisput-

ably true statement cannot be disregarded as part of the *Franks* analysis. The affidavit also stated that securities clearing firms will sometimes alert traders to requests for trading records by the Criminal Authorities. (*Id.*). The fact that clearing firms had provided trading records to the SEC in no way contradicts the affidavit, which expressly concerned the risk of exposing the covert criminal investigation. (*See* Franks Tr. 332). More importantly, the affidavit *did* state that the Criminal Authorities had obtained trading records and explained why the records, standing alone, were not sufficient to build a criminal case.

(5) *Witness Interviews.* The wiretap affidavit accurately described why interviewing or arresting the target subjects, such as Rajaratnam, is "too risky at this time" — it would compromise the FBI's covert criminal investigation, would "alert[] [the target subjects] to the existence of the investigation," and "could require the disclosure of certain confidential sources, thereby prematurely ending [their] utility." (A. 108-10). This section of the affidavit plainly focused on efforts to obtain the cooperation of the targets of the investigation and the risks of revealing the covert criminal investigation.

The District Court stated that the affidavit should have revealed that the SEC had interviewed or deposed Rajaratnam and other Galleon employees. (SA 41). Putting aside the fact that Rajaratnam and others lied during those interviews by denying any knowledge of insider trading (SA 52-53), the District Court's ruling related to a purported *omission*; the Court did not rule that the statements regarding the risks of attempting to obtain witness cooperation in the criminal investigation were false. To the

contrary, the District Court credited the affidavit's statement that, in the FBI's judgment, it would be too risky to seek the cooperation of others. (SA 54). Rajaratnam's assertion that the District Court found that attempting to seek the cooperation of others would "likely succeed" (Br. 54) is untrue. (*See* SA 53-54 ("Rajaratnam . . . has not introduced any evidence other than the success of the Khan approach that suggests that attempting to flip other witnesses was a risk-free strategy that rendered a wiretap unnecessary. And the government's contention that Roomy Khan was a special case is not unreasonable.")).

(6) *Use of Confidential Informants*. The affidavit accurately stated that FBI agents had used two confidential sources, including Roomy Khan (identified as CS-1). (A. 110). The affidavit accurately noted, however, that because Khan was no longer in a position to provide Rajaratnam with Inside Information, her ability to communicate with Rajaratnam "on these matters" was "limited." (A. 110). The fact that the Criminal Authorities continued to use Khan as a source does not render inaccurate the affidavit's statement about her limitations. Rajaratnam has never disputed the affidavit's representations about the second confidential source.

(7) *Undercover Agents*. The affidavit accurately stated that use of undercover agents "would almost certainly not advance the investigation." (A. 111).

(8) *Search Warrants*. The affidavit accurately stated that "applications for search warrants are not appropriate at this stage of the investigation." (A. 111). The affidavit identified two reasons why search warrants were inappropriate: (1) "the locations where the TARGET SUBJECTS

currently maintain records relating to the scheme have not been fully identified" and (2) "searches of any locations would alert the TARGET SUBJECTS to the presence of the investigation without the likelihood of determining with certainty the full scope of the organization's operations." (A. 111). The District Court stated that the affidavit should have also included the fact that SEC had accumulated some four million Galleon documents. (SA 41-42). Again, however, this *omission* does not render the affidavit's statements false. In fact, the Government had not fully identified the locations of documents related to the criminal scheme, and it is self-evident that the execution of a search warrant would alert target subjects to the criminal investigation.

(9) *Arrests*. The affidavit accurately stated that arrests "now would mean that several of the objectives of this investigation would be unfulfilled"; that the individuals who had been providing Inside Information to Rajaratnam had not been fully identified; and that the likelihood of convicting the target subjects that had been identified would be increased with wire surveillance. (A. 111-12).

(10) *Wire Surveillance*. The affidavit accurately stated that prior wire surveillance of other individuals, such as Zvi Goffer, would not provide information about Rajaratnam's "other sources if insider information, such as RAJIV GOEL." (A. 112).

