No. 14-

IN THE

Supreme Court of the United States

RAJAT K. GUPTA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in a federal criminal case in which the defendant has introduced and the trial court has admitted evidence of good character under Federal Rule of Evidence 404(a)(2)(A), the trial court should instruct the jury that character evidence alone may create a reasonable doubt.

2. Whether testimony directly supporting a criminal defendant's theory that he lacked a motive to commit the offense with which he is charged may be excluded under Federal Rule of Evidence 403 as unfairly prejudicial to the prosecution merely because it might also tend to establish a fact that the prosecution had already proven.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

DOCKETED CASES

STATUTES AND RULES

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

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Rajat K. Gupta respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-54a) is reported at 747 F.3d 111. The order of the court of appeals denying rehearing and rehearing en banc (App. 85a) is unreported. The district court's judgment of conviction (App. 55a-65a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 2014. The court of appeals denied a timely

petition for rehearing and rehearing en banc on July 14, 2014. On September 4, 2014, Justice Ginsburg extended the time for filing a petition for certiorari to and including November 11, 2014. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

RULES INVOLVED

Federal Rule of Evidence 403 provides:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one of more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Federal Rule of Evidence 404(a) provides:

> (1) *Prohibited Uses.* Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.
>
> (2) *Exceptions for a Defendant or Victim in a Criminal Case.* The following exceptions apply in a criminal case:
>
> > (A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;
> >
> > (B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:
> >
> > > (i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) *Exceptions for a Witness.* Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

STATEMENT

A. Background Of The Case

Petitioner Rajat Gupta served three terms as the global managing partner of McKinsey & Co., one of the world's leading consulting firms. Based on his professional history as a trusted counselor to institutions, governments, and business leaders around the world, Gupta was appointed to the boards of directors of both Goldman Sachs & Co. and Procter & Gamble Co. Gupta also devoted much of his life to philanthropic pursuits. Both before and after retiring from McKinsey in 2007, Gupta spent what the district court described as "a huge amount of time and effort [on] a very wide variety of socially beneficial activities, such as the Global Fund to Fight AIDS, Tuberculosis and Malaria, the Public Health Foundation of India, the Indian School of Business, the Pratham Foundation (which provides quality education to underprivileged children in India), the Cornell Medical School, the Rockefeller Foundation, and many many more." C.A.J.A. 1619.

After Gupta retired from McKinsey, he entered into business ventures with Raj Rajaratnam, the principal of the Galleon network of hedge funds. Among their ventures was the Voyager investment fund, man-

aged by Rajaratnam, in which Rajaratnam invested $40 million and Gupta invested $10 million. App. 13a-14a.

In 2007, the government commenced an investigation into Rajaratnam for insider trading. As part of that investigation, the government obtained authorization to wiretap Rajaratnam's cell phone. Although Gupta and Rajaratnam spoke frequently by telephone, nine months of wiretaps did not produce any recording of Gupta tipping Rajaratnam with confidential inside information that Rajaratnam used to trade. The wiretaps did, however, record Rajaratnam on two occasions boasting to Galleon colleagues that he had obtained information from a source at Goldman. App. 4a-13a.

Gupta was indicted in the Southern District of New York on five counts of securities fraud, 15 U.S.C. §§ 78j(b) and 78ff, and one count of conspiracy to commit securities fraud, 18 U.S.C. § 371. The prosecution focused on two incidents in which it alleged that Gupta tipped Rajaratnam with confidential information obtained from Gupta's service on the Goldman board and Rajaratnam then used the information to trade Goldman stock.

First, the prosecution charged that, on September 23, 2008, during the midst of the financial crisis, Gupta telephoned Rajaratnam to tell him that Warren Buffett had committed to investing $5 billion in Goldman. According to the prosecution, Gupta tipped Rajaratnam with that information immediately after a Goldman board meeting and shortly before the close of the trading day, and Rajaratnam then frantically purchased Goldman stock before the information about Buffett's investment became public. There was no recording of any such telephone call from Gupta to Rajaratnam nor any live testimony attesting to the content of that call.

The government's case was circumstantial, based on telephone logs suggesting that Gupta called Rajaratnam near the end of the trading day, purchases of Goldman stock by Galleon employees after that call, and a wiretapped conversation the following day in which Rajaratnam told a Galleon colleague that he "got a call at 3:58 … [s]aying something good might happen to Goldman." App. 7a.

Second, the prosecution charged that, in the late afternoon of October 23, 2008, Gupta telephoned Rajaratnam to tell him that Goldman's management was projecting that Goldman would post a loss in the fourth quarter, contrary to the expectation of market analysts who were predicting that Goldman would earn a profit during that quarter. The morning after that alleged tip, Rajaratnam sold Goldman stock. Again, there was no recording or live testimony at trial about the content of the call to Rajaratnam's office on October 23. Instead, the government relied on telephone logs, Rajaratnam's sales of Goldman stock, and a wiretapped conversation the following day, October 24. In that recording, Rajaratnam, during a long conversation about global financial markets with a Galleon colleague who worked in Hong Kong and who did not trade in U.S. financial stocks, bragged that he had heard from someone on the Goldman board that Goldman would lose $2 per share, and that he was going to "whack" the stock if it rose to $105 per share. App. 12a-13a.[1]

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[1] Gupta challenged the admission of the wiretapped statements on several grounds. First, he argued that the wiretaps violated the standards for authorization of wiretaps under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, and in particular that the government had failed to provide the district court authorizing the wiretap with a "full and complete statement" detailing both the probable cause underlying the wiretap applica-

The prosecution also charged Gupta with tipping Rajaratnam on two other occasions. In one of those charges, the prosecution alleged that Gupta disclosed advance information about Goldman's expected results for the second quarter of 2008, which were better than analysts had expected; in the other, the prosecution alleged that on January 29, 2009, Gupta disclosed confidential information about Procter & Gamble's results, which were lower than analysts had expected. C.A.J.A. 30, 34-36 (indictment); *see also*, *e.g.*, *id.* 239-241 (opening statement). For each of those charges, like the two discussed above, the prosecution relied on circumstantial evidence of supposed calls between Gupta and Rajaratnam and subsequent trades by Rajaratnam. Unlike the two charges discussed above, these two charges were not supported by any wiretap evidence.

B. The Defense Case

1. Gupta's motives for allegedly tipping Rajaratnam were obscure. Although there was evidence before the jury of legitimate professional and personal ties between the two, there was no evidence that Gupta received any direct financial benefit from any of Raja-

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tion and the application's necessity, in violation of the statute, 18 U.S.C. § 2518(1)(b), (c). The courts below rejected that argument. App. 16a-17a. Second, Gupta argued that Rajaratnam's statements were inadmissible hearsay. The district court admitted the statements under Federal Rule of Evidence 801(d)(2)(E), the hearsay exception for statements of a coconspirator made during and in furtherance of the conspiracy. App. 17a. In addition, Gupta sought to introduce evidence that the tips might have come from another individual at Goldman, who regularly called Rajaratnam (including on the two days in question) and who had tipped him with confidential inside information about other companies on other occasions. The district court excluded that evidence. App. 46a-47a.

ratnam's trades. Nor did Gupta himself trade on inside information. Rather, the prosecution's theory was that Gupta had an incentive to keep Rajaratnam, his Voyager co-investor, happy by providing him with material nonpublic information.

Gupta sought to rebut that theory by showing that, *before* the alleged September 2008 tip, Gupta believed that Rajaratnam had swindled him in their Voyager co-venture. The prosecution's own evidence showed that, by the end of 2007, Rajaratnam had secretly withdrawn about $25 million in equity from Voyager, leaving Gupta disproportionately exposed to Voyager's collapse in late 2008. C.A.J.A. 758-760. The defense theory was that, because Gupta believed that Rajaratnam had effectively defrauded him, Gupta had no motivation to help Rajaratnam by tipping him with confidential inside information. The defense also argued that Gupta's concern and anger explained his telephone calls to Rajaratnam—that Gupta was trying to secure an explanation from Rajaratnam about what had happened to the Voyager investment.

