Gary P. Naftalis
Stephen M. Sinaiko
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, New York 10036
(212) 715-9100

Attorneys for Rajat K. Gupta

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	No. 11 Cr. 907 (JSR)
- against -	:	ECF Case
RAJAT K. GUPTA,	:	
Defendant.	:	

DEFENDANT RAJAT K. GUPTA'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO SUPPRESS WIRETAP INTERCEPTS

Table of Contents

Table of Authorities

Page(s)

Cases

Table of Authorities (Cont'd)

Constitutional Provisions, Statutes and Rules

Other Authorities

Defendant Rajat K. Gupta respectfully submits this memorandum of law, and the accompanying declaration of Stephen M. Sinaiko, Esq. ("Sinaiko Decl."), in support of his motion, pursuant to 18 U.S.C. §§ 2515 and 2518(10) and the Fourth Amendment to the United States Constitution, to suppress the government's wiretap intercepts and all evidence derived from them.

Preliminary Statement

The indictment in this case accuses Mr. Gupta of participating in an insider trading scheme with Raj Rajaratnam, the former hedge fund manager and head of Galleon Group. According to the indictment, Mr. Gupta disclosed material, non-public information he learned as a director of The Goldman Sachs Group, Inc. and The Procter & Gamble Company to Rajaratnam so that Rajaratnam could trade. There is, however, no direct evidence that Mr. Gupta ever engaged in this conduct. Nor is there any allegation that Mr. Gupta derived any specific benefit from the purported scheme. Rather, it appears that the government intends to offer a circumstantial case, premised on the timing of alleged telephone calls between the two men and trades that Rajaratnam caused the hedge funds he managed to execute. It further appears that the government will attempt to prop up its case with recordings it obtained by wiretapping Rajaratnam's cellular telephone.

Those wiretap intercepts were the subject of a motion to suppress by Rajaratnam in the criminal case against him last year. After conducting a four-day evidentiary hearing, during which four witnesses testified, the court in *United States v. Rajaratnam* found that the government obtained the orders authorizing the wiretap on Rajaratnam's telephone through *ex parte* affidavits that recklessly misrepresented and omitted numerous facts central to the determination whether issuance of those orders was appropriate under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510, *et seq.* ("Title III") -- the

comprehensive statutory scheme that Congress enacted over 40 years ago to restrict the use of wiretaps -- and the Fourth Amendment. Those findings of fact from *Rajaratnam* bind the government here. *See United States v. Coreas*, 419 F.3d 151, 155-56 & n.3 (2d Cir. 2005) (Rakoff, J.).

Although the court in *Rajaratnam* ultimately declined to suppress the wiretap intercepts captured from Rajaratnam's telephone, we respectfully submit that the conclusion in *Rajaratnam* was incorrect, and the intercepts were unlawful, for at least the following reasons. First, Title III does not permit prosecutors and investigators to use wiretaps in investigations of suspected insider trading. (Point A, *infra*). Second, the *Rajaratnam* court's factual findings compel the conclusion that the government violated 18 U.S.C. § 2518(1)(c), which explicitly requires all wiretap applications to provide a "full and complete statement" of circumstances establishing conventional investigative techniques had proved ineffective and that use of a wiretap is therefore necessary. That violation alone triggers the statutory exclusionary rule under Title III. (Point B(1), *infra*). Finally, had the government supplied the judges to whom it applied for wiretap authorization with the requisite "full and complete statement" of facts and circumstances, its applications could not have supported a judicial finding -- required, under 18 U.S.C. § 2518(3)(c), as a prerequisite to the issuance of a wiretap warrant -- that wiretapping (as opposed to conventional techniques) was necessary. (Point B(2), *infra*). Accordingly, this Court should suppress the wiretap intercepts and all evidence derived from them.

Background

The indictment ("Ind.") references a number of telephone conversations that the government intercepted by wiretapping Rajaratnam's cellular telephone. (Ind. ¶¶ 17, 21, 29(a),

29(d), 29(j), 29(p), 29(q), 29(u), 29(x)).[1] Presumably, the government intends to seek to introduce those recordings in evidence in this case. But findings in *Rajaratnam* establish that the government obtained those recordings through a pattern of omissions and misstatements in an initial wiretap application on March 7, 2008, and seven subsequent applications for authorization to continue intercepting conversations on Rajaratnam's telephone.