Although the District Court ruled that the wiretap application should have included more information about the SEC's investigation, the Court did not find that any of the application's statements regarding necessity were false.

The wiretap application's accurate statements regarding the viability of numerous law enforcement techniques were far more than the "generalized and conclusory statements that other investigative procedures would prove unsuccessful" that were criticized in *United States* v. *Lilla*, 699 F.2d 99, 104 (2d Cir. 1983). Accordingly, the application's necessity section was far more than "minimally adequate" to support a finding of necessity. *See Concepcion*, 579 F.3d at 217.

The District Court rightly rejected Rajaratnam's argument, renewed on appeal, that wiretaps cannot be necessary in insider trading investigations, because insider trading has previously been prosecuted without wiretaps. (SA 51, 55). The wiretap affidavit in this case explained why conventional techniques would not be adequate to fully uncover the scope of Rajaratnam's criminal network. Rajaratnam's assertion that there is no "precedent for concluding that Congress intended to authorize wiretaps for a crime like insider trading" (Br. 38) is both irrelevant to the necessity analysis and wrong. Insider trading violates various criminal statutes explicitly listed in Title III, including the wire fraud statute. *See, e.g.*, *Carpenter* v. *United States*, 484 U.S. 19, 28 (1987) (holding that conspiracy to trade in securities based on confidential information is within the reach of the mail and wire fraud statutes); *United States* v. *Cherif*, 943 F.2d 692, 695-96 (7th Cir. 1991) (holding that former employee's scheme to misappropriate confidential business information from employer for securities trading violated the mail and wire fraud statutes). In addition to wire fraud, Title III authorizes the interception of wire communications to seek evidence of money laundering. 18 U.S.C. § 2516(1)(c)

(listing "section 1956 (laundering of monetary instruments")). Both wire fraud and securities fraud are specified unlawful activities under the money laundering statute. 18 U.S.C. §§ 1956(c)(7)(A), 1961(1). Accordingly, certain financial transactions involving the proceeds of insider trading constitute money laundering. Title III also allows courts to authorize the use of wiretap recordings in the prosecution of crimes not listed in the statute. *See* 18 U.S.C. § 2517(5); *In re Grand Jury Subpoena*, 889 F.2d at 387. The wiretap application in this case stated that the Criminal Authorities were investigating crimes listed in Title III (wire fraud and money laundering) as well as a crime that was not (securities fraud). (A. 57 & n.1, 66 & n.1, 69 & n.1; SA 8).

b. The District Court Correctly Ruled that Omitted Information About the SEC Investigation Was Not Material

The District Court correctly recognized that, under *Franks*, suppression is not warranted simply because relevant information is omitted from a wiretap application. (SA 45). Rather, suppression is warranted only if the affidavit, with the omitted information included, would not support a finding of necessity. *See, e.g.*, *Bianco*, 998 F.2d at 1126 (holding that suppression was not warranted even though "the government should have disclosed to the court the information relating to 34 Guild Street"); *Cole*, 807 F.2d at 267-68 (holding that omission of fact that investigating agent was romantically involved with target subject's live-in companion and had been in target subject's home numerous times was not material, because the

wiretap would have been approved even if the information had been revealed to the authorizing judge). The District Court's addition of omitted information to the wiretap affidavit was not, as Rajaratnam suggests, a "*post hoc* factual justification" for the wiretap or an effort to sustain a wiretap based on information outside of the four corners of the wiretap application. (Br. 30, 39). Rather, the Court was applying the *Franks* test for materiality.

Viewed in context, the District Court's statement that it was "impossible" to have a "reasoned analysis of the necessity of employing wiretaps" without additional information about the SEC's investigation (SA 43) was simply a ruling that additional information about the SEC investigation should have been included in the wiretap application and not that the omission was material under *Franks*. Indeed, the District Court made this pronouncement *before* applying the *Franks* analysis, under which the District Court correctly determined the omissions were not material. (SA 43-44).

