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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 DISMISS OR CONSOLIDATE MULTIPLICITOUS COUNTS AND STRIKE PREJUDICIAL SURPLUSAGE FROM THE INDICTMENT

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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 to dismiss or consolidate multiplicitous counts in the indictment ("Ind.") and, pursuant to Fed. R. Crim. P. 7(d) ("Rule 7(d)"), to strike prejudicial surplusage from the indictment.

Preliminary Statement

In this case, Mr. Gupta -- a self-made man who earned his sterling reputation through nearly 40 years as a global business leader and engaged philanthropist -- stands accused of participating in an insider trading scheme with Raj Rajaratnam, the former hedge fund manager and head of Galleon Group. But this case is quite different from the ones against Rajaratnam and various others who pleaded guilty to, or were convicted after trial of, supplying him with inside information on which he traded. Unlike in those other cases, there are no wiretap recordings of conversations in which Mr. Gupta passed material, non-public information to Rajaratnam on which he traded. And unlike in those other cases, the government does not allege that Mr. Gupta ever himself traded on inside information, or that he shared in the profits from illicit trading or received any other sort of cash compensation as a *quid pro quo* for supplying inside information to Rajaratnam.

In a number of respects, the indictment reflects, and attempts to mask, the weakness of the case against Mr. Gupta. For example, the indictment focuses on just two instances in which Rajaratnam is said to have traded on inside information he supposedly received from Mr. Gupta, but improperly uses those two instances to create *five* purportedly separate substantive securities fraud charges. Moreover, although the indictment alleges that Mr. Gupta supplied Rajaratnam with material, non-public information concerning just two companies -- The Goldman Sachs Group, Inc. ("Goldman Sachs") and The Procter & Gamble Company ("P&G") -- paragraph 11(c) of the indictment alleges that, as part of the purported scheme and

on the basis of the information Mr. Gupta supposedly provided, Rajaratnam executed transactions in securities of Goldman Sachs, P&G "and other companies." This broadening language in the indictment not only threatens to prejudice the defense by allowing the government to present surprise evidence at trial, but also creates the risk that the government will seek to convict Mr. Gupta at trial of offenses that the grand jury never voted, in violation of the Fifth Amendment.

The five substantive securities fraud counts in the indictment, because they stem from just two purported unlawful acts, repeatedly charge what are, at most, two alleged offenses. Accordingly, those counts are multiplicitous and the Court should either consolidate them or direct the government to elect between them. (Point I, *infra*). Moreover, in order to avoid unfair surprise at trial, and protect Mr. Gupta's Fifth Amendment right to be accused of serious offenses only by grand jury indictment, the Court also should strike the quoted broadening language from the indictment as prejudicial surplusage under Rule 7(d). (Point II, *infra*).

Background

Mr. Gupta's Personal and Professional Background

Mr. Gupta was born in Kolkata, India in 1948, the son of a Montessori school teacher and a journalist and prominent freedom fighter. After graduating from the Indian Institute of Technology with a degree in mechanical engineering, he came to the United States to attend Harvard Business School, where he earned his MBA. Mr. Gupta joined McKinsey & Company ("McKinsey") in 1973. After leading McKinsey offices in Chicago and Scandinavia, Mr. Gupta ultimately served as the firm's first non-American global managing partner from 1994 to 2003. He was a senior partner of McKinsey from 2003 until he retired from the firm in 2007.

Later, Mr. Gupta served on the boards of AMR Corp., Genpact Limited, Goldman Sachs, Harman International Industries Inc. and P&G.

Mr. Gupta also has a long history of putting not only his money but also his time and personal energies into a wide range of philanthropic activities. Among other things, in 1996 he co-founded the Indian School of Business in Hyderabad, India, which now offers one of the world's leading MBA programs, and served on its board of directors (including as Chairman) for over twelve years. In 2001, following the devastating earthquake in Gujarat, he co-founded the American India Foundation, an organization devoted to catalyzing social and economic change in India. Additionally, Mr. Gupta has served as Chairman of the International Chamber of Commerce; Founding Board Member and Chair Emeritus of The Global Fund to Fight AIDS, Tuberculosis and Malaria; a founder and Chairman of the Public Health Foundation of India; a member of the Advisory Board to the Prime Minister of India; Chair of the Bill & Melinda Gates Foundation Global Development Program Advisory Panel; a member of the advisory boards of the Harvard Business School and MIT Sloan School of Management; a trustee of the University of Chicago; and a special advisor on management reform to the Secretary General of the United Nations.

