UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, - against - ZVI GOFFER, et al., Defendants.	Criminal Docket No. 10-CR-0056 (RJS)

DEFENDANTS' JOINT MOTION TO DISMISS AND SUPPRESS

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MISCELLANEOUS

Introduction

This case – the first insider trading case in which a wiretap was employed – raises important questions about how the crime of insider trading should be defined and investigated. It vividly illustrates the Second Circuit's recent acknowledgement in *United States v. Kaiser*, 609 F.3d 556 (2d Cir. 2010), that insider trading requires a heightened *mens rea* because "it is easy to imagine an insider trader who receives a tip and is unaware that his conduct was illegal and therefore wrongful." *Id.* at 569.

The indictment alleges a labyrinthine web of tippee chains, connected by unknown and uninformed sources, and premised on speculative breaches of fiduciary duty. When deconstructed into its individual parts, the government's convoluted theory reveals several missing links. Alleged inside tips consist of material information that is already public, or non-public information that is not material. Tippees received information from tippers who had no idea where it originated. Tippers are alleged to have violated a duty of confidence that is not recognized by law. Culpable knowledge is assigned to traders who, like so many on Wall Street, merely guarded an informational edge with extreme secrecy.

If this Court does not dismiss the indictment on insufficiency grounds, it should dismiss it because Section 10(b) of the Securities and Exchange Act is irredeemably vague as applied to this case. As with older interpretations of honest services fraud, the charges here sit on the blurry lines between innocent, questionable and criminal conduct. Paradigmatic insider trading cases based on the misappropriation theory share several key elements that are absent in the attenuated tippee chains at issue here.

Counts One and Two should be dismissed for a separate reason: they both charge the same conspiracy in violation of the rule against multiplicity. Count Two expressly subsumes

Count One, and thus a conviction on both would violate the Double Jeopardy rights of Jason Goldfarb and Zvi Goffer.

Finally, the government's much-touted use of wiretaps to investigate this case gives sharp focus to the wisdom of Title III's carefully-calibrated balance between law enforcement needs and individual privacy. Congress did not include insider trading among the offenses for which wiretaps may be obtained, and with good reason. Not only is insider trading an offense where the lines between legal and illegal conduct have generated vigorous academic and judicial debate, it is also one that can be investigated by a wealth of alternative means. It is no surprise that the government's chief evidence against the defendants consists of old fashioned detective work: cooperator testimony, consensual recordings made by cooperators, and trading records. Indeed, the eight months of wiretaps in this case, much of which the defense has analyzed on a minute by minute basis, produced less than a meager 1% of calls and 1% of call-minutes in which the stocks in the indictment were even mentioned. These stocks, it bears noting, had already been identified by the government before the wiretaps began as the subjects of possible insider trading, and all but one of the trades charged in the indictment preceded the commencement of the wiretaps. In other words, beyond historic references, the wiretaps produced nothing of evidentiary value.

They did, however, capture and record scores of irrelevant, purely personal communications that the government should never have intercepted. These interception errors were compounded by a cavalier failure to protect the wiretap evidence from improper dissemination. At the very least, this Court should order a hearing into the government's failures to comply with Title III's stringent provisions.

Statement Of Facts

This case is the by-product of the relentless pursuit over more than a decade of Galleon and traders associated with that family of hedge funds by the Department of Justice (DOJ) and Securities and Exchange Commission (SEC). Between 2003 and 2007, the SEC pursued this goal with dozens of investigatory requests for documents, voluntary inverviews, and sworn testimony, obtaining more than four million pages of business records and extensive depositions and/or interviews of 20 Galleon employees, including that of Galleon's principal Raj Rajaratnam in June 2007.

Beginning in at the latest, March 2007, the SEC began closely coordinating its work, including the conduct of witness interviews and depositions with the efforts of the FBI and USAO. Between July 2007 and the early Fall 2007, the probe branched out into the investigation of other traders and ex-employees in the Galleon orbit including former Galleon partner and trader David R. Slaine; former Galleon trader Craig Drimal, who still worked out of Galleon's offices; Galleon trader [redacted]; Galleon principal [redacted]; and newly-hired Galleon trader Zvi Goffer. The SEC was also conducted a wide-ranging investigation into alleged insider trading in stocks of takeover targets, including 3Com, Hilton and Kronos, which included the interview of Emanuel Goffer in September 2007.

Through the cooperation of Slaine against Craig Drimal, wiretaps were sought in mid November 2007 on a telephone belonging to Drimal, with a wiretap on Goffer's telephone following in mid-December. The applications for the Drimal and Goffer wiretaps and those that followed omitted a number of material facts and misrepresented others concerning the extent of the government's investigation and available alternative means of investigation that undermined the request for the wire as a necessity sought only after other means were exhausted.

A. The Government's Undisclosed Investigation

1. The Investigation of Galleon

The FBI investigation into Galleon was apparently initiated by a complaint from Intel in 1998 that its employee Roomy Khan had misappropriated certain confidential corporate information and faxed it to Galleon's New York office. Raj. Suppr. Tr. at 618-19.[1] Khan pleaded guilty and cooperated with the FBI and although Khan's cooperation with the investigation was not fruitful, the SEC opened formal investigations into Galleon and Sedna Capital, a fund operated by Rajaratnam's brother. Many document requests were issued.[2]

In late March 2007, the SEC approached the USAO and FBI about their investigation, *id.* at 95, 485, and on March 26, 2007, the USAO and FBI requested access to the SEC's investigative file, which request was approved. *Id.* at 122-124, 486, 729-31. A meeting was held between the USAO, FBI, and SEC to discuss the investigation on March 29, 2007, *id.* at 485, at which at least three AUSAs and one FBI agent in attendance reviewed an SEC-prepared briefing book containing factual chronologies the SEC had prepared, along with backup documentation for those chronologies. *Id.* at 490-493. Following this initial meeting, representatives from the SEC, USAO, and FBI met in person or on conference calls on at least 19 other occasions before March 7, 2008 when an application was made to wiretap Rajaratnam's telephone. According to those involved in the investigation, once law enforcement authorities

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[1] Citations to Raj. Suppr. Tr. refer to the transcript of the four day hearing before the Honorable Richard J. Holwell in *United States v. Rajaratnam*, 09 Cr 1184 (RJH), that commenced on October 4, 2010. Citations without reference to a case are to a proceeding in *Goffer* on the date indicated.

[2] Notable among the SEC's extensive document requests was an SEC request on October 27, 2005 that Rajaratnam authorize Bloomberg to release to the SEC almost two years' of Galleon IMs, an acknowledgement of the significance of such communications in insider trading investigations. *Id.* at 34-35.

became involved in the investigation, the SEC routinely checked with the FBI and/or USAO before interviewing or deposing a witness. *Id.* at 135.

By May 2007, a decision was made to seek Rajaratnam's testimony and on May 14, 2007, the SEC served additional document requests and subpoenaed Rajaratnam's testimony. In preparation for the Rajaratnam deposition scheduled for June 7, 2007, the SEC met with the FBI and AUSAs on May 23, 2007 where they discussed subjects to be covered in Rajaratnam's June 7, 2007 deposition. *Id.* at 139-45, 500-01, 733-39. The Rajaratnam deposition spanned seven hours and the deposition transcript was quickly provided to the USAO and FBI, as were the depositions of five other witnesses taken between late 2006 and mid-2007. *Id.* at 187-92, 507, 740.[3]

In reviewing the USAO's role in the Galleon investigation, Judge Holwell indicated that after the four-day hearing, he understood the scope of the SEC's work but not that of the USAO and asked former AUSA Goldberg "what the substance of the U.S. Attorney's Office work was other than receiving information from the SEC prior to the [Rajaratnam] [wire]tap going up" in March 2008, and she responded:

> Certainly one part of the agent's work * * * along with the prosecutors – was reviewing information that we'd gotten from the SEC. So part of it is just getting familiar with that evidence, learning what it was they had, reviewing records. We independently obtained some of our own records, phone records, trading records, bank records. Whatever we obtained through grand jury subpoenas would supplement what the SEC had provided. The agents spent a lot of time putting together, just assimilating

[3] Overall, Galleon produced more than four million pages of documents including in response to the SEC's May 14 and June 8, 2007 subpoenas. *Id.* at 35-36, 38-44; 163-80, 187-89. The documents produced by Galleon included 276,000 emails and 46,000 pages of IMs. *Id.* at 39, 163-69, 172-75. The USAO and FBI were given full access to all of these records. *Id.* at 122-24, 486, 729-31. The SEC also shared access to the results of the at least 221 subpoenas and document requests it served on other parties during the investigation. *Id.* at 195-97.

> their own analyses of what all this information meant; trying to look at public announcements that were related to earnings announcements, whatever the critical events were that we thought surrounded different trades. There was a lot of research done on the different names that had come up. And as we got towards the – I guess late summer of 2007, early into the fall was when we started to put everything sort of together and trying to strategize about what our next step would be. . . .

Id. at 828-29.

In short, the evidence establishes that the SEC, FBI, and USAO worked closely together and coordinated their investigative efforts after March 29, 2007 and even "were coordinating the contact of witnesses" as "part of the coordination" among the SEC, FBI, and USAO that began in 2007. *Id.* at 132-33. But as the AUSA testified, after reviewing the SEC's materials, the government began to strategize about next steps.

2. The SEC's Investigation into Insider trading on Takeover Targets

In 2007, an explosion of private equity deals resulted in the takeovers of a number of companies and the efforts of hedge fund traders to "hit" these takeovers by purchasing stock in the target company before an acquisition was announced became intense. The companies referenced in the indictment: Hilton Hotels, Kronos, Inc., 3Com, and Axcan Pharma were among the companies taken private in 2007 but there were many others. The SEC focused on trading in a number of such companies including the acquisition of 3Com.

Little evidence has been provided by the government on the SEC's ongoing investigation into insider trading in connection with the stocks of companies that were takeover targets. However by September 2007, the SEC was interviewing traders and during that month interviewed Emanuel Goffer regarding his success at hitting "takeovers" as a trader. On October 5, 2007, the SEC also asked Bain Capital to provide a chronology of the events leading up to and relating to 3Com's September 28, 2007 press release concerning its agreement to be acquired by Bain. Ropes & Gray as attorneys for Bain provided a detailed chronology in a letter dated

November 20, 2007. Significantly, the chronology indicates that Bain was only in the process of receiving presentations from management by August 2007 did not restrict trading in the stock of 3Com by its hedge fund affiliate Brookside Capital until September 19, 2007, nine days before the announced merger. *See Letter of John P. Bueker*, dated November 20, 2007, at 1-3, attached hereto in excerpted form as Exhibit A.

3. The Cooperation of David Slaine

While the government was continuing its extended probe of Galleon, it found a new avenue of investigation into Galleon in the form of David R. Slaine, a wealthy ex-Galleon partner who had earned tens of millions of dollars before falling out with other Galleon partners, a parting of ways which culminated in a physical altercation with a Galleon principal in a steam room. In July 2007, Slaine began cooperating with DOJ in order to mitigate the sentence he was to receive for insider trading in connection with UBS Securities, LLC and he began recording conversations with his former colleagues.

One of the few individuals still speaking to Slaine was Craig Drimal, a trader who was employed at Galleon and now traded in his own account from a desk in Galleon's offices. According to Slaine, Drimal had in 2006 provided him with a tip and asked him to make trades in the stock of ATI. In September of 2007, Slaine began to make consensual recordings with Drimal in which the two discussed stock tips and the traders Drimal relied on for information. One of those sources was Zvi Goffer, a young trader then working at Schottenfeld, LLC, who was interviewing with Rajaratnam for a position at Galleon.

As he was planning to move from Schottenfeld to Galleon, Goffer was also making plans with Drimal to raise investments for a new fund later named Incremental Capital. One of the investors they approached was David Slaine. As Drimal explained to Slaine in a

consensually-recorded conversation on September 4, 2007: "[H]e [Zvi] wants a job with us. He wants to get over to Galleon;" and again on September 26, 2007: "He [Zvi] just wants a shot at getting in to Galleon, because he's got aspirations of building a business, you know?" Goffer received his offer from Rajaratnam in October 2007 and subsequently left Schottenfeld on November 27, 2009, two days before the November 29, 2007 announced takeover in Axcan yielded profits for Drimal, cooperating defendants David Plate and Gautham Shankar.

While these consensual recordings were going forward, the government applied for a wiretap on Drimal's telephone and interceptions commenced on November 16, 2007. In consensually-recorded conversations in September and October, and spilling into the first days of the Drimal wiretap, Drimal and Goffer discussed the new fund the two were planning and Slaine's potential investment in that fund. On December 7, 2007, one week before the Goffer wire would be sought by the government, Drimal asked Slaine to meet with Goffer over a potential investment in the new fund. *See* Drimal Call Session 6741. On December 9, 2007, Drimal and Goffer had an extended discussion, which was fully transcribed in the Drimal linesheets by FBI Special Agent Makol, concerning the potential partnership with Slaine. *See* Drimal Call Session 6781. On December 10, 2007 a meeting was scheduled for December 11, 2007. *See* Drimal Call Session 6816. It was rescheduled by Slaine to occur on December 12, 2007, *see* Call Session 6832, one day after Special Agent Jan Trigg swore to her Affidavit, dated December 11, 2007, in support of the application to wiretap Zvi Goffer's telephone.

The Drimal wiretap was renewed only once but launched a juggernaut of interceptions under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2522 ("Title III"), taking place over the telephones of Craig Drimal between November 16, 2007 and January 15, 2007; Zvi Goffer between December 11, 2007 and May 9,

2008, attorney Jason Goldfarb between February 6, 2008 and March 6, 2008; Galleon founder Raj Rajaratnam between March 10, 2008 and December 6, 2008; Roomy Khan tippees Gautham Shankar between March 19, 2008 and June 18, 2008 and Thomas Hardin between June 11, 2008 and July 10, 2008; Danielle Chiesi between August 13, 2008 and October 11, 2008; and C.B. Lee between October 14, 2008 and February 4, 2009.

As the government prepared the Drimal wiretap application still more investigative tools were being developed that would not be revealed to the authorizing judge on the Drimal wiretap or to the dozen or more authorizing judges that followed.