The District Court's determination that the omission of additional information about the SEC investigation was not material was amply supported by the record at the *Franks* hearing, which established, among other things, the following:

- The SEC had been investigating Rajaratnam for more than a year and had on its own developed only some circumstantial evidence against him and his network. (Franks Tr. 421, 425-26, 434-35, 463-64, 608, 646-47, 814, 821-22).

- The SEC had failed to identify Rajaratnam's sources on many of the stocks it was investigating. (Franks Tr. 407-09, 414-18, 420-21, 426-27, 434, 464).

- The only direct evidence of Rajaratnam's insider trading came when the Criminal Authorities used the SEC's evidence to obtain the cooperation of Roomy Khan (Franks Tr. 421, 609, 636-37, 813, 828-29, 839), and, as described above, that evidence was disclosed in the wiretap affidavit (A. 76-81, 101-02).

- The best other circumstantial evidence the SEC developed concerned insider trading in the stock of Intel (Franks Tr. 424), and that evidence was described in the wiretap affidavit, identified as having come from the SEC (A. 101-02), but not sufficient to support a criminal charge (Franks Tr. 424, 613).

- Attempting to "flip" other co-conspirators (*i.e.*, obtain their cooperation) was a risky strategy. (SA 54).

- Rajaratnam and his co-conspirators were careful to exchange inside information over the phone. (SA 49).

- Additional documents were not likely to produce better evidence. (SA 51).

- Introducing an undercover agent into Rajaratnam's close-knit scheme was not likely to succeed. (SA 52).

- Rajaratnam and other individuals deposed or interviewed by the SEC lied and "stonewalled" and provided almost no evidence of insider trading. (SA 52-53).

- At the time of the wiretap application, the SEC and Criminal Authorities had developed either absolutely or virtually no evidence against at least nine individuals in Rajaratnam's sprawling network who were later charged criminally only after they were intercepted on the wiretaps. (Franks Tr. 429-35, 668-78).

In short, modifying the affidavit to include additional information about the progress of the SEC's investigation would have further supported Judge Lynch's initial necessity determination. This is so because the omitted information was, at its core, simply that (1) the SEC had interviewed and deposed witnesses, including Rajaratnam, who denied knowledge of insider trading, and (2) the SEC had collected millions of documents, yet the best evidence of insider trading was set forth in the wiretap affidavit. The District Court correctly concluded that if the affidavit had included these additional facts, it would have still supported a finding of necessity. (SA 3, 47-56). Contrary to Rajaratnam's argument, these were not "new facts relied on" to establish necessity. Rather, they were part of the District Court's assessment that the omitted facts were not material.

Stripped of its rhetoric, Rajaratnam's argument is that the District Court should have ignored the truth about the SEC investigation and inserted into the affidavit only Rajaratnam's own characterizations of it. This is incorrect. Of course a court, when filling in omissions and correcting errors in an affidavit, must add the *true* facts. Indeed, the entire purpose of the *Franks* hearing is to determine what those true facts are, so that the affidavit can be accurately corrected. *See, e.g.*, *Ferguson*, 758 F.2d at 848 (holding