The crucial question at trial was *when* Gupta learned that Rajaratnam had withdrawn his funds from Voyager, and therefore when Gupta developed the belief that Rajaratnam had defrauded him. The government sought to prove that Gupta did not develop this belief until after the charged tips. Through the testimony of cooperating witness Anil Kumar, the government sought to prove that Rajaratnam and Gupta's relationship remained intact until late February 2009, shortly after the last charged tip. Kumar testified that, while Gupta told him in November or December 2008 that Voyager had lost money, it was only some time "between late February and April of 2009" that Gupta indicated to Kumar that Rajaratnam had secretly with-

drawn funds before Voyager's collapse. C.A.J.A. 676. Based on that testimony, the prosecution argued that Gupta was especially motivated in the fall of 2008 to help Rajaratnam and "to do whatever he could to recoup" his Voyager investment (*id.* 1017)—including, if necessary, providing inside information.

Gupta sought to rebut Kumar's testimony, and disprove the government's theory, by showing that he believed—*before* the alleged tips—that Rajaratnam had gone behind his back to take money out of the Voyager account. First, Gupta offered the testimony of Ajit Jain. Jain testified that he had had lunch with Gupta, "probably" on January 12, 2009, during which Gupta stated that he had been "swindled or cheated by Raj [Rajaratnam] and he had lost his entire 10 million that he had invested" in Voyager. C.A.J.A. 1071, 1073. The prosecution objected to Jain's testimony as hearsay, but the Court overruled that objection, admitting Gupta's statement to Jain "for [Gupta's] state of mind only." Mem. Endorsement 19-20, Dkt. No. 109 (S.D.N.Y. June 28, 2012). The jury acquitted Gupta on the substantive securities fraud count relating to the one tip alleged to have occurred after this conversation, on January 29, 2009. App. 56a; C.A.J.A. 36.

Second, Gupta sought to introduce the testimony of his adult daughter Geetanjali, who would have supported Gupta's submission that he believed before the supposed tips at issue here that Rajaratnam had stolen from the Voyager account. Geetanjali was prepared to testify that on September 20, 2008—three days before the alleged September tip and one month before the alleged October tip—Gupta told her that he was "upset about Voyager" and "angry that Raj had taken money out of the fund without telling him." App. 74a. Gupta sought to introduce those statements as evidence of his

then-existing state of mind, admissible under Federal Rule of Evidence 803(3). Had the jury heard and credited Geetanjali's testimony, it could have concluded that Gupta had no motive to tip Rajaratnam, and it could also have found a credible alternate explanation for Gupta's telephone calls to Rajaratnam.

The district court excluded Geetanjali's testimony, apparently reasoning that the jury would misunderstand that testimony as establishing not Gupta's *belief* that Rajaratnam had cheated him, but the *fact* that Rajaratnam had cheated him. It suggested that there was "no way the jury can evaluate this other than as an assertion for its truth," and that the jurors would believe that Gupta was "telling the truth to his own daughter, and they will be taking it for its truth, and I don't see how under [Rule] 403 that gross violation of the hearsay rule can be avoided." App. 72a; *see also id.* 77a (concluding "[t]he jury is going to … draw from this … that Rajaratnam, in fact, cheated Gupta, that Gupta knew it and that Gupta, therefore, was completely outraged"). It reached that conclusion even though, as noted (*supra* pp. 7-8), it was *undisputed* "that Rajaratnam, in fact, cheated" Gupta; indeed, the prosecution's own evidence had established that fact.

The court permitted Geetanjali to answer three questions (asked by the court) in the presence of the jury about the September 20 conversation. She testified that Gupta had expressed "significant concern" about Voyager, that he was "upset," "stressed," and "was running his hands through his hair," and that this was "more because of how Mr. Rajaratnam was treating the investment" than how the investment was doing. App. 83a. When Geetanjali attempted to elaborate on her answer, the court stopped her. *Id.* Geetanjali was not allowed to testify that Gupta was angry be-

cause he believed Rajaratnam had deceived him. Circumscribed in this way, Geetanjali's testimony established only that Gupta was upset in September 2008 about the performance of the Voyager investment—not his belief that Rajaratnam had stolen from him. As curtailed by the court, the meaning of Geetanjali's testimony was fundamentally altered and may actually have harmed Gupta's defense: It presented a narrative consistent with the prosecution's theory that Gupta sought to recoup his unfortunate losses in the fund by providing Rajaratnam with inside information.

2. In conjunction with his efforts to rebut specific factual allegations in the government's case, Gupta presented character evidence demonstrating his reputation for honesty. This character evidence was particularly significant given that the charged conduct—revealing sensitive confidential information for personal benefit—stood in marked contrast with the rest of Gupta's professional and philanthropic career. The fundamental question put to the jury was whether Gupta, who had lived an exemplary personal and professional life as a business leader to whom countless clients and colleagues entrusted sensitive information, would have acted dramatically out of character and breached his fiduciary duties by disclosing Goldman's confidential information.

Gupta's character witnesses included, for example, the former Dean of the Harvard School of Public Health (C.A.J.A. 795), the former Director for Health Nutrition and Population at the World Bank and later the Founding Executive Director of the Global Fund to Fight AIDS, Tuberculosis, and Malaria (*id.* 891), and a longtime friend and colleague at McKinsey, who became the Gates Foundation's Country Director for India (*id.* 906-907). All of Gupta's character witnesses

testified to his exceptional honesty and to his extraordinary achievements in public health. *See, e.g.*, *id.* 796, 892, 908-909, 953, 989.

This character evidence was only reluctantly admitted by the district court, and the court refused to give the jury an instruction on character evidence that Gupta had requested—that character evidence "'in and of itself [may be] sufficient to raise a reasonable doubt'" of guilt. App. 68a. The court noted there was no Second Circuit authority that required such a charge. *Id.* 69a-70a. The court also criticized the proposed instruction on the ground that it "artificially singles out one aspect of the proof and gives it sort of prominence above all others by implication." *Id.* 67a. Instead, the court told the jury that character witnesses "hav[e] no personal knowledge of the transactions at issue in this case," and that the jury could consider the character evidence "together with all the other facts and all the other evidence in the case, and give it such weight as [it] deem[ed] appropriate." *Id.* 70a. By contrast, the court instructed the jury that testimony from the government's cooperating witnesses "may be sufficient in itself to warrant conviction" if believed. *Id.*

C. The Verdict

The jury convicted Gupta of conspiracy and three counts of securities fraud, and acquitted him on two counts of securities fraud. App. 55a-56a. The substantive counts of conviction all related to the wiretapped statements by Rajaratnam that had been admitted into evidence. By contrast, the jury acquitted Gupta of the two substantive counts that were unsupported by wiretap evidence. The district court sentenced Gupta to 24 months' imprisonment on each count, to run concurrently, one year of supervised release, and a $5 million

fine. *Id.* 57a-62a. Gupta was also subsequently ordered to pay $6.2 million in restitution to Goldman Sachs. Order 11, Dkt. No. 136 (S.D.N.Y. Feb. 25, 2013).[2]

D. The Decision Below

The court of appeals affirmed the convictions. App. 54a.

