UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v. 11CV7566(JSR)

RAJAT GUPTA,
RAJ RAJARATNAM,

Defendants.

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New York, N.Y.
November 18, 2011
3:20 p.m.

Before:

HON. JED S. RAKOFF

District Judge

APPEARANCES

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SAMIDH J. GUHA

(Case called)

THE COURT: We are here because of an issue related to the timing of depositions, but I think it may be useful to set the stage by reminding everybody what is not in dispute. First, in the criminal case *United States v. Gupta*, we have a firm, fixed unalterable trial date of April 9, with the various motion and discovery schedules relevant to that case previously set for various dates. For example, the government's discovery is due to be completed on November 2; defense motions are due on January 3; various other disclosures had dates that had be previously set. All of that has been set and fixed and finalized in the criminal case.

In the civil case *SEC v. Gupta and Rajaratnam*, this case, we had similarly arrived at firm and fixed dates, a trial date of October 1, 2012, requests for documents, first request on November 22, and any amended pleadings on November 29, expert reports on June 8 and June 22 respectively, summary judgment papers on August 10, and various dates thereafter, final pretrial conference on September 7, and so forth.

All of that was previously set and the court was able to do that with the cooperation of very able counsel on all sides because of the rule that was enacted by the Southern District of New York some months ago that assigning SEC civil cases and the corresponding cases to the same judge who had the first case on the underlying transactions, which in this case

was the *Galleon* case.

I mention all that because this is in the scheme of things a fairly narrow dispute that still remains. The government jointly called the counsel for the parties the other day to say that they wished to intervene and as I understand and I want to confirm here on the record, the request to intervene is solely on the question of the scheduling of depositions. Yes?

MR. BRODSKY: Yes, your Honor.

THE COURT: Very good. I believe there is no objection to that intervention, correct?

MR. NAFTALIS: No objection to the intervention.

MR. McGRATH: No objection.

MR. GUHA: Not to the intervention.

THE COURT: I should mention one other thing. Before the government intervened for that limited purpose, an intervention hallowed by tradition and which has occurred in virtually every other similar parallel proceeding known to mankind, I had asked the parties to give me their top ten deposition candidates, divided into five super candidates and the five lesser, not necessarily in terms of importance but in terms of immediacy. My hope had been that there would have been some overlap that would have allowed the court not to have to resolve every aspect of this dispute, but that proved not to be the case.

There was no one listed on the SEC list who is also listed on the defendants' lists and the only person who is even listed on both defendants' lists is I think the same person. On defendant Gupta's list, there is listed among others Gary Cohn identified as COO of Goldman Sachs. On the Rajaratnam list, there is listed Gary Cohen (Goldman Sachs). I am guessing wildly that that may be the same person or are they two different people.

MR. NAFTALIS: I think it's the same person.

MR. GUHA: Yes.

THE COURT: Very good.

MR. NAFTALIS: I believe there is one other overlap.

THE COURT: Spelled the same way?

MR. NAFTALIS: This one the spelling may be right on both lists, I think another Goldman official named Mr. Loeb.

THE COURT: David Loeb. You are right. OK.

MR. McGRATH: There is one other overlap. We have identified an individual named Horowitz on our list in the second five and he is also identified in the second five group for Mr. Rajaratnam.

MR. GUHA: That's correct.

THE COURT: I missed that. Thank you very much. So maybe there is a little bit of overlap; that may be helpful as we go forward. But let me hear first from the government then we will hear from counsel to the parties.

MR. BRODSKY: Thank you, your Honor. We are here because we believe, your Honor, Local Rule 13 has enabled change in the handling of parallel criminal and civil proceedings. A wise man once said, your Honor, that coordinating the criminal cases with the parallel civil actions arising out of the same conduct is now much easier, and I believe this court said that it allows the judges to address particular complexities and circumstances tailored to each case.

After the government unsealed its indictment against Mr. Gupta, Mr. Gupta pressed and sent a letter to Judge Fox concurring with the government, the United States Attorney's Office, that Local Rule 13 be applied and believed the criminal case should be before your Honor. I think your Honor has indicated through cases since the local rule that no one size now fits all stay applications. The reason for our stay here, there are multiple reasons. The first reason, your Honor, is that in this court's judgment, and I believe the parties are in full agreement, the criminal case was put on before the civil case. The criminal case was put on in April and the civil case was put on in October.

THE COURT: You are referring to the trial dates.

MR. BRODSKY: Yes. And I believe, your Honor, that the criminal rules of procedure with respect to depositions should apply the prior to the criminal trial. There is

sufficient time after the criminal trial for Mr. Gupta's counsel and certainly Mr. Rajaratnam's counsel to take the depositions before trial.

I say that for the following reason, your Honor. If Mr. Gupta believed that he needed more time for depositions, we are more than happy to move up with your Honor's permission and of course Gupta's permission to move up the criminal trial to January or February if they felt they needed the civil depositions to be, more time for the civil depositions.

I don't believe they need more time for the civil depositions for the simple reason, your Honor, that in similar cases, in fact, far more complicated cases, *SEC v. Galleon*, *SEC v. Longoria* where there were more parties, more securities at issues, more securities transactions, many more people to be deposed, there was a shorter period of time for the parties in that case to conduct their depositions in the civil proceeding than the one before your Honor after the criminal trial.

THE COURT: Here is the issue I have. Of course, I admire your clever ploy of suggesting the criminal trial be even sooner which of course would be totally acceptable to the court but might not fully be acceptable to defense counsel. But there are two considerations that the court now has. The big problem that existed before the new rule has been eliminated which is that two or sometimes more than two judges had to often in ignorance of what had occurred on a given day

in the other's court figure out schedules and constantly revise schedules and now we can move things expeditiously accordingly.