4. The 2007 Schottenfeld Investigation

At the same time the government was seeking to intercept calls over the Drimal and Goffer telephones, broker-dealer Schottenfeld, LLC where Goffer was and had been employed throughout 2007 came under a very public and very intense probe. That investigation began on November 29, 2007, less than two weeks into the first Drimal wiretap, when the SEC began a highly-publicized investigation into the sudden collapse in the share price of Alliance Data System (ADS) stock following the spread of a false rumor emanating from Schottenfeld that Blackstone Group was reducing its offering price for ADS to $70 per share from a previously announced price of $81.75 a share. The rumor cost investors, including hedge funds that specialized in acquisition arbitrage, many millions of dollars. Both ADS and Blackstone denied the rumor, and the SEC focused almost immediately on Schottenfeld. As the SEC and government would know, in compliance with applicable broker-dealer regulations, Schottenfeld preserved all Instant Messages ("IMs") sent or received by its traders over Schottenfeld's computers, regardless of the internet service provider, essentially capturing all communications to and from traders as they engaged in instant messaging from their desks. Significantly, Schottenfeld and its owner Richard Schottenfeld cooperated fully with the investigation.

Schottenfeld produced, among other documents and testimony, all IMs of all Schottenfeld traders throughout 2007 and compelled its traders to submit to interviews.

The IMs, interviews and other material provided via Schottenfeld's cooperation proved a treasure trove for the SEC, and on April 24, 2008, the SEC filed a complaint against Schottenfeld trader Paul Berliner.[4] The complaint was based on a specific IM to 31 other traders between 1:10 and 1:15 pm on November 29, 2007.[5] The November 2007 Schottenfeld investigation dominated chatter at Schottenfeld the moment it commenced, and was eventually reported on in the financial media including CNBC. It would have been impossible for the FBI and AUSAs working on this investigation to be unaware of the concurrent Schottenfeld investigation. As expected, the Schottenfeld traders' anxieties over the SEC probe were also repeatedly reflected in IMs and voiced over the wiretapped telephones. In fact, cooperator David Slaine, likely at the direction of the government, probed the subject of the embattled Paul Berliner in the consensually tape- and video-recorded meeting that took place on December 14, 2007. In one recorded conversation captured over the Goffer wire on December 20, 2008, a Schottenfeld trader complained to Goffer about being interviewed by a group of attorneys

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[4] The April 24, 2008 complaint in *SEC v. Berliner* was signed by SEC attorneys Robert B. Kaplan, Scott W. Friestad, Brian O. Quinn, and Anthony S. Kelly. The same four attorneys would, the following year, file *SEC v. Cutillo*, 09 Civ 9208, against the defendants in this case alleging insider trading at Schottenfeld in 3Com and Axcan among other stocks based on Ropes & Gray-related tips.

[5] The Berliner IM relied on in *SEC v. Berliner* read:

> ADS getting pounded – hearing the board is now meeting on a revised proposal from Blackstone to acquire the company at $70/share, down from $81.50. Blackstone is negotiating a lower price due to a weakness in World Financial Network – part of ADS' Credit Services Unit, as evidence [sic] by awful master trust data this month from the World Financial Network Holdings off-balance sheet credit vehicle.

See SEC v. Paul S. Berliner, Complaint, dated April 24, 2008 at ¶13; http://www.sec.gov/litigation/complaints/2008/comp20537.pdf.

regarding the ADS and Paul Berliner. *See* Goffer Call Session 7003. In a lengthy conversation in March 2008, the recently terminated Berliner himself complained to Gautham Shankar as the FBI monitored and recorded his call, about the production of his IM's by Schottenfeld's attorneys in what Berliner claimed was an unfair effort to scapegoat him. *See* Shankar Call Session 603.

Despite the availability of documentary information which had proved critical in building a case against a Schottenfeld trader, nothing concerning the ongoing investigation into Schottenfeld, its status as a registered broker-dealer with detailed records and databases of communications maintained, including recorded telephone calls and IMs, or the ready availability of cooperation from that company and its traders was ever presented to a federal judge asked to authorize a wiretap based on trading by Schottenfeld traders.

5. The Renewed Use of Failed Cooperator Roomy Khan

The USAO and FBI had also by the Fall 2007 renewed their use of cooperator Roomy Khan who in debriefings told the USAO and FBI that she was the source of what the government would later claim was material non-public information on the Hilton and Kronos acquisitions referenced in the indictment against the Goffer defendants. Khan met with AUSAs and FBI agents in late 2007 numerous times as documented by reporting agents, despite the fact that she also committed numerous crimes while a cooperator.[6] In these proffer sessions, Khan

[6] According to evidence developed before Judge Holwell in *Rajaratnam*, beginning in November 2007 and continuing through March 2008, Roomy Khan was interviewed at least 33 times pursuant to a series of proffer agreements with the Department of Justice and the SEC. Over the course of these interviews, Ms. Khan made and recanted a number of statements and eventually admitted to a lengthy history of insider trading between 2004 and 2007, including while she was on probation for her previous wire fraud conviction. [redacted]

(footnote continued)

readily admitted to passing tips on Kronos and Hilton to Thomas Hardin, FBI 302 reports of interview confirm. Those reports of interview reveal that FBI agents learned from KHAN in interviews occuring: [redacted][7]

The government decided to use Khan proactively against Rajaratnam in making consensually-recorded telephone calls but did not use her against her friend Thomas Hardin or his tippee Schottenfeld trader Gautham Shankar who was passing tips on to other Schottenfeld traders. Instead, the government sought authorization to wiretap their telephones – without revealing to the authorizing judges the fact that the source of allegedly misappropriated inside

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[redacted]

[7] A full and presumably unredacted set of these 302s and the sealed wiretap applications and orders were provided to the Court in camera by the government in connection with the defendants' request for their disclosure in discovery.

information the wiretaps sought to uncover was herself a government cooperator who was working with the FBI.

B. The Title III Interceptions over the Drimal, Goffer, Goldfarb, Shankar and Hardin

1. The Drimal, Goffer and Goldfarb Wire Applications

The November 15, 2007 application and supporting affidavit of Special Agent Jan Trigg ("November 15 Trigg Affidavit") to intercept calls over the Drimal telephone (and the applications that followed on all telephones) referenced wire fraud, in violation of 18 U.S.C. § 1343 and money laundering in violation of 18 U.S.C. § 1956 as the Title III predicate offenses. *See* November 15 Trigg Affidavit, at ¶ 2. The named target subjects, Agent Trigg expected to intercept over the Drimal telephone were Craig Drimal, Zvi Goffer, Galleon trader [redacted], and Galleon partner and trader [redacted]. *Id.* [redacted] *Id.*, at ¶14. No reference is made to any of the ongoing investigations described above.

[redacted]

[redacted] Research into the customs of hedge fund traders would have revealed that simple and easily broken codes are typically used in oral communications to dissuade eavesdropping traders from encroaching on a trading strategy. Drimal's reference to an item someone "eats off" or the "A" thing in his trading account would never thwart the understanding of a law enforcement agent who would have access to his trading records.[8]

The February 6, 2008 wiretap application for attorney Jason Goldfarb's telephone also lacked any showing of necessity. It was presented long after Goldfarb and Arthur Cutillo had been identified by the government as the tippers they sought upstream from Craig Drimal and Zvi Goffer. Moreover, call analysis had already been conducted on the phones of Cutillo and Goldfarb to identify any other Ropes & Gray attorneys, and no other attorneys were found to be using those phones. Therefore, there was no showing that the Goldfarb wiretap would reveal

[8] [redacted]

any additional sources of inside information or, in fact, any material non-public information at all. Not surprisingly, the Goldfarb interceptions were fruitless in producing evidence and the wiretap was not renewed. During the one month of interception, the agents intercepted a number of telephone calls that implicated attorney-client and work product privilege.

2. The Shankar and Hardin Wires

The March 19, 2007 affidavit of Agent Trigg ("March 19, 2007 Trigg Affidavit") in support of the wiretap application on the telephone of Gautham Shankar and the applications that followed on the Shankar telephone and the telephone of Thomas Hardin suffered from the same failure to set forth alternative means. [redacted]

C. The Arrest of the Defendants and Relevant Proceedings

1. The Defendants are Charged

On October 14, 2009, the Honorable Loretta A. Preska signed an order authorizing the unsealing of the Drimal, Goffer, Goldfarb, Hardin, Shankar, Rajaratnam, Chiesi and Far wires to [redacted]

[redacted] For all other purposes the wires and associated filings including applications remained under seal. *See* Exhibit B.

On October 16, 2009, Raj Rajaratnam, and other co-defendants were arrested and charged in a multi-count complaint with insider trading related crimes and was later indicted. On October 20, 2009, cooperating defendant Gautham Shankar pleaded guilty before the Honorable Gabriel W. Gorenstein to one count of conspiracy to commit securities fraud through insider trading in the stocks of 3Com, Avaya, Hilton, and Kronos and one count of substantive securities fraud in connection with the purchase of 3Com stock on August 7, 2008. Gautham allocated as follows:

> In 2007 I got the idea to buy Hilton and Kronos from a person who now I understand and I believe to know that had inside information and so I traded those two stocks. Then with regard to Avaya and 3Com, similar situation but another person, where he told me to buy these stocks, which I now believe is inside information, and I bought those stocks . . .

United States v. Gautham Shankar, 09 CR 996, 10/20/09 Tr. at 15. Judge Gorenstein asked Shankar if he was aware that the individuals providing him with inside information "either themselves were in a position of trust and confidence with respect to these companies or had gotten it from someone in a position" to which Shankar replied: "I didn't know who they got it from but that's what I understood." *Id.* at 16. Shankar allocated as follows to Count Two: "3Com? . . . The other person told me to buy the stock. Based on that information, I bought the stock." Judge Gorenstein asked "if the information had been obtained from someone who was in a position of trust and confidence to the company" and Shankar agreed. *Id.* at 18. In fact, the government would later provide particulars contradicting the basis for Shankar's plea and indicating the government was pursuing a misappropriation theory and not information tipped from inside the issuer. Specifically, the tip on Hilton originated with a ratings agency, and 3Com

from a law firm representing a bidder in an arms length transaction. Significantly, Avaya has been removed from the government's case entirely as a Ropes and Gray-related tip.

On November 5, 2009, Zvi Goffer, Arthur Cutillo, Jason Goldfarb, Craig Drimal, Emanuel Goffer, Michael Kimelman, and David Plate were arrested and charged in a separate Complaint. The Complaint alleged a single conspiracy between April 2007 and May 2008 to commit insider trading in the stocks of 3Com and Axcan (Count One) and five substantive counts of securities fraud in the purchase of 3Com stock by each of the defendants on August 7, 2007 (Counts Two through Six). In describing the conspiracy in Count One, the Complaint alleges:

> Zvi Goffer …operated an insider trading network, through which [he] would obtain material non-public information (the "Inside Information") regarding certain public companies' planned merger and acquisition activity. . . . Zvi Goffer … had several sources for Inside Information, including Arthur Cutillo …[who] misappropriated material non-public information from his employer, Ropes & Gray ….concerning mergers and acquisitions … including … Avaya, Inc. …. 3Com …. [and] Axcan Pharma, Inc. . . . [and] another individual [Gautham Shankar] … concerning . . . Kronos, Inc…. and…. Hilton Hotels, Corp…."

United States v. Goffer et al, 09 Mag. 2438, Complaint ¶ 8-10. In contrast, a multi-conspiracy indictment was returned on January 21, 2010 charging Goffer, Cutillo and Goldfarb with conspiracy to trade on inside information obtained from Ropes & Gray (3Com and Axcan) (Count One) and charged all the defendants except Cutillo with conspiracy to trade on inside information obtained from Ropes & Gray (3Com and Axcan) and Gautham Shankar (Hilton and Kronos) (Count Two). Substantive trading in 3Com between August 7, 2007 and September 21, 2007 comprise the basis for charges in Counts Three through Nine and trading in Axcan on November 21, 2007 is the basis for Count Ten. Trading in Avaya is not referenced.

2. The Government Provides Discovery and Particulars

Following the arrests, the government produced discovery, without benefit of any inventory, on dozens of CD-ROMs, comprising thousands of documents. On December 15, 2010, over one month before the indictment was returned, the government produced a series of 10 CD's with a cover letter signed by an AUSA indicating that the disks contained the telephone calls and recorded meetings referenced in the complaint. Unbenownst to the defendants, the SEC was provided with this same production of calls which included the wiretap communications on which the government was relying as key evidence in charging the case. The government confirmed the production after defense counsel learned of the production in a conference call with the SEC and referred to it before the Honorable Jed S. Rakoff and the Second Circuit as "inadvertent." No fact finding has been conducted by any court.

Unbeknownst to the Goffer defendants, the government provided pre-indictment discovery of the Drimal, Goffer, Goldfarb, Hardin, and Shankar wiretaps to the defendants in the *Rajaratnam* case on January 5, 2010, and provided summary linesheets and associated applications and orders on January 12, 2010. The government confirmed this production in a telephone call with counsel on Jun 17, 2010.

The government did not disclose Schottenfeld's cooperation and the evidence (or testimony) it had produced to the Securities and Exchange Commission in its 2007 investigation – including the IMs discussing the trades in Hilton, Kronos, 3Com and Axcan.

After first resisting production of the Schottenfeld IM's on the grounds that they were in the possession of a separate agency, namely the SEC, with whom the government did not have a "joint investigation," the government finally produced the 2007 Schottenfeld IM's.

Following defense requests for a bill of particulars, the government provided the following discovery in a letter dated April 27, 2010:

> (1) In or about July or August 2007, Cutillo and Santarlas told Goldfarb that Ropes & Gray was working on the acquisition of 3Com Corporation ("3Com"). . . . [and] periodically updated Goldfarb on the progress of the transaction until it was publicly announced.
>
> (2) In or about late October or November 2007, Cutillo and Santarlas told Goldfarb that Ropes & Gray was working on the acquisition of Axcan Pharma, Inc. ("Axcan")…. [and] periodically updated Goldfarb on the progress of the transaction until it was publicly announced.
>
> (3) Between in or about late November 2007 and in or about early 2008, Cutillo and Santarlas told Goldfarb that Ropes and Gray was working on the potential acquisition of PF Chang's China Bistro, Inc. (as well as a transaction involving Boston Scientific corporation).
>
> (4) In or about February and March 2008, Cutillo and Santarlas told Jason Goldfarb about Ropes & Gray's work on the acquisition of Clear Channel Communications, Inc., including the progress of the transaction toward closing.
>
> * * *
>
> (1) In or about March 2007, Gautham Shankar told Zvi Goffer, in substance and in part, that Goffer should purchase Kronos, Inc. ("Kronos") securities. . . .
>
> Shankar obtained the information about the Kronos acquisition from Thomas Hardin. Hardin obtained the information from Roomy Khan. Khan obtained the information from Deep Shah. Shah obtained the information from an individual who was working on the transaction either (1) by misappropriating the information from that individual in violation of a duty of trust and confidence between them or (2) by obtaining the information from the individual, who violated a duty of trust and confidence to the individual's employer and its clients.
>
> (2) In or about late June early July 2007 [sic], Gautham Shankar told Zvi Goffer, in substance and in part, that Goffer should purchase Hilton Hotels Corp. ("Hilton") securities and that the company could be taken out. . . .
>
> Shankar obtained the information about the Hilton acquisition from Thomas Hardin. Hardin obtained the information from Roomy Khan. Khan obtained the information from Deep Shah, who provided it in violation of a duty of trust and confidence that Shah owed his employer.