In *Rajaratnam*, defendant moved to suppress the intercepts at issue here because, among other things, the government's wiretap application did not include the necessary "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." 18 U.S.C. § 2518(1)(c). Although the court ultimately denied that motion, it found -- after conducting a four day evidentiary hearing during which four witnesses testified -- that the government's *ex parte* wiretap applications had omitted various critical facts, including that:

- At the time of the initial wiretap application, the Securities and Exchange Commission ("SEC") had been investigating potential insider trading investigation by Rajaratnam, using only conventional methods, for several years;
- The United States Attorney's Office ("USAO") and FBI learned of the SEC investigation, and gained access to the SEC's files, approximately a year before they made the initial wiretap application;
- The SEC had issued over 200 subpoenas to Galleon and other parties, received in response several million pages of documents (all of which were available to the USAO and FBI), and deposed a number of Galleon employees, including Rajaratnam himself;
- After first learning of the SEC investigation, the USAO and FBI had received periodic briefings from the SEC and "did not themselves review the SEC's investigative file but instead relied on the SEC to provide the most important documents";

[1] For the Court's convenient reference, a copy of the indictment is attached as Exhibit A to the accompanying Sinaiko Decl. This memorandum references the remaining exhibits to the Sinaiko Decl. as "Exh. __."

- The SEC asked the USAO whether it objected to Rajaratnam's deposition going forward as planned, met with the USAO before the deposition to discuss strategy for examining Rajaratnam, and supplied the USAO and FBI with a copy of the deposition transcript; and

- Through briefings and chronologies that the SEC staff supplied, the USAO and FBI learned, before they initially requested the wiretap on Rajaratnam's cellular telephone, that the SEC's investigation had identified several individuals -- including Roomy Khan and Rajiv Goel, who later pleaded guilty to securities fraud charges -- as potentially among Rajaratnam's sources of inside information.

See United States v. Rajaratnam, 2010 WL 4867402, at *15-17 (S.D.N.Y. Nov. 24, 2010). These and other omissions, the *Rajaratnam* court found, rendered misleading a number of the specific statements in the government's wiretap application. *Id.* at *17.

The *Rajaratnam* court also found that the matters that the government misstated and omitted in its wiretap application "would have been critical . . . in assessing whether conventional investigative techniques would (or had) failed and, therefore, a wiretap was necessary." *Id.* at *19. Thus, the court concluded that the government's omissions and misstatements were reckless, and "deprived Judge Lynch [who issued the initial wiretap order] of the opportunity to assess what a conventional investigation of Rajaratnam could achieve by examining what the SEC's contemporaneous, conventional investigation of the same conduct was, in fact, achieving." *Id.* at *17, *19. These factual findings from *Rajaratnam* bind the government in this case. *See, e.g.*, *Coreas*, 419 F.3d at 155-56 & n.3 (factual findings that certain statements in affidavit supporting search warrant were "inaccurate [and] made in reckless disregard of the truth" bound government in subsequent case where different defendant sought to suppress different evidence obtained pursuant to same warrant).[2]

[2] The findings in *Rajaratnam* are not only preclusive on the government, but also are amply supported by the record developed during the hearing. (*See, e.g.*, Exh. B at 38-40, 91-95, 122-45, 190-92, 256-58, 346-47, 507, 614, 684-85, 703-04, 729-41, 827-29). [redacted]

As we now show, the facts that bind the government, read against the controlling law, warrant suppression. Accordingly, Mr. Gupta now respectfully requests that this Court suppress the fruits of the wiretaps on Rajaratnam's cellular telephone.

Argument

THE COURT SHOULD SUPPRESS WIRETAP EVIDENCE OBTAINED FROM RAJARATNAM'S CELLULAR TELEPHONE

Because the government failed to comply with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510, *et seq.* ("Title III"), in obtaining the orders that authorized the wiretaps on Rajaratnam's cellular telephone, Title III and the Fourth Amendment bar the use in this case of intercepts obtained through those wiretaps and evidence derived from them.

