UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): Court of Appeals Docket No. Pending (SDNY Docket No. 09-CIV-08811 (JSR))

Caption [use short title]

Securities and Exchange Commission
v.
Galleon Management, LP (Rajaratnam & Chiesi)

Motion for: Emergency Motion for Stay Pending Appeal and/or Petition for Mandamus

Set forth below precise, complete statement of relief sought:

Appellant requests on an emergency basis a stay pending appeal, a petition for a writ of mandamus, or an administrative stay to permit full consideration of the stay motion and petition. Appellant seeks relief from a February 9, 2010 order compelling him to disclose in civil discovery Title III wiretap intercepts and materials that are under seal in a pending criminal action against Appellant and which Appellant will move to suppress.

MOVING PARTY: Raj Rajaratnam
☐ Plaintiff ☑ Defendant
☑ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: Securities and Exchange Commission

MOVING ATTORNEY: Robert H. Hotz, Jr.

OPPOSING ATTORNEY: Valerie M. Sczcepanik

[name of attorney, with firm, address, phone number and e-mail]

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Court-Judge/Agency appealed from: Southern District of New York, Honorable Jed S. Rakoff

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know
Opposed in DCt.

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☑ Yes ☐ No
Has this relief been previously sought in this Court? ☐ Yes ☑ No
Requested return date and explanation of emergency: February 11, 2010.

The Southern District has ordered Title III materials turned over by February 15, 2010. Given that the Court will not be open from February 12-15, 2010, immediate action is requested.

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney: Robert H. Hotz, Jr. **Date:** 2/11/10

Has service been effected? ☑ Yes ☐ No [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED DENIED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: By:

Form T-1080

No. 10-

IN THE

United States Court Of Appeals

FOR THE SECOND CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

v.

GALLEON MANAGEMENT, LP, *ET AL.*,
Defendants

(RAJ RAJARATNAM and DANIELLE CHIESI,

Defendants-Appellants).

IN RE RAJ RAJARATNAM and DANIELLE CHIESI

Petitioners.

JOINT EMERGENCY MOTION FOR STAY PENDING APPEAL AND/OR PETITION FOR A WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, FOR A TEMPORARY ADMINISTRATIVE STAY PENDING FULL CONSIDERATION OF THE MOTION FOR A STAY AND PETITION

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ATTACHMENTS

INTRODUCTION

Appellants-Petitioners Raj Rajaratnam and Danielle Chiesi respectfully request an emergency stay pending appeal from an order entered late in the afternoon of February 9, 2010, compelling them to disclose to the Securities and Exchange Commission and to every other requesting private party in this case 18,150 wiretap interceptions and related materials that are under seal in a pending criminal action against Mr. Rajaratnam and Ms. Chiesi. The district court (Rakoff, J.) ordered that the disclosure be made by February 15, 2010. *See* Court Order of February 9, 2010 ("2/9/10 Order") (Attachment 1). That same day, both Appellants moved the district court for a stay pending appeal, for a temporary administrative stay to permit this Court's consideration of a stay pending appeal, and for certification pursuant to 28 U.S.C. § 1292(b). Those motions were denied at approximately 1:00 p.m. on February 11, 2010. *See* Court Order of February 11, 2010 (Attachment 2). Given this Court's scheduled closures on February 10 and February 12-15, the timing of the district court's orders has left this Court less than one business day to consider this motion for a stay and petition for a writ of mandamus. Accordingly, the Appellants sought the SEC's consent to a brief two-day stay of the order, until February 17, 2010, to afford the Court a modicum of time to consider this motion, but the SEC refused, claiming prejudice, notwithstanding that trial is not scheduled to commence for six months and the SEC never sought expedited consideration of its motion to compel. Mr. Rajaratnam and Ms Chiesi therefore request that this Court issue on an emergency basis on or before February 15, 2010 a stay pending appeal, a writ of mandamus, or a temporary administrative stay to permit full consideration of the motion for a stay and petition. This Court has jurisdiction to review the ordered disclosure of Title III materials under the collateral order doctrine, *United States v. Gerena*, 869 F.2d 82, 83-84 (2d Cir. 1989), and its authority under the All Writs Act, 28 U.S.C. §

1651, to grant a petition for a writ of mandamus, *see Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 607-608 (2009).

A stay is warranted because the district court's order forces two defendants in a pending criminal action to disclose in civil discovery almost 20,000 sealed, untested wiretaps of their own private telephone conversations, as well as the underlying applications, (i) prior to the materials' disclosure in any criminal or public proceeding, (ii) prior to consideration of the Appellants' motion to suppress those materials and thus a determination of the wiretaps' legality by the court with jurisdiction over the sealed wiretaps (Judge Holwell), and (iii) prior to conclusion of the pending criminal prosecution. That order contravenes the plain text of the wiretap statute, controlling precedent from this Court and the Supreme Court, and the long-established litigation position of the federal government opposing such disclosures – including in briefs filed less than a year ago with this Court. To the Appellants' knowledge, no court – none – has ever ordered such extensive disregard of Title III's strict limitations and privacy protections, and no court has ever allowed the use of wiretaps in civil litigation before adjudication of a motion to suppress or while a criminal prosecution is pending. Absent a stay, the district court's unprecedented order "would be effectively unreviewable on appeal * * * since the alleged damage to appellants' privacy rights [will] have occurred" irretrievably once the ordered disclosure to the SEC and the 15 other parties to the civil litigation takes place. *Gerena*, 869 F.2d at 83.

STATEMENT

1. In Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.*, Congress prescribed a "comprehensive scheme for the regulation of wiretapping," *Gelbard v. United States*, 408 U.S. 41, 46 (1972), prescribing which criminal law enforcement agencies may obtain wiretaps and for which offenses, as well as elaborate rules for

authorizations, conducting wiretaps, and the use and disclosure of wiretap information. *See In re Application of Newsday, Inc.*, 895 F.2d 74, 76 (2d Cir. 1990). As relevant here, Title III separately enumerates the uses that can be made of such information, generally restricting its usage to the enforcement of specified criminal laws. 18 U.S.C. § 2517; *see also* 18 U.S.C. § 2510(7) (restricting authorized law enforcement duties to the enforcement of designated laws). Those enumerated laws do not include insider trading under 15 U.S.C. § 78j(b), which is the cause of action at issue in this civil case.[1]

To enforce Title III's strong privacy protections and its attendant strict limitations on the use of wiretap information, Title III expressly requires that the contents of wiretaps be immediately sealed upon conclusion of the wiretapping, 18 U.S.C. § 2518(8), and that notice be provided prior to the use of the wiretaps in any court proceeding, in order to permit an "aggrieved person" – an individual whose communications have been intercepted, 18 U.S.C. § 2510(11) – to move to suppress those wiretaps before they are used in that proceeding. 18 U.S.C. §§ 2518(9) & (10); *see also* 18 U.S.C. § 2511(1)(c); *United Kingdom v. United States*, 238 F.3d 1312, 1324 (11th Cir. 2001) (noting the United States' position that "court approval would be required before *any* disclosure of grand jury or wiretap information could be made") (emphasis in original). Finally, Title III expressly authorizes the disclosure of wiretap applications for "good cause" shown. 18 U.S.C. § 2518(8)(b). Title III, however, contains no parallel good-cause exception for the disclosure of the intercepted communications themselves.

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[1] SEC employees are not "law enforcement officer[s]" within the meaning of Title III because Congress expressly limited that phrase to a state or federal officer "empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter" or an attorney "authorized by law to prosecute or participate in the prosecution of such offenses." 18 U.S.C. § 2510(7). The SEC has no independent criminal investigatory or prosecutorial authority for any of the offenses enumerated in Title III.

2. On October 16, 2009, the United States Attorney's Office ("USAO") and the SEC simultaneously filed criminal and civil complaints against Mr. Rajaratnam, Ms. Chiesi, and others based on their alleged involvement in an insider trading conspiracy.[2] The criminal complaint revealed that the government had intercepted thousands of telephone conversations and communications as part of its criminal investigation. Those conversations involve over 18,000 untested intercepted communications from ten different telephones, including the Appellants', and capture the private communications of scores of individuals over a sixteen-month period. Included among the calls intercepted were private discussions between Mr. Rajaratnam and his wife, his minor daughter, other family members, and his doctor. *See* 1/25/10 Transcript of Hearing on SEC Motion to Compel ("Hr'g Tr.") at 18 (Attachment 4).

The USAO subsequently indicted Mr. Rajaratnam and Ms. Chiesi on sixteen counts of insider trading and conspiracy.[3] Following indictment, pursuant to Federal Rule of Criminal Procedure 16 and the requirements of the Fifth and Sixth Amendments, the USAO provided Mr. Rajaratnam and Ms. Chiesi with copies of the wiretap applications and the 18,150 intercepted communications. Prior to providing those materials, the USAO requested that Mr. Rajaratnam and Ms. Chiesi stipulate in the criminal case that the USAO could provide copies of the intercepts to the SEC. Mr. Rajaratnam and Ms. Chiesi refused to so stipulate.[4]

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[2] The government improperly disclosed Title III information in the complaints and in the public detention hearing without court authorization and without prior notification to Appellants in violation of 18 U.S.C. § 2518(9). *See United States v. Giordano*, 158 F. Supp. 2d 242, 246 (D. Conn. 2001) ("Until the defendant has had this opportunity [to inspect the order authorizing the surveillance and the documents supporting the request for the authorization], the fruits of an electronic surveillance should not be publicly disseminated.").

[3] A superseding indictment was issued on February 9, 2010.

[4] Before Judge Rakoff, the USAO has asserted the independent authority to release the wiretaps to the SEC *without* court approval. *See* Hr'g Tr. at 10, 27. A motion for a protective order to prevent such disclosure is pending before Judge Holwell.

On December 28, 2009, the SEC issued a civil discovery request to Mr. Rajaratnam and Ms. Chiesi for copies of all 18,150 intercepted communications and the wiretap applications. When the Appellants opposed the demand as precluded by Title III, the SEC filed a motion to compel. Late in the afternoon of February 9, 2010, the district court ordered Mr. Rajaratnam and Ms. Chiesi to produce the wiretap materials to the SEC by February 15, 2010. The court further ordered Mr. Rajaratnam and Ms. Chiesi to "promptly produce the same materials to any" of the "other [fifteen] part[ies] to this case who so demand[] in writing." 2/9/10 Order at 6.

In so holding, the court acknowledged that Title III itself "specifies the conditions under which the Government is authorized to disclose the contents of wiretap recordings," *id.* at 4, and that this Court recently held that "turning Title III into a general civil discovery mechanism would simply ignore the privacy rights of those whose conversations are overheard," *id.* at 3 (quoting *In re Application of the New York Times Co. to Unseal Wiretap Materials*, 577 F.3d 401, 407 (2d Cir. 2009), and *In re Application of NBC,* 735 F.2d 51, 54 (2d Cir. 1984) (internal quotation marks omitted)). The court nevertheless concluded that "principles of civil discovery" permitted the court to supplement Title III's terms and order the broad disclosure by the criminal defendants of their (and other persons') intercepted communications prior to the wiretaps' disclosure in any criminal proceeding, prior to the adjudication of a motion to suppress, and prior to the conclusion of the criminal prosecution, *id.* at 4-5. The district court distinguished this Court's decision in *New York Times* on the ground that government agencies enjoy civil discovery rights that "a purely private plaintiff" does not. *Id.* at 5 n.1. The court further held that issuance of a discovery-phase protective order was the "simple way to satisfy" "Congress' concern with privacy." *Id.* at 5.

On February 11, 2010, the district court denied the Appellants' motions for a stay pending appeal, for a temporary administrative stay to permit this Court to entertain a stay motion, and for certification under 28 U.S.C. § 1292(b).

ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 8, a stay pending appeal is warranted when (1) "the stay applicant has made a strong showing that he is likely to succeed on the merits;" (2) "the applicant will be irreparably injured absent a stay;" (3) issuance of the stay will not "substantially injure the other parties interested in the proceeding;" and (4) "the public interest" weighs in favor of a stay. *In re World Trade Center Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007). Each of those factors warrants a stay in this case.