See Letter of AUSA Andrew Fish, dated April 27, 2010 at 1-3. In a subsequent letter dated May 25, 2010, the government offered the following additional details:

> The duty of trust and confidence between the individual and Shah arose from the fact that they were roommates. We are not certain whether the individual provided the material non-public individual [sic] to Shah. We understand the individual has denied providing information to Shah. . . . Shah's employer was Moody's Investor Service, Inc. ("Moody's"). Moody's provided ratings for Hilton and had a duty to maintain the confidentiality of information provided by Hilton.

The government has not provided the identity of the Kronos source who breached the duty owed a roommate nor the identity of his or her employer. [9]

In its Opposition to Defendants Joint Discovery Motions dated June 11, 2010, the government restated the substance of the material non-public information as "(1) 3Com was going to be acquired, (2) Axcan was going to be acquired, (3) PF Chang's China Bistro, Inc. ("PF Chang's") was going to be acquired, and (4) the acquisition of Clear Channel Communications, Inc. ("Clear Channel"), was progressing toward closing." When defense counsel again pressed for the specific inside information stripped to the communication, before the Court on June 23, 2010, the government stated:

> With respect to the content of the material non-public information,. . . [t]hat 3Com was going to be acquired. That is the tip. . . .you have a lawyer at a law firm providing you with the tip, just like an investment banker would, and telling you this company will be taken out, that is the material non-public information. . . . And that is the same type of tip with respect to Axcan and PF Chang's and CCU.

6/23/10 Tr. at 30-31.

After a lengthy colloquy, the Court agreed that the particulars -- namely the fact that a company was going to be "taken out" – were "sufficient" as long as the government did not shift strategy at trial and argue "it was never about the fact of a sale, it was about the sale at a particular price." 6/23/10 Tr. at 37.

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[9] The letters of April 27, 2010, and May 25, 2010 were attached as Exhibits F and I to Defendants' Joint Discovery Motion.

ARGUMENT

I.

THE INDICTMENT SHOULD BE DISMISSED BECAUSE THE GOVERNMENT'S EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW

The indictment charges conspiracy and substantive counts of insider trading, arising out of defendants' alleged efforts to trade on inside information misappropriated in breach of various relationships of trust and confidence. As set forth in the indictment and particularized in discovery and in court at the status conference on June 23, 2010, Count One alleges an insider trading conspiracy involving alleged tips received from lawyers at Ropes & Gray relating to two acquisition targets, 3Com and Axcan. Count Two alleges overlapping tippee chains emanating from three unrelated sources: the roommate of fugitive defendant, Deep Shah; Deep Shah's employer Moody's Investor Services ("Moody's"); and cooperating witness Brian Santarlas, a lawyer at the firm Ropes & Gray. Counts Three through Ten charge substantive counts of insider trading involving the stocks of 3Com and Axcan.

The government's complex conspiratorial construction, however, disintegrates upon closer analysis. First, none of the information allegedly received from lawyers working at Ropes & Gray was both material and non-public as required to establish the elements of insider trading. The material information in question (that certain companies were acquisition targets and that certain companies were potential bidders) was already public, and the arguably non-public information (that Ropes & Gray was representing a long-standing client in making a potential bid) was not material. Second, the roommate relationship does not create the kind of "relationship of trust and confidence" that can be a predicate for an insider trading charge based on the misappropriation theory – especially, as the government notes, the roommate denies passing the information. Finally, Deep Shah's alleged eventual tippee – Gautham Shankar, the

crucial link in the tippee chains to the defendants for the alleged Moody's information – had no knowledge of the sources of his information, and as such, cannot be deemed an insider trader from whom tippee liability may be derived.

Given that each of the government's theories for holding the defendants liable as tippees is insufficient as a matter of law, the indictment must be dismissed.

A. This Court May Dismiss a Count of an Indictment Where There Has Been a Full Proffer of the Government's Evidence

Rule 12(b)(2) of the Federal Rules of Criminal Procedure, governing pretrial motions, provides that "[a]ny defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion." The Second Circuit has indicated that "[t]he general issue in a criminal trial is, of course, whether the defendant is guilty of the offense charged." *United States v. Doe*, 63 F.3d 121, 125 (2d Cir.1995). The Court has further held that a defendant's challenge to the sufficiency of the evidence may only properly be the subject of a pretrial motion to dismiss the indictment where "the Government has made what can fairly be described as a full proffer of the evidence it intends to present at trial." *United States v. Alfonso*, 143 F.3d 772, 777 (2d Cir.1998).

Thus, several circuits, including the Second Circuit, have upheld the district court's pretrial ruling on the dismissal of an indictment under sufficiency-of-the-evidence grounds where the material facts are undisputed and only an issue of law is presented. *See e.g., United States v. Mennuti*, 639 F.2d 107, 108 (2d Cir.1981) (upholding a district court's dismissal of an indictment for failure to satisfy the jurisdictional element of the federal arson statute where the Government had filed an affidavit making a full proffer of the evidence to be presented at trial); *see also United States v. Yakou*, 428 F.3d 241, 246-47 (D.C. Cir. 2005); *United States v. Flores,* 404 F.3d 320, 325-26 (5th Cir. 2005); *United States v. Phillips*, 367 F.3d 846, 855 & n.

25 (9th Cir.2004); *United States v. Hall*, 20 F.3d 1084, 1087-88 (10th Cir.1994); *United States v. Levin*, 973 F.2d 463, 470 (6th Cir.1992); *United States v. Risk*, 843 F.2d 1059, 1061 (7th Cir.1988). As the Fifth Circuit observed in *Flores*, this approach "avoids the waste of judicial resources that results from legally meritless cases being sent to trial." *Id.* at 325 (citation omitted); *see also Phillips,* 367 F.3d at 355 (existence of undisputed facts obviates the need for the district court to make factual determinations properly reserved for a jury).

Notably, these principles have been applied in an insider trading case. In *United States v. Cassesse*, 273 F.Supp.2d 481 (S.D.N.Y. 2003), a district court in this Circuit dismissed an insider trading charge under Rule 12(b)(2), holding the charge was legally deficient because the alleged "relationship of trust and confidence" at issue was not a legally adequate predicate for an insider trading charge. *Id.* at 488 (holding that the relationship between the defendant and the tipper who disclosed an imminent merger was one of arms-length business competitors, not inherent fiduciaries giving rise to misappropriation liability).

In this case, there has been a sufficient proffer of the evidence and legal theories underlying key elements of the charges against the defendants that this Court may properly consider a pre-trial challenge to the sufficiency of the indictment.

B. None of the Information Allegedly Received from Ropes & Gray Was Both Material and Non-Public

The alleged Ropes & Gray tips – that 3Com and Axcan were acquisition targets – did not constitute material and non-public information as a matter of law. The material information – that certain companies were acquisition targets – was already in the public sphere. The non-public aspect of the information – that Ropes & Gray attorneys represented a potential bidder – was not material.

1. Material and Non-Public Information

Insider trading liability under the misappropriation theory arises when a person trades based on "material non-public information that has been gained in violation of a fiduciary duty to its source." *United States v. Cusimano,* 123 F.3d 83, 87 (2d Cir.1997) (citing *O'Hagan,* 521 U.S. at 652, 117 S.Ct. 2199). No violation of § 10(b) of the Securities and Exchange Act may be found unless the information at issue is both material *and* non-public. *See SEC v. Lyon,* 605 F.Supp.2d 531, 541 (S.D.N.Y. 2009) (*citing SEC v. Warde,* 151 F.3d 42, 47 (2d Cir.1998)).

Information is material if "there is a substantial likelihood that a reasonable [investor] would consider it important in deciding how to [invest]." *Lyon*, 605 F.Supp.2d at 541 (*quoting Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988)). "[T]here must be a substantial likelihood that the disclosure of the omitted facts would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information ... available." *Basic*, 485 U.S. at 231-32 (*quoting TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)). In the context of mergers, the timing of information is key to its materiality. *See Carlin Equities Corp. v. Offman*, 2008 WL 4387328, *10 (S.D.N.Y. September 24, 2008) ("information related to the preliminary stages of a potential transaction is more likely to be immaterial as a matter of law than information related to mature negotiations"); *Taylor v. First Union Corp. of South Carolina*, 857 F.2d 240, 244-45 (4th Cir. 1988) ("the more tentative the discussions the less useful such information will be to a reasonable investor in reaching a decision. Information of speculative and tentative discussions is of dubious and marginal significance").

A generalized confirmation of an event that is "fairly obvious" to every market participant who was knowledgeable about the company or the particular instrument at issue is not material information. *See SEC v. Monarch Fund*, 608 F.2d 938, 942 (2d Cir.1979) (generalized tips that do not divulge the specific terms of an impending but not yet publicly

announced securities offering, where no specific terms or dates or names of participants was divulged, "lack[ ] the basic elements of specificity" to be considered material for purposes of insider trading laws); *SEC v. Rorech*, 2010 WL 2595111, *44 (S.D.N.Y. 2010).

Information becomes public when it achieves "'a broad dissemination to the investing public generally and without favoring any special person or group.'" *Lyon*, 605 F.Supp.2d at 541 (*quoting Dirks v. SEC*, 463 U.S. 646, 653 n. 12 (1983)). Notably, when a corporation makes information available to securities analysts, prospective investors, or members of the press who ask for it, even though it may never have appeared in any newspaper, publication or other publication, such information would be public. *See United States v. Contorinis*, 09 Cr. 1083 (RJS), Jury Charge at 1870.

Importantly, the measures a company took to keep information confidential are a significant factor in any materiality determination. *See SEC v. Mayhew*, 121 F.3d 44, 52 (2d Cir. 1997) ("a major factor in determining whether information was material is the importance attached to it by those who knew about it" (citation omitted)). As the court held in *Rorech*, "[t]here cannot be liability under section 10(b) and Rule 10b-5 unless the owner of the information that was allegedly misappropriated expected the information to remain confidential." *Id.* at *46; s*ee also O'Hagan,* 521 U.S. at 647 (emphasizing that both Grand Met and Dorsey & Whitney, O'Hagan's employer, "took precautions to protect the confidentiality of Grand Met's tender offer plans"); *Dirks v. SEC,* 463 U.S. 646, 655 n. 14 (1983) (in order for a fiduciary duty to be imposed on a temporary insider tipper, "the corporation must expect [him] to keep the disclosed non-public information confidential, and the relationship [between the corporation and the tipper] at least must imply such a duty").

2. The 3Com and Axcan "Tips" Were Not Material and Non-Public

While typically, information regarding discussions with private equity suitors received from an "inside" source takes on "an added charge," *Mayhew*, 121 F.3d at 52, that is not the case here. As the government confirmed at the court conference on June 23, 2010, the only inside information from Ropes & Gray at issue in the indictment is that 3Com and Axcan were acquisition targets. *See* 6/23/10 Tr. at 30-31 ("the material non-public information we argue is that because you have a lawyer at a law firm providing you with the tip, just like an investment banker would, and telling you this company will be taken out, that is the material non-public information"). Such information, however, was already public. The 3Com information could not have been more public: the Wall Street Journal had already reported as early as July 17, 2007, and repeatedly thereafter, that 3Com had been approached by Silverlake Partners and Bain Capital with a buyout deal. *See http://blogs.wsj.com/deals/2007/07/17/3Com-draws-buyout-interest/*, attached as Exhibit G to Defendants' Motion for Discovery. Significantly, Bain Capital did not restrict trading in the stock of 3Com by its hedge fund affiliate Brookside Capital until September 19, 2007, nine days before the announced merger. *See Rorech*, 2010 WL 2595111 at *46 (no insider trading liability where owner of the information that was allegedly misappropriated did not expect the information to remain confidential).

In addition, as the government concedes, a trader at Schottenfeld had independently researched Axcan's efforts to secure a buyout and had spoken to representatives of the Company. *See* Letter of Andrew Fish, dated April 27, 2010 (attached as Exhibit F to Defendants' Motion for Discovery). The fact that Axcan itself was busy advising the investing community of its plans to be acquired fatally undermines the proposition that this information was non-public. *See Lyon*, 605 F.Supp.2d at 541 (information loses its non-public character

when it has been "broad[ly] disseminat[ed] to the investing public generally and without favoring any special person or group").

Moreover, the non-public aspect of the information, that a client or clients of Ropes & Gray were potential bidders, was not material. Obviously, potential bidders in such acquisitions would have lawyers, and given the size of the acquisition targets in question, those lawyers would be likely to work at a major law firm. The identity of specific law firms adds nothing to the "mix" of information. As such is it immaterial information to an investor. *Lyon*, 605 F.Supp.2d at 541 (material information must be the kind that a reasonable investor would consider before investing); *see also Rorech*, 2010 WL 2595111 at *44 (information that Deutsche Bank's investment bankers were advising the sponsor of a bond offering was widely discussed in the marketplace and thus tipper's "was not sufficiently different from the information that was available in the marketplace to be material").

The government makes much of the lengths to which the defendants allegedly went to preserve the secrecy of their information. 6/23/10 Tr. at 31 ("the significance of [the alleged inside information] to the defendants is corroborated by the fact that they are using prepaid cell phones to cover their tracks, and the fact that Zvi Goffer makes a lot of money and then pays part of the proceeds of that, funnels money back to the lawyers to pay for the information"). But this confuses the element of scienter with the separate and distinct elements that the information in question be in fact both material and non-public. Here, whatever cloak and dagger methods the defendants may have employed to preserve the secrecy of their trading strategy – a goal shared by all traders regardless of the source of their information – these methods are separate and apart from the issue of whether the Ropes & Gray "tips" were material and non-public as required to predicate insider trading liability. Since none of the information

allegedly passed by lawyers at Ropes & Gray shares both of those characteristics, the government's charges of insider trading with respect to that information are insufficient as a matter of law.