that omissions should be inserted just as errors are corrected under *Franks*). In fact, *United States* v. *Awadallah*, 349 F.3d 42 (2d Cir. 2003), a case on which Rajaratnam relies, illustrates that approach. In *Awadallah*, the district court had invalidated a material witness warrant because the warrant affidavit, among other things, omitted the fact that Awadallah had been "'cooperative' with FBI agents on September 20 and 21." *Id.* at 67. On appeal, this Court amended the warrant affidavit to include the true facts, and not Awadallah's characterization of them: "[W]e construe this finding to mean that Awadallah responded to questions, not that he necessarily responded truthfully or completely." *Id*. at 67 n.19. Further, in analyzing materiality, this Court did add facts to the affidavit, including the fact that "Awadallah was 'cooperative' with the FBI agents in the sense that he responded to questions." *Id.* at 69. Thus, Rajaratnam's reliance on *Awadallah* for the proposition that new facts may not be added to an affidavit as part of the *Franks* analysis is mistaken. Although the *Awadallah* Court declined to consider unspecified "related facts," *id.* at 70 n.22, it did add to the affidavit the true facts about Awadallah's interactions with the FBI, rather than the more favorable characterization, adopted by the district court, that Awadallah had been cooperative with the FBI, *id.* at 67 & n.19, 69. Likewise, Rajaratnam's reliance on *United States* v. *Harris*, 464 F.3d 733 (7th Cir. 2006), is misplaced, because that case does not dispute that the true facts that were purportedly omitted from an affidavit should be added as part of the materiality analysis. *Id.* at 738.

Rajaratnam's reliance on *Whiteley* v. *Warden, Wyo. State Penitentiary*, 401 U.S. 560, 565 n.8 (1971), a case

that predates *Franks*, is also misplaced. *Whitely* holds only that the Government may not use extrinsic evidence to rehabilitate a complaint that on its face did not demonstrate probable cause for an arrest. 401 U.S. at 565 n.8. The Supreme Court subsequently decided in *Franks* that when a search warrant affidavit *does* support a finding of probable cause, the fruits of a search may be suppressed only when a defendant establishes (1) that a search warrant affidavit contains statements that were deliberately false or made with a reckless disregard for the truth, and (2) that when the false statements are excised, the affidavit no longer establishes probable cause. 438 U.S. at 156. As the District Court correctly recognized, "[s]ince a *Franks* proceeding requires deleting falsehoods and correcting omissions, the entire premise of the *Franks* approach is that the court must consider information that did not appear in the original affidavit." (SA 46). *See also United States* v. *Finley*, 612 F.3d 998, 1003 n.7 (8th Cir. 2010) (holding that *Whiteley* does not preclude consideration of extrinsic evidence in *Franks* hearing).

Finally, the District Court properly rejected Rajaratnam's argument, renewed on appeal, that the Criminal Authorities were required to spend more time combing through Rajaratnam's deposition in which he denied wrongdoing and reviewing documents that had already been processed by the SEC before seeking authorization for a wiretap. (SA 51-56). As noted above, "there is no requirement that any particular investigative procedures be exhausted before a wiretap may be authorized." *United States* v. *Young*, 822 F.2d at 1237 (internal quotations omitted).

In sum, modifying the wiretap affidavit to include additional information about the progress of the SEC's investigation would not have affected Judge Lynch's finding of necessity. Additional information would have simply provided further support for Judge Lynch's conclusion that a criminal investigation using only conventional techniques would not suffice to accomplish the goals of uncovering evidence against Rajaratnam and his network of accomplices for criminal prosecutions. (A. 72). The record of the *Franks* hearing also confirmed that the Government had not taken a shortcut and "resorted" to wiretapping "where traditional investigative techniques would suffice to expose the crime." *Torres*, 901 F.2d at 231 (internal quotations omitted).

4. The District Court Committed Legal Error in Ruling that Recklessness Exists Whenever "Clearly Critical" Information Is Omitted from a Wiretap Affidavit

Because the District Court correctly ruled that any errors or omissions in the wiretap application were not material, this Court may affirm the denial of the suppression motion without addressing the District Court's recklessness determination. Were the Court to consider the question, however, the District Court's determination that information was recklessly omitted from the wiretap affidavit cannot stand, because the District Court applied the wrong legal standard.* This Court reviews the legal

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* Contrary to Rajaratnam's argument on appeal (Br. 15-16), the District Court did not expressly address

standard applied by the District Court *de novo*. *See, e.g.*, *United States* v. *Roberts*, 660 F.3d 149, 156 (2d Cir. 2011).