Therefore, from the standpoint of the SEC case, the setting of the two trials if all the depositions can occur after the criminal trial but before the civil trial without any meaningful difficulties, there is a lot to be said for that. But what I am unclear about is what is the interest that's being served by not having some of these witnesses go forward now. Based on the lists I have received, all parties have said they might want to depose more than the ten, of course, they will have to seek permission for that, but they may receive permission. But even if we just have 30 depositions, that's a lot of depositions to be squeezed into a relatively short timeframe, although I agree with you that more depositions have been done in less time in some of the other cases.

What is the harm to having some of those depositions sooner so that we can move things, smoothe it out over a period of time. I recognize in previous matters where this has come up that there is harm in causing a person to perhaps somewhat artificially invoke their Fifth Amendment. The defendant would almost certainly invoke the Fifth Amendment and the cooperator might well invoke his or her Fifth Amendment. But what about someone who is just, you know, another witness so to speak. Where is the harm in having that person's deposition sooner rather than later?

MR. BRODSKY: Your Honor, I appreciate the fact that the court needs to balance whether there is prejudice to Mr. Gupta, Mr. Rajaratnam, to the SEC, and what the government's, the United States Attorney's Office's interest is in pushing back the depositions. Respectfully, looking at all those interests, we don't see any prejudice to begin with to Mr. Gupta, Mr. Rajaratnam or to the SEC. There is a slight prejudice to the SEC which I can elaborate on. But what we see is some prejudice to the government and to the criminal authorities.

There is a reason. I know your Honor is blind to the tactical purposes that parties have or your position is that you should be blind to the tactical purposes that parties have for pushing depositions before a criminal trial. In our view, there is a tactical purpose to it and that is if you are not going to move up the criminal trial, Mr. Gupta is not asking you to move up the criminal trial, yet pushing for depositions before the criminal trial in our view is a tactical purpose to try to depose some of the government's key witnesses before trial. The local rule allows your Honor to give precedence to and more weight to the criminal rules prior to the criminal trial and Congress in its infinite wisdom has decided that depositions --

THE COURT: Very infinite.

MR. BRODSKY: -- has decided and courts have decided

for a long, long period of time now, well-established, that depositions are not appropriate in criminal cases prior to criminal trials, that there is a strong public interest in not allowing that, and that having the government's key, criminal authorities' key witnesses be deposed prior to trial sort of eviscerates Rule 3500 and sort of allows criminal defendants to have certain abilities that they wouldn't have in a normal criminal trial.

Where you have no prejudice in our view to capable counsel of Mr. Gupta and Mr. Rajaratnam, especially where Mr. Gupta is represented by two of the finest law firms in the world, Debevoise and Mr. Naftalis' firm, and where Mr. Naftalis and four other partners are working on the case along with a number, I am sure, of multiple, nameless, faceless, very I am sure intelligent, hard-working associates in the background, they surely can take the depositions they need to take after the criminal trial.

THE COURT: It's not like the Federal Rules of Criminal Procedure say depositions are prohibited; they simply don't provide for depositions.

MR. BRODSKY: Correct.

THE COURT: Have you seen anywhere articulated by Congress the reason for that?

MR. BRODSKY: I can't say I have looked at the legislative history, your Honor, for that purpose.

THE COURT: You were strongly suggesting that there is some great public purpose here that's being served, but an alternative possibility is simply that historically depositions were in civil cases, not in criminal cases.

MR. BRODSKY: That may be true, although Title 18 U.S.C. Section 3500 does shed some light on Congress taking an actual view as to when the defense should receive statements of all the government's witnesses. In that case, it's actually Congress's view that the government shouldn't be providing those statements until after the direct examination of the government witnesses at trial. By tradition, we of course do not do that; we provide it in advance of trial.

THE COURT: All you say is true although it was modified and was enacted in the context of the constitutional *Brady* requirement so that Congress knew that if there was anything that was exculpatory, it had to be turned over earlier.

MR. BRODSKY: Absolutely.

THE COURT: All they were saying was that stuff that was neither *Brady* material nor *Giglio* material but just simply an agent's notes of a prior conversation didn't have to be turned over until after the direct examination. So I think that's a somewhat narrow base on which to build too much in the way of an implied congressional purpose.

MR. BRODSKY: I could go back and read the

congressional history behind the 3500 case law.

THE COURT: That would be a useful thing.

MR. BRODSKY: I am happy to do that if you think it turns on that because I do think I would find case law by many judges in this courthouse and other courthouses who have taken a different view than your Honor and have found there are --

THE COURT: That's true on any subject.

MR. BRODSKY: That's true -- and have taken the uniform, those who have granted stays prior to Local Rule 13, they have generally relied --

THE COURT: Here is what I get. It's clearly an advantage to the government not to have its witnesses deposed before trial. I think the congressional purpose, but I have no more familiarity with the legislative history and the Federal Rules of Criminal Procedure than you, but I think judging from the case law that I am familiar with, their view was that the defense because of the Fifth Amendment is always going to be free of the government finding out what the defense is going to say, at least the defendant himself, and for other reasons, the defendant is often able to keep unknown until relatively shortly before trial even who its witnesses are.

So the feeling in Congress was what's sauce for the goose is sauce for the gander; if the government can't find out what the defendant's going to say then the defendant should not be able to find out what the government is going to say. It

was that kind of thing, not some more holy policy if you will. If you go back much further, you go back to early American decisions, there is also an element there of fear of witness intimidation. That figures less in subsequent cases just because in the old days the federal government didn't prosecute white collar types as much they later came to do.