First, Mr. Rajaratnam and Ms. Chiesi have a substantial likelihood of success on the merits. Less than six months ago, this Court reiterated its quarter-century-old rule that Title III does not permit the use of sealed wiretap materials as part of "general civil discovery." *In re Application of the New York Times Co. to Unseal Wiretap Materials*, 577 F.3d 401, 407 (2d Cir. 2009) (quoting *In re NBC*, 735 F.2d 51, 54 (2d Cir. 1984)). The district court nevertheless has compelled – based on nothing more than "principles of civil discovery," 2/9/10 Order at 4 – the wholesale disclosure of 18,150 private communications to sixteen different parties in a civil case. The court has done so, moreover, in advance of any lawful disclosure of those communications as part of criminal proceedings, in advance of the criminal court's opportunity to adjudicate a motion to suppress the materials as unlawfully obtained, and in advance of the defendants' criminal trial with its constitutional requirement of fair process. That complete displacement of Title III's textual limitations on the use and disclosure of wiretaps and the criminal court's jurisdiction over the sealed wiretaps not only is without precedent, but defies repeated decisions

of this Court and others forbidding the disclosure or discovery of such materials in advance of their lawful use under Title III precisely because "the disclosure of the contents of a private conversation can be an even greater intrusion on privacy than the interception itself." *Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001).

Second, this Court has already recognized that Title III's "overriding concern" for individual privacy, *Gelbard v. United States*, 408 U.S. 41, 48 (1972), not to mention the defendants' fair trial rights, will be irretrievably lost if wiretap communications are improperly disclosed in violation of the statute's terms and in advance of appellate review, *United States v. Gerena*, 869 F.2d 82, 83 (2d Cir. 1989).

Third, a stay pending appeal will not substantially injure other parties because an expedited appeal could resolve the issue in a timely fashion, would promote the privacy interests of all parties to the conversations, and is consonant with the United States government's longstanding opposition to such disclosures.

Fourth, the public interest favors a stay. Title III reflects Congress's balancing of the relevant interests and Congress struck that balance against the use of wiretaps for insider trading claims (both civil and criminal). 18 U.S.C. § 2516. Furthermore, a criminal defendant's fair trial rights take precedence over civil claims of access to information. That is particularly true when, as here, the government voluntarily chose to file and press its criminal and civil claims simultaneously, rather than awaiting completion of the criminal prosecution and its determination of the wiretaps' lawfulness, as well as the appropriateness *vel non* of each individual intercept's public disclosure in criminal proceedings.

Accordingly, this Court should grant on or before February 15, 2010, an emergency stay pending appeal or, in the alternative, a temporary administrative stay pending full consideration of the motion for a stay, or a writ of mandamus.

A. The Appellants Have a Substantial Likelihood of Success on the Merits.

The district court's conclusion that it takes nothing more than a civil discovery request to supplant Title III's strict limitations on the use and disclosure of intercepted communications is foreclosed both by statutory text and precedent. Title III is a "comprehensive scheme for the regulation of wiretapping," *Gelbard,* 408 U.S. at 46, and when disclosure is sought, Title III is the "statute on point," *New York Times*, 577 F.3d at 406, placing "strict limits on wiretapping and how it could be used," *NBC*, 735 F.2d at 53. For that reason, numerous courts of appeals have determined that "Title III prohibits all disclosures not authorized therein," *Smith v. Lipton*, 990 F.2d 1015, 1018 (8th Cir. 1993) (en banc).[5] This Court too has held that Title III "prohibits, in all but a few instances, the * * * disclosure of wire or oral communications," *see United States v. Marion*, 535 F.2d 697, 700 (2d Cir. 1976), and that there accordingly is a "strong presumption

[5] *See In re Grand Jury*, 111 F.3d 1066, 1078 (3d Cir. 1997) ("The statutory structure makes it clear that any interceptions of communications and invasions of individual privacy are prohibited unless expressly authorized in Title III."); *Lam Lek Chong v. Drug Enforcement Admin.*, 929 F.2d 729, 732-733 (D.C. Cir. 1991) (Title III is "a comprehensive statutory scheme" with "strictly limited disclosure provisions"); *United States v. Dorfman*, 690 F.2d 1230, 1232 (7th Cir. 1982) ("Title III implies that what is not permitted is forbidden * * * [and] [t]he implication is reinforced by the emphasis the draftsmen put on the importance of protecting privacy."); *Fultz v. Gilliam*, 942 F.2d 396, 401-402 (6th Cir. 1991) ("[Title III] implies that what is not permitted is forbidden."); *United Kingdom v. United States*, 238 F.3d 1312, 1322-1323 (11th Cir. 2001) ("Courts interpreting these provisions have held that [Title III] generally bars the disclosure of the contents of conversations intercepted through a wiretap absent a specific statutory authorization. *See, e.g., Nix v. O'Malley*, 160 F.3d 343, 351 (6th Cir. 1998) (noting that the federal wiretap statute permits disclosure in limited instances but that its plain language allows no additional exceptions)"); *United States v. Cianfrani*, 573 F.2d 835, 856 (3d Cir. 1978) ("Congress intended to regulate strictly disclosure of intercepted communications, limiting the public revelation of even interceptions obtained in accordance with the Act to certain narrowly defined circumstances.").

against disclosure of the fruits of wiretap applications," *New York Times*, 577 F.3d at 406 (emphasis in original).

Most importantly, this Court held in *NBC* that wiretaps cannot be turned over to a civil litigant for use in a civil case because "turning Title III into a general civil discovery mechanism would simply ignore the privacy rights of those whose conversations are overheard," *ibid.* Other courts agree. *See Smith*, 990 F.2d at 1020 (8th Cir. 1993); *County of Oakland v. City of Detroit*, 610 F. Supp. 364, 371 (E.D. Mich. 1984); *Dowd v. Calabrese*, 101 F.R.D. 427, 435 (D.D.C. 1984). Furthermore, allowing the disclosure of wiretaps in civil litigation, in advance of any criminal case or adjudication of a motion to suppress, violates Title III's rule that, "[u]ntil the defendant has had th[e] opportunity [to seek suppression], the fruits of an electronic surveillance should not be publicly disseminated." *United States v. Giordano*, 158 F. Supp. 2d 242, 246 (D. Conn. 2001).[6]

The Attorney General of the United States agrees that "Title III prohibits every disclosure that it does not explicitly authorize." Op. Off. Legal Counsel, *Sharing Title III Electronic Surveillance Materials with the Intelligence Community*, 2000 WL 33716983, at *8 (Oct. 17, 2000).[7] And just last year, the federal government (in an appeal authorized by the Solicitor

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[6] The district court cited (Order at 4) dictum in *In re High Fructose Corn Syrup Antitrust Litig.*, 216 F.3d 621 (7th Cir. 2000), but that case concerned consensual recordings to which Title III does not apply, *id.* at 624. Where Title III does apply, the Seventh Circuit's position is the opposite of the district court's: "what is not permitted is forbidden." *Dorfman*, 690 F.2d at 1232. The court's citation (Order at 4) of *Fleming v. United States*, 547 F.2d 872 (5th Cir. 1977), is even more unhelpful because the disclosure at issue there (i) postdated the criminal trial, (ii) was limited to material publicly disclosed at trial, and (iii) involved wiretaps the lawfulness of which was not in dispute, *id.* at 873, 875.

[7] Formal published OLC opinions embody the Attorney General's exercise of his authority to direct the legal positions of the Executive Branch, 28 U.S.C. §§ 511-512, and thus are "controlling on questions of law within the Executive Branch." Off. Legal Counsel, *Best Practices for OLC Opinions* 1 (May 16, 2005), *available at* http://www.justice.gov/olc/best-

General) told this Court that yet another extra-textual disclosure order of wiretaps must be overturned because, "'when addressing the disclosure of the contents of a wiretap,' the question is * * * 'whether Title III specifically authorizes such disclosure, not whether Title III specifically prohibits the disclosure.'" U.S. App. Br. at 16-17, *New York Times*, *supra* (endorsing *Smith*, 990 F.2d at 1018) (emphasis and internal quotation marks omitted); *see NBC*, 753 F.2d at 54 ("We agree with the government" that "turning Title III into a general civil discovery mechanism would simply ignore the privacy rights of those whose conversations are overheard.").

The district court ignored completely this Court's "strong presumption" against disclosure and concluded that all of those courts of appeals and the Attorney General were wrong. First, the court reasoned that this Court's decision in *In re Application of Newsday, Inc.*, 895 F.2d 74 (2d Cir. 1990), "long ago concluded" that Section 2517 permits public "access by * * * other means." 2/9/10 Order at 4. But that is not what *Newsday* held at all. *Newsday* held only that the public disclosure of Title III information was not limited to testimony under Section 2517(3) and, in fact, that Section 2517's other exceptions authorized the use of wiretaps in a search warrant application filed as a "public document" as part of a court record. 895 F.2d at 77. And once wiretap materials were lawfully disclosed as authorized by Section 2517, the public could obtain access "incident to, or after, their use under § 2517." *Id.* at 78.

The conclusion that the public can obtain access to those specific materials disclosed in a "public document" pursuant to Section 2517's specified exceptions, of course, does nothing to

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practices-memo.pdf (last visited Feb. 10, 2010). The Attorney General's analysis has been ratified by Congress, which found it necessary subsequently to amend Title III to allow law enforcement agencies to share wiretap information with intelligence officials. *See* 18 U.S.C. § 2517(6); USA PATRIOT ACT, Pub. L. No. 107-56, 115 Stat. 272 (2001).

support the district court's holding here that a civil litigant can obtain access completely *outside* of Section 2517 and *prior to* (not "incident to, or after," *ibid.*) any authorized disclosure under Section 2517. Quite the opposite, this Court stressed in *Newsday* that, "[a]side from these permitted uses [under Section 2517], Title III requires sealing of intercepted communications," *id.* at 77, and specifically distinguished the authorized use of intercepts as part of a "public document" from efforts to obtain materials that – as in this case – have not yet been publicly disclosed or "filed in the court's records," *ibid.* This Court reiterated just last year that *Newsday* is limited to publicly filed documents. *New York Times*, 577 F.3d at 407 & n.[8]

Second, and more fundamentally, the district court's conclusion that courts can graft additional disclosure provisions onto Title III renders pointless Congress's strict delimitation of the rules for the use and disclosure of wiretap evidence in Title III. It also renders nugatory Congress's textual decision in Section 2518(b) to limit its "good cause" exception to the wiretap applications and *not* to the underlying wiretaps. At bottom, the district court has rewritten Title III's list of permitted disclosures and uses to include an additional provision authorizing the release of the wiretaps themselves under the sweeping relevance standard of civil discovery – a standard far *more lenient* than the one Congress crafted for the arguably less sensitive wiretap applications. That is statutory reconstruction, not statutory interpretation. Courts, however, must

[8] The district court's statement (Order at 1) that the wiretaps at issue "have already partially [been] disclosed publicly" is difficult to understand. Presumably it refers to the 29 wiretap interceptions discussed in the government's criminal complaint. But that very limited disclosure itself violated 18 U.S.C. § 2518 and, in any event, could have no relevance to the propriety of the district court's release of the remaining 18,121 intercepted communications.

"apply the provision as written, not as [they] would write it." *See United States v. Demerritt,* 196 F.3d 138, 143 (2d Cir. 1999).[9]

Third, the district court's reliance (2/9/10 Order at 4) on Section 2517(3)'s authorization of disclosure while a person is "giving testimony under oath" in a judicial proceeding is misplaced. That provision addresses only what can be said by one who already possesses wiretap evidence; it says nothing about disclosing evidence to others outside of criminal enforcement proceedings and outside of Title III's strict terms. Beyond that, even if it allowed the limited disclosure of intercepted communications about which a person will testify, it provides no conceivable license to order the wholesale disclosure of 18,150 intercepts to sixteen parties in advance of any effort by any party to use the materials testimonially (or at all) in civil litigation. It is particularly inappropriate in a case where the criminal defendants have committed to filing a motion to suppress that will preclude the use of those wiretaps in *any* proceeding, civil or criminal. Indeed, if all it took to unloose wiretap materials from Title III's restrictions were the filing of a civil action contemporaneously with criminal prosecutions, then courts would likely see a feeding frenzy of parasitic civil litigation against criminal defendants by non-Title III federal agencies, state agencies, private parties, and the media seeking what Title III has for decades denied.