1. The court upheld the district court's decision to exclude and limit Geetanjali's testimony under Rule 403 on the theory that "the jury would likely be unable to comprehend that the statement could be considered only to show Gupta's belief" that he had been swindled by Rajaratnam "and not to show the truth of what he believed" (*i.e.*, that Rajaratnam in fact swindled him). App. 34a-35a.[3] The court of appeals reached that conclusion even though the underlying fact that Rajaratnam had cheated Gupta was undisputed; indeed, it had been established at trial prior to the exclusion of Geetanjali's testimony through the government's examination of one of its own witnesses. C.A.J.A. 676. In the court of appeals' view, that other evidence of the swindle, rather than obviating any Rule 403 concern, "substantiate[d] the district court's view that this as-

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[2] In a parallel civil proceeding brought by the SEC, the district court imposed on Gupta a $13.9 million civil penalty and enjoined Gupta from future violations of the securities laws, from serving as an officer or director of any public company, and from associating with brokers, dealers, or investment advisers. *SEC* v. *Gupta*, 2013 WL 3784138, at *5 (S.D.N.Y. July 17, 2013), *aff'd*, 569 F. App'x 45 (2d Cir. 2014). The injunctive orders in the civil case are the subject of a separate petition for certiorari, filed herewith. *Gupta* v. *SEC*, No. 14-__ (U.S. Nov. 10, 2014).

[3] The court of appeals did not question that, absent concerns under Rule 403, Geetanjali's testimony would have been admissible under Rule 803(3) as evidence of Gupta's state of mind.

pect of the Geetanjali testimony … would have been cumulative." App. 39a.[4]

The court also found the exclusion of Geetanjali's testimony to have been harmless. App. 39a-46a. In response to Gupta's argument that the district court had excluded the sole evidence that would have established Gupta's belief that Rajaratnam had swindled him *before* the alleged September and October tips, the court of appeals stated that the district court had "placed no restriction at all on the defense's ability to bring out the timing of Gupta's conversation with Geetanjali," and that "Geetanjali testified amply that the conversation occurred on September 20, 2008"—even though she was not allowed to testify about Gupta's *belief* as of that date. *Id.* 41a. The court of appeals also noted that other testimony in the record established that Gupta had told associates that he had learned that Rajaratnam had swindled him—but those conversations all took place *after* the alleged tips for which Gupta was convicted, and thus did not establish Gupta's state of mind at the critical time. *Id.* 42a. Finally, the court stated that government's "circumstantial evidence that Gupta in fact passed confidential information to Rajaratnam on September 23 and October 23 was strong" (*id.* 45a-46a), and so doubted that Geetanjali's testimo-

[4] The court of appeals also observed that the district court allowed Geetanjali to testify about Gupta's "'attitude towards Rajaratnam.'" App. 32a. But Geetanjali was prevented from testifying about the critical point: Gupta's belief, prior to the alleged tips, that he had been swindled by Rajaratnam. Thus, the jury learned only that Gupta was "'quite upset' … and 'frustrated' by his inability to get information from Rajaratnam about Voyager" (*id.* 82a-83a)—testimony that, unlike the excluded testimony, was arguably consistent with the government's theory of motive. *See supra* pp. 9-10.

ny "would have had any substantial influence on the jury" (*id.* 45a-46a)—even though the jury *acquitted* Gupta of tipping Rajaratnam in January 2009, *after* Gupta undisputedly told *another* witness that he believed Rajaratnam had cheated him. *See supra* p. 8.

2. The court of appeals also upheld the district court's refusal to instruct the jury that character evidence may in and of itself raise a reasonable doubt as to guilt. The court relied on its prior decision in *United States* v. *Pujana-Mena*, 949 F.2d 24 (2d Cir. 1991), and rejected Gupta's argument that that decision is inconsistent with this Court's decisions in *Edgington* v. *United States*, 164 U.S. 361 (1896), and *Michelson* v. *United States*, 335 U.S. 469 (1948). App. 52a-54a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW PERPETUATES A CIRCUIT SPLIT ON HOW A JURY SHOULD BE INSTRUCTED TO CONSIDER A CRIMINAL DEFENDANT'S EVIDENCE OF GOOD CHARACTER

This Court's guidance is needed to resolve a question that has long divided the courts of appeals and that is exceptionally well presented in this case: whether the jury should be instructed that evidence of a criminal defendant's good character "alone … may be enough to raise a reasonable doubt of guilt." *Michelson* v. *United States*, 335 U.S. 469, 476 (1948).

The court of appeals in this case, following circuit precedent disfavoring such an instruction, upheld the district court's refusal to give it. App. 52a-54a. Had petitioner been tried in at least three other circuits, he would have been entitled to the charge he requested. A different instruction might well have tipped the scales in this case, where the prosecution's theory was square-

ly at odds with Gupta's unblemished reputation for honesty, attested to by several character witnesses and earned over the course of a distinguished career.

A. The Courts Of Appeals Have Reached Conflicting Decisions On What A Jury Should Be Instructed About Character Evidence

1. The right of a criminal defendant to present evidence of good character, codified in Federal Rule of Evidence 404(a)(2)(A), is so deeply rooted in the common law that it predates other rudiments of the modern trial, including the use of lawyers. *See* 1 Stephen, *A History of the Criminal Law of England* 449 (1883); *Regina* v. *Rowton*, (1865) 169 Eng. Rep. 1497 (Ct. Crown Cas. Res.) 1502-1503 (opinion of Cockburn, C.J.); *see also* Langbein, *Historical Foundations of the Law of Evidence*, 96 Colum. L. Rev. 1168, 1170, 1197 (1996). The right is now "imbedded in our jurisprudence" and has "assume[d] almost constitutional proportions." Fed. R. Evid. 404 advisory committee's note. Like the presumption of innocence, it is "one of the hallmarks of a system designed to protect the accused" from wrongful conviction. Ross, *"He Looks Guilty": Reforming Good Character Evidence*, 65 U. Pitt. L. Rev. 227, 235 (2004).

This Court has twice addressed the right of a defendant to present such evidence, each time recognizing its importance. First, in *Edgington* v. *United States*, 164 U.S. 361 (1896), the Court repudiated a practice that had developed in some jurisdictions of instructing jurors that evidence of good character ought to have weight only in doubtful cases. *See, e.g.*, *Commonwealth* v. *Hardy*, 2 Mass. (1 Tyng) 303, 317 (1807); *see also* 1A Wigmore, *Evidence in Trials at Common Law* § 56 (Tillers rev. ed. 1983). That limitation was inconsistent

with the very purpose of character evidence; as Wharton observed, it is "to *make* the case doubtful" that evidence of good character is offered. Wharton, *Law of Evidence in Criminal Issues* § 67 (8th ed. 1880) (emphasis added). *Edgington* accordingly held that evidence of good character may "alone create a reasonable doubt, although, without it, the other evidence would be convincing." 164 U.S. at 366.

Second, in *Michelson*, the Court confirmed that a defendant "may introduce affirmative testimony that the general estimate of his character is so favorable that the jury may infer that he would not be likely to commit the offense charged." 335 U.S. at 476. "This privilege is sometimes valuable to a defendant," not only because evidence of good character "is relevant in resolving probabilities of guilt" but also because "this Court has held that such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed." *Id.* (citing *Edgington*, 164 U.S. 361).

2. Despite this Court's reaffirmation that the jury "should be … instructed," *Michelson*, 335 U.S. at 476, that evidence of a defendant's good character may "alone create a reasonable doubt," *Edgington*, 164 U.S. at 366, there remains "considerable disagreement" and "confusion" among the courts of appeals "about whether and when it is proper for the judge to give" such an instruction, *Spangler* v. *United States*, 487 U.S. 1224, 1224 (1988) (White, J., dissenting from denial of certiorari).