But what I am having trouble seeing, since none of us knows what the purpose is, I was just giving a hypothesis based on earlier cases I have read, I see the tactical advantage to the government which I do agree with what you said. I think the court should be blind. I shouldn't be affected by what's a good tactic or a bad tactic for any party. That's not my job. My job is to apply the law as fairly as I can regardless of tactical decisions or advantages.

But what's the harm to the government in having a witness, having the defense in effect know what a witness is going to say.

MR. BRODSKY: Your Honor, I think there is a harm, having tried a number of cases, I know your Honor has probably tried more in your past days, there is a harm.

THE COURT: But I overcame it.

MR. BRODSKY: There is a harm, your Honor, to having the government witnesses being cross-examined in a deposition setting prior to a criminal trial. It does hurt the government's ability to prosecute its case effectively in light

of the defendant's ability to shield all of his defenses from the government.

There is an imbalance there, as your Honor pointed out, and why should that imbalance be in place prior to the criminal trial, particularly where the defendant does not want to move up the criminal trial whereas the government does, and the defendant has sufficient time after the criminal trial to fully and diligently complete all his depositions in preparation for his civil trial, particularly in this case, your Honor, where Mr. Naftalis is in a position far better than most criminal defendants, having (1) already seen most of the government's trial exhibits played out once in a criminal trial before Judge Holwell, having some of the government's key witnesses already testify in that criminal trial, having been sued in an administrative proceeding by the SEC, having received all of the wiretaps that are relevant here in that administrative proceeding, and having received thousands, tens of thousands of pages of documents, and having known about the investigation into Mr. Gupta for well over a year before the charges were brought.

So he is in a particularly advantageous position in terms of having a lot of information before this criminal trial. There is no reason for him to have the additional reason of deposing people, particularly where we represent, your Honor, it will hurt our ability to prosecute the case and

there is no harm to Mr. Gupta or Mr. Rajaratnam, especially again, your Honor, I hate to keep emphasizing it --

THE COURT: I am not quite sure I understand when you say it would prejudice you is precisely what they say would be the harm if they didn't get this information. That is to say this whole process that we call trials and the legal process leading up to trials is designed to get at the truth. I don't mean to come on like I am waving a flag here. I am just constantly amazed at all the technical impediments that parties put in the way of finding out the truth.

So if a deposition is taken and the gentleman or lady is under oath and is subject to examination and usually it's taken by the adversary so it's in effect cross-examination, that brings out facts which can help the determination of the truth. The government is aware, as any trial lawyer is aware, that depositions tend to be one-sided, that often statements are made that seem inconsistent with what is said thereafter but really are not inconsistent, a lot turned on the wording, because it's an adversary who is putting the questions, leading questions are permitted, there is little or no opportunity as a practical matter for redirect examination, in effect. It's denominated cross but it's really the party's own counsel that put subsequent questions but there is some opportunity for that.

So, yes, there are dangers there, but in the broader

perspective, the whole reason we have depositions is because we think that they help elicit the truth. So the very harms that you are referring to which are not without some substance, looked at from your adversaries' point of view are bringing out more of the truth than they otherwise would have the ability to do if they have to question in the blind. So I think it's a mixed bag.

MR. BRODSKY: Your Honor, in terms of the criminal trial, there is a great imbalance. Mr. Naftalis can take depositions of witnesses he thinks are going to be government witnesses at trial. The government, United States Attorney's Office can't take depositions of who the defense witnesses will be. There is a great imbalance there before the criminal trial. This is all one-sided. Mr. Gupta will take the Fifth before the criminal trial which will have no consequences in terms of the criminal trial. The government's witness will not take the Fifth barring some exceptions that are well-known. The government's critical witnesses who are noninvolved witnesses, nonco-conspirators, won't be taking the Fifth.

There are two other important considerations for your Honor. One, a lot of the depositions will revolve around wiretaps. Some of the wiretap conversations, for example, in late July 2008, there is a very long wiretap call between Mr. Gupta and Mr. Rajaratnam. Surely Mr. Gupta will want to question, Mr. Gupta's counsel will want to question people at

Goldman regarding that call. We anticipate that Mr. Gupta's counsel will want to move to suppress those wiretaps. He has a right as an aggrieved party to do that. It seems odd that the whole depositions could occur revolving around wiretaps that Mr. Gupta will seek to suppress where there is no ruling at the time of those depositions.

THE COURT: Of course that's their choice. In other words, I think that's not an argument for the government so much as a choice they have made. Let me ask you a different question. You looked at the three lists.

MR. BRODSKY: Yes, your Honor.

THE COURT: Is there anyone on that list who you think it's unlikely the government will call as a witness? I don't want you to tell me who you are going to call as a witness at this stage, but is there someone who without binding you, just as a probability, it's unlikely you would call?

MR. BRODSKY: I think there are several people.

THE COURT: What would be the harm in having those depositions?

MR. BRODSKY: I think if we knew we are not going to call those people, I think there are some people in that category, we would have less of an argument that there is harm to us. We still don't like the imbalance. We would still suggest to your Honor that the defense would be having the advantage of taking depositions whereas we wouldn't. So our

preference again would be that that still not go forward because he has more than enough time with his colleagues to take those depositions in light of your Honor's schedule for the civil trial.

THE COURT: Speaking of the three lists, my chambers got a call earlier today from a reporter requesting to see the lists. Is there any party who objects to my furnishing these three letters to the press? I have not heard any objection, so going once, going twice --

MR. McGRATH: Your Honor, I think our only concern is the privacy of the individuals whose names are on the list right now. It's somewhat premature in terms of when they would normally be disclosed in a public proceeding. They have not been given any heads-up. Given the attention of the press to this case, I think we are a little hesitant to agree to have those names turned over. Other than that, we don't have any objection, it's just the privacy concern.

MR. NAFTALIS: We don't have any objection.

MR. GUHA: We don't have any objection either.