The Narrow Charges Against Mr. Gupta

The indictment accuses Mr. Gupta of participating with Rajaratnam in an insider trading scheme. (Ind. ¶ 11).[1] According to the indictment, Mr. Gupta supplied Rajaratnam with material, non-public information so that Rajaratnam could trade. (*Id.* ¶ 11(b)). The indictment's limited allegations focus tightly on Goldman Sachs and P&G. Those are the only two companies

[1] For the Court's convenient reference, a copy of the indictment is attached as Exhibit A to the accompanying Sinaiko Decl.

as to which the indictment claims there was any disclosure of inside information. Indeed, the indictment defines the term "Inside Information" to mean "material, nonpublic information *relating to Goldman Sachs and P&G*." (*Id.* ¶ 11 (emphasis added)). Likewise, the only securities trades that the indictment alleges are purchases and sales of Goldman Sachs and P&G stock and options that Rajaratnam directed. (*Id.* ¶¶ 14, 16, 20, 24, 29(g), 29(h), 29(i), 29(n), 29(t), 29(y), 31).

The indictment asserts that Mr. Gupta "provided the Inside Information to Rajaratnam because of [his] friendship and business relationships with Rajaratnam," and then alleges, without specifics, that Mr. Gupta "benefitted and hoped to benefit from his friendship and business relationships with Rajaratnam in various ways, some of which were financial." (*Id.* ¶ 25). But there is no allegation that Mr. Gupta engaged in any securities trades relating to the purported scheme. Nor is there any allegation that Mr. Gupta ever received money, or participated in the profits from trades that Rajaratnam conducted, as a *quid pro quo* for supplying Rajaratnam with inside information. Indeed, there is no specific claim that Mr. Gupta ever received any particular benefit from the purported scheme, such that he would have had a motive to depart from a lifetime of probity and engage in unlawful conduct.

The indictment charges Mr. Gupta with six offenses. Count One accuses him of conspiring with Rajaratnam and "others known and unknown" to engage in insider trading, in violation of section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b) ("Section 10(b)") and 17 C.F.R. § 240.10b-5 ("Rule 10b-5"). (*Id.* ¶¶ 26-27). Although the allegations in the indictment focus exclusively on Goldman Sachs and P&G, the indictment asserts that, as part of the supposed scheme that was the object of the conspiracy, Rajaratnam "caused the execution of transactions in the securities of Goldman Sachs, P&G, *and other companies*." (*Id.* ¶ 11(c)

(emphasis added)). Counts Two through Six purport to charge Mr. Gupta with substantive securities fraud violations. (*Id.* ¶ 31). These five purportedly separate offenses, however, stem from just two instances in which Mr. Gupta allegedly supplied Rajaratnam with inside information concerning Goldman Sachs, and Rajaratnam used that information to trade in Goldman Sachs common stock.

First, the indictment alleges that, on or about September 23, 2008, Mr. Gupta learned during a Goldman Sachs board meeting that Berkshire Hathaway Inc. would be investing $5 billion in the company, and then conveyed that information to Rajaratnam, before it became public, during a telephone conversation that began around 3:54 p.m. that day. (*Id.* ¶¶ 12, 13). According to the indictment, at "approximately 3:58 p.m." on September 23, Rajaratnam "caused the Galleon Tech Funds to order the purchase of approximately 350,000 shares of Goldman Sachs common stock," which order was filled to the extent of 217,200 shares. (*Id.* ¶ 14). That act by Rajaratnam is the basis for *two* substantive charges in the Indictment. Thus, Counts Two and Three purport to charge Mr. Gupta with separate securities fraud offenses, based on alleged purchases on September 23 of 150,000 and 67,200 Goldman Sachs shares. (*Id.* ¶ 31).