Finally, the district court's effort to escape this Court's recent decision in *New York Times* on the ground that the SEC enjoys civil discovery rights that are greater than "a purely private

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[9] Congress not only omitted a good-cause provision for release of the wiretaps themselves, but also declined to enact a parallel to Federal Rule of Criminal Procedure 6(e)(3)(c), which permits a civil litigant to obtain grand jury evidence upon a specialized showing of need. *United States v. Wong*, 78 F.3d 73, 83 (2d Cir. 1996). Critically, such disclosure can only occur by order of the criminal court in custody of that evidence. *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 225 (1979).

plaintiff" (2/9/10 Order at 5 n.1) cannot withstand scrutiny. It overlooks that the district court in its next breath ordered equivalent disclosure to the fifteen private parties in this litigation. In any event, the argument that the government can obtain for itself the very discovery that it opposed for *NBC* lacks any basis in law, logic, or rudimentary rules of a fair and even-handed judicial process. Certainly nothing in Title III's comprehensive scheme contains or authorizes such a double standard for civil discovery, nor would such a rule be workable, consistent with due process, in litigation (like this case) that involves both governmental and private parties.

In sum, Mr. Rajaratnam and Ms. Chiesi have a substantial likelihood of success for the simplest of reasons: the plain statutory text and a quarter century of precedent from this Court foreclose the district court's order compelling the criminal defendant – the "aggrieved person" under Title III, 18 U.S.C. § 2510(11) – to inflict on himself the very privacy intrusion against which Title III protects and to hand over to the SEC and fifteen private civil litigants nearly 20,000 intercepts of private telephone conversations in advance of an adjudication of their motion to suppress, in advance of the wiretaps' public disclosure under the terms carefully specified by Title III, and in advance of the pending criminal prosecution.

B. Disclosure Will Irreparably Injure the Appellants.

The harm of disclosure pending appeal would be profound. First, as this Court explained in *Gerena*, disclosure would inflict, without any opportunity for appellate review, the very "damage to appellants' privacy rights" that Title III was designed to prevent. 869 F.2d at 83.

Second, Mr. Rajaratnam and Ms. Chiesi have a statutory right to challenge the legality of the interceptions before they are disclosed in court proceedings, *see* 18 U.S.C. § 2518, which would be irreversibly compromised if they were forced to release thousands of private conversations to sixteen parties in a civil lawsuit. Indeed, if suppression were later granted, it

would be virtually impossible to unscramble the impact of disclosure and derivative uses of the material after the fact. Such a voluminous disclosure would also irretrievably violate the Appellants' Fourth, Fifth, and Sixth Amendment rights to privacy, due process, and a fair trial – rights that only the firm wall that Congress erected in Title III can reliably protect.

Third, throwing a protective order over such unauthorized disclosures does not cure the problem. *See* 2/9/10 Order at 5. In fact, the order presupposes the very question presented in this case – whether courts can handcraft such extra-textual disclosure processes for sealed, never-publicly-disclosed wiretap information the lawfulness of which has not yet been determined through a motion to suppress. Beyond that, the "disclosure of the contents of a private conversation can be an even greater intrusion on privacy than the interception itself," *Bartnicki*, 532 U.S. at 533, and thus inflicts a new harm separate and apart from the privacy intrusion caused by the interception. Indeed, "Congress' recognition of the victim's privacy as an end in itself recognizes that the invasion of privacy is not over when the interception occurs, but is compounded by disclosure." *Providence Journal Co. v. FBI*, 602 F.2d 1010, 1013 (1st Cir. 1979). And "[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." *Fultz v. Gilliam*, 942 F.2d 396, 402 (6th Cir. 1991). All the protective order does is encircle the harm the district court's order inflicted; it does not prevent the profound privacy intrusion caused by disclosure in the first instance. That is why Title III does not require a threshold volume of disclosures before its protections attach.

Moreover, the number of unauthorized and "inadvertent" disclosures of wiretap material that have already occurred in this case underscore the wisdom of the Supreme Court's admonition in *United States v. Sells Eng'g*, 463 U.S. 418, 419 (1983), that statutorily protected

material obtained in a criminal case cannot be released to civil enforcement agencies, in part because disclosures in civil litigation inherently "increase the risk of inadvertent or illegal release," *id.* at 432.[10] Nor does the district court's order provide *any* protection against the use of wiretap materials at the civil trial itself, which the district court has scheduled without regard to the timing of proceedings or a suppression motion in the criminal case. *See* 2/9/10 Order at 5.

In short, the harm to Mr. Rajaratnam and Ms. Chiesi (not to mention the scores of other people whose private conversations will be exposed) is both statutorily and constitutionally significant, and the harm is not staunched by the court's discovery-phase-only protective order.

C. Staying Disclosure Pending Appeal Will Not Harm the SEC.

A stay pending appeal (and certainly not a brief administrative stay pending full consideration of the motion to stay) will not inflict any cognizable harm on the SEC. First, expedited consideration of the appeal at a schedule of convenience to this Court would prevent undue disruption of the district court proceedings.

Second, the district court's and the SEC's protestations about the unfairness of the Appellants' possession of the wiretap materials (2/9/10 Order at 2, 4, 5) are without basis. The SEC chose to initiate this litigation simultaneously with the criminal prosecution, knowing full well that the Constitution and Title III would require disclosure of the wiretaps to the Appellants *and* knowing just as well that Title III's plain terms, court precedent, and four decades of practice under Title III had never permitted the SEC to obtain wiretaps prior to their disclosure pursuant to Section 2517, prior to the conclusion of criminal proceedings, and/or prior to a determination

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[10] In addition to the unauthorized disclosures noted in footnotes 2 and 8, *supra*, the USAO improperly disclosed 21 wiretap communications to the SEC on December 15, 2009. It also appears that the SEC was given unauthorized access to the materials prior to filing its civil complaint because the complaint refers in several places to specific conversations, between specific individuals, on specific dates, which were unknowable absent access to the wiretaps.

of their lawfulness. The claims of disparate knowledge thus are nothing more than thinly veiled efforts to whipsaw Mr. Rajaratnam and Ms. Chiesi between the exercise of their constitutional right to defend themselves in a criminal proceeding and surrendering their privacy rights under Title III and the Constitution in the course of defending themselves in civil litigation. After all, Mr. Rajaratnam and Ms. Chiesi possesses the wiretap evidence solely because the Constitution and Title III guarantee them a meaningful opportunity to review it and to challenge its collection and content before it is used against them in a criminal trial. *See Giordano,* 158 F. Supp. 2d at 246 ("In order for a defendant to challenge the legality of Title III evidence, he must first have an opportunity to inspect [it]," and "the purpose of § 2518(9) is to give the defendant an opportunity to make a motion to suppress."). Opening Title III to the tag-team circumvention of its protections by government agencies – as the district court's discovery order has done – threatens to turn the Constitution's and Title III's privacy shield into a dagger aimed straight at the criminal defendant. On the other hand, denying the SEC the windfall use of wiretaps that Title III never authorized for civil insider trading claims would inflict no harm on it; it would simply keep the SEC where Title III left it.

Third, contrary to the district court's assumption, Mr. Rajaratnam and Ms. Chiesi have never "agree[d] that the recordings are highly relevant to this case." 2/9/10 Order at 2. To the contrary, unless the SEC has impermissibly been given access to the sealed wiretaps or unless the simultaneous civil and criminal prosecutions were calculated to end run Title III, then the SEC must have initiated this action and intended to litigate it without the wiretaps from the outset, just as it has presumably done in every other insider trading action brought by the SEC in its history. *See* Remarks of Preet Bharara, U.S. Attorney, S.D.N.Y., Press Conference, October 16, 2009 ("[T]his case represents the first time that court-authorized wiretaps have been used to target

significant insider trading on Wall Street."). In any event, there has been no determination that all 18,150 or even a statistically significant percentage of them have any relevance to this action.

Finally, any concerns about informational imbalance are misplaced. The Appellants have committed to moving to suppress the wiretaps in the criminal case, which would preclude their use in any proceeding. 18 U.S.C. § 2518(10). Furthermore, should an attempt to introduce a particular wiretap intercept as evidence ever materialize, the court can address that concern through a motion to preclude or a disclosure order tailored to the particular usage, not the blunderbuss of wholesale release of all 18,150 intercepts and related material based on nothing more than the specter of hypothesized use, as the court ordered here.

D. The Public Interest Favors A Stay.

Lastly, the public interest warrants a stay. In enacting Title III, "Congress performed all of the balancing necessary of the public interest in law enforcement against the privacy interests of citizens," *In re Grand Jury*, 111 F.3d 1066, 1078-79 (3d Cir. 1997), and it strictly limited disclosure to the specifically enumerated law enforcement proceedings. Unless and until wiretap materials are publicly disclosed in the manner and for the purposes Congress authorized and until their legality is settled, Congress determined that the "overriding" public interest in privacy and carefully channeling law enforcement efforts, *Gelbard*, 408 U.S. at 48, forbids their routine disclosure in civil discovery, *NBC, supra,* let alone compelling the aggrieved defendants to compound the intrusion on their privacy by forcing them to disseminate the materials to sixteen different litigants solely because the *government chose* to proceed against them both criminally and civilly at the same time. In addition, this Court has long recognized that a criminal defendant's right to a fair trial takes precedence over the public's right of access to materials. *United States v. Myers*, 635 F.2d 942, 944 (2d Cir. 1980) (stay in favor of criminal defendant

warranted after balancing his "right to a fair trial" against "the public's right of access to exhibits entered into evidence in a public trial").[11]

E. In the Alternative, a Petition for Writ of Mandamus Should Be Granted.

For all of the foregoing reasons, the district court's order reflects a "clear abuse of discretion" that profoundly harms the statutory and constitutional rights of Mr. Rajaratnam and Ms. Chiesi, and they thus are entitled, in the alternative, to a writ of mandamus. *Orange County Water Dist. v. Unocal Corp.*, 584 F.3d 43, 48 (2d Cir. 2009), or a stay pending the Court's resolution of their petition for such a writ. Mandamus in this context "is available because: important issues of first impression are raised; the [protections against discovery] will be irreversibly lost if review awaits final judgment; and immediate resolution of this dispute will promote sound discovery practices and doctrine." *In re the County of Erie*, 473 F.3d 413, 415 (2d Cir. 2007). *See In re Sims*, 534 F.3d 117, 141-142 (2d Cir. 2008) (granting mandamus for erroneous disclosure order).[12]

This is a case of first impression in that no court to the Appellants' knowledge has authorized the disclosure of sealed wiretap materials in civil discovery – let alone the forced disclosure by the very persons who are aggrieved by the wiretaps and seek their suppression in

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[11] *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599 (2009), left this Court's appellate jurisdiction intact because the Supreme Court dealt there only with the attorney client privilege in a civil case, and expressly reserved the question whether a different rule would apply when, as here,,the confidential nature of the materials has constitutional roots. *Mohawk*, 130 S. Ct. at 609 n.4. In addition, Title III's statutory mandates limiting disclosure until after an authorized public disclosure and/or motion to suppress has been resolved implicate different considerations under the collateral order doctrine (such as the enforcement of statutory proscriptions and the protection of the privacy interests of non-parties whose conversations were intercepted) than does the common-law privilege at issue in *Mohawk*. *Id.* at 605 (review permitted where bar on disclosure implicates a "substantial public interest" or other "particular value of a high order").

[12] *See also United States v. Coppa*, 267 F.3d 132, 146 (2d Cir. 1997) (same as *Sims*); *In re United States*, 834 F.2d 283, 284 (2d Cir. 1987); *In re von Bulow*, 828 F.2d 94, 98 (2d Cir. 1987).

all court proceedings – prior to their authorized public use under Title III, to a determination of the wiretaps' lawfulness in the criminal case, or to the conclusion of the criminal prosecution.