THE COURT: I am not sure the government has standing on this issue but I will ask anyway.

MR. BRODSKY: If we had any standing, we would have no objection.

THE COURT: While I think the SEC's point is not without some force, I think it's inevitable that all these

things are going to be released in the near future in any event, so it's really a question of timing. So I will release the three letters. If any member of the press wants a copy, they can call my chambers. I can either just send it to anyone who requests or just docket the three letters so they are publicly available. I don't care either way.

MR. NAFTALIS: Whatever is most convenient to the court.

MR. McGRATH: We agree.

MR. GUHA: We agree.

THE COURT: We will docket the three letters.

MR. BRODSKY: My only suggestion would be to address the SEC's concern, perhaps docketing them tomorrow would enable the SEC to contact whoever they thought should be contacted to let them know in advance.

THE COURT: That seems reasonable. I don't think I can docket tomorrow. We will docket them on Monday. OK.

Going back, let me hear from the SEC, and you don't need to repeat things that have been said by the United States Attorney's Office, let me hear anything else you want to add.

MR. McGRATH: Your Honor, as you know, we have asked the court to defer the depositions until after the criminal trial so we obviously are joining in the request by United States Attorney's Office. I would just like to clarify one point. We have not asked yet at least right now we don't have

any intention to ask for more than ten depositions. So when the court made reference to all the parties, we certainly have not done that.

THE COURT: You just won my heart.

MR. McGRATH: Secondly, your Honor, I would point out that at least in this case, in the civil case, I have not seen any convincing argument why there is prejudice to having the depositions deferred for the reasons Mr. Brodsky mentioned. It seems that both defense counsel are very capable and have the resources to complete whatever depositions are necessary and appropriate in our case after the criminal case ends.

Typically, your Honor's pretrial conference plan has about a five-month window in it. We will have about five months in this case after the criminal trial ends. Presumably it begins in April ends later in April, May, June, July, August September. This is not any shorter time period than you would have in the normal case where there is not a criminal trial. Depositions are readily completed within that timeframe in the typical case. As Mr. Brodsky said, this is less complicated in terms of witnesses and evidence than many other cases that we have had before your Honor, and a lot of the discovery already has been handed out, so a lot of efficiencies have already been achieved.

THE COURT: The United States Attorney indicated that there were at least a few witnesses they were unlikely to call

as witnesses. I understand and I agree that there probably will be time after the trial, there will be time after the trial to get all the discovery done. But on the other hand, I think it is reasonable not to compress the discovery if we can get it going earlier and, frequently, discovery leads to more discovery.

I am not going to change these trial dates under any set of circumstances because I think one of the huge problems in the American legal system is endless delay. That's another reason why I am so grateful that the judges in the Southern District of New York have put in place this new rule, because it allows a judge to move the cases expeditiously without having to worry about what some other judge is doing.

Just to take an example. Here on the list is, this is on Mr. Rajaratnam's list, the top five, a Cyprus Group representative (consultant to Galleon). It's not even a person identified; it sounds like it's a 30(b)(6) witness.

MR. GUHA: We believe so, your Honor.

THE COURT: What would be the harm of having a 30(b)(6) witness deposition now? There is a great advantage to having 30(b)(6) witnesses earlier than later. They of all deponents are the ones who frequently invite further document requests. So, I wonder if it's really an all-or-nothing proposition.

MR. McGRATH: Well, the harm would be the harm we

articulated in our last appearance which is the wastefulness aspect. All of this may be obviated if there is a conviction and we move for summary judgment. So there is a potential waste of government resources, a potential waste of defense resources, and the imposition on a third party who would not otherwise be burdened with being involved in this proceeding if there is a conviction. So, that would be the harm. There is no, I don't see the reason to have it ahead of time where there is sufficient time afterwards. So why put all the parties and third parties through that potentially unnecessary burden. That would be the harm.

With respect to, if I may a couple other points, the efficiencies of waiting, again, if you look at the list, a lot of the witnesses are people who I would expect the government may very well call at the criminal trial. And again for that reason, it seems unnecessarily duplicative to have these Securities and Exchange Commission lawyers and defense lawyers and individuals who are going to be deposed put through the burden of a deposition before the criminal trial when there will be I am sure fulsome examination, cross-examination of them at the criminal trial.

For many of these people, their depositions may be obviated either (1) because of the result of the criminal trial or (2) there is going to have been such complete testimony taken that it really is beating a dead horse to take them

again. Even if the court were to allow up to 30 depositions, many of them would very likely be obviated. So that shortens the potential list that would be taken after the criminal trial is over.

Just a final point I will make not to belabor what we said before, in addition to the arguments that Mr. Brodsky has made about what the harm is to the government, and I am not speaking for them but just on my experience, I would say that even the most sterling witness, even the most truthful witness, every time he is asked to testify and questions, human nature being what it is, people's answers will vary. They will vary slightly. They will be somewhat inconsistent. That witness, the more he is deposed, the more he is questioned, the more his credibility is subject to I would argue unfair undermining. That's I think a recognizable danger and prejudice to the government that the court can I think give some weight to.

THE COURT: That danger exists, but then on your theory, forget about parallel proceedings, in an everyday civil trial, there should be no depositions because that same danger is going to exist. I don't think anyone seriously suggests that because the benefits in bringing out the basics of the case and allowing the opportunity to not be surprised at trial, and allowing follow-up before trial have been held in the civil context since time immemorial to outweigh the true danger you mention but one that pales by comparison with the benefits.

MR. McGRATH: Well, there's a balancing, your Honor. Obviously there's a balancing. And we're certainly not saying that there shouldn't be depositions in the civil case.

What I'm saying is the balancing is you get one deposition, you don't get to depose the person two, three, four, five times to build a record where there's some inconsistencies that really are not substantive inconsistencies, but might be perceived that way by a jury.