Consistent with *Michelson*, the D.C. Circuit has long required the instruction when requested by the defendant. *See, e.g.*, *United States* v. *Lewis*, 482 F.2d

632, 637 (D.C. Cir. 1973) ("accused is entitled" to the instruction); *Villaroman* v. *United States*, 184 F.2d 261, 262-263 (D.C. Cir. 1950) (same). The Fifth Circuit too has made clear that "the jury *must* be appropriately instructed" that "evidence of good character may of itself create a reasonable doubt as to guilt." *United States* v. *Hewitt*, 634 F.2d 277, 278 (5th Cir. Unit A Jan. 1981) (Wisdom, J.) (emphasis added); *see also, e.g.*, *United States* v. *John*, 309 F.3d 298, 302-304 (5th Cir. 2002) (failure to give proposed instruction that "would have informed the jury that character evidence 'may give rise to a reasonable doubt'" was reversible error). That rule also appears to have carried over to the Eleventh Circuit. *See United States* v. *Thomas*, 676 F.2d 531, 536 (11th Cir. 1982) (approving requested instruction that "evidence of good character … may of itself give rise to a reasonable doubt"); *but cf. United States* v. *Borders*, 693 F.2d 1318, 1328, 1329 (11th Cir. 1982) (acknowledging that the "general rule … was established in *Edgington*" but finding no abuse of discretion in charging the jury merely "that character evidence … should be considered along with all of the other evidence in the case").[5]

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[5] Pattern instructions in those circuits confirm that the jury should be charged that evidence of the defendant's good character may create a reasonable doubt, though not all the pattern instructions explain that such evidence may "alone" or "itself" create a reasonable doubt even where none would otherwise exist. *See Fifth Circuit Pattern Jury Instructions (Criminal Cases)* Instr. 1.09 (2012) ("Evidence of a defendant's character, inconsistent with those traits of character ordinarily involved in the commission of the crime charged, may give rise to a reasonable doubt, since you may think it improbable that a person of good character with respect to those traits would commit such a crime."); *Eleventh Circuit Pattern Jury Instructions (Criminal Cases)* Special Instr. 12 (2010) ("Evidence of a defendant's character traits may create a

By contrast, the Second Circuit has declared the instruction "misleading," "harmful," and "not required" in any case. *Pujana-Mena*, 949 F.2d at 30-31. It adopted that view despite its own precedent to the contrary, *see id.* at 27-28 (collecting cases), the contrary view of the Court in *Michelson*, which it dismissed as ill-considered dicta, *id.* at 29, and the "valid point" that "character evidence is 'precisely the kind of proof as to which jurors require special guidance,'" *id.* at 30. It thus joined other circuits that have deprecated or forbidden the instruction. *See United States* v. *Winter*, 663 F.2d 1120, 1148 (1st Cir. 1981) ("not … the proper function of the trial judge"); *United States* v. *Krapp*, 815 F.2d 1183, 1187 (8th Cir. 1987) ("disapproved").[6]

The remaining circuits have taken yet other, inconsistent positions. The Tenth Circuit has stated that the instruction need not be given *unless* "[t]he circumstances of a particular case may require it." *Oertle* v. *United States*, 370 F.2d 719, 727 (10th Cir. 1966) (en banc); *see also Tenth Circuit Criminal Pattern Jury Instructions* Instr. 1.09 (2011) ("Evidence of good character may be sufficient to raise a reasonable doubt whether the defendant is guilty[.]"). Similarly, the

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reasonable doubt."). All of these model instructions are directly at odds with the Second Circuit's view and with the district court's instruction in this case. App. 70a.

[6] Even in those circuits that have expressly disapproved of the instruction as formulated in *Michelson*, there is uncertainty as to the appropriate language. *Compare* Hornby, *Pattern Criminal Jury Instructions for the District Courts of the First Circuit* Instr. 2.19 (2014) (jurors should be instructed to consider whether "evidence of … good character creates a reasonable doubt"), *with Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit* Instr. 4.03 (2013) ("No instruction recommended.").

Ninth Circuit has stated that the instruction need not be given *unless* "special reason[s]" are present. *Smith* v. *United States*, 305 F.2d 197, 206 (9th Cir. 1962). The Fourth Circuit has found the instruction not required in particular cases but has reserved the question whether it might be required as "a matter of right" in other circumstances. *United States* v. *Foley*, 598 F.2d 1323, 1337 (4th Cir. 1979). By contrast, the Seventh Circuit has found that the instruction is never required as a matter of right but has reserved whether the instruction might be appropriate in some circumstances. *United States* v. *Burke*, 781 F.2d 1234, 1238-1239 (7th Cir. 1985). Other circuits have similarly found no abuse of discretion in declining to give the instruction in particular cases, without foreclosing that it might be given in others. *See United States* v. *Spangler*, 838 F.2d 85, 87 (3d Cir. 1988); *United States* v. *Brown*, 353 F.2d 938, 939 (6th Cir. 1965).

Judges and commentators have long recognized the fractured state of federal law on this issue. *See, e.g.*, *Spangler*, 487 U.S. at 1224 (White, J., dissenting from denial of certiorari) ("confusion" reigns); Federal Judicial Center, *Pattern Criminal Instructions* Instr. 51 cmt. (1987) ("*FJC Instructions*") ("not clear"); Wang, *The "Standing Alone" Instruction Given in Connection with Evidence of Good Character: A Century of Confusion in the Federal Courts*, 12 Crim. Just. J. 33, 33-34 (1990) (noting the "disturbing … potential for defendants to face disparate results" throughout the country).[7] The United States has also acknowledged the

[7] The picture is no clearer in state law, which both *Edgington* and *Michelson* consulted for guidance on common law principles. *Compare, e.g.*, *State* v. *Green*, 294 S.E.2d 335, 335 (S.C. 1982) (defendant is "[g]enerally … entitled to [the] instruction"), *with People* v. *Miller*, 315 N.E.2d 785, 736 (N.Y. 1974) (contrary view).

circuit split and has previously urged the Court to resolve it. Pet. 8, 13-17, *United States* v. *Daily*, No. 90-1828 (U.S. May 28, 1991); *see also United States* v. *Daily*, 502 U.S. 952, 952 (1991) ("Justice White and Justice Blackmun would grant certiorari.").

The division of the circuits is thus clear, longstanding, and apparently intractable. Only this Court's guidance can ensure the uniformity of federal law on an important question touching every federal criminal trial in which the defendant offers and the court admits evidence of good character.

B. The Second Circuit Incorrectly Refused To Require A Jury Instruction That Evidence Of Good Character May Be Sufficient To Raise A Reasonable Doubt

Review is also warranted because the Second Circuit's position is mistaken. The instruction that was denied in this case—that evidence of the defendant's good character, inconsistent with the charged offenses, may be "itself sufficient to raise a reasonable doubt" (App. 68a)—is unquestionably an accurate statement of federal law as it has stood at least since *Edgington*, 164 U.S. at 366. "As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews* v. *United States*, 485 U.S. 58, 63 (1988). Like an affirmative defense, evidence of a defendant's good character is "inconsistent with the claim that the defendant" committed the charged offense, *see id.* at 64, and an instruction on the import of that evidence should be given when warranted by the proof at trial, *see also*, *e.g.*, *United States* v. *Lively*, 803 F.2d 1124, 1126 (11th Cir. 1986) (defendants

are entitled to an instruction on the "theory of defense" (collecting cases)).

The instruction is also necessary because, without an instruction about the import of such evidence, the jury is likely to be confused as to its relevance. Indeed, absent a proper instruction, the jury may well mistakenly think that the defendant's evidence of good character is offered to excuse the alleged conduct, rather than to prove that it did not occur. Simply admitting the evidence, or telling the jury that it may consider it along with all the other evidence, *see Pujana-Mena*, 949 F.2d at 31, is tantamount to "not telling [the jury] anything" at all, *Egan* v. *United States*, 287 F. 958, 969 (D.C. Cir. 1923).