The District Court wrongly ruled that Government agents act with reckless disregard for the truth whenever they omit "clearly critical" information from a wiretap application. (SA 19-20, 45 (stating that "the proper inquiry under the first prong of the *Franks* analysis [is] whether it was 'clearly critical' to the reviewing court's analysis of the necessity issue to be informed that conventional investigative techniques were then being employed by the SEC and relied upon by the government")). The District Court's legal standard effectively eliminates the state of mind prong of the *Franks* analysis, because all material misstatements or omissions are, by definition, "clearly critical" to the reviewing court's analysis of the necessity issue. *Franks*, however, holds that "negligence or innocent mistake" on the part of a government agent is "insufficient" to warrant suppression. *Franks*, 438 U.S. at 171. Instead, suppression is appropriate only when Government representatives had the kind of subjective state of mind that needs to be deterred with that extraordinary sanction. *See, e.g.*, *United States* v. *Awadallah*, 349 F.3d at 68 ("*Franks* protects against omissions that are *designed to mislead*, or that are made in *reckless disregard of whether they would mislead*" the court. (internal quotations omitted; emphasis in original)); *United States* v. *Trzaska*, 111 F.3d 1019, 1028 (2d Cir. 1997) ("Whether a person acted

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the question of whether false statements or omissions relating to probable cause were made recklessly.

deliberately or recklessly is a factual question of intent . . . ."; district court "decided that any false statements in the affidavit were a result of . . . mistakes and other misunderstandings, and that these mistakes and misunderstandings did not arise to a deliberate or reckless disregard for the truth"); *see also Herring* v. *United States*, 555 U.S. at 145 ("Under *Franks*, negligent police miscommunications in the course of acquiring a warrant do not provide a basis to rescind a warrant and render a search or arrest invalid."). Because, as is self-evident, Government agents may negligently omit even "clearly critical" information from a wiretap application, the District Court applied an erroneous legal standard for finding that a Government agent acted with reckless disregard for the truth.

To be sure, this Court has stated that "[r]ecklessness *may* be inferred where the omitted information was 'clearly critical' to the probable cause determination." *Rivera* v. *United States*, 928 F.2d 592, 604 (2d Cir. 1991) (emphasis added). But simply because a state of mind *may* be inferred does not mean that it *must* be found. Indeed, applying the correct legal standard, the record in this case does not support a finding that a Government agent acted with a reckless disregard for the truth, that is, that a Government agent "in fact entertained serious doubts as to the truth of his allegations." *United States* v. *Lowe*, 516 F.3d 580, 584 (7th Cir. 2008) (internal quotations omitted); *see United States* v. *Ranney*, 298 F.3d 74, 78 (1st Cir. 2002); *Bruning* v. *Pixler*, 949 F.2d 352, 357 (10th Cir. 1991).

The record includes the fact that "that no one acted with the deliberate intent to mislead Judge Lynch." (SA 44). The District Court "comfortably" reached this conclusion (*id.*), and the Court's finding was not clearly erroneous.

Moreover, the wiretap affidavit submitted to Judge Lynch stated in seven separate places that the Criminal Authorities were receiving information from the SEC, through both "conversations with SEC personnel" and documents "obtained from the SEC," including trading records, phone records, instant messages, emails and other materials. (A. 79, 80, 95, 99, 101-02, 108). This belies any notion that the Criminal Authorities were seeking to conceal the SEC investigation from Judge Lynch. To the contrary, the AUSA who drafted the application believed that it "would be obvious to anyone reading the affidavit" that the Criminal Authorities were getting information from the SEC. (Franks Tr. 773).