The remaining substantive securities fraud counts against Mr. Gupta stem from an accusation that, during a conversation that occurred after the market closed on October 23, 2008, Mr. Gupta informed Rajaratnam that, according to internal and confidential Goldman Sachs financial analyses, the company had lost nearly $2 per share to that point in the quarter ending November 28. (*Id.* ¶¶ 18, 19). According to the indictment, shortly after the market opened the next morning, Rajaratnam "caused the Galleon Tech Funds to sell its entire long position in Goldman Sachs stock, which consisted of approximately 150,000 shares." (*Id.* ¶ 20). However, the indictment uses Rajaratnam's act of "caus[ing] the Galleon Tech Funds to sell its entire long

position in Goldman Sachs stock" to generate *three* offenses. Thus, Counts Four, Five and Six purport to charge separate substantive securities fraud violations based on three sales of 50,000 shares each that took place on October 24, 2008. (*Id.* ¶ 31).

The Relief Mr. Gupta Seeks on this Motion

In order to avoid unfair prejudice arising from defects in the indictment, Mr. Gupta now seeks two items of relief. First, he moves the Court to consolidate or dismiss the substantive securities fraud counts in the indictment, on the ground that they are multiplicitous. Separately, he seeks an order under Rule 7(d), striking as prejudicial surplusage certain broadening language in the indictment. As we demonstrate, the Court should grant both items of relief at this juncture.

Argument

I. THE INDICTMENT IMPROPERLY MULTIPLIES THE CHARGES AGAINST MR. GUPTA

The indictment, on its face, shows that the five substantive securities fraud counts in this case are multiplicitous. Counts Two and Three arise from precisely the same alleged conduct -- Mr. Gupta's supposed communication of material, non-public information concerning Goldman Sachs to Rajaratnam on September 23, 2008 and Rajaratnam's direction immediately thereafter that the Galleon Tech Funds purchase 350,000 Goldman Sachs shares. (Ind. ¶¶ 12-14, 31). Likewise, the alleged conduct underlying Counts Four, Five and Six is Mr. Gupta's supposed disclosure of inside information to Rajaratnam after the markets closed on October 23, 2008 and Rajaratnam's act, shortly after markets opened the next morning, of "caus[ing] the Galleon Tech Funds to sell its entire long position in Goldman Sachs stock." (*Id.* ¶¶ 18-20, 31). Accordingly, Counts Two and Three splinter a single alleged offense into multiple charges, as do Counts Four through Six. The Court should remedy this defect in the indictment now.

An indictment is multiplicitous when it "charges in separate counts two or more crimes, when in law and fact, only one crime has been committed." *United States v. Handakas*, 286 F.3d 92, 97 (2d Cir. 2002) (citation omitted), *overruled on other grounds by United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (en banc). Multiplicitous indictments prejudice a defendant because they "may lead to multiple sentences for the same offense and may improperly prejudice a jury by suggesting that a defendant has committed not one but several crimes." *United States v. Reed*, 639 F.2d 896, 904 (2d Cir. 1981) (*citing United States v. Carter*, 576 F.2d 1061, 1064 (3d Cir. 1978)). Courts remedy multiplicitous indictments before trial by either consolidating the duplicative counts or compelling the government to elect one of them and dismiss the rest. *See, e.g.*, *United States v. Kee*, 2000 WL 863117, at *4 (S.D.N.Y. June 27, 2000) (requiring government to elect between multiplicitous counts); *United States v. Wiehl*, 904 F. Supp. 81, 91 (N.D.N.Y. 1995) (directing consolidation of multiplicitous counts). Indeed, granting either of those remedies *after* the close of evidence risks implicitly (and inappropriately) suggesting to the jury that the court has dismissed meritless counts, but regards as meritorious any counts that remain.