In addition, the Appellants' privacy rights—and those of all the other individuals recorded surreptitiously by the government on the 18,150 intercepts—will be irreversibly sacrificed if disclosure occurs, and the Appellants' right to a fair trial and adjudication of their rights under Title III and the Fourth Amendment will be profoundly impaired if this court fails to act. Once information is let out of the bag, the direct and derivative uses of impermissibly disclosed information in both the civil and criminal cases cannot be unraveled in any meaningful respect.

Finally, the government's use of a civil discovery demand to circumvent Title III's comprehensive and longstanding protections institutes an "unsound" discovery practice by providing a roadmap for the countless would-be litigants to end run Title III's previously solid wall against civil disclosure in advance of criminal proceedings. And if wiretaps are freely available for civil litigants' asking, then it will be hard to continue to explain why interests of constitutional stature like the First Amendment do not warrant equivalent respect. *Contrast NBC, supra.*; *compare Bartnicki*, 532 U.S. at 535 (recognizing that, in some circumstances, First Amendment interests would not outweigh privacy interests).

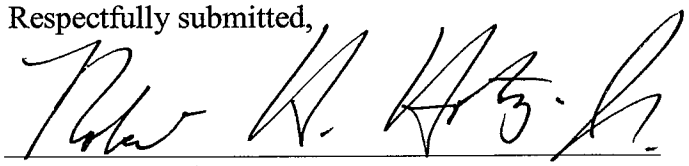
The district court's decision, in other words, profoundly unsettles the law and cannot be reconciled with this Court's precedent. Mr. Rajaratnam and Ms. Chiesi are thus entitled to a writ of mandamus. *See In re Long Island Lighting Co.*, 129 F.3d 268, 270 (2d Cir. 1997) (stay of order compelling disclosure of evidence granted and writ of mandamus issued); *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 163-164 (2d Cir. 1992) (same). Because the balance of interests also strongly favors withholding disclosure, a stay is warranted.

CONCLUSION

For the foregoing reasons, an emergency stay pending appeal should be granted and/or Mr. Rajaratnam and Ms. Chiesi should be granted a writ of mandamus, on or before February 15, 2010. In the alternative, a temporary administrative stay should be granted pending full consideration of the motion for a stay and petition for a writ of mandamus.

Dated: February 11, 2010
New York, New York

Respectfully submitted,



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ATTACHMENT 1

CHAMBERS OF HON. JED S. RAKOFF
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	Terence J. Lynam Akin Gump Strauss Hauer & Feld (Raj Rajaratnam)	Fax: (202) 887-4288
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FROM: Jessee Alexander-Hoeppner
Law Clerk to Hon. Jed S. Rakoff

DATE: February 9, 2010

RE: SEC v. Galleon, 09 Civ. 8811

MESSAGE: Please see attached Order.

PAGES: (including cover) 7

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	:	
Plaintiff,	:	09 Civ. 8811 (JSR)
-v-	:	MEMORANDUM ORDER
GALLEON MANAGEMENT, LP, et al.,	:	
Defendants.	:	

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

Several months after the filing of this lawsuit, criminal indictments predicated on essentially the same allegations of "insider trading" as here alleged were returned against a number of the same defendants as here named. See United States v. Rajaratnam, 09 Cr. 1184, filed on December 15, 2009 and assigned to Judge Holwell; and United States v. Goffer, 10 Cr. 056, filed on January 21, 2010 and assigned to Judge Sullivan. As the pleadings and other filings in those cases make clear, the prosecutors in those cases had previously obtained wiretap recordings of the defendants and others that they intend to use in the criminal cases and have already partially disclosed publicly. But, although the Department of Justice (the "Government") and the Securities and Exchange Commission (the "S.E.C.") were, in the Government's word, "partner[s]" in the investigation of the underlying allegations, see transcript of hearing, 1/25/10, at 30, 31, 33, the Government did not share the wiretap recordings with the S.E.C. at any time during the

investigation and, with one exception mentioned below, has not shared them since. However, subsequent to the filing of the indictment in United States v. Rajaratnam, the Government provided the wiretap recordings to the defendants in that case, Raj Rajaratnam and Danielle Chiesi, and presumably will do the same in the criminal case before Judge Sullivan. It also appears that the defendants in the case before Judge Holwell may share the recordings with counsel for some other defendants pursuant to a "joint defense" agreement. See Letter from Valerie A. Szczepanik, Esq., at 4 n.3 (Jan. 20, 2010).

Since, as a result, certain of the defendants have had access to these recordings, while the S.E.C. has not, the S.E.C. timely propounded discovery demands, pursuant to Federal Rules of Civil Procedure 26 and 34, for production of the recordings from these defendants. The defendants opposed, and the Court then received extensive written and oral submissions from the relevant parties, as well as from interested third parties such as the Government. Although, in the process, adroit counsel raised numerous interesting and even esoteric arguments, in the end the Court finds the issue to be a relatively simple one.

The parties agree that the recordings are highly relevant to this case and that they would ordinarily be discoverable. See Fed. R. Civ. P. 26(b)(1). For example, if it were the defendants who had themselves made the recordings, they would not have any basis to

refuse production of the recordings to their adversary, even if they did not themselves intend to use the recordings at trial. The parties also agree that the Government, in providing these recordings to the defendants as part of discovery in the criminal case, did not seek any protective order barring the defendants from using these recordings in any way in this parallel case or, for that matter, in any other respect.

The defendants in possession of the recordings nonetheless argue that they are precluded by law from disclosing the tapes to the S.E.C. or, indeed, to anyone not involved in the joint defense of the criminal cases. But they have proved unable to cite any statutory authority for this restriction. Instead, they argue that, because of privacy and other concerns that animated Congress in passing the applicable statue, 18 U.S.C. §§ 2510-2522 (more commonly called "Title III," because these sections were collectively Title III of the Omnibus Crime Control and Safe Streets Act of 1968), the statute should be read as implicitly prohibiting any disclosure of the recordings not expressly authorized by the statute. See also In re New York Times Co., 577 F.3d 401, 407 (2d Cir. 2009) ("[T]urning Title III into a general civil discovery mechanism would simply ignore the privacy rights of those whose conversations are overheard." (quoting In re NBC, 735 F.2d 51, 54 (2d Cir. 1984)) (internal quotation mark omitted)).

It is true that the statute, in § 2517, specifies the conditions under which the Government is authorized to disclose the contents of wiretap recordings; but as the Second Circuit long ago concluded, "it is a non-sequitur to conclude the obverse: that Congress intended in § 2517 . . . to forbid . . . access by any other means on any other occasion." In re Newsday, Inc., 895 F.2d 74, 77 (2d Cir. 1990). Moreover, while most of § 2517 is directed at specifying the scope and conditions for disclosure of wiretap materials by "any investigative or law enforcement person," the section was amended in 1970 to provide that "[a]ny person" who has lawfully received wiretap recordings may disclose their contents while giving testimony "in any proceeding held under the authority of the United States or of any State or political subdivision thereof." § 2517(3). As two sister circuits have noted, since this means, at a minimum, that in a civil enforcement action a government agency could call to the stand a criminal enforcement agent who had lawful access to the wiretaps to testify to their contents, it would be absurd for the civil attorneys preparing the witness not to have access to the wiretap recordings beforehand. See In re High Fructose Corn Syrup Antitrust Litig., 216 F.3d 621, 624 (7th Cir. 2000); Fleming v. United States, 547 F.2d 872, 875 (5th Cir. 1977). More broadly, the notion that only one party to a litigation should have access to some of the most important non-privileged evidence bearing directly on the case runs counter to basic principles of civil discovery in an adversary

system and therefore should not readily be inferred, at least not when the party otherwise left in ignorance is a government agency charged with civilly enforcing the very same provisions that are the subject of the parallel criminal cases arising from the same transactions.[1]

It follows that the S.E.C.'s demand for production of wiretap recordings presently in the possession of certain of the defendants here should be granted and the recordings produced to the S.E.C. by no later than February 15, 2010, and production of the recordings should also be promptly made to any other party to this case that makes a similar demand on the applicable defendants.

This is not to say, however, that Congress' concern with privacy, which underlay much of the debate over Title III, should be ignored, particularly in light of the defendants' indication that they intend to move, in this or some other court, for suppression of the wiretap recordings on the ground that they were allegedly obtained in violation of law. But the simple way to satisfy this concern at this juncture is to cover the wiretap recordings with a protective order prohibiting their disclosure to any non-party until, at a minimum, a court of competent jurisdiction rules on any suppression motion that is timely filed (keeping in mind that the trial of this action is firmly set for August 2, 2010).

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[1] By contrast, one could readily imagine cases where a court might find that the presumption in favor of protecting privacy might easily outweigh a similar discovery request by a purely private plaintiff, let alone a third party. See In re New York Times Co., 577 F.3d at 406-07.

Accordingly, defendants Rajaratnam and Chiesi are hereby ordered to produce to the S.E.C. by February 15, 2010 copies of all the wiretap recordings received by those defendants from the Government, and to promptly produce the same materials to any other party to this case who so demands in writing, provided that all parties to this case who have or receive such recordings shall not provide them to any person who is not a party to this case pending further order of this Court.[2]

SO ORDERED.

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

Dated: New York, New York
February 9, 2010

[2] The above ruling obviates the need for the Court to consider the defendants' request that the Court hold a hearing on a small group of wiretap recordings that were inadvertently provided by the Government to the S.E.C. and then retracted. Similarly, the Court has no occasion to rule on the Government's contention that, under its reading of § 2517, it is free at any time to provide the entire set of recordings to the S.E.C., since, in fact, it has not done so.

ATTACHMENT 2

CHAMBERS OF HON. JED S. RAKOFF
UNITED STATES DISTRICT COURT
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500 PEARL STREET, CHAMBERS 1340
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TO:	**Valerie Ann Szczepanik** Securities and Exchange Commission	Fax: (212) 336-1317
	Terence J. Lynam Akin Gump Strauss Hauer & Feld (Raj Rajaratnam)	Fax: (202) 887-4288
	Alan R. Kaufman Kelley Drye & Warren (Danielle Chiesi)	Fax: (212) 808-7897
FROM:	Jessee Alexander-Hoeppner Law Clerk to Hon. Jed S. Rakoff	
DATE:	February 11, 2010	
RE:	SEC v. Galleon, 09 Civ. 8811	
MESSAGE:	Please see attached Order.	
PAGES:	(including cover) 3	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	:	
Plaintiff,	:	09 Civ. 8811 (JSR)
-v-	:	ORDER
GALLEON MANAGEMENT, LP, et al.,	:	
Defendants.	:	

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

On February 9, 2010, the Court issued a memorandum order in this case ordering defendants Rajaratnam and Chiesi to produce certain Title III wiretap materials to the S.E.C. by February 15, 2010. By letters dated February 9, 2010, defendant Rajaratnam moved for a stay pending appeal and certification of the ruling for immediate appeal pursuant to 28 U.S.C. § 1292(b), or in the alternative an administrative stay, in which request defendant Chiesi joined. Per arrangements made during the snow-closing yesterday, the Court received the S.E.C.'s letter in opposition at noon today, in order that the Court could rule immediately thereafter, so that, if the Court's ruling were adverse, the defendants could immediately apply this afternoon to the Court of Appeals, as they indicated they were prepared to do.

Given the shortness of time, therefore, the Court will simply indicate that it finds the reasoning in the S.E.C.'s letter wholly persuasive and adopts its reasoning by reference. Accordingly, the

Court denies both the motion for certification, which the Court regards as frivolous, and the motion for a stay, which the Court finds would be highly prejudicial to the S.E.C.

SO ORDERED.

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

Dated: New York, New York
February 11, 2010

ATTACHMENT 3

No. 10-

IN THE

United States Court Of Appeals

FOR THE SECOND CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

GALLEON MANAGEMENT, LP, *ET AL.*,

Defendants

(RAJ RAJARATNAM and DANIELLE CHIESI,

Defendants-Appellants).