C. Tippee Liability Cannot be Premised on Misappropriation from a Roommate

The indictment accuses the defendants of conspiring to misappropriate inside information relating to the acquisition of Kronos, Inc. As expanded in the government's particulars provided by letter on April 27, 2010 and May 25, 2010, the Kronos tip was allegedly obtained through a tippee chain emanating from Deep Shah's roommate – who either provided the information to Deep Shah in violation of a relationship of trust and confidence, or from whom the information was misappropriated in violation of a the relationship of trust and confidence owed a roommate. The first alternative is pure speculation; the second is insufficient as a matter of law.[10]

1. Fiduciary Relationship or Similar Relationship of Trust and Confidence

Misappropriation liability turns on the existence of "a fiduciary duty or similar relationship of trust and confidence" owed to the source of the material, non-public information. *United States v. Chestman*, 947 F.2d 551, 566 (2d Cir. 1991). In *Chestman*, the Second Circuit set forth the necessary elements of a fiduciary relationship and "a similar relationship of trust and confidence," which the Court defined as "the functional equivalent of a fiduciary relationship." *Id.* at 568. Emphasizing that "fiduciary obligations arise within a narrow, principled sphere," *id.* at 567, the Court elaborated that "[a]t the heart of the fiduciary relationship' lies 'reliance, and de facto control and dominance.'" *Id.* at 568 (2d Cir.1991) (*quoting United States v. Margiotta*, 688 F.2d 108 (2d Cir.1982)). "The relation exists when confidence is reposed on one side and there

[10] Notably, the roommate denies providing the information, and Deep Shah is a fugitive.

is resulting superiority and influence on the other." *Id.* (citations omitted). Furthermore, "[a] fiduciary relationship involves discretionary authority and dependency." *Id.* at 569. *See also United States v. Falcone*, 257 F.3d 226, 234-35 (2d Cir.2001) ("Qualifying relationships are marked by the fact that the party in whom confidence is reposed has entered into a relationship in which he or she acts to serve the interests of the party entrusting him or her with such information."). In *Chestman*, the Court also gave examples of "associations" with these characteristics that are "inherently fiduciary," including relations "between attorney and client, executor and heir, guardian and ward, principal and agent, trustee and trust beneficiary, and senior corporate official and shareholder." *Id.* at 568.

Thus, courts have frequently held that "a fiduciary duty cannot be imposed unilaterally by entrusting a person with confidential information." *Chestman*, 947 F.2d at 567; *see also United States v. Reed*, 601 F.Supp. 685, 715 (S.D.N.Y.1985) ("The mere unilateral investment of confidence by one party in the other ordinarily will not suffice to saddle the parties with the obligations and duties of a confidential relationship."); *Falcone*, 257 F.3d at 234 ("[A] fiduciary duty cannot be imposed unilaterally by entrusting a person with confidential information, and ... a fiduciary relationship, or its functional equivalent, exists only where there is explicit acceptance of a duty of confidentiality or where such acceptance may be implied from a similar relationship of trust and confidence between the parties.").

2. The Absence of Fiduciary Elements in the Roommate Relationship

The roommate relationship bears none of the hallmarks of a fiduciary relationship or its functional equivalent. It is not the kind of relationship that is inherently marked by "de facto control" and "dominance" or "discretionary authority and dependency." *Chestman*, 947 F.2d at 568-69. To be sure, many roommates may share confidences, but the government improperly confuses the trust that may exist between roommates with the fiduciary-like

relationship necessary as a predicate for misappropriation liability in an insider trading case. The roommate relationship is not one where one party necessarily assumes a superior or dominating role, and the other the role of dependent. Roommates do not routinely assume discretionary authority over the others' affairs. Not surprisingly, we have uncovered no case that premises insider trading liability on a roommate relationship, and the proposition flies in the face of established caselaw that roommates are not fiduciaries of one another. For example, the law is well-established that a roommate may not consent to the search of an individual's bedroom. *See, e.g.*, *United States v. Orejuela-Guevara*, 659 F.Supp. 882, 886 (E.D.N.Y.1987) ("while any one roommate can consent to a search of common areas and her own room, she cannot consent to a search of a bedroom if it does not appear that she has authority to do so").

In short, the government's theory that the relationship between Deep Shah and his roommate was a fiduciary one is unsupported by fact or law. To the extent the defendants are accused of insider-trading based on an alleged violation of a relationship of trust and confidence between these roommates, the charge should be dismissed as a matter of law.

D. There Can Be No Derivative Tippee Liability Absent Shankar's Knowledge that his Tips Came from an Insider in Breach of a Relationship of Trust

The tippee chains involving the stocks of Kronos and Hilton converge on Deep Shah, who received the information on these two stocks, respectively, from his roommate and his employer Moody's. It is unclear from whom the roommate obtained the information. The information then went from Deep Shah eventually to Gautham Shankar and to the defendants in this case. Gautham Shankar, however, had no idea where and under what circumstances his information originated. As such, he cannot be liable as an insider trader, and since tippee liability is derivative of the tipper's liability, his tip cannot be the predicate of insider trading liability for the defendants in this case.

1. Tippee Liability Is Derivative of Tipper Liability

It is well-established that a tipper is only liable under the misappropriation theory where he or she knows that the information at issue was obtained in violation of a fiduciary duty or similar relationship of trust and confidence. *See, e.g.*, *SEC v. Warde*, 151 F.3d 42, 47 (2d Cir. 1998) (tippee must know or should have known that tipper violated a relationship of trust by relaying the alleged inside information). Moreover, it is also well-established that a tippee's liability is secondary to, and dependent upon, the tipper's liability. *See O'Hagan*, 521 U.S. at 663 ("Absent any violation by the tippers, there [can] be no derivative liability for the tippee.").

2. The Alleged Tippee Chain Involving Kronos and Hilton is Fatally Flawed

Gautham Shankar's allocution reveals that it is apparently only now, after his arrest and prosecution, that he understands his Kronos and Hilton tips to have come from someone with inside information. *See* Shankar Tr. 15/18 ("In 2007 I got the ideas to buy Hilton and Kronos from a person who *now* I *understand* and I *believe* to know that had inside information") (emphasis added). Clearly, at the time, he had no idea from whom his sources of the Kronos and Hilton tips received their information. *See* Shankar Tr. 16/11-12 ("I didn't know who they got it from, but that's what I *understand* [that they were in positions of trust or received their information from someone in a position of trust]") (emphasis added).[11]

Moreover, while he allocated in conclusory fashion to knowing that the individuals providing him with information "were in a position of trust and confidence with respect to these companies or had gotten it from someone in a position [of trust]," *id.* at 16/7-9,

[11] His comments echo those allegedly made by Zvi Goffer to cooperating witness David Slaine when asked to identify his sources: "[Slaine] did not need to know and did not want to know the source of the information." Complaint at ¶ 35.

and that the information provided to him "had been imparted to someone in a position of trust and confidence," *id.* at 17/15-16, nothing in his allocution indicates that he knew or had reason to know that the information had been obtained *in breach of a fiduciary duty or its functional equivalent.* *See Chestman*, 947 F.2d at 568. The individuals providing him with the information may have been in positions of trust and confidence, but the critical issue for insider trading purposes is whether their revelation of the information constituted a violation of duties owed as a result of such relationships. *Id.* at 551 (tippee liability only attaches when "the tippee knows or should have known that there has been a breach").

Absent evidence that Shankar knew, or consciously avoided, that the source of the information had breached a fiduciary relationship or its equivalent, he is not liable for insider trading, and nor are his tippees.

II.

THE INDICTMENT SHOULD BE DISMISSED BECAUSE SECTION 10(B) IS VOID FOR VAGUENESS AS APPLIED TO THIS CASE

To construe Section 10(b) of the Securities Exchange Act of 1934 to capture the conduct in this case would make it impermissibly vague - expanding it to include a wide-range of conduct that is entirely innocent, as well as conduct that merely treads the borders of insider trading laws without crossing them. Information and recommendations are the currency of Wall Street. A good tip is not necessarily an inside tip. Secrecy and code words are not automatically evidence of culpability. Something received in confidence is not inevitably obtained in breach of a fiduciary duty. But the speculative, and at times preposterous, theories underlying this prosecution – premised on the malleable concept of fiduciary duty – blur the lines between innocent, questionable and guilty conduct. This case exemplifies the concerns animating the void-for-vagueness doctrine, and the importance of confining general statutes to paradigmatic

cases to ensure fair notice and avoid arbitrary prosecutions. Core insider trading cases based on the misappropriation theory share several key elements absent in the labyrinthine tippee chains at issue here. Since this case is manifestly not one of the cases forming the heart of insider trading jurisprudence, it should be dismissed as falling outside the permissible reach of Section 10(b).

1. Uncertain Criminal Statutes Should be Pared Down to Core, Paradigmatic Cases

"To satisfy due process, 'a penal statute must define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Skilling v. United States*, 130 S. Ct. 2896 (2010) (*quoting Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). When statutes are challenged as unconstitutionally vague, the Court emphasized in *Skilling* the "cardinal principle" that a court should endeavor to construe rather than invalidate a statutory provision. *Id.* at 2930, n.40. As the Court explained, its many cases "'paring down' federal statutes to avoid constitutional shoals . . . recognize that the Court does not *legislate*, but instead *respects the legislature*, by preserving a statute through a limiting interpretation." *Id.* at 2931, n.43 (*citing United States v. Lanier*, 520 U.S. 259, 267-68, n.6 (1997) (emphasis in the original)).

In *Skilling*, the Court addressed a challenge to 18 U.S.C. § 1346 on the grounds that the statute was unconstitutionally vague on its face. Acknowledging that Skilling's vagueness challenge had force in light of precedents "that were not models of clarity or consistency," the Court examined its previous precedents with the goal of "preserv[ing] what Congress certainly intended the statute to cover." *Id.* at 2928. The result was a "par[ing] of that body of precedent down to its core" – to "paramount applications" that presented no vagueness problem. *Id.* at 2928. In the context of honest services fraud, this meant cases involving offenders who received bribes or kickbacks. These were "plain as a pikestaff," "paradigmatic

cases" that did not implicate the concerns regarding fair notice and arbitrary prosecution. *Id.* at 2933.

2. The Misappropriation Theory of Insider Trading is Mired in Uncertainty and Inconsistency

As with 18 U.S.C. § 1346 and its elusive predicate "the intangible right to honest services," the misappropriation theory of insider trading has generated inconsistent rulings and scholarly criticism. *See, e.g.* Saikrishna Prokash, *Our Dysfunctional Insider Trading Regime*, 99 Colum. L. Rev. 1491 (1999); J. Scott Colesanti, *"We'll Know It When We Can't Hear it": A Call For a Non-Pornography Test Approach to Recognizing Non-Public Information*, 35 Hofstra L. Rev. 539 (2006). The indeterminacy of the misappropriation theory is further complicated by the fact that, unlike honest services fraud, it is entirely a creation of case law, making the task of defining its reach fraught with uncertainty. The controversy centers primarily on the nature of the duty that can predicate an insider trading charge. Given what the Fifth Circuit recently described as "the paucity of jurisprudence on the question of what constitutes a relationship of 'trust and confidence' and the inherently fact-bound nature of determining whether such a duty exists," *SEC v. Cuban*, 2010 WL 3633059, *5 (5th Cir. 2010), it is no exaggeration to say that "[t]he ordinary businessman is at a substantial disadvantage in recognizing when a fiduciary duty exists." Morvillo and Anello, *Fiduciary Duty Not Always Easy to Determine*, 235 L.J., 3, col. 1 (June 6, 2006).

Cuban neatly illustrates the lack of clarity. In that case, the SEC filed suit against a minority shareholder who sold his stake in a company after receiving confidential information from the company's CEO regarding a private equity offering. The suit alleged insider trading under the misappropriation theory of liability, arising out of Cuban's alleged violation of a duty not to trade based on his agreement to keep the information confidential. The district court had

dismissed the action, holding that a confidentiality agreement regarding material non-public information does not by itself support a duty to disclose or abstain from trading. *Id.* at *1. Reversing and remanding for further fact-finding, the Fifth Circuit held that the complaint established "more than a plausible basis to find that the understanding between the CEO and Cuban was that he was not to trade, that it was more than a simple confidentiality agreement." *Id.* at *5. The duty not to trade could emanate from an "implicit[.]" understanding that the company provided the terms of the private offering to Cuban for the sole purpose of exploring his participation in it, and he could not otherwise use the information for his own personal benefit. *Id.* The Fifth Circuit's ruling in *Cuban* can be contrasted with a district court's decision in this Circuit in *United States v. Cassesse*, 273 F.Supp.2d 481 (S.D.N.Y. 2003). In that case, the court dismissed as insufficient insider trading charges against a businessman who had traded based on confidential information imparted to him by a business competitor, declining to infer a duty of confidentiality in an arms-length business relationship. *Id.* at 486-87.[12]

There have been similar apparently inconsistent rulings in the context of family and marital relationships. In *Chestman*, the Second Circuit held that "marriage does not, without more, create a fiduciary relationship." 947 F.2d at 568. Several courts, however, have held that the spousal relationship may be a predicate for misappropriation liability. *See*, *e.g.*, *SEC v. Yun*, 327 F.3d 1263, 1273–74 (11th Cir. 2003) (it was a jury question whether communications between spouses were confidential so as to support insider trading liability based on a tip of information between husband and wife); *United States v. Corbin*, U.S. v. Corbin, 2010 WL

[12] Perhaps the difference between the Fifth Circuit's expansive approach in *Cuban* and that of the Court in *Cassesse* can be explained by the fact that *Cuban* was a civil suit and *Cassesse*, a criminal prosecution. But no such distinction was drawn.

4236692, *6 (S.D.N.Y. October 21, 2010) (government adequately made out a charge for illicit trading based on husband's agreement with wife that he could not use or share confidential information entrusted to her by her employer). Another area of disagreement is fiduciary-like relationships attenuated from the original source of the information. *Compare Chestman*, 947 F.2d at 554 (stockbroker did not violate Rule 10b-5 when trading on information obtained from customer), *with SEC v. Willis*, 825 F. Supp. 617, 622 (S.D.N.Y. 1993) (Rule 10b-5 violation by broker of psychiatrist who misappropriated information from patient).

In short, the law is uncertain, rife with inconsistencies and so fact-specific that the misappropriation theory of insider trading transforms § 10(b) into one of those "vague statutes [that] fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that they authorize or encourage seriously discriminatory enforcement." *Skilling*, 130 S.Ct. at 2935 (Scalia, J. concurring) (citations omitted). As Justice Scalia commented on the fiduciary duty concept embedded in honest services fraud:

> [T]o say that a man is a fiduciary only begins the analysis; it gives direction to further inquiry .... What obligations does he owe as a fiduciary? . . .[T]he duty remained hopelessly undefined. Some courts described it in astoundingly broad language. *Blachly v. United States* loftily declared that "[l]aw puts its imprimatur on the accepted moral standards and condemns conduct which fails to match the reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society." Other courts unhelpfully added that any scheme "contrary to public policy" was also condemned by the statute. Even opinions that did not indulge in such grandiloquence did not specify the duty at issue beyond loyalty or honesty.