Where an indictment, like the one in this case, charges "the *same* statutory offense . . . as two separate counts," the multiplicity analysis depends on "whether Congress intended the counts to constitute separate 'unit[s] of prosecution.'" *Handakas*, 286 F.3d at 98 (emphasis in original) (*quoting Bell v. United States*, 349 U.S. 81, 82-83 (1955)). Absent a clear expression of Congressional intent to permit separate counts, either in statutory text or legislative history, the rule of lenity compels a conclusion that the counts are multiplicitous. Thus, more than 50 years ago in *Ladner v. United States*, 358 U.S. 169 (1958), the Supreme Court held that a single discharge of a gun that injured two federal officers would support only one count, rather than

two, under a statute prohibiting assault of any federal officer with a deadly weapon. Applying the rule of lenity, the Court reasoned that "[n]either the wording of the statute nor its legislative history points clearly to either meaning," and it was "appropriate, before we choose the harsher alternative, to require that *Congress should have spoken in language that is clear and definite*." *Id.* at 177-78 (emphasis added); *see also, e.g.*, *Bell*, 349 U.S. at 84 ("[I]f Congress does not fix the punishment for a federal offense *clearly and without ambiguity*, doubt will be resolved against turning a single transaction into multiple offenses.") (emphasis added); *United States v. Coiro*, 922 F.2d 1008, 1014-15 (2d Cir. 1991) (applying rule of lenity to find counts multiplicitous where Congress did not clearly dictate unit of prosecution).

Similarly, unless Congress has clearly directed otherwise, courts assessing the appropriate "unit of prosecution" for purposes of multiplicity eschew interpretations of criminal statutes that, in terms of the number of offenses charged, would permit arbitrary treatment of similarly situated defendants. For example, in *United States v. Davenport*, 929 F.2d 1169 (7th Cir. 1991), the indictment alleged that defendants received $100,000 from an unknown source and, during a two-week period, deposited $81,500 of the money into several banks in ten small increments. Based on that conduct, a jury convicted defendants on ten counts, under 31 U.S.C. § 5324(3), of structuring cash transactions so as to avoid reporting requirements -- one for each deposit. *Id.* at 1171. On appeal, defendants argued that the "structuring" of the overall sum of money, rather than the individual deposits, constituted the appropriate "unit of prosecution." The Seventh Circuit agreed, and vacated the convictions, reasoning that the government's contrary position would "lead[] to the weird result that if a defendant receives $10,000 and splits it up into 100 deposits he is ten times guiltier than a defendant who splits up the same amount into ten deposits." *Id.* at 1171-72, 1175; *see Ladner*, 358 U.S. at 177 (noting that interpretation of statute

under which single act could constitute multiple offenses would lead to "incongruous results" and "[p]unishments totally disproportionate to the act"); *Handakas*, 286 F.3d at 98-99 (rejecting contention that individual deposit can constitute separate structuring offense) (*citing Davenport*, 929 F.2d at 1171-72).

The substantive securities fraud counts against Mr. Gupta employ a "unit of prosecution" giving rise to precisely the sort of "weird result" that *Davenport* condemned. The indictment alleges that "[o]n September 23, 2008, . . . just two minutes before the close of the market, . . . Rajaratnam caused the Galleon Tech Funds to order the purchase of approximately 350,000 shares of Goldman Sachs common stock," of which "the Galleon Tech Funds purchased approximately 217,200 shares." (Ind. ¶ 14). But because that directive was executed in two tranches, a single act by Rajaratnam gives rise to *two* charges (Counts Two and Three). (*Id.* ¶ 31). And Rajaratnam's alleged directive on the morning of October 24, 2008 that "the Galleon Tech Funds . . . sell its entire long position in Goldman Sachs stock," because it was executed in three 50,000 share sales, results in *three* charges (Counts Four through Six). (*Id.* ¶¶ 20, 31). Thus, the indictment proceeds on the theory that the degree of culpability depends not on the number of times Rajaratnam allegedly directed trades based on inside information he purportedly received from Mr. Gupta, but rather on the number of increments in which Rajaratnam's trading directives were executed. But the number of increments is purely fortuitous, depending on the judgment of traders as to how they would execute Rajaratnam's instructions, market conditions -- such as the degree of buying or selling interest in Goldman Sachs common stock -- at a moment in time, or any number of other circumstances divorced from Rajaratnam's decision to trade.