So the point I'm making is --

THE COURT: In some ways, a deposition is a much clearer statement.

What happens now in a criminal trial is the witness is confronted, isn't it true that you told agent so-and-so at your meeting on such-and-such a date something inconsistent. And the attorney making that assertion has a much less certain record to work from because it's typically the handwritten notes of the agent then transcribed into a so-called 302, if it's an FBI agent, for example.

So it's much less precise; the jury has no real way of knowing whether it was -- the attorney is accurately repeating what was said by the witness or, rather, what the FBI agent wrote down as his belief as what the witness said. And most FBI agents and other agents, SEC agents included, are not trained as court reporters.

So I mean these dangers still exist. I don't want to

get too far afield.

MR. McGRATH: Right.

THE COURT: There is a disconnect that the American legal system has never really come to terms with between the fact that where the stakes are primarily money, we allow elaborate discovery, discovery that is so elaborate that it has proven a deterrent to trials because it's so expensive. But it's endless. Depositions, interrogatories, document requests, requests for admissions, contention interrogatories, etc., etc., all in the name of trying to find the truth, but overdone to the point where it actually diminishes the possibility of cases going to trial because they are too expensive a process, and so the full truth never comes out.

That's on the civil side.

On the criminal side, where you have a gentleman or lady's liberty at stake, we say discovery? What's that? No depositions, no interrogatories, limited document discovery. And most of what's required to be disclosed is required only by the Constitution and not by any rules.

So we go to two extremes. And we go overboard when it's only money involved, and we go hugely underboard when it's liberty involved.

How do we explain it?

I think it's not explained by logic, it's not explained by reason, it's not explained by principle; it's

explained by history. Someday someone will say, I'll try to rationalize it. That hasn't happened yet. And certainly this Court has no power to do that. I'm stuck with what I'm handed, so to speak.

But putting all those very broad generalizations aside, I think the argument that most seems to me to be a forceful one for both the SEC and the government is that there's no compelling reason that will have the depositions go forward before the criminal trial. In the cases like *Saad* and *Oakford* where I've addressed this issue before, and part of what's always been a driving force for this Court has been that there is going to be an endless delay in bringing the civil matter to a head. That's not going to happen now, thanks to the new rule. And we have our set of dates.

So I think maybe it's time to hear from defense counsel.

MR. McGRATH: Thank you, your Honor.

The only other point I had, I think it responds briefly to the Court's pointing out the dichotomy between the way we handle civil and criminal cases.

In addition to what you just articulated is our argument that, yeah, there's no prejudice in waiting. There is the prejudice in going forward, which is the one-sided aspect of it that the Court alluded to earlier, which is that the defendants aren't going to be deposed here, and that's part of

why I think in a criminal case they have this imbalance, because they recognize that it is one-sided, and it's unfair to be one-sided.

THE COURT: But, of course, that imbalance, one might argue, is not an imbalance, but a recognition of the fact that the burden is always on the government, and that the defense is not required to produce any proof in a criminal case. And that the whole point of a criminal case, looked at in that way, is does the government have the goods or not. And, therefore, it's irrelevant that they can't get any discovery from the defense because that's not the way the Constitution has set the system up. That, at least, would be the argument. I can think of some possible counterarguments, but I throw that on the table.

MR. McGRATH: Right. But this is the civil case, so I'm speaking to that. So here, you don't have that concern, but you have the prejudice of the one-sided situation where we would have government witnesses.

THE COURT: You're saying you are prejudiced in a case where both sides are supposed to be heard.

MR. McGRATH: Exactly.

THE COURT: Because you still can't get the testimony of the defendants -- they are going to take the Fifth -- and so it is one-sided in terms of how the civil system is set up.

MR. McGRATH: Yes.

And I'll rest with that.

THE COURT: That's a fair point.

Let me hear from defense counsel.

MR. NAFTALIS: If your Honor please, I think in this case your Honor should adhere to the approach that your Honor has taken in like cases, going back for many years, and culminating in your decision in the *Saad* case. And I don't see, most respectfully, any reason for there being a change in that approach. The criminal case always gives --

THE COURT: Maybe I'm just older and wiser.

MR. NAFTALIS: I thought you were pretty wise at the time of *Saad*. I see no ability to improve.

THE COURT: Talk to my wife.

MR. NAFTALIS: And here, I think, without belaboring some of the history we went into the last time, the fact that we find these two cases on a parallel track right now is strictly a governmental decision.

After all, we were sued administratively in a vehicle where we were being deprived of many rights, including our right to take depositions. We went to vindicate those rights in the lawsuit which ended up with the SEC dropping their administrative case and then saying, But we intend to proceed. And they waited three full months to proceed. And they did not proceed until, in coordination with the U.S. Attorney, the same day.

So, therefore, had they proceeded as one would have imagined, had they been acting independently -- and, by the way, there were lot of joint investigations. And I say it not critically; that's normal, joint interviews, joint this, joint that, sharing of information. I mean I'm not saying it in a critical way; I'm just saying it because it's been going on even in my youth.

THE COURT: I don't remember back that far.

MR. NAFTALIS: And we've been subjected to extraordinary publicity, extraordinary reputational damage extending back to March, when the SEC filed their charges. And we intend -- I think as your Honor said, I think, in *Oakford* and *Saad* and some of the other cases, the fact that two cases are brought with serious consequences, one an SEC case, and one a United States Department of Justice case, the defendant has a right to vindicate his rights in both forum.

So, therefore, when we submitted our schedule to your Honor and argued to your Honor ten days ago, before the U.S. Attorney's Office decided to get involved in this kind of the eleventh hour, we said that your Honor should follow what was -- what you did in *Saad*, which was -- when your Honor said, Look, depositions can go forward. Government cooperators, with whom there's a Fifth Amendment issue, accomplice witnesses, and the defendants, they will be later. Third-party witnesses can go forward now.