At the very least, it should take compelling countervailing reasons to refuse to give an accurate instruction to the jury in the precise language of this Court's precedent. The Second Circuit and other courts disfavoring the instruction have never identified any such reasons. In *Pujana-Mena*, the court of appeals reasoned that the instruction "threatens to interfere with one of the quintessential functions of the jury—to determine the relative weight, if any, to be given to particular evidence" and risks causing jurors to "disregard *all* the other evidence in the case." 949 F.2d at 30, 31; *see also Burke*, 781 F.2d at 1239 (the instruction "invites attention to a single bit of evidence and suggests to jurors that they analyze this evidence all by itself"); *Foley*, 598 F.2d at 1336-1337 (character evidence need not be "singled out as potentially exculpatory standing 'alone'").

Those concerns are overstated. If there is any genuine risk that jurors who are instructed that character evidence may itself generate a reasonable doubt

will mistakenly consider *only* the evidence of good character, the trial court need only remind them to consider all the evidence in the case. *E.g.*, *FJC Instructions* Instr. 51. As to "singling out" character evidence, the jury is commonly instructed that particular evidence favorable *to the government* is "by itself" or "alone" sufficient to sustain a conviction.[8] Here, for example, jurors were instructed that accomplice witness testimony "may be sufficient *in itself* to warrant conviction," which immediately preceded the district court's tepid character-evidence instruction. App. 70a (emphasis added).

C. The Petition Presents An Ideal Vehicle To Resolve The Lower Courts' Confusion

The question whether to give the instruction may never be better presented than it is here. Evidence of Gupta's good character was critically important in this case, where the fundamental question put to the jury was whether Gupta, for no tangible benefit, disclosed confidential information to Rajaratnam after "a lifetime of good deeds and philanthropy" (C.A.J.A. 1614) and while at the "pinnacle" (*id.*) of a profession in which he had safeguarded the sensitive business information entrusted to him by countless clients and colleagues. Gupta's character witnesses testified to Gupta's honesty and to his extraordinary achievements in public health. *Supra* pp. 10-11. Character evidence might well have made the difference in the case, had the jury

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[8] *E.g.*, *Fifth Circuit Pattern Jury Instructions* Instr. 1.15 ("[T]he testimony of [an accomplice] may *alone* be of sufficient weight to sustain a verdict of guilty." (emphasis added; collecting cases)); *see also Tenth Circuit Criminal Pattern Jury Instructions* Instr. 1.14; *Sixth Circuit Criminal Pattern Jury Instructions* Instr. 7.06A (2013).

been properly instructed that such evidence may itself give rise to a reasonable doubt.

II. THE DECISION BELOW WRONGLY CONSTRUES FEDERAL RULE OF EVIDENCE 403 TO EXCLUDE CRUCIAL DEFENSE EVIDENCE THAT IS NEITHER PREJUDICIAL NOR CUMULATIVE

The decision below also warrants review because it wrongly countenances the use of Federal Rule of Evidence 403 to exclude evidence that is fundamental to a criminal defendant's case—thus imperiling the defendant's right, guaranteed by the Sixth Amendment, to present a defense. *See United States* v. *Davis*, 639 F.2d 239, 244 (5th Cir. Unit B 1981) ("[T]he trial court's discretion is necessarily limited by the Constitution of the United States. The exclusion of otherwise admissible evidence or testimony sought to be presented by a criminal defendant must be weighed against the sixth amendment right to have compulsory process for obtaining witnesses in his favor.").

A. A District Court May Exclude Crucial Defense Evidence Under Rule 403 Only If There Is A Substantial Basis In The Record To Support Such Exclusion

Rule 403 by its express terms is tilted in favor of admission of evidence; the Rule authorizes exclusion of relevant, admissible evidence only when "its probative value is *substantially outweighed* by a danger" of unfair prejudice (emphasis added). But here, the court of appeals affirmed the exclusion of the *only* evidence that would have established a fact critical to Gupta's defense: that Gupta believed, before any of the charged tips took place, that Rajaratnam had swindled him. The probative value of that testimony was compelling

and might well have made the difference in this case—it would have forcefully rebutted the government's case, introduced through the testimony of cooperating witness Anil Kumar, that Gupta expressed this belief only after all of Rajaratnam's trades had been completed. The unfair prejudice posed by this evidence was nil.

Rule 403 does permit a district court in its discretion to exclude evidence that is "redundant or of only marginal significance." *United States* v. *Foster*, 982 F.2d 551, 553 (D.C. Cir. 1993) (Ginsburg, J.). But as several courts of appeals have recognized, where (as here) that evidence is "essential" to a criminal defendant's theory of the case, it is "neither rational nor fair" to exclude it. *Id.* at 555. If "'the evidence is *crucial*, the judge would abuse his discretion in excluding it,'" absent a compelling justification. *Id.* (quoting 1 Weinstein & Berger, *Weinstein's Evidence* ¶ 403[06] (1992)).

This Court has also made clear that criminal defendants have a constitutional right to "a meaningful opportunity to present a complete defense," and that right trumps the application of "evidence rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve." *Holmes* v. *South Carolina*, 547 U.S. 319, 324 (2006) (internal quotation marks and brackets omitted). Those same weighty concerns are present here. Gupta's right to present his defense was improperly abridged by the courts' mechanistic application of the terms "prejudice" and "cumulative" in Rule 403. To avoid such constitutional concerns, the Rule must be construed to permit (absent a compelling justification) the admission of evidence that "would have been relevant and material, and … was vital to the defense." *Washington* v. *Texas*, 388 U.S. 14, 16 (1967); *see also Davis*, 639 F.2d at 244 (explaining that "[i]f the tri-

al court abuses its discretion in excluding evidence [central to a criminal defendant's case] under Rule 403, the error is of constitutional proportion"). The decision of the court of appeals warrants review because it deviates from these settled principles that rules of evidence, and Rule 403 in particular, should not be deployed to exclude evidence central to a criminal defendant's case absent compelling countervailing concerns.

A district court has substantial discretion to weigh and compare the probative and prejudicial characteristics of proffered evidence. *See United States* v. *Abel*, 469 U.S. 45, 54 (1984); *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 384 (2008). But that discretion is not unbridled; it must be exercised within "well-defined parameters" established by law. 2 Childress & Davis, *Federal Standards of Review* § 11.02 (4th ed. 2010). In particular, the plain text of Rule 403 does not permit a court to exclude evidence where there is no unfair prejudice, confusion of the issues, or any other enumerated danger. At a minimum, a decision to exclude evidence must be supported by a substantial basis in the record to believe that one of these dangers actually exists. In other words, deference is not warranted where, as here, an objective review of the record reveals that the offered evidence does not present any dangers contemplated by Rule 403. *See Davis*, 639 F.2d at 244.

B. Geetanjali's Excluded Testimony Was Admissible And Exceedingly Probative

The exclusion of Geetanjali's proffered testimony seriously impaired Gupta's right to present a defense. The linchpin of Gupta's case (App. 31a) was that he had no motive to tip Rajaratnam and would never have ille-

gally divulged confidential information to the man he believed had swindled him. The swindle itself had already been proven earlier in the trial through the testimony of prosecution witness Anil Kumar (C.A.J.A. 676) and through documents introduced by the prosecution summarizing activity in the account of the Voyager fund in which Gupta and Rajaratnam had invested (*id.* 758-759). The question thus was not *whether* Rajaratnam had taken money out of Voyager. The question for the jury was: At the time of the alleged tips, did Gupta have a motive to help Rajaratnam? If, as the prosecution argued, Gupta was desperate to make up the losses he suffered in a poorly performing fund, then the jury might have concluded that Gupta had an incentive to place himself in Rajaratnam's good graces. It was therefore crucial for the defense to establish that, as of September 23, 2008, Gupta was furious with Rajaratnam and had no motive to tip the man Gupta believed defrauded him out of millions. Geetanjali's testimony would have provided that evidence.