The Supreme Court has long recognized that wiretapping is a particularly intrusive investigative technique that raises special privacy concerns. Congress enacted Title III in 1968, in order to meet and exceed the restrictions on wiretapping that the Supreme Court, in two decisions the previous year, found the Fourth Amendment to require. *See Katz v. United States*, 389 U.S. 347, 354-57 (1967); *Berger v. New York*, 388 U.S. 41, 55-60 (1967). Title III effectuates what the Supreme Court has described as a "comprehensive scheme for the regulation of wiretapping and electronic surveillance." *Gelbard v. United States*, 408 U.S. 41, 46 (1972).

The Title III scheme includes various procedural and substantive restrictions, such as multiple levels of antecedent approvals, by which Congress sought to "guarantee that wiretapping . . . occurs only when there is a genuine need for it and only to the extent that it is needed." *Dalia v. United States*, 441 U.S. 238, 250 (1979). Among other things:

[redacted]

- Congress prohibited the use of wiretaps except in connection with the investigation of offenses, enumerated in 18 U.S.C. § 2516, that it regarded as "major crimes." S. Rep. No. 90-1097, at 2 (1968).

- Federal prosecutors and law enforcement personnel may not apply for judicial authorization of a wiretap until after they obtain the approval of the Attorney General of the United States or a specially-designated senior official of the Justice Department. *See* 18 U.S.C. § 2516(1).

- After obtaining the necessary upper-echelon Justice Department approval, federal prosecutors and law enforcement personnel must make a written application to a judge for an order authorizing the wiretap. *See* 18 U.S.C. § 2518(1).

- In addition to showing there is probable cause to believe that a wiretap will yield evidence of one of the offenses enumerated in 18 U.S.C. § 2516, the wiretap application must 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," so that a judge may determine in advance whether wiretapping, rather than conventional investigative methods, is necessary. 18 U.S.C. §§ 2518(1)(c), 2518(3)(c).

Courts recognize that "[s]trict compliance" with the procedural safeguards embodied in Title III is "essential." *E.g.*, *United States v. Marion*, 535 F.2d 697, 706 (2d Cir. 1976); *see also United States v. Capra*, 501 F.2d 267, 276-77 (2d Cir. 1974) ("The standards [of Title III] are to be construed strictly").

To further assure that prosecutors and investigators will observe statutory and constitutional restrictions on wiretapping, Title III has its own exclusionary rule. Where the government (or anyone else) intercepts a communication other than in the manner that Title III expressly authorizes, the statute provides that "no . . . such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court . . . of the United States." 18 U.S.C. § 2515. Moreover, Title III authorizes any aggrieved person to move to suppress any communication that was intercepted unlawfully or in violation of the relevant wiretap order, and evidence derived from such communication. 18

U.S.C. § 2518(10)(a). This statutory exclusionary rule is broader than the "judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights," and requires suppression whenever "there is failure to satisfy any of [the] statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *United States v. Giordano*, 416 U.S. 505, 524-27 (1974).

During a proceeding before the Court on November 18, 2011, in support of its application to stay the taking of depositions in the parallel SEC case, the government noted that Mr. Gupta "will want to move to suppress" the wiretaps in this case, and acknowledged that "[h]e has a right as an aggrieved party to do that." (Exh. K at 16-17). As we demonstrate, the wiretaps on Rajaratnam's cellular telephone were unlawful because (a) Title III does not authorize the use of wiretaps to investigate insider trading; and (b) reckless omissions and misstatements tainted the government's wiretap applications, violated the statutory requirement that all wiretap applications include a "full and complete statement" of prior investigative efforts, and rendered inadequate the government's showing (also required by Title III) that use of wiretaps was necessary because conventional investigative techniques would not suffice. While the *Rajaratnam* court did not accept these arguments, we respectfully submit that its ruling was incorrect and that suppression is necessary in order to avoid gutting the controls that Congress put in place to prevent abuse by law enforcement of electronic surveillance techniques.