IN RE RAJ RAJARATNAM and DANIELLE CHIESI

Petitioners.

DECLARATION OF ROBERT H. HOTZ, JR. IN SUPPORT OF JOINT EMERGENCY MOTION FOR STAY PENDING APPEAL AND/OR PETITION FOR A WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, FOR A TEMPORARY ADMINISTRATIVE STAY PENDING FULL CONSIDERATION OF THE MOTION FOR A STAY AND PETITION

ROBERT H. HOTZ, JR. submits this declaration pursuant to 28 U.S.C. § 1746 and under penalty of perjury.

1. I am a partner at the law firm of Akin Gump Strauss Hauer & Feld LLP ("Akin Gump") and a member in good standing of the bar of this Court. I am one of the attorneys representing defendant-appellant Raj Rajaratnam in the above-captioned matter brought by the United States Securities and Exchange Commission (the "SEC") which is

pending before Judge Rakoff, and in the parallel criminal proceeding, *United States v. Raj Rajaratnam and Danielle Cheisi*, S1 09 Cr. 1184 (RJH), pending before Judge Holwell. I respectfully submit this declaration in support of the joint emergency motion of defendants-appellants Raj Rajaratnam and Danielle Chiesi for a stay pending appeal and/or pending a petition for writ of mandamus or, in the alternative, for a temporary administrative stay pending full consideration of the motion for a stay and petition.

2. I base this declaration upon my personal knowledge, my review of documents in the case and my conversations with others.

The Need for an Emergency Motion

3. At approximately 3:30 p.m. February 9, 2010, my firm received by fax a copy of the order (the "Order") issued by Judge Rakoff that is the subject of this emergency motion. That Order compels Mr. Rajaratnam and Ms. Chiesi to produce to the United States Securities and Exchange Commission "by February 15, 2010 copies of all wiretap recordings received by those defendants from the Government" in the parallel criminal case before Judge Holwell and "to promptly produce the same materials to any other party to this case who so demands in writing . . ." Memorandum Order at 7.

4. The Order is unprecedented in that it requires the defendants-appellants to produce raw, untested wiretap recordings obtained pursuant to Title 18, United States Code, Section 2510 *et seq*. ("Title III"), in civil discovery to the SEC before the propriety of the wiretaps has been litigated before Judge Holwell in the criminal case. Counsel for the defendants-appellants have stated their intention to move in the criminal case to suppress the wiretaps and related evidence for, among other things, materially false statements made by the Government in the supporting affidavits and applications and will

request a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). A conference is scheduled in the criminal case before Judge Holwell on February 17 at 5:30 p.m. during which it is expected that the timing of such a motion will be addressed.

5. Shortly after receiving the court's Order, I learned that both the district court and Second Circuit had announced their closure for February 10, 2010, due to inclement weather. Because both courts were already scheduled to be closed from February 12-15th for the President's Day holidays, the timing of the Order left only one business day in which both the district court and this Court would be open before the ordered disclosure must occur. Our firm immediately filed on February 9, 2010, a motion for a stay pending appeal, a temporary administrative stay pending application to this Court for a stay, and a request for certification pursuant to 28 U.S.C. § 1292(b) with the district court.

6. The same afternoon we received the Order, lawyers at my firm contacted the Second Circuit Clerk's Office to apprise the Court that we might need to file an emergency motion and to coordinate logistics for such a filing in light of the closures and weather. My colleagues spoke with Motions Staff Attorney Joy Fallek, who also discussed the matter with the Clerk and subsequently relayed the Clerk's instructions. We contacted the Clerk's Office again the morning of February 11, 2010, to update them on the district court's projected timing for a decision on the motion for a stay or certification under 28 U.S.C. § 1292(b).

7. Our firm contacted SEC counsel on February 10, 2010, requesting the SEC's consent to a brief two-day extension of the disclosure Order (until February 17th) so as to permit the district court and this Court more than a single business day (February 11th) to each consider the defendants' request for a stay pending appeal. The SEC refused to

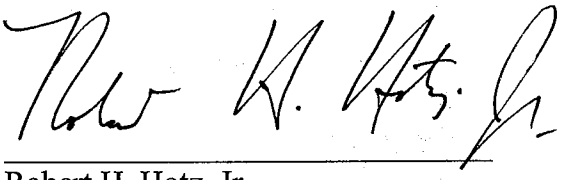
consent, asserting that each day of nondisclosure prejudiced the SEC. Although the trial in this case is not scheduled to commence for six months (August 2, 2010) and the SEC never sought expedited consideration of its motion to compel, the SEC offered no reason beyond its unelaborated claim of prejudice for its unwillingness to afford the courts any reasonable time to consider the stay applications.

8. The SEC subsequently opposed the motion for a stay and for Section 1292(b) certification. By order issued February 11, 2010 at approximately 1:00 p.m., Judge Rakoff denied these requests.

9. Because of the timing of the Order, previously scheduled court holidays, and the sudden emergency closure for severe weather, and the SEC's refusal to consent to even a two-day postponement of disclosure, the defendants have been left no choice but to pursue this highly expedited emergency request for a stay and/or petition for writ of mandamus.

10. For the foregoing reasons and the reasons set forth in the accompanying motion, a stay pending appeal and/or the filing and issuance of a petition for a writ of mandamus should be granted. In the alternative, a temporary administrative stay should be granted pending full consideration of the motion for a stay and petition.

Dated: February 11, 2010
New York, NY



Robert H. Hotz, Jr.

ATTACHMENT 4

01pdsecm

MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

GALLEON MANAGEMENT, LP, et al.,

Defendants.

----------x

New York, N.Y.

09 Civ. 8811 (JSR)

January 25, 2010
4:57 p.m.

Before:

HON. JED S. RAKOFF,

District Judge

APPEARANCES

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JASON E. FRIEDMAN
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BY: JONATHAN STREETER
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(Case called; all sides ready)
THE COURT: All right. We have two matters before the Court, one of which has been the subject of formal motion papers, the other the subject of letter briefing that, however, has been docketed and is publicly available.
The formal motion is the SEC's motion to file an amended complaint, and the letter briefing relates to the SEC's application to obtain, by way of discovery from the defendants, the wiretap recordings and information that they've received from the U.S. Attorney's Office, which is here as well.
The fact that the door to the cell block just opened should not discourage anyone from making any argument they care to make. I have a criminal matter after this matter.
I think we will start with the motion to amend, though the two are not totally unrelated.
I think it comes down to a question of whether there is any real prejudice. Unlike, for example, the case of SEC v. Bank of America, where I denied such a motion because the SEC had waited until the end of discovery to bring on such a motion, here discovery is, while underway, far from being completed; it doesn't need to be completed until April 30th. It is true that we've set a trial date and, like all my trial dates, it is fixed in stone and will not move. But that is August 2nd, which is eons from now.
So absent some substantial prejudice, I am inclined to

grant the motion. So I think we ought to hear first from opposing counsel.

MR. WHITE: Thank you, your Honor. William White for defendant Raj Rajaratnam.

On prejudice, your Honor, it comes down to dates that have been set. The first is the expert disclosure date, which is currently set for February 16.

THE COURT: Yes. We could move that, though, because their expert is not due until March 23rd, and, more importantly, all depositions don't have to be completed until April 16th. So if you need a couple of extra weeks there, we could certainly give you that.

MR. WHITE: Yes, your Honor. I think I can come back to that.

The second point is Mr. Raj Rajaratnam's deposition, which is currently being scheduled for early March, in terms of just gathering the material for these new matters -- and these new matters do substantially increase the size of the work -- the disgorgement amount, the purported disgorgement amount doubles. The one case, which is the ATI case, the disgorgement figure that the SEC has included in the complaint is $19 million, which is essentially double the amounts for all the other stocks combined.

There is also a five-month period of time between the first just tip, as the government would allege in the

complaint, until the actual announcement --
THE COURT: I have no doubt that it will require some additional work. It doesn't sound to me, though, like it requires an inordinate amount of work. Your client is blessed with very skillful counsel from a very large firm. And experience suggests that you would be able to whip this into shape, so to speak, in a relatively modest amount of time.
I mean, I suppose we could move his deposition a week or so, as well, to give you a little bit more time, but it certainly doesn't seem to me to be the kind of prejudice that would warrant denying the motion. It just means some adjustments in the discovery schedule.
Is there anything else, though, you wanted to add?
MR. WHITE: Just this, your Honor. I think we could make some modest adjustments in both of those deadlines and that will certainly help give me some additional time. The concern that we have, though, in this case, what prompted the proposed amended complaint is some additional information from the U.S. Attorney's Office developed through a guilty plea of one of the defendants in this case. And our concern is as we keep going further down the road, if there is further information, are there going to be continued motions to amend that will cause those dates --
THE COURT: You should take some solace from my normal practices in that regard. I'm not going to allow any amendment

that would have any likelihood of moving the trial date. And moving back from that, you know, a lot follows. And I'm sure that message has gotten through to your adversary as well.

So why don't we move -- let me hear if the SEC has any problem in moving the date for the defendants -- for the proponent's expert. It depends on the nature of the expert who goes first and who goes second. But, anyway, two weeks, and then the response maybe a week. So it will be -- instead of February 16th, it would be March 2nd. And instead of March 23rd, it would be March 30th.

Let me just pause there.

Any problems with that in terms of the experts?

MS. SZCZEPANIK: Your Honor, is that just for Mr. Raj Rajaratnam's experts or for all the defendants?

THE COURT: Well, I will hear the other defendants in a minute but let's take the worst case. Assuming it was everyone; so what?

MS. SZCZEPANIK: We don't object to a two-week extension.

THE COURT: Let me hear from any other defendant who wants to be heard on that issue.

MR. HAKKI: Your Honor, I am Adam Hakki for Galleon Management --

THE COURT: You would be delighted to take the extra time?

MR. HAKKI: We would, your Honor.
MR. KAUFMAN: I echo that.
THE COURT: So it would be for everyone.
In terms of the deposition of Mr. Raj Rajaratnam, what day is that on for now?
MR. WHITE: We have some dates. We hadn't firmly set it. The SEC has proposed some dates in the first week of March. We would request that we do that later in March, closer to the end of March, if that's --
THE COURT: I don't think the end of March. I think, from what you just told me, frankly, you could probably do the earlier part of March, but I'll give you to -- it can be any date that you mutually agree to up to but no later than March 15th.
All right. So with those understandings, the motion to amend is granted.
Now let's talk about what I think is a really kind of interesting issue, not that they aren't all very interesting, of course, which is the disclosure of the wiretap information. I want to distinguish here, if I may, between the recordings themselves and the applications. Because much has been made of interpreting the Second Circuit's recent decision in the matter of the application of The New York Times to unseal wiretap and search warrant materials, 577 F.3d 401, (2d Cir. 2009), where the Court of Appeals, in its wisdom, reversed me for granting

access to those materials.

I only mention that because I am very familiar, obviously, with that case. That had to do with wiretap applications and with the standard of who is an aggrieved person and the standard of good cause in connection with wiretap applications. I did not understand that case -- but I will be glad to hear anyone who wants to argue otherwise -- that that is really addressing the issue here insofar as the recordings, as opposed to the applications. There is no issue of recordings in that case. It had all to do with wiretap applications.

It does not appear to me that the statute really addresses directly the issue we have here. But let me ask -- and this might be addressed as much to the U.S. Attorney's Office as to the SEC -- if you had applied to Judge Holwell, which I gather you keep threatening to do, to disclose to the SEC for its use in this civil case the wiretap information, or -- this is addressed to the SEC -- the SEC, regardless if the U.S. Attorney's office had applied to Judge Holwell for release of the information, assuming, for the purpose of my hypothetical that no release had been yet made to the defendants -- that's artificial, of course, because sooner or later the criminal case, but it could have conceivably happened earlier on -- what would be the standard is my question? What standard would you have to show to Judge Holwell in a criminal

case to warrant his disclosing the wiretap recordings to the SEC for use in the parallel civil case?