And what really is interesting and what I find somewhat kind of remarkable about the government's application here, is it is a 180-degree flip of the position that they took before your Honor in the *Galleon* civil cases, when they first were before your Honor a year ago. At that time, the same issue comes up. As Yogi would say, de ja vu all over again. The same issue comes up. And Mr. Streeter, who was Mr. Brodsky's co-counsel, was the one who actually gave the argument, not Mr. Brodsky at that time. And here's what he said:

In terms of the -- it's at page 26 of the transcript of March 10th, 2010, in *SEC v. Galleon*, in other words, the case which, in a sense, brings us all here. Galleon, Raj Rajaratnam, et al.

And here's Mr. Streeter for the government:

"In terms of the U.S. Attorney's Office, we are simply following your Honor's lead in the *Saad* case in saying that the depositions of cooperators and defendants should be stayed until after.

"The Court: But not third parties who are willing to be deposed.

"Mr. Streeter: That's our position, your Honor."

The government, the same government in the same nucleus case, broad case, was perfectly willing to have third-party depositions taken at that time.

THE COURT: Of course, it may not be an inconsistency; it may be an application of what Yogi meant when he said, "When you come to a fork in the road, take it."

MR. NAFTALIS: But the reasons offered by my friend Mr. Brodsky here are no different than the usual historical reasons: We would like a tactical advantage. Period. That's what it comes down to. There's no other reason offered.

THE COURT: Well, I think he's saying he doesn't want to give you a tactical advantage that he thinks you would not otherwise have.

MR. NAFTALIS: Let's take that out.

If anything, his position is weaker here than in any other kind of case, because there's already been a trial. There's already been a trial here. And some of the witnesses on the deposition lists have actually testified at that trial. So there's no secrecy to any of that.

And I must take great issue with my friend Mr. McGrath, if a witness is telling the truth, he can tell the truth more than once. He actually can. It's only people who can't tell the truth who tell the stories differently from time to time. And depositions are also different than trial testimony, because you explore, you try and discover things. So it seems to me that, therefore, their position is weaker.

And in terms of imbalance, my gosh, they had the grand jury to do an investigation here. And without going into

things that I don't want to go -- wouldn't be proper, but we brought witnesses and information that we thought was exculpatory of our client to their attention in the hopes that they wouldn't proceed in the case. And I won't get into any of that. And they then had the right and the ability to question those witnesses in the grand jury and otherwise. So this notion this implication somehow -- they've had plenty of investigative stuff, which is their right.

So it does seem to me that we have a right to defend this case; the *Saad* case is correct. In our letter to your Honor, we tried to be very strict in our following of it. We took accomplice cooperator witnesses and put them in the later group, even though we'd be happy to examine them, and thought it would be helpful, obviously, to us. We put them in the later group. Our earlier group is only made up of people who we have no reason in the world to believe, whatever claim, the Fifth Amendment privilege or have cooperation agreements with the government or pled guilty or anything like that. And also, in terms of timing and all of the rest of it here, at least when we consensually agree to a schedule, which your Honor lists, a negotiation with our friends from the staff at the SEC, we made clear from the beginning that our ability to comply with various dates in that schedule in part depended on us being able to take some meaningful discovery earlier rather than later, or else all these things -- I mean 30 depositions

in July and August don't exactly work. And I think, you know, in part, the schedule, at least in our minds, and obviously your Honor controls the dates, we don't, was at least premised on that.

And this notion of limitless resources, we're the only law firm representing Mr. Rajaratnam in this case; there are no others. Mr. Gupta.

We are also representing Mr. Rajaratnam.

MR. GUHA: We appreciate the assistance.

MR. NAFTALIS: No, but we are the only law firm representing Mr. Gupta in this case. Nobody else is here to help us with any --

THE COURT: I wouldn't send your bill to Mr. Rajaratnam, at least not these days.

MR. NAFTALIS: I doubt he'll pay.

He's very well-represented by my friend.

THE COURT: All right.

Thank you very much.

Let me hear from counsel for --

MR. GUHA: Your Honor, I don't mean to intrude.

I support all statements that Mr. Naftalis made. And I just have a few brief comments to add from Mr. Rajaratnam's perspective.

THE COURT: Yes.

MR. GUHA: The SEC, for reasons of its own, has chosen

to sue Mr. Rajaratnam in light of all of the events of the last past year and the consequences Mr. Rajaratnam suffered. I'm not going to speculate as to why that is, but it does raise some issues for this discussion in particular; namely, the points raised by Mr. Brodsky as to the interests that are implicated because of a criminal trial don't affect our client. And having been sued by the SEC and forced to defend himself, he's entitled to proceed with discovery.

A second point that I raised, just because I know how conscious the Court is of its schedule, and we are mindful of it, as well, there is actually an additional complication potentially with Mr. Rajaratnam with truncating the deposition period to the summer.

Your Honor, Mr. Rajaratnam has an appeal pending before the Circuit seeking bail pending his main appeal. But if that is denied, the complication of us consulting with our client in connection with depositions and discovery and the ability to defend this case may require more time. So truncating to that period of summer may have implications for our client that may not otherwise have for Mr. Gupta.

The only other point I would raise -- because I think those two points are unique to Mr. Rajaratnam in this instance.

THE COURT: Actually, the first point you raise in particular seems to me quite striking. It doesn't go to the SEC's arguments, but it does go to the government -- maybe the

SEC's, as well. So let me just interrupt you for a second.