A. Insider Trading Is Not an Offense for Which Title III Permits Wiretapping.

Legislative history shows that Congress' "major purpose" in enacting Title III was "to combat organized crime." S. Rep. 90-1097, at 41-45 (1968). Congress recognized that participants in organized crime "do not keep books and records available for law enforcement

inspection," that victims of organized crime "do not normally testify for they are already in bodily fear or they are compliant," and that "[i]nsiders [of organized crime] are kept quiet by an ideology of silence underwritten by a fear, quite realistic, that death comes to him who talks," and therefore concluded that "intercepting the communications of organized criminals is the *only* effective method of learning about their activities." *Id.* at 43-44 (emphasis added). By contrast, extensive regulation requires securities market participants to maintain copious records, make those records available to authorities upon request and (in many instances) provide sworn testimony upon request. Thus, it is hardly surprising that 18 U.S.C. § 2516, when enacted, did not authorize the use of wiretaps to investigate insider trading. Nor is it surprising, although Congress has amended § 2516 at least *thirteen* times since 1968, it never added insider trading to the list.

[redacted] Defending these wiretaps last year, in *Rajaratnam*, the government argued that (a) because insider trading may be prosecuted as wire fraud, a 1984 amendment to Title III that added wire fraud as an enumerated offense in § 2516 also had the effect of authorizing the use of wiretaps to investigate insider trading; and (b) under 18 U.S.C. § 2517(5), it was free to use the wiretaps in an insider trading case. We

respectfully submit that, although the *Rajaratnam* court accepted these arguments, this Court should not.

There is no reason to believe that Congress, by its 1984 amendment adding wire fraud to the enumerated offenses in § 2516, authorized the use of wiretaps to investigate insider trading. If Congress had intended that result, it could have added Section 10(b) or 18 U.S.C. § 1348 (which also criminalizes securities fraud) to the list of enumerated offenses. It did not. Moreover, in 1990 -- years *after* the amendment that added wire fraud to § 2516 -- Congress amended the statute again to add bank fraud. Pub. L. 101-647, § 2531 (1990). Legislative history demonstrates that Congress and the Justice Department believed that amendment was necessary to permit use of wiretaps to investigate bank fraud. (*See* Exh. L at 190; Exh. M at 202-03). But virtually any bank fraud susceptible of investigation through wiretapping would also qualify as a wire fraud. *See Neder v. United States*, 527 U.S. 1, 20-21 (1999) (observing that bank fraud statute is modeled on mail and wire fraud statutes). It is difficult to imagine that the Justice Department sought, and Congress enacted, the 1990 amendment to § 2516 for the purpose of targeting the narrow sliver of bank frauds for which a wiretap might yield evidence but that would not also constitute wire fraud. Rather, the 1990 addition of bank fraud to § 2516 makes sense only if Congress and the Justice Department did *not* believe the 1984 amendment had already swept into Title III any offense that the government could label as "wire fraud," and understood that inclusion of the capacious wire fraud statute in § 2516 would not authorize the use of wiretaps to investigate offenses defined by other, more particularized statutes. Especially

given that Title III seeks to *restrict* the use of wiretapping, in light of powerful privacy concerns, that is the better reading of the statute.[3]

B. The Government Failed to Make the Requisite Showing That a Wiretap Was Necessary.

Even if use of wiretaps were permissible in insider trading investigations, misrepresentations and omissions in the government's wiretap applications would still warrant suppression. Title III reflects Congressional policy that "electronic surveillance cannot be justified unless other methods of investigation are not practicable," and therefore seeks to assure that "wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." *United States v. Kahn*, 415 U.S. 153 n.12 (1974). Thus, the statute permits wiretaps to occur only upon a judicial finding -- and not merely a determination by investigators and prosecutors -- that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried." 18 U.S.C. § 2518(3)(c). Recognizing that it would be impossible for judges to make that determination in a meaningful fashion without candid disclosure of the relevant facts and circumstances, Title III also requires that all wiretap applications 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." 18 U.S.C. § 2518(1)(c). Here, the Court should