Id. at 2935 (citations omitted); *see also* Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 Ga. L. Rev. 1, 15 (2001) ("A clear characterization of fiduciary obligation is elusive and its exact nature is much debated."); Peter J. Hammer, *Pegram v. Herdrich*: *On Peritonitis, Preemption, and the Elusive Goal of Managed Care Accountability*, 26 J. Health Pol'y & L. 767, 771 n.6 (2001) ("The term fiduciary is a slippery

concept."); Andrew D. Shaffer, *Corporate Fiduciary-- Insolvent: The Fiduciary Relationship Your Corporate Law Professor (Should Have) Warned You About*, 8 Am. Bankr. Inst. L. Rev. 479, 482 (2000) ("Despite its long history, the exact contours of the concept have remained elusive."). In the absence of clarity on the nature and contours of fiduciary duty, the misappropriation theory of insider becomes a particularly virulent species of common law crime.

3. The Relevant Facts in this Case Are Mired in Speculation and Pure Guesswork

The chaos in the legal principles applicable to this case is matched by uncertainty and speculation as to the relevant facts. The government concedes, as it must, that it simply does not know the specifics of each link in the convoluted tippee chains alleged in the indictment. For example, with respect to the tip that Kronos was an acquisition target, the government states:

> The duty of trust and confidence between the individual and Shah arose from the fact that they were roommates. We are not certain whether the individual provided the material non-public individual [sic] to Shah. We understand the individual has denied providing information to Shah. . . .

See Letter of Andrew Fish, dated May 25, 2010. Given that Deep Shah is a fugitive, the government's first theory – that the roommate breached a duty by voluntarily disclosing the information to Shah – is pure speculation. Their second – that Shah violated a duty to the roommate by stealing it from him – is premised on a legal duty that is created from whole cloth.

The tippee chain involving Hilton is similarly insecure. The government's cooperator in that chain, Gautham Shankar, has no idea where his information came from, and thus could not have communicated to his tippees that the information was obtained in violation of a fiduciary duty or its equivalent.

Finally, while the tips regarding the potential acquisitions of 3Com and Axcan may have emanated from attorneys at a law firm working on the buyer's side of the deal with the issuer, it is not at all clear that this revelation was a breach of the lawyers' fiduciary duties to

their clients, where this information was, respectively, publicly available on the Wall Street Journal, and was freely disseminated by the target company. *See* N.Y.Code of Professional Responsibility EC 4-1 (McKinney's 2009) ("[b]oth the fiduciary relationship existing between lawyer and client and the proper function of the legal system require the preservation by the lawyer of *confidences and secrets of one who has employed or sought to employ the lawyer*") (emphasis added); *see also Dirks v. SEC,* 463 U.S. 646, 655 n. 14 (1983) (in order for a fiduciary duty to be imposed on a temporary insider tipper, "the corporation must expect [him] to keep the disclosed non-public information confidential, and the relationship [between the corporation and the tipper] at least must imply such a duty").

Moreover, even if the lawyers breached their fiduciary duties, it does not follow – and indeed is counter-intuitive for the tippees to believe – that it was improper to impart that information in light of its public nature. *See Libera,* 989 F.2d at 600 (to support a conviction of the tippee defendant, the government must prove defendant's knowledge that the tipper had breached the duty); *see also Kaiser*, 609 F.3d at 569 (for insider trading liability to attach, the defendant must not only know that his conduct is wrongful, he must also know that it is illegal).

4. This Case is not a Paradigmatic Misappropriation Insider Trading Case

This case – characterized as it is by convoluted and unclear tippee chains, uniformed tippers and speculative breaches of fiduciary duties – does not represent a paradigmatic insider trading case based on the misappropriation theory. As such, the indictment should be dismissed on an "as applied" basis under the void-for-vagueness doctrine.

A survey of reported decisions addressing misappropriation cases in this Circuit reveals several core elements absent here. First, these cases involved "a fiduciary relationship, that under any definition of that term, was usually beyond dispute." *Skilling*, 130 S.Ct. at 2931,

n.41. *See, e.g., United States v. Geibel*, 369 F.3d 682 (2d Cir. 2004) (employer-employee relationship); *United States v. Falcone*, 257 F.3d 226 (2d Cir. 2001) (same); *United States v. Cusimano*, 123 F.3d 83 (2d Cir. 1997) (same); *United States v. Mylett*, 97 F.3d 663 (2d Cir. 1996) (same); *United States v. Libera*, 989 F.2d 596 (2d Cir. 1993) (same); *United States v. Teicher*, 987 F.2d 112 (2d Cir. 1993) (attorney-client and banker-client).

Second, the cases involve clear breaches of those fiduciary relationships in connection with the charged insider trading. *See, e.g., Geibel*, 369 F.3d at 686 (misappropriation of non-public information regarding pending mergers and acquisitions from investment bank); *Falcone*, 257 F.3d 226 (misappropriation of confidential advance copies of business magazine column from magazine distributor); *Cusimano*, 123 F.3d at 88 (employees of AT&T stole non-public information about pending acquisitions of AT&T); *Mylett*, 97 F.3d at 668 (same); *Libera*, 989 F.2d at 601(misappropriation of confidential advance copies of business magazine column from magazine printer); *Teicher*, 987 F.2d at 115-17 (misappropriation of non-public information regarding potential mergers and acquisitions). After all, it is not enough that a tip emanate from someone in a fiduciary relationship with the source of the information. The tipper must in fact breach the fiduciary duty owed. *See Chestman*, 947 F.2d at 566-67 (misappropriation theory of insider trading liability requires misappropriation "in breach of a fiduciary duty or similar relationship").

Finally, and most significantly, the cases involve clearly-delineated tippee chains, in which each link was aware that the tips constituted misappropriated information in violation of a fiduciary or fiduciary-like duty. *See Geibel*, 369 F.3d at 687 (defendant tippees deduced source of information, and then offered to pay him money to return to the specific bank that generated the most profitable tips); *Falcone*, 257 F.3d at 234 (tipper told tippee defendant stock-broker that

information had been obtained from employee at magazine distributor in breach of duty of confidentiality); *Cusimano*, 123 F.3d at 85 (defendant tipped directly by employee at source of information, and conducted trades on behalf of employee on his own account); *Mylett*, 97 F.3d at 668 (defendant tippee knew he received information regarding AT&T acquisitions from Vice President at AT&T); *Libera*, 989 F.2d at 602 (2d Cir. 1993) (tipper employee explicitly told defendant tippee that employees were forbidden to take advance copies of business magazines non-public information out of the printing plant); *Teicher*, 987 F.2d at 121 (defendant tippee had direct contact with employees at law firm and bank who misappropriated the information); *Contorinis*, 09 Cr. 1083 (RJS) (cooperator banker working on deal to hedge fund manager tippee trading on it).

By contrast, none of the overlapping tippee chains alleged in this case contain all of these core and essential elements. As discussed in Section I, the Ropes & Gray tips, while implicating the fiduciary relationship of attorney-client, did not involve either a breach of that relationship, or a breach that was causally connected to any securities trading. The information about acquisition targets was already in the public domain or offered publicly by the issuer to callers, and therefore the revelation of that information by associates at Ropes & Gray was not a breach of their fiduciary duties. Moreover, to the extent the attorneys breached their fiduciary duties by revealing the Ropes & Gray connection to those acquisitions, this information was not material and therefore not causally related to any trading.

The tippee chaines emanating from Deep Shah are similarly flawed. The facts and circumstances surrounding the Moody's tips – in particular, that they were obtained in violation of the fiduciary relationship of employer-employee – were not communicated to the tippees in the lengthy tippee chains at issue in this case. The Kronos tip – allegedly

misappropriated from Deep Shah's unnamed roommate – did not implicate any cognizable fiduciary relationship.

To construe Section 10(b) to capture the conduct in this case makes it "irremediably vague." *Skilling*, 130 S.Ct. at 2928. The only way to address this vagueness problem is to confine Section 10(b) to paradigmatic cases. This is manifestly not such a case.

III.

COUNTS ONE AND TWO SHOULD BE DISMISSED BECAUSE THEY ARE MULTIPLICITOUS

The indictment in this case charges the same conspiracy as two separate crimes, in violation of the rule against multiplicity. Indeed, the multiplicity is blatant: Count One is expressly subsumed into Count Two, charges a violation of the same statute and the same object of the conspiracy as Count Two, and both counts overlap substantially with regard to personnel, location and time period. A conviction on both Counts One and Two would thus violate the Double Jeopardy rights of Zvi Goffer and Jason Goldfarb.

A. Courts Apply a "Totality of the Circumstances" Test To Determine If Two Alleged Conspiracies Constitute One For Multiplicity Purposes

An indictment is multiplicitous if it charges the same crime in two counts. *United States v. Ansaldi*, 372 F.3d 118, 124 (2d Cir. 2004); *see also United States v. Chacko*, 169 F.3d 140, 145 (2d Cir.1999) ("An indictment is multiplicitous when it charges a single offense as an offense multiple times, in separate counts, when, in law and fact, only one crime has been committed"). The vice of a multiplicitous indictment is that it both "violates the Double Jeopardy clause of the Fifth Amendment, subjecting a person to punishment for the same crime more than once," *id.*, and also "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).

When, as here, the same statutory violation is charged twice, the question is whether the facts underlying each count were intended by Congress to constitute separate "units" of prosecution. *United States v. Ansaldi*, 372 F.3d 118, 124 (2d Cir. 2004) (*quoting Bell v. United States*, 349 U.S. 81, 83-84 (1955)). In the context of conspiracy charges, the inquiry thus becomes whether the two counts charge a single or multiple conspiracies. *Id.; see also United States v. Miller*, 26 F. Supp. 2d 415, 421 (N.D.N.Y. 1998). Courts apply a "totality of the circumstances" test to determine whether multiple conspiracy counts alleged in an indictment are, in fact, a single conspiracy. *United States v. Korfant*, 771 F.2d 660, 662 (2d Cir.1985) (addressing the issue in the context of successive prosecutions). Relevant factors include "(1) the locality where the two alleged conspiracies took place; (2) whether there is a significant degree of time overlap between the two conspiracies; (3) whether there is an overlap of personnel between the two conspiracies, including unindicted and indicted co-conspirators; and (4) whether the overt acts charged and the role played by the defendant according to the charges is similar." *United States v. Deas*, 2008 WL 5063903, *3 (D. Conn. November 24, 2008) (citing cases). The Second Circuit has considered these factors, along with similarity of operation and the degree of interdependence between the two conspiracies, in the context of a second prosecution for the same conspiracy. *Id. (citing United States v. Lopez*, 356 F.3d 463 (2d Cir. 2004)).

The defect of multiplicity can and should be remedied before judgment. *See Haji v. Miller*, 584 F.Supp.2d 498, 509 n19 (E.D.N.Y. 2008). The court may direct the prosecution, early in a case, to elect between multiplicitous counts, *see*, *e.g., United States v. Seda*, 978 F.2d

779, 782 (2d Cir.1992), or the court may itself dismiss or consolidate counts. *See Haji*, 584 F.Supp.2d at 509 n19 (*citing* 1A Charles Alan Wright, *Federal Practice and Procedure* § 145, at 86-87 (3d ed.1999)). If an indictment is multiplicitous on its face, then the multiplicitous count(s) should be dismissed pre-trial. *See United States v. Reed*, 639 F.2d 896, 904 (2d Cir.1981).

B. Count Two Expressly Subsumes Count One, Which Involves Identical Charges, Conspiracy Objects, Personnel, Dates, Location and Overt Acts

Applying the "totality of the factors" test here, it is clear that the conspiracy alleged in Count One is identical to and fully subsumed within the Conspiracy alleged in Count Two. First, Counts One and Two charge a violation of the same federal criminal statute, 18 U.S.C. § 371, and both conspiracies allege the same object: securities fraud through insider trading. Specifically, in both counts, Zvi Goffer and Jason Goldfarb are alleged to have entered into an agreement with other individuals to obtain confidential, non-public information from Ropes & Gray for the purpose of conducting profitable inside securities trades. Indictment at ¶¶ 13, 14, 18, 19, 29, 31, 32. The fact that the non-overlapping charged co-conspirator in Count One is an individual from whom the alleged information was obtained, and the non-overlapping charged co-conspirators in Count Two are alleged tippees of the information is an immaterial difference that does not alter Congressional intent to treat the conduct at issue as "one unit" of prosecution. *See United States v. O'Hagan*, 521 U.S. 642, 656 (1997) (misappropriation for insider trading purposes occurs when breach of duty and securities transaction coincide); *SEC v. Warde*, 151 F.3d 42, 47 (2d Cir.1998) (elements of insider trading involving tippee liability consist of the following: (1) tipper possessing material, non-public information; (2) discloses to the tippee; (3) who in turn trades on the basis of the information; (4) knowing the tipper has violated a relationship of trust; and (5) the tipper benefits from the disclosure).

Second, there is a substantial overlap of personnel in the two counts. Two of the three defendants in Count One are charged in Count Two, and the third is an uncharged co-conspirator in Count Two. Both alleged conspiracies also overlap temporally and geographically. Third, to the extent the conspiracy in Count One is not identical to the conspiracy alleged in Count Two, there is at least an interdependence between them. The information allegedly obtained from attorneys at Ropes & Gray, as alleged in Count One, is deemed "inside" information used by the coconspirators in Count Two. Indictment at ¶¶ 13, 29, 35. Fourth, the conspiracies in Counts One and Two are alleged to have occurred in a similar manner: confidential non-public information is obtained via a tippee chain from an insider, trades are made on the basis of the information, and thousands of dollars are allegedly paid to the source. *Compare* Indictment at ¶¶ 18 and 35. Finally, Count Two alleges the exact same overt acts as Count One, since it expressly incorporates all of Count One's allegations. Indictment at ¶ 20 (incorporating ¶¶ 1-15, 18-19).

In sum, Count One is wholly subsumed within the conspiracy alleged in Count Two, and accordingly, the two counts are multiplicitous. One should be dismissed, or the government directed to elect the one upon which to proceed. *See Seda*, 978 F.2d at 782; *Reed*, 639 F.2d 896 at 904.[13]

[13] Defendant Goldfarb separately adds that Count Two should be dismissed against him on duplicity grounds, under the principles enunciated in *United States v. Geibel*, 369 F.3d 682 (2d Cir. 2004) (single insider trading conspiracy involving both originating tipper and remote tippees did not exist where remote tippees were actually aware of the originating tipper, but the originating tipper was not aware of the remote tippees). Presumably, the duplicity issues raised in *Geibel* were the reasons for the multiplicitous indictment in the first place.

IV.

