UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	11 Cr. 907 (JSR)
-v-	MEMORANDUM ORDER
RAJAT K. GUPTA,	
Defendant.	

JED S. RAKOFF, U.S.D.J.

Pending before the Court are defendant Rajat Gupta's motions to 1) dismiss Count 2 of the Superseding Indictment as unconstitutionally vague; 2) dismiss or consolidate Counts 3 and 4 of the Superseding Indictment as multiplicitous; 3) strike prejudicial surplusage from the Superseding Indictment; and 4) compel the Government to provide additional details in its bill of particulars. Having carefully considered the parties' briefs and oral arguments, the Court hereby denies all four of defendant's motions.

Regarding the first motion, Count 2 of the Superseding Indictment charges defendant Gupta with securities fraud. It alleges that Gupta disclosed inside information about Goldman Sachs to Raj Rajaratnam, which Rajaratnam used to purchase "at least approximately 350,000 shares of common stock" of Goldman Sachs through "certain Galleon Funds, including the Galleon Tech Funds," on March 12, 2007. Superseding Indictment ¶¶ 14, 35. The allegations comprising Count 2 satisfy the requirement of a "definite written statement of the essential facts constituting the offense charged," Fed. R. Crim. P. 7(c), as they sufficiently

apprise the defendant of what the Government intends to prove such that he can prepare his defense, and avoids the potential for double jeopardy. See Russell v. United States, 369 U.S. 749, 763-64 (1962).

Gupta argues, however, that Count 2's use of the words "at least approximately 350,000 shares" and "certain Galleon Funds" violates his Fifth Amendment rights by allowing the Government to prove the charge based on evidence that, he speculates, was never presented to the Grand Jury. This argument fails, for several reasons.

First, it is premised on sheer conjecture that the Grand Jury never was presented with an adequate basis to make the foregoing allegations. It takes something far more definite than this to warrant an inquiry into the confidential proceedings of the Grand Jury, which, in the federal system, have been historically protected against such inquiries if their product, the indictment, is legally sufficient on its face. See Costello v. United States, 350 U.S. 359, 363 (1956).

Second, there is no requirement that a Grand Jury issuing an insider trading indictment specify the exact number of shares traded or the precise entity that executed the alleged trades. Rather, it is sufficient, not just in terms of Rule 7 but also of the Constitution, if the indictment simply describes the crime charged with enough detail to provide fair notice and

protect against double jeopardy. Count 2 of the Superseding Indictment does that, and more. It specifies the Goldman Sachs information Gupta provided to Rajaratnam and the date Rajaratnam executed the trades in Goldman Sachs shares based on that information, specifies that Rajaratnam traded through Galleon entities (and gives an example thereof), and specifies the approximate minimum number of Goldman Sachs shares that were traded on the basis of the purloined information. In no sense does this leave Gupta unable to prepare his defense, risk a conviction based on evidence not presented to the Grand Jury, or leave him unable to invoke the double jeopardy clause of the Fifth Amendment in a subsequent prosecution. See United States v. Alfonso, 143 F.3d 772, 776 (2d Cir. 1998). Accordingly, the motion to dismiss Count 2 is denied.

Regarding the second motion, while the Court is dubious that Counts 3 and 4 are multiplicitous, at this stage the motion is premature. This is because neither of the two reasons for consolidating or dismissing multiplicitous counts applies at this juncture. The first reason for consolidating multiplicitous counts is because charging multiple counts for the same offense "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). But here, as counsel have been previously apprised, this Court never reads nor sends the

indictment to the jury, and counsel will have no reason to enumerate the counts in their opening statements, so no potential for prejudice will conceivably arise until much later in the trial, at which time the Court will have a better evidentiary basis to evaluate the claim of multiplicity.

The second reason to consolidate multiplicitous counts is because the Double Jeopardy Clause of the Fifth Amendment forbids punishing a defendant twice for committing the same offense. The Second Circuit, however, has held that this concern arises only at sentencing and is not something the Court need take heed of at this pre-trial stage. See United States v. Josephberg, 459 F.3d 350, 355 (2d Cir. 2006). Indeed, in Josephberg, the Court of Appeals vacated as premature the dismissal of a multiplicitous count at the pre-sentencing stage. Accordingly, the motion to consolidate or dismiss multiplicitous counts is denied as premature, without prejudice to being re-raised if and when it becomes ripe.