---

[3] Nor can the government avoid suppression in reliance on 18 U.S.C. § 2517(5), which permits an investigator to use the contents of intercepted communications as evidence of offenses *other* than the ones that the wiretap order identifies, but only if a "judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter." There can be no such finding here because, as we have demonstrated, Title III does not authorize the use of wiretaps to investigate alleged insider trading -- the offense that the government sought to investigate by its wiretaps of Rajaratnam's cellular telephone. *See United States v. Ward*, 808 F. Supp. 803, 806-08 (S.D. Ga. 1992) (suppressing intercepts where wiretap application disclosed that government was investigating offenses not enumerated in § 2516).

suppress the wiretap intercepts captured from Rajaratnam's cellular telephone for the separate and independent reasons that (1) the government failed to provide the "full and complete statement" that § 2518(1)(c) requires, and (2) the government's applications -- shorn of their reckless omissions and misrepresentations -- did not support the requisite judicial finding that wiretapping (as opposed to conventional investigative techniques) was necessary.

1. The Government's Violation of 18 U.S.C. § 2518(1)(c) Alone Warrants Suppression.

The *Rajaratnam* court previously found as fact, after a four-day hearing at which four witnesses testified, that rather than comply with the explicit mandate under § 2518(1)(c) to provide a "full and complete statement" of prior conventional investigative efforts, the government's wiretap applications "fail[ed] to disclose the substance and course of the SEC investigation," and thus "made what was nearly a full and complete *omission* of what investigative procedures in fact had been tried." The Court further found that the government's violation of § 2518(1)(c) "deprived Judge Lynch of the opportunity to assess what a conventional investigation of Rajaratnam could achieve by examining what the SEC's contemporaneous, conventional investigation of the same conduct was, in fact, achieving." *Rajaratnam*, 2010 WL 4867402 at *17 (emphasis in original); *see* pages 3-4, *supra*. These factual findings from *Rajaratnam* bind the government here. *See Coreas*, 419 F.3d at 155-56 & n.3. The government's violation triggers Title III's exclusionary rule, requiring suppression.

The Supreme Court's decision in *Giordano* is instructive. There, the wiretap application inaccurately stated that an Assistant Attorney General had supplied the advance approval required by 18 U.S.C. §§ 2516(1) and 2518(1)(a), when in fact the approval had come from the Attorney General's executive assistant. *Giordano*, 416 U.S. at 510. After holding that approval by the executive assistant did not satisfy Title III, the Supreme Court turned to the

government's argument that suppression was not appropriate because there had been no constitutional violation. Initially, the Court noted that the question of suppression "does not turn on the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights, but upon the provisions of Title III." *Id.* at 505, 524. The Court reasoned that § 2518(10)(a)(i) -- which requires suppression of any "communication [that] was unlawfully intercepted" -- applies "where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *Id.* at 527. The Court concluded that "the provision for pre-application approval was intended to play a central role in the statutory scheme and that suppression must follow when it is shown that this statutory requirement has been ignored." *Id.* at 528.

The logic of *Giordano* calls for a similar result here. The Second Circuit has recognized that, while "it would be in some sense more efficient to wiretap whenever a telephone was used to facilitate the commission of a crime," the "statutory requirement that other [conventional] investigative procedures be exhausted before wiretapping reflects a congressional judgment that the cost of such efficiency in terms of privacy interests is too high." *United States v. Lilla*, 699 F.2d 99, 105 n.7 (2d Cir. 1983). Thus, like the requirement that prosecutors and investigators obtain advance approval before making a wiretap application, sections 2518(1)(c) and 2518(3)(c) -- which require judges to make a finding of necessity, based on the government's "full and complete statement" of the facts and circumstances, before authorizing a wiretap -- "play a central role in the [Title III] statutory scheme." As the *Rajaratnam* court found, the government's failure to comply with § 2518(1)(c) prevented any meaningful determination of necessity by the judges who considered the wiretap applications here. That

failure, which rendered the resulting wiretaps "unlawful" under sections 2515 and 2518(10)(a)(i), is alone reason for suppression.[4]