THE WIRETAPS SHOULD BE SUPPRESSED BECAUSE INSIDER TRADING IS NOT A PREDICATE OFFENSE UNDER TITLE III

Title III prohibits precisely what the government trumpeted here: the use of wiretaps to investigate insider trading. Moreover, the government effectively concedes as much by its tortured efforts in its various applications for wiretap orders in this case to mischaracterize its multi-year and multi-agency insider trading investigation as an investigation of honest services fraud and money laundering. These two crimes were foils not foci of the investigation. Nor are they umbrella crimes that necessarily encompass insider trading. Indeed, the Second Circuit has repeatedly pointed out that not all violations of the securities laws in which the mails or wires are used constitute violations of the mail or wire fraud statutes. In maintaining, however, that the investigation targeted wire fraud and money laundering, the government misled the authorizing district judges to approve highly intrusive surveillance, knowing full well it would produce nothing to advance the stated objective, and instead, seeking the evidence to support a prosecution for a crime that is not listed in Title III. Such manipulation of the judges in this district and of the carefully-calibrated mechanisms of Title III should not be sanctioned by this Court.

A. Wiretaps Are Not Permitted to Investigate Insider Trading

The passage of Title III was bitterly fought because it invaded an individual's privacy like no other investigative technique did. As the Second Circuit graphically explained, a search warrant "is like a surprise snapshot of your home taken in your presence," whereas a wiretap is akin to "a continuous film of events in your home, secretly recorded over a period of weeks or months." *In Re U.S.*, 10 F.3d 931, 938 (2d Cir. 1993) (concluding that a wiretap "is obviously a far greater invasion of privacy than a [search warrant]"). Consistent with this

recognition of the invasiveness of telephonic eavesdropping, Congress authorized wiretap interception only under certain stringent circumstances, one of which is that the interception provide evidence of specific listed offenses. *See* 18 U.S.C. § 2516. As one court explained, "Section 2516 [.] plays a central and functional role in furthering Congress's legislative purpose to guard against unwarranted use of wiretapping or electronic surveillance, and it directly and substantially implements Congress's limiting intent regarding this intrusive technique." *United States v. Bruno*, 808 F.Supp. 803, 806 (S.D. Ga. 1992).

Securities fraud, and insider trading in particular, do not appear on that list, reflecting Congressional judgment that wiretaps are neither necessary nor appropriate to investigate these offenses. And for good reason. Congress reserved the exigency of wiretap usage for those situations where traditional investigatory techniques could not function, due to threats of violence, intimidation, lack of record keeping, and underground activities. S. REP. NO. 90-1097 at 42-44 (1968), as reprinted in 1968 U.S.C.C.A.N. 2112, 2159-2160. The highly regulated and heavily documented securities industry does not come within that definition. It is not surprising, therefore, that despite the fact that Congress has seen fit to add several additional offenses to the predicate Title III offenses listed in 18 U.S.C. § 2516, it has not added securities fraud or insider trading. Nor has the Justice Department requested that those offenses be added to the list. Notably, as the net of predicate offenses has expanded, Congress has taken care not to include illegal conduct typically pursued by regulatory agencies, even though in most regulatory regimes, willful violations can be prosecuted as a criminal offense. *See, e.g.,* 29 U.S.C. § 666(e) (which provides criminal penalties for any employer who willfully violates a safety standard prescribed pursuant to the Occupational Safety and Health Act, where that violation causes the death of any employee).

Wire fraud was added in 1984, but that addition cannot be interpreted as an effort to add scores of unenumerated fraud offenses that use a wire. There is no indication in the statutory text or legislative history that in adding wire fraud to section 2516 in 1984, Congress meant also silently to authorize wiretaps for any and every fraud offense in which a suspect picked up a telephone. Indeed, if that were Congress's intent, it would not have bothered later to amend Title III to specifically include additional fraud offenses such as the addition of fraud in connection with access devices in 1986, bank fraud in 1990, aircraft parts fraud in 2000, and computer fraud and abuse in 2001. The Antitrust Division regularly used the mail fraud statute to pursue bid rigging. *See, e.g. Washita Construction Co*., 789 F.2d 809, 824 (10th Cir, 1986), *Dynalectric Co.*, 859 F.2d 1559, 1577 (11th Cir, 1988). Congress, however, found it necessary to amend Title III in 2004 to cover antitrust violations. Every instance of tax fraud could be charged as mail or wire fraud, but this does not give the government the right to ignore Congress' clear decision not to make tax offenses into Title III predicates. *See In re Grand Jury Subpoena*, 889 F.2d 384, 387 (2d Cir. 1989) (noting that that 2416 does not include tax predicates or federal securities law violations).

Moreover, when Congress passed the Insider Trading and Securities Fraud Enforcement Act of 1988, in part "to augment the current methods of detection and punishment of [insider trading]" it did not see fit at that point to authorize wiretaps in insider trading investigations. *See* H.R. Rep. 100-91, at 2 (1988), reprinted in 1988 U.S.C.C.A.N. 6043, 6044. While Congress noted at that time that the government was free "to litigate insider trading cases based on other provisions of the securities laws and of the general mail and wire fraud statutes," it pointed out that the SEC and the Attorney General are only permitted to resort to additional mechanisms for addressing insider trading violations where they are "legally entitled." *Id.* at 29,

6074. In other words, Congress has recognized that insider trading may sometimes violate the wire fraud statute, but does not always do so. Similarly, the Second Circuit has acknowledged that all securities fraud violations are not necessarily wire fraud violations. *See United States v. Dixon*, 536 F.2d 1388, 1399 (2d Cir 1987) ("[t]he mere fact that many violations of the securities legislation may also constitute violations of the mail or wire fraud statute does not mean that every violation of the former by use of the mails or wire communications is a violation of the latter"). Most recently, the Court has pointed out in *Kaiser* that insider trading does not necessarily involve a deception, and thus, is not necessarily a violation of the wire fraud statute. *See Kaiser*, 609 F.3d at 569 ("[u]nlike securities fraud, insider trading does not necessarily involve deception, and it is easy to imagine an insider trader who receives a tip and is unaware that his conduct was illegal and therefore wrongful"). In *Kaiser*, the Court indicated that the "willfulness" element of insider trading requires knowledge that one's conduct was not just wrongful, but illegal, in recognition of the complex regulatory framework implicated by the crime, and the significant potential that one can be an innocent tippee of inside information. *Id.* Congress hardly intended that an offense carrying the most stringent definition of willfulness could be investigated by the most invasive investigative technique. But if it did, it certainly knows how to do so. When it wants to cover both wire fraud and securities fraud, it refers to them both in statutory text. *See, e.g.,* 18 U.S.C. § 1514A; 18 U.S.C. § 1028A; 15 U.S.C. § 80b-3(e).

In short, insider trading is not synonymous with wire fraud, and accordingly, the fact that wiretaps are authorized in wire fraud cases does not amend Congress' careful delineation in Title III of eligible crimes and exclusion of all others. Nor does it absolve a court from making the analytically distinct inquiry into whether the government may freely use Title

III in insider trading cases. To hold otherwise would undo the careful work of Congress and invite prosecutors to seek wiretaps to investigate a staggering array of crimes that could be recharacterized as wire fraud. As to such crimes, the fundamental limitations of Title III would be rendered meaningless. Given the extraordinary intrusiveness of electronic surveillance, Title III should not be interpreted expansively, and courts should take particular care to prevent the government from freely deploying this measure in areas dominated by regulatory agencies.

B. This Case Does Not Fall Within Title III's Exception to the Use of Wiretaps To Prosecute Unenumerated Offenses

That Congress did not intend courts to imply additional unenumerated offenses in the list contained in 18 U.S.C. § 2516 is underscored by the procedures Congress specifically provided in Title III for the use of wiretaps to prosecute non-wiretap-eligible offenses. *See* 18 U.S.C. § 2517(5). The Second Circuit has made clear, however, that judicial approval of the interception of evidence relating to a non-authorized offense may only be granted under this provision "upon a showing that the original order was lawfully obtained, that it [was] sought in good faith and not as a subterfuge search, and that the communication was in fact incidentally intercepted during the course of a lawfully executed order." *United States v. Masciarelli,* 558 F.2d 1064, 1068 (2d Cir.1977); *see also United States v. Marion*, 535 F.2d 697, 711 (2d Cir. 1976) (18 U.S.C. § 2517(5) permits the use of wiretaps to prosecute non-wiretap-eligible offenses only when (i) law enforcement comes upon the evidence "inadverten[tly]" in the course of intercepting communications for authorized offenses, and (ii) a court independently determines that the interception was necessary (and otherwise authorized) to investigate that eligible offense). Thus, the use of evidence of a non-enumerated offense is only permissible if it is "serendipitously discovered," *In re Grand Jury Subpoena*, 889 F.2d 384, 389 (2d Cir. 1989), while genuinely investigating in good faith an authorized predicate offense. Here, it is

abundantly clear that the government's goal in obtaining the wiretaps on defendants' telephones was to investigate an alleged insider trading scheme, and specifically, insider trading at Galleon and Schottenfeld. The references to wire fraud and money laundering were provided for cover. Indeed, the government effectively concedes in its applications that its goal was to investigate insider trading. But the fact that the government fronts this issue, does not alter the necessity of complying with Title III's stringent regime, including the requirement that the wiretap be obtained for the purpose of investigating an eligible offense. *See United States v. Ward*, 808 F.Supp. 803, 806 (S.D. Ga. 1992) (government's "candid" inclusion of unenumerated offenses in its application did not legitimize evidence obtained in violation of the wiretap statute).

Finally, and as more fully discussed below, when an application reveals that an ineligible offense is the primary or a principal target of an investigation, as occurred here, enforcement of the necessity prong becomes all the more imperative. In those circumstances, the necessity determination must ensure that the wiretap is uniquely necessary to some aspect of wire fraud or some aspect of the criminal investigation that is separate and distinct from investigating the ineligible offense. Otherwise, courts would be helpless to "prevent evasion of" Title III's limitation of wiretap authority to its enumerated offenses. *Marion*, 535 F.2d at 700.

V.

THE WIRETAPS SHOULD BE SUPPRESSED BECAUSE THE WARRANT APPLICATIONS MISREPRESENTED THE NECESSITY OF THE WIRETAPS

The government misrepresented the necessity for wiretaps in this case, where alternative means had either been tried and proven successful, or had not even been tried and exhausted. Moreover, the government was well aware that alternative means, such as use of cooperators and analysis of trading records, were a far more fruitful means of obtaining evidence in this case, and that resort to the highly intrusive technique of wiretapping was not only

unnecessary, but utterly unproductive. The appropriate remedy is suppression. At the very least, the Court should grant a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978).

A. Title III Wiretaps Are Only Authorized Where Alternative Means Are Unavailable

18 U.S.C. § 2518(d) mandates "a full and complete statement as to whether or not other investigative procedures have been tried" or are "unlikely to succeed if tried." This standard must be met to ensure 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. 143, 153 n. 12 (1974).

As the Second Circuit has pointed out, "the statutory requirement ... 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, "[i]n other words, the question is not whether a wiretap provides the simplest, most efficient means of conducting an investigation; telephonic surveillance may only be used when it is necessary to assist in law enforcement." *United States v. Concepcion*, 579 F.3d 214, 218 (2d Cir. 2009).

Misstatements in the necessity section of a Title III warrant affidavit are subject to the same standard set forth in *Franks*. *See United States v. Rajaratnam*, 2010 WL 3219333 (S.D.N.Y. August 12, 2010) (*citing United States v. Bianco*, 998 F.2d 1112, 1124-26 (2d Cir.1993)); *see also United States v. Green*, 175 F.3d 822, 828 (10th Cir.1999) ("If a wiretap affidavit omits material information that would vitiate either the necessity or the probable cause requirements had it been included, the resultant evidence must be suppressed.")

In *Rajaratnam*, the court ordered a *Franks* hearing to determine defendant's claim that the affidavit in support of the wiretap applications failed to mention such material facts as the existence of an extensive, document-rich SEC investigation and a prior FBI investigation of

Rajaratnam's trading, and that the government had access to the materials generated by the SEC, including some four million documents and transcripts of many individuals employed at Rajaratnam's hedge fund, including Rajaratnam himself.

> Correcting the affidavit to account for these omissions, the Court concludes that the existence and scope of the SEC investigation raise a substantial question as to whether the government affidavit adequately demonstrated the necessity of a wiretap-that is, a showing that conventional investigative techniques had been tried and had failed, or that there would be little use in trying them because they would likely fail.

Id. 2010 WL 3219333 at *2.

B. Less Intrusive Alternative Means Existed and Should Have Been Pursued

The government made little effort to pursue obvious alternative means to investigate Drimal, Goffer, Goldfarb, Hardin, or Shankar and materially omitted from the wiretap applications those alternative means that were available and/or being pursued by the SEC, in coordination with the FBI and the USAO. In each of the applications, the government indicated that among the investigative objectives to be sought through these wires was discovery of the "identities" of the co-conspirators. Yet, in the application to intercept calls over Drimal's telephone the government had already identified Zvi Goffer as well as the Galleon colleagues the government was unsuccessfully pursuing. In the very first application to intercept calls over the Goffer telephone, every defendant charged before this Court had already been identified with the exception of Michael Kimelman. Thus wiretaps were not necessary to effect this objective.

The applications also indicates an objective of uncovering "the existence and location of records" – a unlikely goal in an insider trading case especially when the government was aware of and had access to records already subpoenaed from Galleon, an SEC-registered investment advisor which was required to maintain them and Schottenfeld, an SEC-registered broker-dealer which was under even more stringent record-keeping requirements. In fact,

through cooperation with the SEC, the government had access to deposition transcripts and millions of pages of documents from Galleon and an undisclosed volume of evidence from Schottenfeld which included all 2007 IMs and interviews of traders. The listed objective of uncovering the "receipt and distribution of money involved in those activities" could be readily accomplished in this case by tracing the trading accounts of the individuals and conducting surveillance immediately after the trades revealed a "takeover hit."

In the end, it was cooperators who helped the government make its case – and the government had enlisted at least a half dozen cooperators to gather evidence against the defendants. Slaine, for example, spent months wearing a wire against Drimal but used his first meeting with Goffer to demand to know what Goffer's alleged inside sources of information were – an effort to tickle a wire not to avoid one by building trust.

In explaining why conventional techniques cannot be employed, the government relies on what a former AUSA Goldberg recently described as boilerplate from a copied narcotics wiretap affdavit. Indeed, the section encaptioned "Alternative Investigative Procedures" is nearly identical in the Drimal, Goffer and Rajaratnam Wiretaps as a side-by-side comparison reveals. *See* Exhibit C attached hereto. In making its presentation on the alternative means it had unsuccessfully employed, the government simply ignores the traditional investigative method successfully employed by the SEC in this and other cases. For example, the affidavits and applications indicate that use of the federal grand jury to gain witness information would be inadvisable because "it is unlikely any of them would testify voluntarily" and that witness interviews were "too risky at the present time" although many traders, including Galleon and Schottenfeld traders, were voluntarily interviewed and/ or deposed by the SEC

during this period including defendant Emanuel Goffer – a fact not disclosed to the authorizing judges.