In addition, far from "coordinating" interviews with the SEC, the Criminal Authorities took pains not to direct the SEC's investigative actions in light of adverse court decisions in *United States* v. *Scrushy*, 366 F. Supp. 2d at 1138-39, and *United States* v. *Stringer*, 408 F. Supp. 2d at 1087-88. (Franks Tr. 337-40, 774, 817-19).[*] As a result,

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[*] The Criminal Authorities met with the SEC Staff in advance of Rajaratnam's deposition so the SEC Staff could advise the Criminal Authorities what the SEC Staff planned to do. (Franks Tr. 142-43, 340-41). The Criminal Authorities did not propose questions or discuss a strategy for the deposition. (Franks Tr. 340-41).

the civil SEC investigation was not an alternative law enforcement technique the Criminal Authorities either directed or controlled. For this reason, the AUSA who drafted the affidavit testified that when she "was drafting the affidavit, it never occurred to me, never crossed my mind to put a section in that said SEC investigation. I didn't think about the SEC investigation as an alternative technique that was available to the FBI agents, because we can't direct them what to do." (Franks Tr. 819-20). The FBI agent who swore out the affidavit similarly testified that he simply "didn't think about including [the SEC investigation] in a criminal affidavit, criminal investigative technique. . . . We just didn't really think about it." (Franks Tr. 570; s*ee also* Franks Tr. 571, 602). Numerous decisions from this Court have held that the necessity section of a wiretap affidavit should advise "'the authorizing judicial officer of the nature and progress of the investigation and of the difficulties inherent in the use of normal *law enforcement* methods.'" *See, e.g.*, *Concepcion*, 579 F.3d at 218 (quoting *Diaz*, 176 F.3d at 111) (emphasis added); *Miller*, 116 F.3d at 663; *Torres*, 901 F.2d at 231. Accordingly, the AUSA's and FBI agent's focus on law enforcement methods, as opposed to the SEC's civil investigation, was understandable.

Further, before the wiretap affidavit was submitted to Judge Lynch, it was reviewed by supervisors at the United States Attorney's office who were familiar with the investigation but did not suggest that the application include additional details about the SEC investigation. (Franks Tr. 796-98). This provides further evidence that the AUSA who drafted the application and the FBI agent who swore to the affidavit were not acting with reckless

disregard for the truth when they omitted additional details about the SEC's civil investigation. *Cf. Messerschmidt* v. *Millender*, 132 S. Ct. 1235, 1249 (2012) ("[T]he fact that the officers sought and obtained approval of the warrant application from a superior and a deputy district attorney before submitting it to the magistrate provides further support for the conclusion that an officer could reasonably have believed that the scope of the warrant was supported by probable cause.").

Applying the proper legal standard, the record from the *Franks* hearing established that, at most, the omission of additional details regarding the SEC's investigation was an innocent mistake rising to the level of negligence. Under the *Franks* analysis, this is not enough to warrant suppression. *See, e.g.*, *Miller,* 116 F.3d at 664.

In sum, the District Court's recklessness determination was the result of legal error. The denial of Rajaratnam's suppression motion should also be affirmed because (1) the *Franks* hearing established"that no one acted with the deliberate intent to mislead Judge Lynch" (SA 44) and (2) under the proper legal standard, the record does not support a finding that a Government agent acted with reckless disregard for the truth.

POINT II

The Jury Instructions Were Correct

Rajaratnam argues that the jury's verdict on the substantive securities fraud counts (Counts Six through Fourteen) should be vacated, because the District Court included the phrase "however small" in its jury instruction on use of material, nonpublic information. Rajaratnam

concedes that the District Court's instruction finds support in the prior decisions of this Court (Br. 57), and, in fact, the instruction was correct. Moreover, in light of the overwhelming evidence that Rajaratnam executed trades in the securities at issue in Counts Six through Fourteen of the Indictment based on Inside Information, any error in including the phrase "however small" in the jury instructions would have been harmless.

A. Applicable Law

An appellant challenging a jury instruction faces a heavy burden: he must establish both that he requested a charge that "accurately represented the law in every respect" and that the charge delivered was erroneous and caused him prejudice. *See, e.g.*, *United States* v. *Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004). A conviction will not be overturned for refusal to give a requested charge "'unless that instruction is legally correct, represents a theory of defense with basis in the record that would lead to acquittal, and the theory is not effectively presented elsewhere in the charge.'" *United States* v. *Doyle*, 130 F.3d 523, 540 (2d Cir. 1997) (quoting *United States* v. *Vasquez*, 82 F.3d 574, 577 (2d Cir. 1996)).