Gupta's statement to Geetanjali—that he was "angry that Raj had taken money out of the fund without telling him" (App. 74a)—is classically admissible state-of-mind evidence to show Gupta's belief in a particular fact. Gupta's statement was not hearsay because it was not offered to prove the truth of the matter asserted (that Rajaratnam had surreptitiously taken money from the fund). For the purpose of the defense, it was immaterial whether Gupta's beliefs were true; what the defense sought to establish was that Gupta *believed* them at the time. Such evidence of a belief has long been held to be admissible, notwithstanding the rule against hearsay. *See* Fed. R. Evid. 803(3); *Elmer* v. *Fessenden*, 24 N.E. 208, 208 (Mass. 1889) (Holmes, J.) (error to exclude declarants' belief that they were ex-

posed to arsenic); *Mattox* v. *News Syndicate Co.*, 176 F.2d 897, 903 (2d Cir. 1949) (L. Hand, J.) ("The relevant fact was the declarants' belief, and that was proved only by what they said to the witnesses."); *see also* 6 Wigmore § 1730.[9]

Under the Federal Rules of Evidence, federal courts have consistently admitted similar statements not for their truth but to show the declarant's motives and beliefs. Thus, a defendant charged with misappropriating federal funds may introduce an out-of-court declarant's statement that the funds were used legitimately—not to prove the truth of that fact but to establish the defendant's belief of legitimate use. *United States* v. *Leake*, 642 F.2d 715, 720 & n.6 (4th Cir. 1981). Likewise, the prosecution in a murder case may introduce evidence that the victim was rumored to be a police informant—not to prove that she actually was, but to establish the defendant's belief that she may have been an informant. *United States* v. *Looking Cloud*, 419 F.3d 781, 788 (8th Cir. 2005). Such statements help the jury "understand the context and circumstances" of the defendant's actions, and permit them to better infer the defendant's beliefs, motives, and intent. *Id.*

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[9] Although Gupta's statement contained a factual assertion (that Rajaratnam took money from Voyager without telling him), that did not render the statement inadmissible hearsay. Rather, that factual assertion is "circumstantial evidence of [Gupta's] state of mind—his knowledge of" Rajaratnam's withdrawal. *United States* v. *Harris*, 733 F.2d 994, 1004 (2d Cir. 1984). It is commonplace for admissible state-of-mind evidence to be inferred from a declarant's factual assertions in that manner. *See* 4 Mueller & Kirkpatrick, *Federal Evidence* § 438 (2d ed. 1994); 6 Wigmore § 1715.

C. The Second Circuit Wrongly Deferred To The District Court's Ruling When There Was No Basis In The Record To Support Any Deference

1. Despite the statement's clear admissibility to show Gupta's state of mind, rather than its truth, the district court excluded Geetanjali's testimony because, it suggested, the jury "would have extreme difficulty" understanding that the evidence was not offered for its truth. App. 74a-75a. In doing so, the court invoked its exclusionary authority under Rule 403, ruling that if the statement were taken for its truth, it would be "unusually prejudicial." *Id.* 77a. The court of appeals accepted this reasoning, agreeing with the district court that "the jury would likely be unable to comprehend that the statement could be considered only to show Gupta's belief and not to show the truth of what he believed." *Id.* 34a.

There are two fundamental flaws with both courts' conclusions. First, both courts failed to give sufficient consideration to the possibility of a limiting instruction, which could have charged the jury to consider the evidence only as relevant to Gupta's state of mind as of the date the statement was made and not to the truth of the matter asserted (*i.e.*, whether Rajaratnam had in fact swindled Gupta by that date). Although the district court deprecated the effectiveness of a limiting instruction, it had no hesitation in attaching such an instruction to *other* aspects of Geetanjali's curtailed testimony. App. 84a. Indeed, the court issued similar limiting instructions throughout the trial[10]—and specifical-

[10] *See* C.A.J.A. 427 ("Ladies and gentlemen, an exhibit is received not for its truth, a funny way to express it, maybe I need to explain. What it means is neither side is saying that the state-

ly on Gupta's belief that Rajaratnam had taken money out of the Voyager account[11]—without any worry that the jury could not follow those instructions.

The district court suggested that the reason why a limiting instruction would not work for Geetanjali's testimony about Gupta's state of mind was Geetanjali's credibility. The court suggested that her relationship with Gupta would render her testimony so persuasive that the jury would believe "that [Gupta] is telling the truth to his own daughter." App. 72a. That is not a proper reason to exclude testimony; the district court was not authorized by Rule 403, or any other rule of evidence, to exclude evidence on the ground that the jury would have found it too persuasive. A court "may not screen witnesses simply to decide whether their testimony is persuasive." *Western Indus., Inc.* v. *Newcor Can. Ltd.*, 739 F.2d 1198, 1202 (7th Cir. 1984); *see also United States* v. *Evans*, 728 F.3d 953, 963 (9th Cir. 2013); *cf. United States* v. *Peak*, 856 F.2d 825, 834 (7th Cir. 1988) ("But the district court, which has broad discretion in evidentiary matters, does not have discretion to exclude testimony because the judge does not believe the witness."). Nor was there any reason to believe that the prosecution could not have cross-examined Geetanjali effectively; as it was, the prosecution's entire cross-examination was designed to show

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ments here are necessarily accurate or inaccurate, but what they're simply saying is that this was information that was provided to the board members at the time. So that is the purpose you should consider it for."); *see also id.* 529; *id.* 871; *id.* 920-921.

[11] C.A.J.A. 697 ("Ladies and gentlemen, all these conversations of this sort you need to understand are not being offered for their truth as to whether Mr. Rajaratnam did take money out of the account or not, but really are offered as bearing on the state of mind of Mr. Gupta[.]").

Geetanjali's bias and to undermine the jury's confidence in her. C.A.J.A. 988 ("Q. Ma'am, you love your father? … Q. You would do what you could to help your father? … No further questions.").

Second, neither court identified what, if any, undue prejudice the prosecution would have suffered if the jury mistakenly took the evidence for its truth. In the court of appeals, the prosecution did not defend the district court's exclusion on this ground. U.S. C.A. Br. 53-55. That is because the government could not have suffered undue prejudice *even if* the jury took the evidence as true: That "truth"—that Rajaratnam had surreptitiously withdrawn money from the Voyager account—was proven by other evidence at trial, including evidence introduced by the prosecution. Throughout the trial, the jury heard uncontested evidence that Rajaratnam withdrew $25 million from the Voyager account (C.A.J.A. 758-759) and that Gupta told both Kumar and Jain that Rajaratnam had acted without his knowledge. The jury also heard Rajaratnam's own voice on wiretap telling a third party that he "didn't tell [Gupta] that I took that equity out" (*id.* 1603), which the court admitted without a limiting instruction (*id.* 1000). That evidence eliminated any remnant of prejudice that might have flowed from the introduction of Geetanjali's testimony. *See* 6 Wigmore § 1788 (factual assertion should be admitted to prove state of mind when the underlying fact is "proved by other evidence").

2. The court of appeals offered an alternative justification for affirming the exclusion of Geetanjali's testimony: that it was cumulative of other evidence that showed Rajaratnam withdrew money from Voyager. App. 39a. That rationale, however, fundamentally misapplies the concept of cumulative evidence and misap-

prehends the central role that Geetanjali's testimony would have played at trial.