Applying the authorities we have cited, the Court should not permit this "weird result." Nothing in the express language of Section 10(b) or Rule 10b-5 speaks to the

appropriate "unit of prosecution" for insider trading cases. Moreover, the legislative history of Section 10(b) provides little or no insight into Congress' intent. *See, e.g., Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201-06 (1976) ("The legislative reports do not address the scope of § 10(b) or its catchall function directly."); Alan R. Bromberg, et al., 1 *Securities Fraud & Commodities Fraud* § 2:14 (2d ed. 2008) (same). Absent *any* guidance from Congress -- much less clear and unambiguous guidance -- the Court should apply the rule of lenity and resolve doubt "against turning a single transaction into multiple offenses." *Handakas*, 286 F.3d at 98 (*quoting Bell*, 349 U.S. at 82-84). Accordingly, the Court should hold that the "unit of prosecution" is the trading directive by Rajaratnam, rather than the number of tranches into which traders divided those directives. Under that standard, the Court should consolidate Counts Two and Three, and Counts Four through Six, or direct the government to elect one count from each group and dismiss the others.

II. THE COURT SHOULD STRIKE PREJUDICIAL SURPLUSAGE FROM THE INDICTMENT

In addition to being multiplicitous, the indictment also includes improper broadening language that threatens to prejudice Mr. Gupta in several respects. Specifically, although the indictment closely focuses on supposed insider trading activity relating solely to Goldman Sachs and P&G, it includes an allegation that, as part of the purported scheme, based on supposed tips concerning only Goldman Sachs and P&G, Rajaratnam "caused the execution of transactions in the securities of Goldman Sachs, P&G, *and other companies*." (Ind. ¶ 11(c) (emphasis added)). This language raises the possibility that the government will seek to surprise and prejudice Mr. Gupta unfairly at trial by offering evidence of transactions unrelated to the ones the indictment describes. Moreover, presentation at trial of evidence concerning "other companies" could result in conviction of an offense that the grand jury did not authorize,

depriving Mr. Gupta of his Fifth Amendment right to be charged with serious offenses by indictment. Potential prejudice in these respects, singly and together, warrants an order striking broadening language under Rule 7(d).

A leading decision by Judge Weinfeld illustrates the principle. In *United States v. Pope*, 189 F. Supp. 12 (S.D.N.Y. 1960), the grand jury indicted the defendants for, *inter alia*, criminal violations of various provisions of the Securities Act and the Securities Exchange Act, arising from alleged material misstatements and omissions in certain registration and proxy statements. *Id.* at 15. Defendants moved to strike the words "among other things" from the paragraphs of the indictment that described the ways in which the filings at issue in ten of the counts allegedly were materially false or misleading. *Id.* at 25.

Judge Weinfeld observed that "[t]he words 'among other things' add nothing to the charges and give the defendants no further information with respect to them," and that allowing those words to remain "would constitute an impermissible delegation of authority to the prosecution to enlarge the charges contained in the indictment," reasoning as follows:

> A specific charge made by the grand jury may itself fail for lack of proof and yet, if the prosecution may augment the charges under the all-inclusive "among other things," the defendants may finally be prosecuted and convicted on charges . . . not considered by the grand jury or, if considered, may have been rejected by it.

Id. at 25-26. He rejected the government's contention that a bill of particulars would remedy this prejudice, because "[a] bill of particulars would permit the prosecution to go beyond the grand jury accusation, as set forth in the indictment, by adding thereto specifications of false and misleading statements under the phrase 'among other things,'" and "would enable the prosecution to 'guess at what was in the grand jury's mind.'" *Id.* (citation omitted). Granting defendants' motion to strike, Judge Weinfeld concluded that "[t]he language in question is not

only surplusage, but may, if not stricken, result in depriving a defendant of . . . his constitutional right to be accused of a felony offense only on the basis of a grand jury indictment." *Id.*