Indeed, in ordering that a suppression hearing be conducted in *United States v. Rajaratnam*, Judge Holwell noted his disapproval of the government's failure to disclose the existence of a parallel SEC investigation which resulted in a successful SEC case without use of wiretaps. Following the hearing, Judge Holwell criticized the government for putting itself in Judge Lynch's position in deciding not to disclose the deposition of *Rajaratnam* and the extensive documentary materials collected:

> It's hard to read the [FBI] affidavit and say: Well, subpoenaed documents are no good because we don't know where the documents are located; but not to disclose that the government, albeit through two investigative bodies, had four million of them.

Raj Suppr. Tr. at 101.

Here, the SEC has brought two cases against the defendants *SEC v. Galleon et al*, 09 Civ. 8811 (JSR), against Rajaratnam, Goffer, Plate and others which includes allegations of trading in Kronos and Hilton and *SEC v. Cutillo*, 09 Civ. 9208 (RJS), against all the Goffer defendants including Goffer and Plate. As the government was aware from its experience in working closely with the SEC, among the first items requested in an investigation into trading is recorded telephone calls, e-mails, and IMs. The investigations into Galleon and Schottenfeld were no different. Roomy Khan's IMs to Rajaratnam were among the key evidence in investigating Rajaratnam's alleged insider trading. Review of IMs figured prominently in the SEC's investigation into Schottenfeld.

[redacted]

[redacted]

[redacted]

Notable in reviewing these IMs is the lack of code, on which the government relied so heavily in its wiretap applications. With security from eavesdropping traders, the senders of IMs could share their trading strategies and ideas freely. The authorizing judges should have been made aware of the potential evidentiary value of IMs, and, if they existed, recorded telephone calls at Schottenfeld, and their usefulness as an investigatory tool – one relied on in the Galleon and Schottenfeld probes -- in determining whether a wiretap was necessary.

In general, the question of whether the Drimal, Goffer, Goldfarb, Shankar, and Hardin wiretaps were necessary because alternative means had been investigated and exhausted can be answered by looking at the substantive acts of insider trading the government alleged took place during those wires. All trading in Hilton, Kronos, and 3Com preceded the wiretap by many months and Axcan is alleged to have had a single trade conducted during the wire period and that trade by a trader whose telephone was not wiretapped.

Despite the government's relentless pursuit of all leads into Galleon and listening to five months of Zvi Goffer's calls while he worked there, they charge no trading by Goffer at Galleon indicating only that two spectacularly losing trades in P. F. Chang and Clear Channel Communications in the Spring of 2008 were based on material non-public information misappropriated from Ropes & Gray – although clearly lacking in enough materiality on which to base a successful trade. The government's subsequent use of wires on its own cooperators' tippees, namely Shankar and Hardin, also raises serious concerns about whether they made appropriate disclosures to the authorizing judges.

C. This Court Should Suppress or Order a *Franks* Hearing

At the very least, we request that the Court grant a *Franks* hearing into the accuracy of the government's claim that this invasive investigative technique was required. There is a heightened need for suppression hearings in the context of wiretap evidence, given the privacy concerns at issue. As the Second Circuit held in *Rajaratnam*, additional disclosure of unlawfully obtained wiretap materials may "compound" the "invasion of privacy" of the defendants and others. *Id.* 2010 WL 3768060 at *20 (quotation omitted).

Further, in light of the evidence that emerged during the *Rajaratnam* suppression hearing of the close cooperation between the USAO and the SEC, we ask that the Court order the government to produce all materials discoverable under Rule 16, *Brady*, and *Giglio* possessed by the SEC. *See, e.g., SEC v. Saad*, 229 F.R.D. 90, 92 (S.D.N.Y. 2005) (when SEC and USAO conducted parallel investigations, materials in the possession of the SEC may "well be '*Brady*' material that the government might well be required to turn over sufficiently before trial to enable the defense to make meaningful use of them"); *United States v. Giffen*, 379 F.Supp.2d 337, 342 (S.D.N.Y. 2004) (prosecutor cannot "avoid disclosure of evidence by the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial").

VI.

THE WIRETAPS SHOULD BE SUPPRESSED BECAUSE THEY WERE NOT MINIMIZED IN ACCORDANCE WITH TITLE III

Minimization – the bulwark against invasive interceptions, and particularly important here given that trading is a legitimate activity – was performed abysmally in this case. Scores of calls were recorded that should never have been intercepted. Still more were recorded that should have been minimized the moment it was clear who was on the other line. Globally,

the ratio of pertinent to non-pertinent calls and call minutes evinces a wholesale disregard for the privacy rights that were the animating factor behind Title III's strict regime. These errors mandate suppression.

1. The Factors Considered in a Minimization Analysis

Minimization, the requirement that intercepting agents limit the extent to which a wiretap seizes and intrudes upon non-pertinent, purely private communications, is a central component of Title III's stringent regime balancing enforcement interests with privacy rights. *See United States v. Simels*, No. 08-CR-640 (JG), 2009 WL 1924746, at *11 (E.D.N.Y. July 2, 2009) (while private, non-pertinent conversations will inevitably be captured in wiretap surveillance, "it is equally clear that the mandated effort to identify and not intercept such conversations plays 'a central role in the statutory scheme'") (*quoting United States v. Giordano*, 416 U.S. 505, 528 (1974)).

Whether the minimization requirements of Title III set forth in 18 U.S.C. § 21518(5) have been met is a fact-specific inquiry that focuses on the reasonableness of the actions of the agents conducting the surveillance. *See Scott v. United States*, 436 U.S. 128, 140-41 (1978) ("[b]ecause of the necessarily ad hoc nature of any determination of reasonableness, there can be no inflexible rule of law which will decide every case[;]" . . . "the issue of compliance will depend on the facts and circumstances of each case"). It is the government's burden to make a prima facie showing of compliance with § 2518(5)'s minimization requirements. *United States v. Rizzo*, 491 F.2d 215, 217 n. 7 (2d Cir. 1974). Once a prima facie showing is made, the burden shifts to the defendant to show that, despite a good faith compliance with the minimization requirements, "substantial unreasonable interception of non-pertinent conversations occurred," to the extent warranting suppression of evidence. *United States v. Ianniello*, 621 F.Supp. 1455, 1470 (S.D.N.Y.1985), *aff'd*, 824 F.2d 203 (2d Cir.1987); *see also*

18 U.S.C. § 2518(10)(a)(i) (aggrieved persons may move to suppress communications that were "unlawfully intercepted").

In analyzing the reasonableness of the implementation of the intercepts of investigators, the court must consider such factors as the extent of the conspiracy and number of co-conspirators under surveillance, the stage of the investigation, the length of the conversations being monitored, and the use to which the telephone is typically put by the conspiracy. *Scott*, 436 U.S. at 140-42. The percentage of non-pertinent calls is a factor, though not a "sure guide to the correct answer." *Scott*, 436 U.S. at 140. Non-pertinent calls may properly be intercepted under a variety of circumstances, including non-pertinent calls under two minutes pursuant to which investigators have not had a chance to "identify the caller or characterize the conversation." *Scott*, 436 U.S. at 140; *Capra*, 501 F.2d at 275-76 (holding in the context of wiretap on a payphone that two minutes was "'too brief a period for an eavesdropper even with experience to identify the caller and characterize the conversation") (*quoting United States v. Bynum*, 485 F.2d 490, 500 (2 Cir. 1973), *judgment vacated on other grounds*, 417 U.S. 903 (1974)).

In this case, the government has evinced "a pervasive disregard of the minimization requirement," *United States v. Cirillo*, 499 F.2d 872, 881 n.7 (2d Cir. 1974), warranting suppression.

2. The Minimization Errors Require Suppression

As set forth in the accompanying declaration of former Hedge Fund analyst David Zheng (attached hereto as Exhibit D), counsel for Goffer and Drimal have conducted an extensive analysis of the wiretaps on their clients' telephones, summarizing and categorizing the calls and call-minutes, in order fully to capture the subject matter and extent of the interceptions

at issue. Both the calls themselves and the timed increments were individually categorized under five headings:

(1) mention or discussion of the stocks referred to in the indictment: HLT, KRO, AXCA, and COMS

(2) mention or discussion of stocks referred to in discovery as additional evidence of alleged insider trading, or stock tips discussed: PFCB, BSX, CCU, ATYT, AMD, ADS, AV, ALXN, NUS, AW, CSG, VTIV; as well as alleged "conspiracy evidence," including arrangements to meet alleged co-conspirators and discussion of prepaid cell-phones

(3) mention or discussion of stocks not listed above

(4) personal or social conversations, calls to voicemail (calls hung up or not connected were also placed in this category, but were not included in the total number of completed calls)

(5) privileged conversations

The results of the analysis reveal a staggering capture of non-pertinent, purely personal calls on both wiretaps, and pervasive monitoring errors:

(a) Drimal Wiretap

Total Pertinent Calls/Call Minutes

Only 0.5 % of the total calls for which a working recording was provided refer to stocks listed in the indictment. Alternatively, if one analyzes the calls in terms of call-minutes, only 0.9% of the call-minutes refer to stocks listed in the indictment. If one includes stocks referred to in discovery as additional evidence of alleged insider trading or stock tipping, as well as other alleged "conspiracy evidence," the percentages become, respectively, 1.8% of calls or 2.4% of call-minutes. In other words, even taking the most generous view of relevant calls (discussions of stocks named in the indictment as well as stocks that may be evidence of insider trading), 98.2% of the calls captured by the government and 97.4% of the call-minutes involved non-pertinent conversations. This is an unreasonably high percentage, evidencing a total failure

to comply with Title III's minimization requirements. This conclusion is borne out by a further analysis of non-pertinent calls, which reveals a pattern of recording private calls between Drimal and his wife, Drimal and his children, Drimal and other family members, as well as non-pertinent and irrelevant calls between Drimal and his broker.

Privileged Calls

Of the total calls, 11% of calls, or 13% of call minutes, involved calls between Drimal and his wife. These calls were easy to identify, since most occurred betweenDrimal's cell-phone (the wiretapped phone) and his home telephone number, and the remaining occurred between Drimal's cell-phone and his wife's cell-phone.

These calls include deeply personal conversations about private marital matters, vividly illustrating Judge Gleeson's comment in *Simels* that "all one has to do to appreciate the wisdom of Title III's stringent [DOJ] approval requirements is listen to a recording of a wholly innocent conversation that should never have been recorded." *Id.*, 2009 WL 1924746, *11.

Not one of these calls involved any discussion of any stock or any discussion of insider trading activity. This could hardly have been a surprise to the government, since its cooperator, David Slaine, would have apprised them that Drimal's wife played no role whatsoever in Drimal's trading.

Notably, the minimization instructions, which each monitoring agent was required to sign, the agent was required to turn off the recording and listening devices once he/she had determined that the communications were privileged. *See* Drimal Minimization Instructions at ¶ 8, 20 (attached as Exhibit E). The paragraph in the Minimization Instructions regarding martial communications is categorical:

> Husband-Wife
>
> There is also a privilege concerning communications between spouses. You are to discontinue monitoring if you discover that you are intercepting a personal communication soley between a husband and wife. If it appears that a third person is present during this communication, however, the communication is not privileged. So, too, if the communication deals not with private matters between husband and wife, but instead with ongoing as opposed to past violations of law, it is not a privileged communication.

Id. at ¶ 20.

The Minimization Instructions also contain a clear-cut prohibition on capturing calls – just like the calls between Drimal and his wife – that reflect a pattern of innocence:

> **Patterns of Innocence**
>
> If, after several days or weeks of interception, we have learned that communications between one or more of the TARGET SUBJECTS and a particular individual or individuals are invariably innocent, non-crime related matters, then a "pattern of innocence" exists and such communications should not be recorded, listened to, or even spot monitored, once such an individual has been identified as a party to the communication.

Id. at ¶ 10. If the monitoring agents did not know in advance of the wiretapping that calls between Drimal and his wife would be entirely innocent – something they should have known – then this fact was readily apparent after the first couple of calls between them.

Despite these directions, the agents intercepted 178 calls between Drimal and his wife, and only minimized 143 of these calls. The government cannot claim the two-minute "safe harbor," when it would only take a second for a monitoring agent to identify that the call is to a spousal phone and no matter what its subject matter, would not be pertinent to the investigation. *See Scott*, 436 U.S. at 140 (permitting interception of calls under two minutes where investigators have not had a chance to "identify the caller or characterize the conversation").

Family Calls

The cavalier disregard for marital privacy is matched by a disregard for family privacy. Despite the fact that the government was well aware (or should have been aware) prior to commencing the wiretap that none of Drimal's children, siblings, and in-laws had any involvement in his trading, and despite strict minimization instructions that calls between "invariably innocent" individuals, the agents intercepted 330 calls between Drimal and family members, including his children (all under 18), his siblings and in-laws. These represent 20% of the total completed calls, or 26% of the total call minutes on the wiretap. 58, or 18%, of the calls between family members exceeded two minutes.

Broker Calls

Finally, the agents inappropriately captured 263 calls between Drimal and his broker, who was not listed as a target subject. There was no justification for intercepting Drimal's calls to his broker, since Drimal's trading records were readily available to the government.

Improper Interception of Wholly Unrelated Party

The unreasonableness of the minimizations in this case is exemplified in the fact that for five days**,** due to a technical malfunction, the government erroneously intercepted up to 80 calls that were made over an entirely different telephone by someone who was wholly unrelated to Craig Drimal and this case. A few of these calls were conducted in Spanish but most were in English. There is simply no justification for the monitoring agents' failure to recognize this malfunction immediately and cease monitoring those calls.

(b) Goffer Wiretap

As with the Drimal wire, the number of calls or call-minutes that reference the stocks in the indictment is a tiny percentage of the interceptions. Only 0.2% of the total completed calls

refer to stocks listed in the indictment. Alternatively, if one analyzes the calls in terms of call-minutes, only 0.6% of the call-minutes refer to stocks listed in the indictment. If one includes other stock tips referred to in discovery as potential trial evidence, the percentages become, respectively, 12.7% of calls or 17.8% of call-minutes. Thus, even taking the most generous view of relevant calls (discussions of stocks named in the indictment as well as other stock tips), 87.1% of the calls captured by the government and 81.6% of the call-minutes involved non-pertinent conversations. This too is an unreasonably high percentage, particularly, as it is based on the government's erroneous assumption that these discussions of stock tips represent evidence of insider trading activity.