What is the basis for the U.S. Attorney's Office objecting to an earlier deposition -- again, remember, we are only talking about timing here; that's the only issue -- of someone on Mr. Rajaratnam's list who is not likely to be a witness at the Gupta trial?

MR. BRODSKY: Your Honor, I think we would have the same softer reasons. I don't think we'd have a stronger reason to object as we would to those witnesses we expect to call at a criminal trial for the same general reasons that Mr. Naftalis's counsel -- Mr. Gupta's counsel would attend those depositions and have an opportunity to get that information wouldn't ordinarily exist prior to a criminal trial. But I agree with your Honor that that's not as a strong basis.

THE COURT: Thank you.

Let me ask the SEC. Your argument, I thought one of your stronger arguments, was that the Gupta criminal trial might eliminate the need for some. But that wouldn't be true with respect to Rajaratnam.

So what's your objection going forward with a witness on the Rajaratnam list, who the government is not likely to call, we'll find out who that is, having that deposition now?

MR. McGRATH: Without knowing specifically who they have in mind, I'm not sure I could articulate any reason other than just the lack of prejudice; so why do it sooner rather

than later. I'm not sure that I agree with his argument on prejudice; that Mr. Rajaratnam, I assume, is going to surrender very shortly either way, so he's likely to be in custody whether we do depositions before or after the trial.

THE COURT: No, I'm only talking about the first argument, which is the criminal trial as to Rajaratnam is over.

Rajaratnam now, however, has a related important civil case brought by the SEC that he needs to defend himself on. He has indicated a list of ten witnesses that are mostly different from the witnesses that Mr. Gupta indicated. There still may be on his list people who the government might very well be calling. But let's assume arguendo that there are some people on his list who the government thinks it's unlikely to call.

What possible reason would be there not to go forward with those depositions, and, to that extent, ease the burden from later in this civil schedule?

MR. McGRATH: Well, I think it always helps to focus on specific witnesses, and that's what I'm trying to do here. So when I look at their list, I see that the first four people that they have identified in their top five are all members of a company who I think very well might be called at the criminal trial. So I mean I can't speak for the government, but perhaps they can shed more light on it.

THE COURT: These are all Goldman Sachs witnesses.

MR. McGRATH: Yes.

They certainly are people who I think are candidates to be called.

THE COURT: I notice in their top group is a 30(b)(6) witness from Cyprus Group. And as I mentioned before, 30(b)(6) witnesses are precisely the ones you want to have early in discovery because, first of all, they simplify future discovery because their answers are binding, so the witness from Cyprus who speaks for Cyprus Group as a whole.

Secondly, they almost always give testimony that invites further document requests, which is always good to get out of the way sooner rather than later.

MR. McGRATH: The only other argument I think on that, and then I just want to address the other five individuals in their group, I think are either -- one is a government cooperator, and the other four are people who -- some of whom may take the Fifth.

So I'm not sure how many we're actually talking about, other than the 30(b) witness. But on that, your Honor, again, I would acknowledge that there are less forceful arguments against that. The only argument I make, and I think I recognize, if I'm thinking through this quick enough, that there wouldn't be the same collateral estoppel effect. So the outcome of the criminal trial wouldn't necessarily automatically obviate the need for a civil trial as to Mr. Rajaratnam on these charges. But the parties might all be

in a position where they'd reconsider the purposes in going forward; there might be settlement discussions.

So, again, it could be an unnecessary deposition depending on the outcome. But not as automatic as the collateral estoppel effect.

THE COURT: Yes.

While we're on that list, let me go back now to counsel for Rajaratnam.

In your second group, you list a bunch of Galleon employees. Forgetting about the government and cooperator, do you have any reason to believe these people will take the Fifth?

MR. GUHA: Your Honor, the short answer is we don't know.

We have had some communications. The ability of a witness to cooperate with somebody who's been charged with a criminal case changes. That's where, candidly, just to add my limited weight on -- limited voice on this topic, the idea of imbalance or one-sidedness rings hollow, because everyone knows, practically speaking, when a defendant is charged, the ability of other witnesses to cooperate with them, even for the purpose of seeking the truth, becomes limited for fear of repercussions from the government. That's a severe advantage that the government has in any criminal proceeding, that when you have a situation like this rolls over.

It's the civil proceedings.

Do I know whether any of those individuals would cooperate or would take the Fifth? I don't, your Honor; but I have reason to believe that they may not be willing to testify voluntarily or cooperate voluntarily with structure or defense.

I do believe that -- and I do have to check this, your Honor. I believe Mr. Harwood has been listed in previous government submissions as an unindicted co-conspirator. I don't mean to slur Mr. Horwitz's reputation in any way, in case that's wrong, but I do believe that that might be the case.

THE COURT: All right.

Well, as always, I am in awe of -- I'm sorry.

MR. BRODSKY: Your Honor, may I just briefly respond to Mr. Gupta's counsel's points?

THE COURT: Yes.

MR. BRODSKY: I'll just tick them off.

First, your Honor, although Mr. Naftalis relies on *Saad*, we'll rely on the evolution of your Honor's views on this since the local rule. And that is *SEC v. Longoria*, 11 CV 753, around March 11th of this year, over the objection of two defendants your Honor decided for, based in part on the local rule and based in part on the particularities of that case, the civil depositions in that case should go after the criminal trial, which was expedited, and the depositions should take place in a two-month period between October of this year and

December.

So I do think your Honor has not taken a uniform approach, and we do encourage the lack of uniformity depending on the circumstances.

Second, Mr. Gupta said it was the government's decision to file at the same time. Mr. Gupta's counsel knows fully well that we do not have any control -- "we" being the U.S. Attorney's Office -- over the SEC in terms of when they file. In fact, if we had that control, we certainly would have told them not to file on the day that we unsealed our indictment, and pushed it off at least a year or until after the criminal trial.