Evidence may be excluded under Rule 403 if it is "needlessly … cumulative." Evidence is needlessly cumulative if the "'evidence on one side is so full that no jury that rejected it would be likely to change its mind because of the introduction of the proffered evidence.'" *United States* v. *Rodriguez-Felix*, 450 F.3d 1117, 1129 (10th Cir. 2006). In this case, the evidence on Gupta's side about his state of mind at the critical time was not "full"; Gupta needed Geetanjali's testimony to establish the fact critical to his defense, that he believed, before the alleged September and October tips, that Rajaratnam had surreptitiously withdrawn money from their joint investment.

Although there was other evidence at trial that Gupta came at some point to believe that Rajaratnam had cheated him, none of that other evidence established Gupta's belief before the September and October 2008 trades. And although, as the court of appeals noted (App. 41a), Geetanjali was allowed to testify as to when she had the pertinent conversation with her father, she was not allowed to inform the jury about the critical content of their conversation on that date. No other evidence before the jury tied Gupta's belief to a date as early as September 2008. Because the defense was not allowed to introduce Gupta's belief at that time, the prosecution was free to argue that Gupta committed the charged offenses in order to work his way back into Rajaratnam's favor.[12]

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[12] The prosecution's exact argument was: "Gupta lost a lot of his money in Voyager. Was he upset about that? I'm sure he was. Does that mean that he no longer had a reason to continue helping Rajaratnam? *Absolutely not. Indeed, at that point Gupta wanted*

Gupta's statement cannot be characterized as cumulative, as that term has been consistently applied by this Court and other courts of appeals (other than in the decision below). Cumulative evidence "adds very little … probative force" and the mere costs of introducing such evidence tend to outweigh its usefulness. *United States* v. *Williams*, 81 F.3d 1434, 1443 (7th Cir. 1996); *see also* 2 McLaughlin, Weinstein, and Berger, *Weinstein's Federal Evidence* § 401.04[2][e][iii] (2d ed. 2014); 6 Wigmore § 1904. By contrast, evidence "of distinct and independent facts of different character, though it may tend to establish [the same] ground of defence or relate to [the same] issue, is not cumulative," *Southard* v. *Russell*, 57 U.S. (16 How.) 547, 554 (1854), because it is "the first direct evidence" for that new proposition, 22A Wright & Graham, *Federal Practice & Procedure* § 5220 n.12 (2012 supp.). The court of appeals' decision warrants review because, contrary to these established principles, it allows evidence to be excluded "merely because of an overlap with other evidence," in direct contradiction of the Rule's text. 1 Mueller & Kirkpatrick, *Federal Evidence* § 96 (2d ed. 1994).

D. The Petition Presents An Ideal Vehicle For Clarifying The Deference Due To District Courts Under Rule 403

The court of appeals' decision warrants review because it deviates from the established principle that, when reviewing decisions to exclude under Rule 403, the appellate court must "look at the evidence in a light most favorable to its proponent, maximizing its proba-

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to do whatever he could to recoup the $10 million[.]" C.A.J.A. 1017 (emphasis added).

tive value and minimizing its prejudicial effect." *United States* v. *Russell*, 971 F.2d 1098, 1106 (4th Cir. 1992) (internal quotation marks omitted).[13]

Geetanjali's proffered testimony was crucial to Gupta's defense, which his counsel had foreshadowed in opening statements. C.A.J.A. 249 ("It defies common sense that Mr. Gupta would deviate from a lifetime of decency, a lifetime of honesty, to criminally help someone who he believed had not treated him right, had cost him a lot of money, and who he had felt had betrayed him."). Gupta's belief that Rajaratnam "betrayed him," coupled with his lifetime of exemplary character, were the foundation for Gupta's attempt to answer to the question that puzzled even the district court: Why would Gupta tip Rajaratnam? *Id.* 1636. Gupta's response—that he wouldn't—was far less persuasive if Gupta could not show that he lacked any motive to help Rajaratnam in September and October 2008. And the jury noticed that lack of evidence; it convicted Gupta on those trades but acquitted him of the January 2009 alleged tip that occurred after Gupta's conversation with Ajit Jain.

In Gupta's case, the excluded testimony did not even have a residue of prejudice that could hypothetically justify exclusion. Neither of the courts below nor the prosecution identified what prejudice Geetanjali's testimony would have caused. Nor was there any basis to believe that Geetanjali's excluded testimony would have been cumulative. *See supra* pp. 30-32. When this Court has been faced with a similar lack of "any ration-

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[13] *Accord Paschal* v. *Flagstar Bank*, 295 F.3d 565, 580 (6th Cir. 2002); *United States* v. *Brown*, 688 F.2d 1112, 1117 (7th Cir. 1982); *United States* v. *Finestone*, 816 F.2d 583, 585 (11th Cir. 1987).

al justification for the wholesale exclusion of this body of potentially exculpatory evidence," it has reversed that exclusion. *Crane* v. *Kentucky*, 476 U.S. 683, 691 (1986). Exclusion is a "drastic remedy," only appropriate when the need for exclusion is clear. 1 Wigmore § 10a. But in this case there are "no grounds for believing that any *unfair* prejudice would result" from admitting Geetanjali's testimony about her father's state of mind. *United States* v. *Jamil*, 707 F.2d 638, 645 (2d Cir. 1983).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2014

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 12-4448

UNITED STATES OF AMERICA,
Appellee,

v.

RAJAT K. GUPTA,
Defendant-Appellant.

Argued: May 21, 2013
Decided: March 25, 2014

[747 F.3d 111]

* * *

[115]

Before: NEWMAN, KEARSE, and POOLER, Circuit Judges.

KEARSE, Circuit Judge:

Defendant Rajat Gupta ("Gupta") appeals from a judgment entered in the United States District Court for the Southern District of New York on November 9, 2012, following a jury trial before Jed S. Rakoff, Judge, convicting him on three counts of securities fraud, in violation of 15 U.S.C. §§ 78j(b) and 78ff, and one count of conspiracy to commit securities fraud, in violation of 18 U.S.C. § 371. Gupta was sentenced principally to 24 months' imprisonment, to be followed by a one-year

term of supervised release, and was ordered to **[116]** pay a fine of $5,000,000. In an amended judgment entered in February 2013, Gupta was also ordered to pay restitution in the amount of $6,218,223.59, an order that is the subject of a separate appeal that has been held in abeyance pending decision of the present appeal. In the present appeal, Gupta challenges his conviction, contending principally that he is entitled to a new trial on the grounds that the trial court erred (1) by admitting statements of a coconspirator, recorded in wiretapped telephone conversations to which Gupta was not a party, and (2) by excluding relevant evidence offered by Gupta. For the reasons that follow, we conclude that Gupta's contentions lack merit, and we affirm the judgment.

I. BACKGROUND

At the times pertinent to this prosecution, Gupta was a member of the board of directors of The Goldman Sachs Group, Inc. ("Goldman Sachs" or "Goldman"), the global financial services firm head-quartered in New York. Gupta was also involved in several financial ventures with Raj Rajaratnam (or "Raj"), founder of The Galleon Group ("Galleon"), a family of hedge funds that invested billions of dollars for its principals and clients. The present prosecution arose out of a multiyear government investigation of insider trading at Galleon which included court-authorized wiretaps of Rajaratnam's cell phone, *see United States v. Rajaratnam*, 719 F.3d 139, 144-45 (2d Cir. 2013).