VII.

THE WIRETAPS SHOULD BE SUPPRESSED BECAUSE THEY WERE DISCLOSED IN VIOLATION OF TITLE III

The wiretaps in this case should also be suppressed because of serious violations of Title III's notice and disclosure requirements. First, the government turned over a subset of the wiretap interceptions obtained in this case to the SEC. Second, the government turned over the entirety of the interceptions obtained on the defendants' telephones in this case to the defendants in another case, ostensibly as part of its compliance with its Rule 16 obligations, and waited five months before advising defendants in this case of that fact. Neither disclosure complied with Title III's strict rules on the disclosure of the interceptions. The appropriate remedy, both statutory and constitutional, is suppression. Alternatively, the wiretaps should be excluded because they were disclosed in violation of Title III's sealing requirements.

A. Suppression is Required Because the Disclosures of Wiretap Recordings to the SEC and to the Defendants in *U.S.A. v. Rajaratnam* Violated the Disclosure Requirements of Title III

In *United States v. Giordano*, 416 U.S. 505 (1974), the Supreme Court explained what kinds of Title III violations merit suppression under its suppression provision, 18 U.S.C. § 2518(10)(a)(i). First, the Court expressed its belief that "Congress intended to require suppression 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." *Giordano*, 416 U.S. at 527. Second, the Court noted that the specific provision at issue in that case "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; *see also United States v. Chavez*, 416 U.S. 562 (1974) (suppression appropriate for violation of statutory provision that plays "a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance"); *United States v. Marion*, 535 F.2d 697 (2d Cir. 1976) ("'The words unlawfully intercepted are themselves not limited to constitutional violations,' but include a failure to satisfy requirements of Title III as well") (*quoting Giordano*, 416 U.S. at 527).

Clearly, the disclosure provisions of Title III play "central," "functional" role in balancing the competing privacy and law enforcement interests at the heart of Title III. Indeed, the procedures governing disclosure in Title III play as important a role as the procedures governing interception. As the Second Circuit acknowledged recently in *SEC v. Rajaratnam*, 2010 WL 3768060 (2d Cir. September 29, 2010), "there is a distinct privacy right against the disclosure of wiretapped private communications that is separate and apart from the privacy right against the interception of such communications . . . The tapes will have been listened to, and the

privacy rights of the parties to the conversations will forever have been harmed by the very act of exposure." *Id.* at *6.

The question now becomes whether the government violated Title III in turning over a subset of the wiretaps in this case to the SEC without court authorization, and in turning over the entirety of the wiretaps in this case to defendants in another.

The government has not disputed that the disclosure to the SEC was improper. Rather, it maintains that the disclosure to the SEC was inadvertent. It is our understanding that the recordings were provided to the SEC under separate cover. At the very least, this matter should be the subject of a hearing.

With regard to the disclosures to the defendants in *United States v. Rajaratnam*, the government relies on 18 U.S.C. 2517(2) and Fed.R.Crim.P. 16. Neither provision, however, authorized the unprecedented disclosure that occurred here: the provision of sealed wiretap materials pre-indictment to defendants in another criminal case, without notice to the aggrieved parties, without a court order permitting disclosure, and without any apparent effort to redact non-pertinent, privileged and patently confidential communications.

No court has held that 18 U.S.C. § 2517(2) authorizes the kind of disclosure that occurred here. That provision permits officers to "use" the communications or derivative evidence to the extent "appropriate to the proper performance of their official duties." *Id.* Courts have interpreted this provision narrowly to permit limited and carefully-curtailed disclosures for law enforcement purposes. *See, e.g., United States v. Gerena*, 869 F.2d 82, 84-86 (2d Cir.1989) (use of intercepted communications in trial preparation authorized by section 2517(2)); *United States v. Ricco*, 566 F.2d 433, 435 (2d Cir.1977) (disclosure of intercepted conversations to a witness for the purpose of making voice identification is an appropriate use of intercepted

wiretap communications).[14] While the Court in *SEC v. Rajaratnam* indicated that the "USAO ha[d] lawfully disclosed wiretapped communications to criminal defendants pursuant to § 2517(2)," *id.* at *10, that statement occurred outside a full consideration of the relevant facts, including that the *entirety* of the *Goffer* wiretaps had been provided to defendants in *Rajaratnam*, despite the fact that only *seven* of the calls on these recordings captured the voice of a defendant in *Rajaratnam*. In short, no case has authorized the kind of whole-sale discovery dump that occurred here under the guise of compliance with Fed.R.Crim.P. 16 obligations.

Notably, in *Gerena*, the Second Circuit held that the final arbiter of any third-party disclosures is the court, not the government. *Id.* at 86 ("we believe that the district court must assume responsibility for the balancing required" between the public's right of access and defendants' privacy interests). It is also significant that the disclosure that occurred here took place pre-indictment, before a district judge was assigned to the case. *See Certain Interested Individuals, John Does I-V, Who Are Employees of McDonnell Douglas Corp. v. Pulitzer Pub. Co.*, 895 F.2d 460, 466 (8th Cir. 1990) (holding in the context of disclosure of Title III materials, "the absence of an indictment weighs heavily in favor of the privacy interests and non-disclosure").

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[14] *See also United States v. VanMeter*, 278 F.3d 1156, 1165 (10th Cir. 2002) ("federal agent was within his official duty when he briefly quoted and paraphrased intercepted telephone communications to establish probable cause for [defendant's] arrest"); *United States v. Martinez*, 101 F.3d 684, 996 WL 281570, *2 (2d Cir. May 21, 1996) (Title III authorizes government to play wiretap recordings to witness in course of investigation); *Application of Newsday, Inc.*, 895 F.2d 74, 78 (2d Cir. 1990) (noting that "use" in § 2517(2) means both derivative use and also "quotation of the contents of intercepted communications"); *United States v. O'Connell*, 841 F.2d 1408, 1417 (8th Cir. 1988) (disclosures to secretaries and intelligence analyst probably valid under section 2517(2)); *American Friends Service Committee v. Webster*, 720 F.2d 29, 73 (D.C.1983) (noting that Title III's legislative history contemplated the "use of the contents of intercepted communications, for example, to establish probable cause for arrest, to establish probable cause to search, or to develop witnesses"); *United States v. Rabstein*, 554 F.2d 190, 193 (5th Cir.1977) (section 2517(2) authorizes use of conversations for voice identification).

Similarly, there is no authority for the proposition that the government's Rule 16 obligations in another case trump the stringent privacy protections of Title III, such that the government is not even obligated to seek court permission or provide notice to defendants prior to wholesale disclosure of their wiretap materials. *Cf. Gerena*, 869 F.2d at 86. Moreover, Rule 16, at most, requires the government to turn over items that contain a defendant's recorded voice, items it plans to use at trial, and items that are material to the defendant's preparation of his defense. *See* Fed.R.Crim.P. 16(1)(e). Clearly, the entirety of the thousands of recordings on the Goffer, Drimal and Goldfarb recordings do not come within these categories. Indeed, it is notable that only seven of the thousands of phone-calls intercepted on the wiretaps in *United States v. Rajaratnam* were provided in discovery to the defendants in *United States v. Goffer.* The government effectively conceded that the wholesale dump was inappropriate in *SEC v. Rajaratnam*, when it agreed that the SEC had not right to receive irrelevant conversations. *Rajaratnam*, 2010 WL 3768060 at *21

These blatant violations of Title III's disclosure requirements mandate suppression. At the very least, a hearing should be held to explore the circumstances surrounding both the alleged 18 U.S.C. § 2517(2) disclosure and the "inadvertent" disclosure to the SEC. Such hearing should also explore the reasons behind the late notice (by five months) of the disclosure made in *United States v. Rajaratnam* to defendants in violation of 18 U.S.C. § 2518(9), and whether suppression is separately warranted based on any possible improper collusion between the USAO and the SEC in circumventing Title III. *Cf.*, *United States v. Scrushy*, 366 F.Supp.2d 1134, 1137 (N.D.Ala.2005) (suppressing deposition given by defendant in an SEC civil investigation because, unbeknownst to the defendant, the civil and criminal

investigations had "merged" and the USAO had, inter alia, instructed the SEC on how to tailor the deposition questions).

B. Suppression is Required Because the Disclosures of Wiretap Recordings to the SEC and to the Defendants in *U.S.A. v. Rajaratnam* Violated the Defendants' Constitutional Rights to Privacy

Suppression of the wiretaps is separately required because the unauthorized disclosures that occurred here violated the defendants' constitutional right to privacy.

As the Supreme Court pointed out in *Bartnicki v. Vopper*, 532 U.S. 514 (2001):

> the disclosure of the contents of a private conversation can be an even greater intrusion on privacy than the interception itself. As a result, there is a valid independent justification for prohibiting such disclosures by persons who lawfully obtained access to the contents of an illegally intercepted message, even if that prohibition does not play a significant role in preventing such interceptions from occurring in the first place.

Id. at 533 (emphasis added); *see also Gelbard v. United States*, 408 U.S. 41, 51-52 (1972) ("[c]ontrary to the Government's assertion that the invasion of privacy is over and done with, to compel the testimony of [ ] witnesses compounds the statutorily proscribed invasion of their privacy by adding to the injury of the interception the insult of compelled disclosure"); *Fultz v. Gilliam*, 942 F.2d 396, 402 (6th Cir. 1991) ("[e]ach time the illicitly obtained recording is replayed to a new and different listener, the scope of the invasion widens and the aggrieved party's injury is aggravated").

These principles informed the Second Circuit's conclusion in *Rajaratnam* that "there is a distinct privacy right against the disclosure of wiretapped private communications that is separate and apart from the privacy right against the interception of such communications." *Rajaratnam*, 2010 WL 3768060, at *6. In effect, improper disclosure of wiretap communications, even if originally properly seized, is another "search" under the Fourth Amendment – invading an individual's private space, and exposing their most personal moments

to public glare. The appropriate remedy for this is suppression. *See, e.g., Amanuel*, 615 F.3d at 126 ("blanket suppression of the intercepted communications and all evidence derived therefrom" may be appropriate in the context of constitutional violations).

Here, it is beyond dispute that the defendants' privacy rights have been violated by the improper disclosures that occurred here: hundreds of intensely private calls that have absolutely no bearing on the facts of this case were turned over to defendants in another case, who promptly assigned a "listening team" of lawyers to review and analyze every minute of the communications. Viewing each disclosure as another "seizure," it is clear that the defendants' Fourth Amendment rights to privacy have been irreparably violated. The only meaningful remedy is suppression. *See Herring v. United States*, 129 S.Ct. 695, 702 (2009) ("[t]o trigger the exclusionary rule, [government] conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system").

C. Exclusion is Required Because the Disclosures of Wiretap Recordings to the SEC and to the Defendants in *U.S.A. v. Rajaratnam* Violated the Sealing Requirements of Title III

The wiretaps obtained in this case are also subject to exclusion under 18 U.S.C. § 2518(8)(a), which precludes the government's use of wiretaps at trial under certain circumstances if the required seal is absent. *Id.* ("[t]he presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefore under subsection (3) of section 2517"). As the Second Circuit recently explained in United *States v. Amanuel*, 615 F.3d 117 (2d Cir. 2010) the application of 18 U.S.C. § 2518(8)(a) requires a two-part inquiry: "First we determine whether the government complied with the recordation and sealing requirements. If the government has not complied, we determine

whether it offered a 'satisfactory explanation' for its failure to do so." *Id.* at 127 (*quoting Hermanek*, 289 F.3d at 1084). If the Government fails to satisfy both parts of the inquiry, the evidence is excluded. *Id.* In *Amanuel*, the state police investigators had visually monitored pager interceptions and then entered them in a handwritten log, rather than electronically recording them as required by the warrant in question. The Court agreed with the district court's conclusion that handwritten transcription did not satisfy the recording requirement of Title III, and, as such, could not satisfy the statute's sealing requirement either. Moreover, there was no "satisfactory explanation" for the failure to record and seal as required under Title III, since the police had failed to use a pager recorder that was readily available to them. *Id.* at 127. The appropriate remedy was exclusion of the interceptions at trial: "As the pager wiretap evidence before us violated the recording and sealing requirements, the proper remedy to address those errors is the prohibition of the use of those interceptions in ways that would otherwise be permitted by § 2517(3). *Id.* at 129.

Here, the government obtained an unsealing order from the Hon. Loretta Preska, which permitted the government to use and disclose the wiretaps only under the following two scenarios: "when these [FBI] agents give testimony under oath or affirmation in any proceeding, including when swearing out complaints against certain individuals and providing evidence to the grand jury." *See* October 14, 2009 Preska Order. Notably, it did not permit the disclosures that occurred here: (1) the disclosure of key wiretap recordings to a regulatory agency that did not, on its own, have the power to conduct wiretaps, nor is entitled to receive copies of the wiretaps under any other provision of Title III; and (2) disclosure of the entirety of all interceptions to defendants in a separate criminal case, purportedly in fulfillment of Rule 16

obligations, although concededly, only one defendant in that case is captured in a handful of calls.

Moreover, there is no "satisfactory explanation" for these disclosures. Even if the disclosure to the SEC was inadvertent, which the defense disputes, such cavalier disregard of the sealing requirements of Title III does not come close to a "satisfactory" explanation. There is no inadvertence claim with respect to the wholesale disclosures to the defense team in *U.S. v. Rajaratnam*. Nor were those disclosures justified under any other provision of Title III. Accordingly, pursuant to 18 U.S.C. § 2518(8)(a) and the principles set forth in *Amanuel*, the wiretaps should be excluded at trial.

D. The Court Should Order a Hearing into the Circumstances of the Disclosures

If the Court does not suppress and/or exclude the wiretap interceptions on the basis of improper disclosures, we ask that this Court conduct a hearing into the circumstances of the disclosures. These disclosures implicate the lawfulness both of the wiretap interceptions obtained in this case, and their use in any proceeding. As the Second Circuit held in *Rajaratnam*, additional disclosure of unlawfully obtained wiretap materials may "compound" the "invasion of privacy" of the defendants and others. *Id.* at *20 (*quoting Globe Newspaper*, 729 F.2d at 54). In the context of wiretap interceptions, therefore, there is a heightened need for a hearing on the defendants' motion to suppress to ensure that the seizing and use of the interceptions is fully in compliance with Title III, since a remedy at the appellate level may come too late. *See id.* 2010 WL 3768060, at *6 ("the privacy interests harmed by the disclosure order here could not be adequately remedied on final appeal").

CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court dismiss the indictment and suppress and/or exclude the wiretap evidence.

Respectfully Submitted.

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