MR. STREETER: Your Honor, the government submits that it would be 2517, Section 2, which provides that the government can use wiretap evidence and disclose it to the extent such use is appropriate to the proper performance of the official duties of the person making disclosure. So we would have --

THE COURT: You don't think that's limited, as your adversary seems to argue, to criminal investigative and law enforcement agencies?

MR. STREETER: Section 1 is but Section 2 is expressly not so limited. We would not apply under Section 2 for the reasons they've identified, namely, that the Securities and Exchange Commission is not the investigative law enforcement officers that can conduct investigations for the statutes provided in Title III, but Section 2 allows us to disclose wiretap evidence so long as it is part of the proper performance of our official duties. And we think it would be, and we have been threatening to bring that to Judge Holwell. But we are waiting because we don't think it makes sense for two judges to spend their time on what you described as a difficult and interesting issue.

But we are prepared --

THE COURT: Judge Holwell undoubtedly is grateful for that.

I do think -- and I'll hear anyone if they disagree with this -- I think, as the parties seem to agree on one thing, which is that essentially the same issues would be raised in either forum. So since it is before me, I might as well decide it.

MR. STREETER: I think, actually, your Honor, it would produce the same result but we think the analysis is totally different here than it would be before Judge Holwell. Judge Holwell would be addressing the question whether or not it is part of the proper performance of our duties to hand over this evidence to the SEC. As your Honor knows, the issue for you is whether or not there is anything in Title III that prevents the defendants from handing it over pursuant to a duly issued discovery request.

THE COURT: Yes. But the reason I am not quite sure that that's not the same issue is because that seems to open up, on your analysis, a situation where anytime a criminal defendant received wiretap information, anyone who wanted that information for any purpose could bring a civil suit. And if they had a basis -- you know, someone was an alleged victim, someone had some other legally cognizable basis for bringing the lawsuit -- they could get it. I'm not sure that Title III really visages that kind of disclosure.

MR. STREETER: Two things about that, your Honor. First of all, the fact that it has never happened before

suggests that the parade of horribles that the defendants suggest is not likely to happen.

Number two, a motion to dismiss such a frivolous lawsuit that's merely designed to get at Title III evidence could easily be granted in order to prevent that from happening.

And thirdly, the Court --

THE COURT: Let's take a real possibility. Let's assume that the victim of a criminal case -- and most crimes have victims -- brought a civil suit seeking damages -- but it is not the SEC; we are talking now about, you know, just a private victim -- and sought from the defendants the wiretap information. So you're saying that would be fine as far as you're concerned?

MR. STREETER: Yes, your Honor. There are things the court could do to manage that situation. The schedule could be structured in a way that the criminal trial goes first and the evidence is either disclosed or not, and suppression is determined in the criminal trial and then you are smiling because --

THE COURT: Criminal trial expert, this is unheard of?

What about, or you could have a protective order?

MR. STREETER: You absolutely could. In terms of the defendants' privacy concerns, we think that all of them can be addressed with a carefully drafted and strictly enforced

protective order in this case.
THE COURT: All right. Let me ask the SEC: Are you of the same mind as the U.S. Attorney's Office?
MS. SZCZEPANIK: Yes, your Honor. And I don't think the issue before the Court is whether any private litigant can get the information. The facts here are that the information is clearly relevant. The defendants have it. It's not privileged. There is nothing constraining the defendants as far as the protective order in the criminal case. And we've sought it pursuant to a valid discovery request. And we don't see anything in Title III that prohibits the defendants turning it over to us.
Moreover, the current situation is creating such an informational imbalance as can hardly be countenanced under the Federal Rules. And we think that the issue is ripe for your Honor --
THE COURT: I think the Federal Rules countenance all sorts of things, but I understand the point you are making.
So let me hear from defense counsel.
MR. LYNAM: Thank you, your Honor. Terence Lynam for Mr. Raj Rajaratnam.
Your Honor raised a number of points that I would like to address. We obviously disagree with the government's position and quite strenuously. We think, first of all, a fair reading of the Second Circuit's decision in New York Times last

year also provides guidance to this Court on the wiretaps themselves, not just the applications, because the Second Circuit said that Title III created a strong presumption against disclosure of the fruits of the wiretap applications.

They also said that Title III has a categorical presumption against disclosure of the sealed applications.

So they talked about both the fruits and the applications.

THE COURT: You would agree, would you not, that the only holding had to do with the wiretap applications, because no wiretap recordings were before them?

MR. LYNAM: That's right, your Honor. That's correct. But I think the Court is well aware that applications, when you have subsequent wiretaps and renewals, like we did here, the applications and the subsequent applications reveal the contents of the prior intercepts. So the applications here --

THE COURT: I agree. But going back to -- in other words, what the SEC is most complaining about is, they say here's a case where the wiretaps that bear directly on the case, you've got it, they don't. That has infinitely greater force, it seems to me, when we are talking about the recordings itself than about the applications.

MR. LYNAM: Yes. Your Honor, I would agree with you on the recordings; that is really the meat of this.

THE COURT: Yes.

MR. LYNAM: But the applications are important because they reveal the recordings and because, as the Second Circuit pointed out, there is a specific statute that governs the applications.

THE COURT: Yes. But I guess -- I don't mean to interrupt, though actually I do, but the --

MR. LYNAM: That's all right.

THE COURT: Assuming for the sake of argument -- and this is not a ruling, just a hypothetical -- that I were to say they can't get the applications. Tell me why they shouldn't get the recordings?

MR. LYNAM: The recordings get at least as much protection as the applications. I think if your Honor applied New York --

THE COURT: Where do you see that in the statute?

MR. LYNAM: Well, your Honor, I think you have to look at what the Second Circuit was saying in The New York Times. They were saying that there was no disclosure authorized unless it is -- no disclosure may occur unless it is permitted in the statute. It's where you start the analysis from.

The government's analysis is that all disclosures are authorized unless prohibited in the statute. That's not what the Second Circuit said. The Second Circuit said there is a presumption against disclosure. Only can disclose both the fruits and the applications --

THE COURT: Which relied heavily on the "aggrieved person" language because that traced back to the MDC decision.
MR. LYNAM: Correct.
THE COURT: And that's language that would seemingly only apply to the applications.
MR. LYNAM: The applications do encompass the notion of an aggrieved person because the statute and the MDC case talks about it that way. We are certainly just as much an aggrieved person with the wiretaps themselves of Mr. Raj Rajaratnam.
THE COURT: That's why I could well see that they might not qualify as an aggrieved person to get the wiretap applications. But what does that have to do with recordings?
MR. LYNAM: I agree. The recordings, I agree that they are different. But they certainly are not an aggrieved person for the recording. Their showing must be, under New York Times and under MDC and if you take into account the Second Circuit's decision in Newsday, have these wiretap recording, are they still private? Have they been disclosed in a public forum? They haven't. They are under seal before Judge Holwell. We only got them because we are a criminal defendant --
THE COURT: Why is your situation any different than grand jury material? If there were testimony that had been given in the grand jury and a party, any party in the world,

but certainly the SEC, could move for release of that regardless of whether it had been turned over to the defendants or not. And all they would have to show, under Rule 6(e) of the Federal Rules of Criminal Procedure, was that they wanted to use it in connections with an ongoing judicial proceeding, like a lawsuit.

And then, if they got it, you'd be screaming they got to give it to you as well because how could you defend and have proper preparation for defending yourself in my hypothetical lawsuit where they have the grand jury material unless they turned it over to you as well. Why isn't that the kind of analysis you should use here?

MR. LYNAM: I think it is because, your Honor, Title III is unique in the sense that the history of why it was passed in response to the Supreme Court's decision in Katz and the interpretations of it have been in order to allow any wiretapping at all, it must be done under the strictures of the statute itself. So it is not directly analogous to a grand jury situation. You have to really look at whether the statute authorizes it. If the statute doesn't authorize the release, it's prohibited.

But I would like to mention one case that we cited in our letter which dealt with the grand jury situation. It is interesting. It is the Third Circuit's decision in In Re Grand Jury where there were wire intercepts by private parties,

illegal -- allegedly illegal intercepts. The government sought to subpoena those intercepts and they wanted to present them to a grand jury. So we all know the rules of grand jury secrecy, and presumably they would be protected under those rules. But the Third Circuit held that disclosure to the grand jury was not permitted, analogous to the protective order that we see the government --

THE COURT: Because?

MR. LYNAM: Because Title III did not authorize it. They look at the statute. They say Title III does not authorize disclosure even to a grand jury. The brief person objected. And the court said there was no authority in the statute to disclose the contents of these intercepts to the grand jury. These were intercepts of private parties.

But, nevertheless, I think the point is that even the protective order that the government is seeking here doesn't solve this. These wiretaps that we are talking about have conversations of Mr. Rajaratnam his wife, with his daughter, with other family members, with his doctor. The SEC has no right to any of that information. They are strictly under seal in the criminal case. We've only been given access to them because of the criminal case.

And that has to be the starting point, Title III. Title III creates the presumption against disclosure. They haven't cited any case that has authorized disclosure --

THE COURT: Why can't your concerns in that regard be handled through an appropriate protective order?

MR. LYNAM: Well, your Honor, because Title III does not allow for disclosure under a protective order. It either allows for the disclosure or not. There is no provision that allows disclosure for use in civil discovery. There simply is no provision in that.

As I said, there would be a privacy violation even by disclosing this information to the SEC under a protective order. They have no right to listen to these intercepts of Mr. Rajaratnam talking to his wife or his other family members. They have no -- the privacy interests of the person who is intercepted are paramount here. We have them for a very limited purpose, disclosure in the criminal case because, we are entitled to it under --

THE COURT: Haven't you shared that with other defense counsel?

MR. LYNAM: Your Honor, I know that the government is very interested in that. The government, the U.S. Attorney's Office recognizes that as a criminal defendant we are entitled to prepare for trial, in a criminal trial, to use those materials. We had done some preparation like that. We have not disclosed any of the recordings to any other defendant.

THE COURT: Well, do you plan to?

MR. LYNAM: No, your Honor. Now that this case is

indicted as just Ms. Chiesi and Mr. Rajaratnam, Ms. Chiesi's counsel has the intercepts so we don't need to disclose them to our codefendant in the case. So, no, we have not disclosed the recordings.

THE COURT: She has yours as well as -- in other words, these conversations between your client and his wife, which you say, you know, are highly private, although experience suggests that those conversations between husbands and wives are incredibly boring, but have they been disclosed to anyone else?

MR. LYNAM: Your Honor, I'll just tell you what we got. We got the intercepts from Mr. Rajaratnam's cell phone, which is about 2400 recordings, which we are still going through. We got another group of over I think 3 or 4,000 intercepts from Ms. Chiesi's phone, a separate recording. We got other intercepts over Mr. Farr's phone and we got other intercepts over the Drinel/Goffer intercepted phone, which is another person or defendant. Total intercepts we have are about 14,000. I assume that Ms. Chiesi's attorney got the same thing.

MR. KAUFMAN: That is correct, your Honor. We have the same intercepts from --

THE COURT: So now you know what Mr. Rajaratnam said to his wife. Do we need to exclude you from this case.

MR. KAUFMAN: Hardly, your Honor. But, your Honor, we

received that from the U.S. Attorney's Office, not from Mr. Rajaratnam's counsel. Again, we received those intercepts pursuant to Rule 16. And --

THE COURT: Rule 16. Oh, I thought I just heard from counsel that it had to only be pursuant to Title --

MR. KAUFMAN: It was Rule 16 discovery. They are obligated to turn over this material.

THE COURT: I think actually it probably is pursuant to Section 2517, as well.

MR. LYNAM: Right.

THE COURT: There is someone standing behind you who wants to be heard. Let me hear from her.

MS. MONACO: Very briefly, your Honor. Cynthia Monaco, on behalf of Zvi Goffer.

I think counsel just --

THE COURT: Mispronounced by your learned colleague.

Yes.

MS. MONACO: I think as was just mentioned, some of the voluminous wiretaps that were presented to Ms. Chiesi and Mr. Rajaratnam under Rule 16 included intercepts of my client and another criminal defendant in the separate criminal case, and we had not had access to those. They have not been produced to Mr. Goffer or, to my knowledge, to Mr. Drinel under Rule 16. Our case was just indicted, or the indictment was just unsealed on Thursday. We haven't been presented for

arraignment yet before Judge Sullivan. So we have no knowledge of what it is that my client's wiretaps communicate and nor has Mr. Rajaratnam's counsel shared those with us, your Honor.