2. The Government's Wiretap Applications Were Also Insufficient Under a *Franks* Analysis.

Even if the Fourth Amendment analysis set forth in *Franks v. Delaware*, 438 U.S. 154 (1978) -- rather than the Title III statutory exclusionary rule -- controls the effect of the misrepresentations and omissions in the government's wiretap applications here, the result is the same. The *Franks* Court held that, where an investigator's affidavit supporting a search warrant application contains intentional or reckless false statements, the Fourth Amendment requires suppression of evidence seized pursuant to the warrant if the affidavit, with the false statements excised, would not have supported the requisite finding of probable cause. *Franks*, 438 U.S. at 155-56. Because intentional or reckless falsehoods prevent an issuing judge from conducting a meaningful probable cause analysis, courts applying *Franks* consider *de novo* the question whether probable cause existed to issue the warrant, rather than conducting a deferential "minimally sufficient evidence" review. *See United States v. Canfield*, 212 F.3d 713, 717 (2d Cir. 2000).

Courts have extended *Franks* to cases where an investigator makes a warrant affidavit that is misleading by reason of intentional or reckless *omissions* of fact, holding that

[4] The Second Circuit's decision in *United States v. Bianco*, 998 F.2d 1112 (2d Cir. 1993), is not to the contrary. The *Bianco* court held that Fourth Amendment analysis under *Franks v. Delaware*, 438 U.S. 154 (1978), rather than the statutory exclusionary rule of section 2515, would control the impact of alleged omissions from the government's showing under 18 U.S.C. § 2518(11)(a)(ii) -- which requires a "full and complete statement" as to why it is "not practical" to specify a place and time for interception of conversations by electronic means -- in support of a "roving bug" application. *Bianco*, 998 F.2d at 1126. But *Bianco* did *not* address the proper analysis where, as here, the government fails to make the "full and complete statement" necessary to permit a judicial determination that conventional investigative methods have failed or are impractical, such that Title III would permit electronic surveillance in the first instance.

suppression is appropriate where omitted facts defeat probable cause. *See, e.g., Canfield*, 212 F.3d at 718. But application of the *Franks* analysis in omissions cases requires special caution. The Supreme Court has held that, in order to avoid nullifying the Fourth Amendment warrant requirement, the government may not rehabilitate a deficient affidavit with facts it knew but did not disclose at the time of the warrant application. *Whiteley v. Warden, Wyoming State Penitentiary*, 401 U.S. 560, 565 n.8 (1971). For the same reason, when evaluating the materiality under *Franks* of reckless omissions from a warrant affidavit, courts should "add back" *only* facts that tend to *negate* probable cause. *See United States v. Harris*, 464 F.3d 733, 739 (7th Cir. 2006) (district court's "consideration of new information omitted from the warrant affidavit should have been limited to facts that did *not* support a finding of probable cause") (emphasis added); *United States v. Perez*, 247 F. Supp. 2d 459, 482 n.11 (S.D.N.Y. 2003) (court reviewing sufficiency of search warrant "cannot consider material outside of the affidavit"); *Thompson v. Wagner*, 631 F. Supp. 2d 664, 680 (W.D. Pa. 2008) ("Where an arrest is based solely on the existence of a warrant, evidence available to the affiant but not passed on [to] the issuing authority cannot be used to establish the existence of probable cause."). Under these principles, suppression of the wiretap intercepts from Rajaratnam's telephone is appropriate.

The *Rajaratnam* Court found that the government's reckless omission from its wiretap affidavit of facts concerning the SEC's conventional insider trading investigation rendered misleading a number of the affidavit's affirmative statements. Among other things:

- The affidavit's assertion "that interviewing Rajaratnam and other targets is an 'investigative route' that is 'too risky at the present time'" ignored the facts that the SEC had interviewed or deposed over 20 Galleon employees (including two interviews and a deposition of Rajaratnam himself), provided the results of those interviews and depositions to the USAO, and met with the USAO to discuss "strategy" before examining Rajaratnam;