Regarding the third motion, defendant moves to strike from the Superseding Indictment the words "for example" and "among other things," which precede allegations of how Gupta benefited from the tips and his business dealings with Rajaratnam. See Superseding Indictment ¶¶ 9, 29. Although couched as a motion under Fed. R. Crim. P. 7(d) to strike prejudicial surplusage, the gist of Gupta's argument is that this language

impermissibly broadens the Superseding Indictment by allowing the Government to introduce evidence of financial benefits and dealings that were never presented to the Grand Jury, in violation of his Fifth Amendment rights. See United States v. Pope, 189 F. Supp. 12 (S.D.N.Y. 1960). For much the same reasons as in the case of Gupta's first motion, supra, this motion fails. Quite aside from the unsupported speculation that the Grand Jury lacked an evidentiary basis to use these terms, the words do not in any material respect broaden or otherwise alter the essential allegations of the crimes charged, i.e., conspiracy and substantive insider trading, but simply indicate that the Government's proof of the charges will not be limited only to certain items of proof that the indictment specifies. See United States v. DePalma, 461 F. Supp. 778, 798-99 (S.D.N.Y. 1978) (distinguishing between "charging" paragraph, which describes gravamen of charged offenses, and "means" paragraphs, which goes to "matter of proof to sustain the charges"). Indeed, by describing, but not limiting, the kinds of proof that led the Grand Jury to conclude that Gupta benefited financially from the charged offenses, the Superseding Indictment provides Gupta with a benefit that ordinarily might only be provided, if at all, by a bill of particulars. See, e.g., United States v. Washington, 947 F. Supp. 87, 90 (S.D.N.Y. 1996) (holding no basis to strike

language that "refers to the matter of proof to sustain the charges"). Accordingly, this motion is also denied.

Regarding the fourth motion, defendant moves pursuant to Fed. R. Crim. P. 7(f) to have the Government supply additional particulars detailing 1) Gupta's alleged management role and economic interest in an entity called "Galleon International," Superseding Indictment ¶¶ 9(e), 29(b); 2) the "ownership stake" that Rajaratnam "awarded" Gupta in Galleon Special Opportunities, ¶ 9(f); 3) "financial benefits" Gupta "received and hoped to receive" as a result of his ownership interest in the Voyager fund, ¶ 29(a); 4) the number of specific shares involved in the alleged trades based on insider information, i.e., particularizing what is meant by "at least approximately 350,000 shares" of Goldman Sachs in March 2007, and "more than 700,000 shares" in September 2007, ¶ 33(a)-(b); 5) the specific Galleon funds involved in each trade, ¶¶ 14, 28, 33(a)-(b), 33(bb); and 6) the quantity, cost, and strike price of the "call option contracts" described in Count One, ¶ 33(i).

In actuality, Gupta has already received most if not all this information in the form of the detailed Superseding Indictment, the substantial discovery already provided by the Government, the additional discovery already made available to defendant through the parallel civil action against Gupta and the previous criminal case involving Rajaratnam, and the previously-

ordered Bill of Particulars that has now been provided. But, in any event none of these additional requests for what is highly specific evidentiary detail is appropriate for a bill of particulars. See United States v. Walsh, 194 F.3d 37, 47 (2d Cir. 1999) (holding bill of particulars unnecessary where Government has made sufficient disclosures by other means); United States v. Cephas, 937 F.2d 816, 834 (2d Cir. 1991) (holding Government not required to "particularize all of its evidence"); United States v. Love, 859 F. Supp. 725, 738 (S.D.N.Y. 1994). Accordingly defendant's motion for additional particulars is likewise denied.

In short, all four motions are hereby denied. The Clerk of the Court is directed to close document numbers 12, 15, and 28 on the docket sheet of this case.

SO ORDERED.

JED S. RAKOFF, U.S.D.J.

Dated: New York, New York
March 26, 2012