THE COURT: Let me ask the SEC and the U.S. Attorney's Office: Are you in agreement that if I were to grant this application, that everything that that covers, that is disclosed to the SEC, ought to also be disclosed to all defendants, including those who don't yet have such information?

MR. STREETER: Yes. Subject it a protective order, your Honor.

THE COURT: Yes, of course, yes.

MS. SZCZEPANIK: Agreed, your Honor.

THE COURT: So I think that issue, you know, is subordinate to the main issue.

All right. Let me hear first anything further that defense counsel have to say.

MR. LYNAM: Your Honor, I would like to just respond to the U.S. Attorney's position that disclosure would be authorized under 2517, Sub 2, which is investigative or law enforcement officer. That's defined in the statute.

The SEC is not an investigative or law enforcement officer because they are not authorized to make arrests or prosecute offenses for which the wiretaps could have been authorized. And that is because Title III specifies the

offenses for which you can get a wiretap, and insider trading is not one of the specified enumerated offenses. So the SEC has no right to get the wiretaps pursuant to this investigative or law enforcement function because you can't wiretap for insider trading, and that's the only charge they bring in this civil case. That is the only charge they can bring.

So they are trying to end run -- the SEC is trying to end run their own restriction under this statute to get wiretap materials for an insider trading case where the statute doesn't permit such intercepts.

THE COURT: You mentioned this in your letter and I had meant to look at it but I didn't have a chance. Where do you find the definition that you are now relying on of an investigative or law enforcement officer?

MR. LYNAM: Give me one moment, your Honor.

MR. KAUFMAN: Sub 7, 2515.

MR. LYNAM: 2510, Sub 7, I am told by my co-counsel.

THE COURT: 2510, Sub 7. Hold on.

(Pause)

So "Investigative or law enforcement officer means any officer of the United States, or of a state or political subdivision thereof, who is empowered by law to conduct investigations."

Let me stop there. So far that would include the SEC, yes, up to that point?

MR. LYNAM: Up to that point, but if you read --
THE COURT: Yes, I know.
MR. LYNAM: All right, up to that point.
THE COURT: "Investigations, however, to make arrests for offenses enumerated in this chapter and any attorney authorized by law to prosecute or participate in the prosecution of such offenses."
Now, the offenses enumerated in the chapter would include mail and wire fraud, yes?
MR. LYNAM: Yes, but not insider trading.
THE COURT: Well, insider trading is proceeded against in the SEC's case pursuant to Section 10b-5, which is identical to the mail and wire fraud statute except it includes an additional element, namely, in connection with the purchase and sale of securities.
Do you think Congress really was making that fine tuned a distinction?
MR. LYNAM: Yes, your Honor. Congress also did not put in securities fraud as an enumerated offense, which is a Title 18 offense. So they left out securities fraud under Title 18, and they left out all the Title 15 offenses that the SEC can bring. So neither of those are covered.
The U.S. Attorneys --
THE COURT: No. Wait. I thought the point you were making is that securities fraud is not in Title 18.

MR. LYNAM: No. There is a new securities fraud statute, I think it is 1346, that was added about 10/15 years ago in Title 18.

THE COURT: 1346, which is before the Supreme Court right now, is the beyond the service --

MR. LYNAM: I'm sorry. 1345.

THE COURT: There is, of course, RICO, which at one point, at the time of the enactment of the statute, included security fraud as a predicate.

MR. LYNAM: My point is that neither the securities fraud in Title 18 -- and we will get the cite in a second -- or the Title 15 securities fraud, which is the insider trading one that we have in this civil case, neither of them are enumerated in Title III's list of offenses for which you can wiretap. Therefore, the SEC doesn't satisfy the definition of an attorney entitled by law to prosecute the offenses. They are not prosecuting wire fraud and they are not prosecuting mail fraud. They are prosecuting a Title 15 offense.

1348 and Title 18 is the securities fraud statute.

THE COURT: Supposing -- all right. I'm sorry. What is the --

MR. LYNAM: The securities fraud statute and Title 18 is 1348. That is also not listed as an enumerated offense.

So insider trading under Title 15 nor this 1348 violation is not something that Congress has authorized

wiretaps for. The SEC has tried to end-run that by getting them from us.

Your Honor, it is kind of strange what's going on here, because the SEC could have gone to the U.S. Attorney's Office and just asked the U.S. Attorney's office to disclose them to it. But they hadn't done that. They seem reluctant -- the U.S. Attorney's Office seems reluctant to disclose these wiretaps directly to the SEC, and I think that's because they recognize there is no provision in Title III that authorizes them to disclose them to the SEC.

THE COURT: OK. So I understand that argument now. Let me go back to either the SEC or the U.S. Attorney, whichever wants to be heard on that.

The argument, as I now more fully understand it, is that Subsection 2 of Section 2517 is limited to you guys, not to the SEC, in terms of who is an investigative or law enforcement officer, and that the proper performance of what in this clearly sexist statute is listed as his official duties, means the kind of official duties referenced in Subsection 7 of Section 2510, which means prosecuting crimes.

What about that?

MR. STREETER: Your Honor, we are contending that we are the law enforcement agency --

THE COURT: Right.

MR. STREETER: -- that in the proper performance of

its duties --

THE COURT: What is it that leads you to believe that your disclosure to the SEC is, quote, appropriate to the proper performance of your official duties?

MR. STREETER: A couple of things, your Honor.

First of all, the Sixth and Ninth Circuits have decided, in cases involving IRS civil authorities, which is not, again, among the investigative law enforcement officers, that such disclosures can be made, and that the IRS civil authorities are the analogue of the SEC in this case.

But furthermore, your Honor, we work with the SEC. They are the experts in this field. We seek their expertise. We often partner with them. And we think it's part of the proper performance of our duties --

THE COURT: Did you disclose the wiretaps to them or not?

MR. STREETER: No, we didn't.

THE COURT: Under your theory, you could have.

MR. STREETER: We could have. You are right, your Honor. We could have. And we think we could have done it even without getting Court approval. But we didn't because we have defendants here who, candidly and not surprisingly, are going to attack everything that we do. And so we're being very careful, and that's why we are where we are today.

We could have said it's part of the proper performance

of our duties to hand this material over to the SEC, but we didn't want to get into a whole litigation with them about that.

THE COURT: In the cases, which I haven't read, but I will, now that you bring them to my attention, in the Sixth and Ninth Circuit, was the IRS then able to use those wiretaps in a civil proceeding?

MR. STREETER: They were and they did, and they were not suppressed, and the court allowed that in both instances -- in, actually, three different instances, two instances in the Sixth Circuit and one instance in the Ninth Circuit. So those are some of cases we intended to bring to Judge Holwell's attention in connection with Subsection 2, which is why I said to you at the beginning that the analysis --

THE COURT: Are they in your letter because I must have missed that?

MR. STREETER: They are not.

THE COURT: Ah, no wonder I missed it.

MR. STREETER: I can tell you them now.

It was our view that the question of whether or not we, in the proper performance of our law enforcement duties could directly hand them over to the SEC was a question that we had planned to bring to Judge Holwell. We are happy to tell you about our arguments in the cases --

THE COURT: One of the things that I thought made this

otherwise difficult issue simpler was that your adversary said, quite forthrightly, in their letter -- and I'm talking about Akin Gump -- that if this had been litigated before Judge Holwell, they would have made the same arguments they make here.

So I understand your argument that you say I don't even have to reach that, but assuming I don't agree with you on that and I do have to reach it, I might as well hear any authority you would have brought to Judge Holwell's attention because I'm going to have to, if I go that route, have to address the same issues.

MR. STREETER: Absolutely, your Honor.

Let me give you the cites so you have them and then I'll talk to you --

THE COURT: And I'll give your adversary an opportunity to put in brief letter responses, since they are hearing this for the first time.

MR. STREETER: The first case is United States v. Fleming -- I'm sorry. United States v. Griffin. Fleming is a Fifth Circuit case, which is 547 F.2d --

THE COURT: I'm sorry 540 F.2d.

MR. STREETER: 547.

THE COURT: Oh, 547. Sorry.

MR. STREETER: F.2d 872.

United States v. Griffin is another Fifth Circuit

case, 588 F.2d 521; united States v. Resha, 767 F.2d 285, another Sixth Circuit case; and United States v. Spatafore, 752 F.2d 415 are the cases --

THE COURT: I'm sorry. What circuit?

MR. STREETER: Ninth circuit, your Honor. But we don't just rely on those. There are Second Circuit opinions that say we can show this material to witnesses. We can use it to refresh recollection. We can use it to develop -- we can use it in many other ways that --

THE COURT: I think that's different because that's all in connection with your criminal prosecution. The issue here is disclosing it to the -- you know, for better or worse, the SEC hasn't received this. They want it now not to assist you in your criminal prosecution but so that they will be on a level playing field with the defendants in the civil case that they have brought.

MR. STREETER: It is really two things, your Honor. It both of those things. It's, number one, we want to give it to them so that they can help us, and that's what we were going to present to Judge Holwell, that question. And we want to give it to them because they are our partner in enforcing the securities laws, and we want them to be able to do that effectively. We also think that the imbalance of information in their case could actually negatively affect our criminal prosecution.

For instance, if one of our cooperators in the criminal prosecution has his or her deposition taken and the defendants have all the wiretap evidence but the SEC, in preparing that witness for a deposition and in attending and defending that deposition, doesn't have access to that information, we think that will distort the truth-seeking process. A transcript will come out of that that will ultimately be used against our cooperator in a criminal case.

So we want the SEC, for our own purposes, to have equal information with the defendants, in addition to the fact that we want their expertise and assistance and the fact that they are a partner in enforcing securities laws and we want them to be able to do that effectively because we think that's what Congress envisioned. So it is all of those things.

THE COURT: Hard for me to see from that, on those theories, why, if they were working closely with you in the investigation of this case, why, if I am to credit what you were just saying, you didn't disclose it to them there.

MR. STREETER: Your Honor, candidly, this is an issue that we have been thinking about for a long time, trying to figure out what the safest course was, knowing that we were going to be -- that everything we did was going to be questioned. And we tried to proceed in the most careful way possible, meaning doing it after our investigation was public, after the defendants had the material, after they would have an

opportunity to --
THE COURT: But, I mean, conversely, I mean now somehow, without the help of the SEC, you managed to muddle through to an indictment, and you are prepared to go to trial and prove guilt beyond a reasonable doubt, if you can, independent of their help. So why on those reasons is it material at this point?
MR. STREETER: Well, A couple of things first of all, your Honor. We are certainly prepared with respect to the two people that we have indicted. But as you've heard here, there are other wiretaps that have been turned over to the defendants, and there are materials on the wiretaps of the defendants that we think, you know, there are issues on there about other people to prosecute, and we would like their assistance in evaluating that. We think that their role in prosecuting civil securities fraud matters will be enhanced by having access to that information. So it is not just about helping us in our criminal prosecution of Mr. Rajaratnam and Ms. Chiesi, which is why this is a broader issue that I had said we thought was distinct from the issue before your Honor, but we are happy to tell you about it. We want their assistance with evaluating other potential people that we would prosecute, them prosecuting other people, other types of violations that are contained in the wiretaps that they have expertise in that we do not.

You are right, we have successfully indicted two people, and we are prepared to go to trial and prove their guilt beyond a reasonable doubt. But we also want them to effectively do their job, and we want them to be able to use them as a partner with having the same evidence that we have access to, which is why we want to ask for that permission, your Honor.

THE COURT: All right. Let me hear if defense counsel wants to say anything in response. I understand that these are new cases so I will give you the opportunity to put in something in writing on that. But do you have anything more to say now?