Even if a defendant makes a timely objection to a jury charge and there is error in the charge, reversal is not warranted if the trial court's error was harmless. *United States* v. *Amuso*, 21 F.3d 1251, 1260-61 (2d Cir. 1994).

B. Discussion

There was no error in the District Court's jury instructions. In *United States* v. *Royer*, 549 F.3d 886 (2d Cir. 2008), this Court approved a jury instruction that was the

functional equivalent of the challenged instruction in this case. *See id.* at 899 n.12 (approving jury instruction stating that a "purchase or sale of a security is 'on the basis of' material non-public information about that security, if the person making the purchase or sale was aware of the material non-public information when the person made the purchase or sale, *and the information in some way informed the investment decision*" (emphasis in original)). This Court ruled that the challenged instruction in *Royer* actually "appear[ed] to require more of a causal connection between the possession of the information and the trade in the security concerned than would be demanded under a knowing possession standard." *Id.* This Court also held that it would have been sufficient if the defendants traded securities while in "knowing possession" of material nonpublic information. *Id.* at 889.

Recognizing that his jury instruction challenge is precluded by *Royer*, Rajaratnam argues that the Supreme Court's decision in *CSX Transportation, Inc.* v. *McBride*, 131 S. Ct. 2630 (2011), requires this Court to overrule *Royer*. (Br. 58). Rajaratnam is mistaken. *CSX Transportation* upheld a jury instruction in a civil negligence action under the Federal Employers' Liability Act that stated that the defendant would be liable if its "negligence played a part — no matter how small — in bringing about the injury." *Id.* at 2635, 2644. *CSX Transportation* did observe that the Supreme Court had applied "traditional notions of proximate causation" in private securities fraud lawsuits for damages. *Id.* at 2644 n.14 (citing *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336, 342-46 (2005)). But the doctrine of proximate cause is applicable to civil fraud suits for damages, and not to criminal fraud

prosecutions. *Compare Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. at 343-44 ("Judicially implied private securities fraud actions resemble in many (but not all) respects common-law deceit and misrepresentation actions. . . . The common law of deceit subjects a person who 'fraudulently' makes a 'misrepresentation' to liability 'for pecuniary loss caused' to one who justifiably relies upon that misrepresentation. . . . And the common law has long insisted that a plaintiff in such a case show not only that had he known the truth he would not have acted but also that he suffered actual economic loss.") *with Neder* v. *United States*, 527 U.S. 1, 24-25 ("The common-law requirements of 'justifiable reliance' and 'damages,' for example, plainly have no place in the federal fraud statutes."). Moreover, nothing in *CSX Transportation* suggests that the jury instruction in this case regarding the use of material, nonpublic information was incorrect. Contrary to Rajaratnam's argument, the instruction in this case is consistent with the rule set forth in *United States* v. *O'Hagan*, 521 U.S. 642, 652-53 (1997). Under the District Court's instructions, if the jury had concluded that Rajaratnam had *not* traded "on the basis" of Inside Information, the jury would have returned a verdict of not guilty.

In any event, if the inclusion of the phrase "however small" in the jury instructions had been erroneous, the error would have been harmless. The evidence at trial overwhelmingly established that the stock trades that were the subject of the substantive securities fraud charges were based on Inside Information. Accordingly, the phrase "however small" could not have had an impact on the jury's verdict.