But the SEC has independent statutory obligations, an independent commission that does not, as your Honor knows, adhere to the U.S. Attorney's Office for our desires or wishes. And I think Mr. Naftalis, although he says many things, were done jointly, I think he also knows that many things could not be shared with the SEC, given the fact that it was a grand jury proceeding, and some things did take place pursuant to grand jury power where the U.S. Attorney's Office was not able to share that information, and could not, and did not, with the SEC.

Third, Mr. Naftalis says we got involved at the eleventh hour. I think, you know, a week later after, you know, the conference on this might not be the eleventh hour,

although he wants to say it's the second hour, that's fine. We waited, your Honor, rightly or wrongly, until we saw the list of deponents and realized that they were looking to depose all of our witnesses, the critical witnesses in the government's case.

Finally, your Honor, he relies on some comments made by Mr. Streeter in *SEC v. Galleon*. Although I think, as your Honor knows, that's before the local rule took effect, which is basically the crux of our argument that has had a sea change.

Second, I think it should be based on the facts and circumstances of the case. SEC-Galleon had different circumstances.

And third, although he relies on what Mr. Streeter advised your Honor, clearly we were wrong, because when the Second Circuit took a look at it, they had a different view as to how that case should have been handled. And maybe the U.S. Attorney's Office should have been -- should have foresaw, you know, where the direction was when we met with your Honor and convened with your Honor at the time.

THE COURT: I'm not sure -- maybe I'm missing your point there.

Are you referring to the Second Circuit's decision in the wiretap?

MR. BRODSKY: Yeah. We had told your Honor that we didn't have any objection to the wiretaps being produced, even

though there was a pending litigation over it before your Honor.

THE COURT: In the Second Circuit.

MR. BRODSKY: A different view.

THE COURT: The Second Circuit there, that was -- I can never decide whether I love or hate that decision, but --

MR. BRODSKY: Well, they agree with you, your Honor, ultimately.

THE COURT: But I don't think it's really relevant to this discussion.

What they said there was that I was right that the SEC had a right to the wiretaps -- and, of course, it's well-known that I always, when possible, rule in favor of the SEC -- but that I should have awaited the decision by Judge Holwell on the suppression motion. And so they vacated my order. And then after he ruled against the defense in the suppression motion and upheld the wiretaps, then the rest of their opinion came into effect and the wiretaps were given over to the SEC.

But the only thing that shows that's at all relevant to this discussion is the great benefits of the new rule in allowing one judge to coordinate the two things.

Judge Holwell and I were trying to work out our separate schedules as best we could. And we did not feel we could ever have substantive communications about any issue; we could have some scheduling discussions. So the result was that

we were constantly -- or primarily on my end constantly readjusting schedules in a way that made it very difficult to move the case along.

So that has been obviated by the new rule.

All right.

MR. BRODSKY: The other minor point, I would say, your Honor, is I know Mr. Gupta's counsel, Mr. Rajaratnam's counsel would like to say the depositions will take place during the summer of next year after the criminal trial. That's leaving out the rest of April -- because we would anticipate the criminal trial will be long done before the end of April -- that leaves out May, and that leaves out June. So I think before the summer months, they would have most of their civil depositions done.

THE COURT: Yes.

MR. NAFTALIS: Just two brief remarks.

I think the United States Attorney's Office cannot say they work for a different government than the Securities and Exchange Commission. I think the law is clear: There is one government, it's called the United States, and they are both agencies of it. And it was not a coincidence that the cases were filed on the same day at the same time. And nor is it --

THE COURT: I think no one is going to assume that there wasn't coordination. That doesn't mean they don't have separate interests that could be separately represented. It's

one government in one sense, but they -- just as they have separate counsel here that are not part of the same office, they also have separate interests.

It reminds me of the famous colloquy between Judge Murphy -- Mr. Naftalis is the only one here who knows who I'm talking about, a former distinguished judge of this Court -- and a defendant who was asked when he appeared for arraignment, but without counsel, "Who is your counsel?"

And he said, "God is my counsel."

And Judge Murphy said, "Yes. But who's your local counsel?"

So I think the two organizations have separate local counsel in this case with separate interests.

But, anyway, go ahead.

MR. NAFTALIS: I'm local counsel here.

Just to respond to a point.

Apart from the fact that a trial lawyer always likes to utilize a prior inconsistent statement and, therefore, the remarks of the government's position that the government took in the very same Galleon circumstance on what was appropriate and what was fair should have some weight here. And the sea change here, the fact that the new rule I don't think really speaks to that issue at all. It speaks to the fact that things can be done more efficiently, because one judge is able to coordinate, you know, all the various scheduling things. But I

don't think it goes to the substance of having to -- you know, what is fair and what is right under the circumstances.

THE COURT: All right.

So as I was beginning to say before, I really and truly, having all of the high-quality lawyering in this case, which, of course, makes my job all the more difficult, because there are so many good arguments being made on all sides.

I was originally going to decide this by next Tuesday, as you know. In light of this new aspect, I will decide this no later than the following Tuesday, Tuesday after Thanksgiving.

But I do want to get from the government some time before this coming Tuesday a letter indicating which of the listed witnesses on the parties' lists it is unlikely to call as a witness at the Gupta trial.

This is not binding. If something comes out and you change your mind, this is not the time when you have to definitively say who your witnesses are. But I think you're in a position to give it your best judgment as of this moment.

All right?

Very good. Thanks very much.

MR. NAFTALIS: Thank you, your Honor.

MR. BRODSKY: Your Honor, one quick question.

You say before Tuesday?

THE COURT: Well, by Tuesday.

MR. BRODSKY: By Tuesday.

THE COURT: Yeah.

MR. BRODSKY: Thank you.

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