Since *Pope*, courts in this district and elsewhere have applied Judge Weinfeld's reasoning to strike from indictments broadening language that threatens to allow the government to present evidence of offenses that the grand jury did not charge. *See, e.g., United States v. Kassir*, 2009 WL 995139, at *4 (S.D.N.Y. April 9, 2009) (in prosecution for providing material support to terrorists, based on defendant's operation of certain websites, striking words "among other things" from paragraphs of indictment describing purported unlawful website content); *United States v. Mango*, 1997 WL 222367, at *16 (N.D.N.Y. May 1, 1997) (in prosecution for violations of Clean Water Act, striking words "among other things" from paragraph describing conduct by which defendant allegedly violated construction permit); *United States v. DePalma*, 461 F. Supp. 778, 799 (S.D.N.Y. 1978) (striking words "and other activities" from paragraph describing defendants' conduct that constituted the bankruptcy fraud offense charged in indictment); *see also United States v. Cecil*, 608 F.2d 1294, 1297 (9th Cir. 1979) (indictment charging conspiracy in non-specific terms violated Fifth Amendment by failing to limit government's proof at trial to offense that grand jury approved).

These authorities call for a similar result here. The indictment against Mr. Gupta, on its face, confirms that this case is about an alleged insider trading scheme involving *only* Goldman Sachs and P&G. Those are the *only* companies as to which the indictment claims Mr. Gupta disclosed material, non-public information. (Ind. ¶¶ 11(b), 13, 19, 24, 28(a), 28(b), 29(m), 29(s)). Moreover, the *only* trades by Rajaratnam that the indictment identifies are alleged purchases and sales of Goldman Sachs and P&G securities. (*Id.* ¶¶ 14, 16, 20, 24, 29(g), 29(h), 29(i), 29(n), 29(t), 29(y), 31). Indeed, the indictment mentions no company *other than* Goldman

Sachs and P&G. Against that backdrop, it is hard to imagine that the grand jury had before it evidence of any alleged unlawful conduct other than in connection with Goldman Sachs or P&G, or voted to charge Mr. Gupta with a conspiracy involving any other company. Yet the "and other companies" language in paragraph 11(c) allows the government a blank check to identify, and present at trial, trades in securities that the grand jury never considered. And whereas the universe of material that the government could mine for additional offenses in *Pope* was relatively small -- a handful of publicly-filed documents -- the broadening language in this case forces Mr. Gupta to wonder which of the *hundreds of thousands* of securities transactions Galleon conducted during the relevant time period the government will focus on at trial.

As in *Pope*, *Kassir*, *Mango* and *DePalma*, the allegation that Rajaratnam "caused the execution of transactions in the securities of Goldman Sachs, P&G, *and other companies*" (Ind. ¶ 11(c)) (emphasis added) -- in addition to threatening Mr. Gupta with prejudice in the form of an unfair trial by ambush -- also would permit the government to introduce proof at trial of a conspiracy charge different from the one the grand jury authorized, in violation of the Fifth Amendment. The Court therefore should strike the "and other companies" language from paragraph 11(c) of the indictment.[2]

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[2] Courts also have determined to strike broadening language from indictments under Rule 7(d) on the ground that such language may cause unfair prejudice by "allow[ing] the [petit] jury to draw the inference that the defendant is accused of crimes not charged in the indictment." *E.g.*, *United States v. DeFabritus*, 605 F. Supp. 1538, 1547 (S.D.N.Y. 1985). However, this Court has denied motions to strike based on concern about that sort of prejudice, in light of its longstanding practice never to submit an indictment to the petit jury. *E.g.*, *United States v. Umeh*, 762 F. Supp. 2d 658, 666 (S.D.N.Y. 2011) (Rakoff, J.). In the event that the Court determines to depart in this case from its normal procedure, and either supply the indictment to the jurors or read it to them, Mr. Gupta requests the opportunity to move to strike broadening language from paragraph 11(c) and elsewhere in the indictment, based on the potential for jury prejudice.

Conclusion

For all of the foregoing reasons, the Court should dismiss or consolidate Counts Two and Three, and Counts Four through Six, as multiplicitous, and strike broadening language from paragraph 11(c) of the indictment pursuant to Rule 7(d).

Dated: New York, New York
January 3, 2012

Respectfully submitted,

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