Counts Six and Seven charged Rajaratnam with substantive insider trading in the securities of Clearwire on March 24 and 25, 2008. The trial evidence demonstrated that, during March 2008, Goel obtained inside information about Intel's investment in Clearwire and that Goel shared that information with Rajaratnam. (A. 464-65, 624-45, 656-58, 660-61). For example, on the evening of March 20, 2008, Goel asked Rajaratnam if Rajaratnam had "digest[ed] the information I gave you." (A. 628). Rajaratnam replied that he had, and then the two discussed how to value the new Clearwire entity based on certain, specific, confidential information regarding the deal, including that Intel would invest $1 billion and receive ten percent of the new entity. (A. 628-33). That conversation took place on a Thursday evening. The next day, Friday, the market was closed for Good Friday. (GX 10). And on the very next trading day — Monday, March 24, 2008 — Rajaratnam purchased Clearwire stock. (A. 466-67). An Intel executive testified about (1) Goel's access to confidential information regarding the deal and (2) the significance of that information to Intel and others. (*See* Tr. 1315-16). Further, Goel testified that he had provided the confidential information regarding the deal to Rajaratnam. (Tr. 1916-55).

Counts Eight, Nine and Ten charged Rajaratnam with substantive insider trading in the securities of Akamai on July 25, 29 and 30, 2008. The trial evidence demonstrated that on July 24, 2008, Chiesi obtained a tip from an Akamai insider that Akamai would be issuing negative guidance and then passed that information to Rajaratnam. (A. 497, 706-09). Rajaratnam then made substantial investments (short sales and purchases of put options) that

would result in profits if Akamai's stock price dropped. (A. 498). Akamai issued the negative guidance after the close of trading on July 30, 2008, and the stock price then dropped dramatically. (Tr. 3278-82). The following day, Rajaratnam thanked Chiesi for the tip, demonstrating that he used it to make his trades. (A. 733-36).

Counts Eleven and Twelve charged Rajaratnam with substantive insider trading in connection with his purchases of PeopleSupport stock in Goel's brokerage account based on Inside Information that Rajaratnam had learned through Galleon's seat on PeopleSupport's board of directors. (A. 471-76, 730-32, 825-28; Tr. 1976-98). The evidence included recorded conversations in which Rajaratnam discussed these trades with Goel, as well as Goel's testimony about them. (A. 730-32, 825-28; Tr. 1976-98).

Count Thirteen charged Rajaratnam with substantive insider trading in connection with his trades based on Kumar's tip about AMD's secret planned acquisition of ATI in 2006. (Tr. 350-87). Based primarily on Kumar's illegal tips, Rajaratnam purchased approximately $89,400,000 in ATI stock and earned nearly $23,000,000 after the public announcement of the deal. (Tr. 3425; A. 477-79). After the transaction was announced, Rajaratnam thanked Kumar for the information and said Kumar was a "hero." (Tr. 387). Later that year, Rajaratnam gave Kumar a $1,000,000 bonus. (Tr. 387-88).

Finally, Count Fourteen charged Rajaratnam with substantive insider trading relating to Intel's quarterly earnings announcement on April 17, 2007. Goel testified that he obtained confidential information regarding Intel's

quarterly earnings in April 2007 and provided that information to Rajaratnam. (Tr. 1647-51, 1675-76). An Intel investor relations employee confirmed that he provided the information to Goel. (Tr. 933-41). Telephone and trading records confirmed this testimony. For example, telephone records showed that on April 9 — the day that the investor relations employee learned "worse" information about revenue — Goel called Rajaratnam, and Rajaratnam sold short Intel stock. (A. 459, 461). On April 13, the day after the investor relations employee received positive news, Goel spoke with the employee for ten minutes and then immediately called Rajaratnam. (A. 459). Rajaratnam then began to cover his short position in Intel stock. (A. 461).

In light of the evidence set forth above, the "however small" language in the jury instructions could not have affected the jury's verdict on any of the substantive counts.

CONCLUSION

The judgment of conviction should be affirmed.

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April 25, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with this Court's April 20, 2012 order stating that the Government may file a brief not to exceed 18,000 words. As measured by the word-processing system used to prepare this brief, there are 17,536 words in this brief.

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