MR. LYNAM: Thank you, your Honor, because I think it is going to be important to see whether the criminal case was over before the civil case allowed some disclosure, because that is an important factor. In your decision in New York Times, you noted that the criminal case was over and, therefore --

THE COURT: This was a totally different situation. There it was the press at The New York Times and others that was seeking disclosure. Here it's the -- first of all, it is a government instrumentality; it is not just any private party.

Secondly, it is the party that has a firm, fixed trial date of August 2nd, whereas Judge Holwell hasn't had the opportunity yet to even set his trial. And also his trial only

relates to some of the defendant here, as just was noted. So I think the analogy is not really that applicable.

MR. LYNAM: I was only pointing that sometimes you have a situation where the criminal case is over, which is why the Newsday case was decided the way it was, too.

But with regard to the issue of this disclosure to the SEC that the prosecutor just talked about, I would note, your Honor, that somehow the SEC has been able to bring a complaint, an amended complaint, and now a second amended complaint without the benefit of these wiretaps. Presumably, they've got enough to go on --

THE COURT: I don't hear them saying that they are seeking this primarily -- though they are not excluding the possibility that they would use this information in their case. They are seeking it primarily so that they are in the same position as you are, which is as SEC counsel points out, the norm of a civil case, that both sides are in the same position in terms of information.

MR. LYNAM: And in response to that, your Honor, I would say we don't have any advantage over the SEC because we got the wiretap material because of our clients' status in the criminal case. We are not intending to use the wiretap material in the civil case. Obviously, if we did that we would be opening up the door against the very argument that we're making. If we were to try to use it in the civil case, I would

agree, the SEC would be entitled to a level playing field. We couldn't just use it in the civil case as a sword and they don't get to use it.

But we're not intending to use it in the civil case. Our goal is to move to suppress it in the criminal case, which is where it remains under seal before Judge Holwell. But we have no advantage. We are not going to be disclosing it in the civil case. It wouldn't help us. It wouldn't help our point. That it should be suppressed.

THE COURT: All right. Let me just make sure -- I think it is implicit in everything I have received, but let me make sure that each and every defendant here who either already has or who might conceivably receive, depending on how I resolve this motion, wiretap information is saying that they will not offer it on their case. I'm not sure everyone is saying that but I want to be sure.

MR. KAUFMAN: Your Honor, on behalf of defendant Chiesi, at this point, given the amount of time we have had to review the wiretap information, we have no expectation and no intention of using it.

THE COURT: Supposing there is information -- let's just take a hypothetical. Supposing this might apply, for example, to defendant Goffer. Supposing there is information in which one of the wiretap persons says to the other wiretap person, thank God Mr. Goffer doesn't know what we're up to,

and, therefore, counsel for Mr. Goffer then wants to put that into evidence. I just heard an argument of how that would make it totally unfair for the SEC not to have the information at that point. What about that?

MR. KAUFMAN: Is that addressed to me or to Mr. Goffer's counsel? I will take it.

THE COURT: Your colleague stood up behind you once again but not carrying a knife. So go ahead.

MR. KAUFMAN: Your Honor, I think the simplest answer to that is at the most, it gives the SEC an argument for disclosure of that particular conversation. Not for the 14,000 hours of conversations that have been recorded --

THE COURT: Then they might say, gee, we want to see if in a conversation a month later someone said, you know, I was wrong, Goffer knew everything. And we can't figure that out until we've looked at all the conversations.

MR. KAUFMAN: But the cases have been very clear in saying that disclosure of Title III information is not meant as a civil discovery device. And this is not something that we, the defendants, have created. We --

THE COURT: I come back to the question, then: You may tell me you are not prepared to say anything at this point and I'll understand, but I just want to know. Counsel for Mr. Rajaratnam has said that he will not use this information, period. Correct?

MR. LYNAM: In the civil case, that's right.
THE COURT: In the civil case?
MR. LYNAM: Right.
THE COURT: Is there any other defendant who is prepared to make that representation?
(Pause)
MR. KAUFMAN: I am making that representation as of this current time.
THE COURT: You are saying you want to keep open the possibility that you will find something good for your client and you might want to use it.
MR. KAUFMAN: I'm saying I'm not clairvoyant and I can't know what's in the hundreds of hours that I haven't listened to yet.
THE COURT: The point is it casts some doubt I think a little bit on the argument that the statute only allows disclosure under very specified, narrowly construed bases and everything else is automatically prohibited, which is essentially how defense counsel reads the Second Circuit decision as I'm hearing it.
But now I'm hearing perhaps a suggestion: Well, although we only got it in the criminal case pursuant to a very specific disclosure in the criminal case, if we find something good, we'll feel free to use it in the civil case. That seems perhaps inconsistent with the argument I just heard.

MR. KAUFMAN: No, your Honor, because the statute allows a person receiving Title III information in 2517(3) to use it only in one circumstance, and that is while testifying under oath. The only way we are allowed to use this under Title III, in addition to preparing for our defense in the criminal case, is pursuant to 2517(3).

The statute doesn't allow us any other disclosure. We believe that if we disclose it to the SEC we are violating the law.

THE COURT: I saw that in your letter. Let me make sure I understand what you are saying and let's see if this is the government's view, as well.

You are saying that if there was something in a recording that you received that was exculpatory to your client and someone else was on the stand -- not your client -- who could identify it, or there was just a stipulation as to its authenticity, that you could not play the portion that was exculpatory to you except if and when your client testified? Is that how you are reading the statute?

MR. KAUFMAN: The statute says that any person who has received the wire communication -- that's us -- may disclose the contents of that communication while giving testimony under oath or affirmation in any proceeding --

THE COURT: I see that. That is, for the record, 2517(3). And your reading of that is consistent with the very

narrow interpretation that your colleague is giving this statute.

My question is: Is that really what your position is?

MR. KAUFMAN: Yes, your Honor.

THE COURT: So in the criminal case you are not going to be able to put in anything that might be exculpatory in these tapes except for the testimony of your client?

MR. KAUFMAN: No, because in the criminal case -- we are allowed to use the tapes to defend ourselves in the criminal case.

THE COURT: Where are you finding that?

MR. KAUFMAN: The whole purpose of --

THE COURT: Of course, the whole purpose. That's --

MR. KAUFMAN: In the criminal case.

THE COURT: No.

MR. KAUFMAN: Your Honor, the whole premise of Title III is with respect to criminal law enforcement. The U.S. Attorney's Office is trying to graft onto Title III this partnership notion that they're entitled to share this Title III information with agencies that only have civil jurisdiction. That doesn't exist in Title III.

Title III is designed for one purpose and one purpose only -- to provide maximum protection to the privacy of the individuals whose privacy has been violated and to allow that evidence to be used in criminal prosecutions.

THE COURT: All right. Let me interrupt you. I hear you, but let me find out what the U.S. Attorney's position is on this issue we were just discussing.

MR. STREETER: Your Honor, the U.S. Attorney's Office's position is that 2517(1), (2) and (3) are directed to what the government can do. And it can't be the case that the only thing that a defendant can do is contained in 2517(3). It would be unconstitutional, your Honor, so it can't be.

Congress drafted this statute directed to what the government could and couldn't do. This statute doesn't address what a defendant can do. And we all agree, a defendant has to be able to show these materials and play them for witnesses; that's not contained in Section 3. They have to be able to show them to expert witnesses; that's not contained in Section 3. They have to be able to share it with their codefendants, which they've acknowledged they have done; that's not contained in Section 3. And so it has to be that Section 3 is not the complete description of what they can do with it, and that means that they can do all these things with it --

THE COURT: So I am tentatively of that view. But now let's go back to what you can do with it.

The cases, which I haven't read, that you just brought to my attention regarding the IRS, the IRS, of course, has joint criminal and civil enforcement duties. So one could see that one might say, oh, of course, if the wiretap was disclosed

to an IRS agent in connection with a criminal investigation and it turned out all he could do with it is use it civilly -- there wasn't enough evidence to go forward on criminal but there was civil -- we're not going to say that somehow he was tainted or had to blind himself to that use. But the SEC, though it may be your partner, does not have criminal jurisdiction.

MR. STREETER: Well, your Honor, on that question, I mean, I'm not a tax lawyer and so you'll excuse me. But I understand that there is a bright line that Congress has established between the civil and criminal authorities, in part, to avoid abuse by one of the information contained in the other. And so --

THE COURT: That may be true.

MR. STREETER: That bright line --

THE COURT: You mean, in the IRS?

MR. STREETER: Exactly, in the IRS. It protects against them.

But, your Honor, it is important to understand that there are two potential ways that the SEC can get this information. Either from the defendants, as part of discovery in this case, in order to level the playing field, that's number one, and that's what we addressed our letter to.

Number two is a totally separate way, which is us giving it directly to the SEC because we think it is the proper

performance of our law enforcement duties. And Mr. Kaufman is conflating the two. I understand your Honor wants to consider both, but it's important to know that those are two totally different ways in which the SEC can get the information.

THE COURT: All right. Let me ask one other question of the SEC, and I think we are going to regretfully schedule some short additional briefing in light of what has come up here today.

I take it that the SEC is not making any argument, and will not make any argument, that if I do disclose this information, that because it will take you some time to get through it, that you will on that basis be seeking any adjournment of the trial of this case?

MS. SZCZEPANIK: Yes, your Honor, we are not seeking an adjournment.

THE COURT: Yes.

MS. SZCZEPANIK: And just along those lines, I think the fact that there are a lot of materials underscores the point that we should be getting them sooner rather than later.

THE COURT: That's why I want to resolve this one way or the other soon.

So I'm going to give anyone who wants the opportunity to put in additional letter briefs not exceeding five pages, single-spaced, by let me ask, how about close of business Wednesday? Is that doable?

And then anyone who wants to respond to those submissions can put in letter briefs, not to exceed five single-spaced pages by Friday, close of business. And I will then have enough to make the decision the following week.

So anyone have any problem with that schedule?

MR. LYNAM: No, your Honor. Just for clarification, since you left with "anyone who wants to," can I assume the government will be filing Wednesday and we will file Friday?

THE COURT: No. I'm purposely --

MR. LYNAM: Can we file both days?

THE COURT: I mean, actually, the more I think about it, maybe what makes sense is to have both sides file on both days, because there are issues -- I am not going to limit it to these new cases. There are issues that came up today that people may have further thoughts on. So I think no one's going to be -- anyone who files on Friday alone is limited, strictly limited, to stuff that was in the letters on Wednesday. But if you have something affirmative you want to say that relates to anything that came up today, then you need to put that in on Wednesday. And then Friday is just response to other people's letters. OK? That goes for everyone, including the U.S. Attorney's Office, the SEC as well.

OK. Anything else we need to take up today?

MS. SZCZEPANIK: Your Honor, one housekeeping matter.

The SEC is about to schedule a number of depositions.

We think we are going to be exceeding the ten deposition limit, and we would seek leave to do that.

THE COURT: How many do you want?

MS. SZCZEPANIK: I mean, we could conceivably do 30 to 40, and I'm not trying to be, you know --

THE COURT: Anything is conceivable. How long are these depositions?

MS. SZCZEPANIK: We will obviously try to accommodate everyone, all the defendants' schedules, but we would like to keep them one day per person.

THE COURT: No. I was thinking of something much more efficient, which was, for example, if you had 20 depositions limited to three-and-a-half hours apiece, that seems to me not inconsistent with the underlying purposes of the ten, seven-hour deposition limits. It is not quite the same but it is still a little bit more onerous.

But so how about that? 20 three-and-a-half hour depositions. You could mix and match. You could take a couple for seven hours and a couple for two hours, but a total of 70 hours of depositions.

MS. SZCZEPANIK: We will take that, your Honor, and if it looks like we can't make it within that limit, which we will try our best to do, I will come back to you.

THE COURT: OK. Anyone else want to be heard on that?

OK. Very good. Thanks very much.

MS. SZCZEPANIK: Thank you, your Honor.

THE CLERK: All rise.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served by hand and electronic mail on the Honorable Jed S. Rakoff, United States District Court for the Southern District of New York, 500 Pearl Street, Courtroom 14B, New York, NY 10007-1312, and on all below counsel of record on this 11th day of February, 2010. Service was accomplished by regular mail and electronic mail.

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