- The assertion that "the conventional use of search warrants 'is not appropriate at this stage of the investigation, as the locations where . . . records related to the scheme have not been fully identified, if at all" ignored the fact that the USAO and FBI -- as a result of SEC and grand jury subpoenas -- "had, in fact, accumulated or had access to four million Galleon documents . . . and had built a compelling circumstantial case of insider trading in several securities";

- The government's "boilerplate assertion that 'the issuance of grand jury subpoena[s] likely would not lead to the discovery of critical information' . . . blink[ed] reality," given that grand jury and SEC subpoenas "had already led to a mountain of incriminating circumstantial evidence as the impressively detailed [SEC] chronologies . . . fully attest[ed]"; and

- Although the government's affidavit stated that requesting trading records "would jeopardize the investigation" because clearing firms might "alert traders to the requests," both the SEC and the grand jury had already issued subpoenas seeking such records.

Rajaratnam, 2010 WL 4867402, at *17-18 & n.23.

Eliminating these misleading assertions from the government's affidavit leaves only the assertions that [redacted]; *Rajaratnam*, 2010 WL 4867402, at *21 n.24).

These bare assertions, however, could not possibly support a finding under § 2518(3)(c) that conventional investigative techniques had been tried and failed, or were unlikely

to succeed -- particularly when considered in light of the omitted facts concerning the success of the SEC's investigation using only conventional methods. *See United States v. Gonzalez, Inc.*, 412 F.3d 1102, 1112-13 (9th Cir. 2005) (affirming ruling that affidavit reciting five days of pen-register analysis, trap-and-trace analysis and physical surveillance efforts at location where wiretap was sought could not support showing of necessity under § 2518(3)(c), particularly where government apparently had *not* attempted to use conventional techniques that had succeeded at other locations operated by same group of defendants); *see also Lilla*, 699 F.2d at 104-05 (reversing conviction where trial court erroneously found wiretap "necessary" under § 2518(3)(c) in face of record establishing that "normal investigative procedures that *were* used [by investigators] were successful") (emphasis in original).[5]

[5] The *Rajaratnam* court ultimately denied Rajaratnam's motion to suppress, concluding that the reckless misstatements and omissions in the government's wiretap applications were not material to a determination of "necessity" under 18 U.S.C. § 2518(3)(c) by the judges who issued the wiretap orders. The court reached that conclusion in reliance on testimony by government witnesses that the SEC investigation had "failed to fully uncover the scope of Rajaratnam's alleged insider trading ring and was reasonably unlikely to do so because evidence suggested that [he] and others conducted their scheme by telephone." *Rajaratnam*, 2010 WL 4867402, at *1. But the government could have stated that fact in its various requests for wiretap authorization. The holdings in *Whiteley*, *Harris*, *Perez* and *Thompson* therefore should have precluded consideration of that fact in determining the materiality of the government's misrepresentations and omissions to the finding of necessity. Thus, we respectfully submit that the *Rajaratnam* court's determination not to suppress the wiretap intercepts at issue here reflected a misapplication of the *Franks* analysis.

Conclusion

For all of the foregoing reasons, the Court should suppress the wiretap intercepts captured from Rajaratnam's cellular telephone as well as all evidence derived from them.

Dated: New York, New York
January 3, 2012

Respectfully submitted,

Kramer Levin Naftalis & Frankel LLP

By: /s/ Gary P. Naftalis
Gary P. Naftalis
Stephen M. Sinaiko

1177 Avenue of the Americas
New York, New York 10036
(212) 715-9100

Attorneys for Rajat K. Gupta

CERTIFICATE OF SERVICE

I, Stephen M. Sinaiko, hereby certify that on January 3, 2012, I caused the foregoing Notice of Motion to Suppress Wiretap Intercepts, supporting Declaration and Memorandum of Law to be served by hand on the following counsel of record:

AUSA Richard C. Tarlowe
AUSA Reed M. Brodsky
United States Attorney's Office
Southern District of New York
One Saint Andrew's Plaza
New York, New York 10007

Counsel for the United States of America

Dated: New York, New York
January 3, 2012

/s/ Stephen M. Sinaiko
Stephen M. Sinaiko