During its investigation, the government discovered evidence indicating, *inter alia*, that Rajaratnam was receiving inside information about Goldman Sachs from Gupta and trading on that information. Eventually, Gupta was charged with six counts of securities law

violations. Count One of the superseding indictment on which Gupta was tried (the "Indictment") alleged, *inter alia*, that Gupta, Rajaratnam, "and others … conspire[d] … to commit … securities fraud" (Indictment ¶ 30); that "GUPTA disclosed … Inside Information" about Goldman Sachs "to Rajaratnam, with the understanding that Rajaratnam would use the Inside Information to purchase and sell securities" (*id.* ¶ 12(b)); and that Rajaratnam, knowing the information he received from Gupta was confidential, "shared the Inside Information with other coconspirators at Galleon and caused the execution of transactions in the securities of Goldman Sachs" (*id.* ¶ 12(c)). The object of the conspiracy was the "purchase and sale of securities" in order to "receive illegal profits and/or illegally avoid losses" (*id.* ¶¶ 31 and 32(b)) based on "GUPTA['s] disclos[ure of] Inside Information obtained from Goldman Sachs" to Rajaratnam, which information "Rajaratnam shared … with other coconspirators at Galleon" (*id.* ¶¶ 32(a) and (d)). Gupta was convicted on the conspiracy count and on three substantive counts of securities fraud (Counts Three, Four, and Five), all relating to trades of Goldman Sachs stock by Rajaratnam based on confidential inside information Rajaratnam received from Gupta in the fall of 2008.

A. *Evidence Supporting the Counts of Conviction*

All of the government's evidence that Gupta passed confidential information about Goldman Sachs to Rajaratnam, on the basis of which Rajaratnam made purchases or sales of Goldman stock, was circumstantial. Most of the evidence described below was presented through testimony from employees of Galleon or Goldman, wiretapped telephone calls between Rajaratnam and other Galleon employees, records of calls made to or from telephones used by Gupta or Rajaratnam, and

[117] records as to the timing of trades by Galleon in Goldman Sachs stock.

1. *Galleon Trades of Goldman Sachs Stock on September 23, 2008*

At 3:15 p.m. on September 23, 2008, Goldman Sachs held a special meeting of its board of directors. The purpose of the meeting was to approve an investment of $5 billion in Goldman by Warren Buffett. The imminent investment was highly confidential, as it was likely to have "a meaningful impact" on Goldman's stock price. (Trial Transcript ("Tr.") 1590.) It was to be announced to the public after the 4 p.m. close of trading on the New York Stock Exchange.

Gupta, a former managing director of the consulting firm McKinsey & Company ("McKinsey"), participated in the Goldman Sachs board meeting via telephone from a conference room at McKinsey's New York office. Telephone records indicated that Gupta was on the Goldman Sachs conference call from 3:13 p.m. until 3:53 p.m.

At approximately 3:54 p.m., Gupta's assistant, Renee Gomes, dialed Rajaratnam's direct line; the McKinsey conference room telephone from which Gupta had participated in the Goldman Sachs board meeting was then connected to the call to Rajaratnam's line. The connection between Rajaratnam's line and the telephone Gupta used lasted approximately 30 to 35 seconds.

Caryn Eisenberg, Rajaratnam's assistant in 2008-2009, testified that on September 23, 2008, she answered a call on his direct line at about 10 minutes before the 4:00 p.m. market close. As a general rule Eisenberg was not to put calls through to Rajaratnam

near the end of the trading day, but she put the caller on hold, located Rajaratnam, and put the call through. Although at the time of trial Eisenberg no longer remembered the name of the man who was on the line, she testified that she put this call through because his name was on the short list of persons whose calls Rajaratnam would accept near the end of the trading day; she recognized his voice as that of a frequent caller; and the man said it was "urgent" that he "speak to Raj." (Tr. 238-39.)

Rajaratnam took the call in his office and was on the telephone only briefly. Eisenberg testified that Rajaratnam thereafter summoned Galleon cofounder Gary Rosenbach into his office and the two had a closed-door conversation. Rosenbach then "went back to his desk," picked up his telephone, "and started saying buy Goldman Sachs." (*Id.* at 254.)

Galleon trader Ananth Muniyappa testified that at approximately 3:56 p.m. on September 23, Rajaratnam, as he was hanging up his telephone, instructed Muniyappa, who was at his own desk nearby, to purchase 100,000 shares of Goldman Sachs stock. When Muniyappa determined that he would probably be unable to buy as many as 100,000 shares before the market's close (he managed to buy only a total of 67,200 shares), he quickly informed Rajaratnam, who promptly instructed Rosenbach to buy Goldman stock.

Rosenbach proceeded to buy 200,000 shares of the stock, 150,000 for Rajaratnam's portfolio—which specialized in technology stocks—and 50,000 for Rosenbach's own portfolio. Rosenbach also bought 1.5 million shares (1,000,000 for Rajaratnam's portfolio and 500,000 for his own) of a financial-sector index fund made up of stocks of several institutions, including Goldman. Each

of these trades was made in the final "three to four minutes" of the trading day (Tr. 401), *i.e.*, between approximately 3:56 p.m. and 4:00 p.m. In all, the Goldman Sachs stock purchased by Muniyappa and Rosenbach at the behest of [118] Rajaratnam in the final minutes of the trading day on September 23—excluding the shares of the index fund—cost more than $33 million.

Warren Buffett's $5 billion investment in Goldman Sachs was announced at approximately 6:00 p.m. on September 23. The next morning, Goldman's stock price rose to a high nearly 7% above its September 23 closing price. A government witness testified that the profits on the above Galleon purchases of Goldman stock at the end of the trading day on September 23 exceeded $1 million.

Eisenberg testified that after Rajaratnam took the urgent call near the close of trading on September 23 he was smiling more than usual. (*See* Tr. 259.) But not everyone at Galleon was happy. Leon Shaulov was a Galleon trader and portfolio manager. Muniyappa did not buy any Goldman Sachs stock for Shaulov on September 23. Muniyappa testified that that evening, shortly after Goldman announced the Warren Buffett investment, Shaulov sent Rosenbach an email saying, "Thanks for the heads up, by the way. I'm short 170 million in financials. Not one word from anyone. Thank you very much. All I get is sick dilution. Zero help. Zero." (*Id.* at 441-42; *see also id.* at 439 (a "short" position is one speculating that the market price will go down).)

On the morning of September 24, 2008, before the stock markets opened, Rajaratnam placed two calls from his cell phone (which was wiretapped) to Ian Horowitz, his principal trader. In the first call, at 7:09 a.m.,

Rajaratnam began to tell Horowitz about the events of the previous afternoon:

> RAJ RAJARATNAM: …. So, big drama yesterday, but I have to ….
>
> IAN HOROWITZ: Yeah, I, I, I heard.
>
> RAJ RAJARATNAM: Hum.
>
> IAN HOROWITZ: I heard a little, um, you mean the last three minutes of the day?
>
> RAJ RAJARATNAM: No, *I got a call at 3:58*, right?
>
> IAN HOROWITZ: Yeah.
>
> RAJ RAJARATNAM: *Saying something good might happen to Goldman*. Right?
>
> IAN HOROWITZ: So it is what it is. Everything's, everyone's fine, I saw it cross the board.…
>
> RAJ RAJARATNAM: No I saw, I, *so, I told Ananth [Muniyappa] to buy some*, he was fucking around, he can't, you know. *So I went to Gary [Rosenbach] and said just buy me*, right?
>
> IAN HOROWITZ: Mm hmm.
>
> RAJ RAJARATNAM: B*ecause you were not there*. It happens all the fucking time, you know you're there every day of the year, right? ….

(Government Exhibit ("GX") 21-T ("First Rajaratnam-Horowitz Call"), at 1-2 (emphases added).)

Rajaratnam called Horowitz again at 7:56 a.m. After asking how much Goldman Sachs stock Galleon cur-

rently owned, Rajaratnam continued his report on the previous afternoon's events:

RAJ RAJARATNAM: Okay, yeah, let me tell you what happened, honestly, right?

IAN HOROWITZ: Yeah, no, I looked at our price, I looked at our price, and I looked at what happened.

RAJ RAJARATNAM: Yeah.

IAN HOROWITZ: Someone had this before us, someone, whatever went on, something happened, someone, they …

RAJ RAJARATNAM: *I got a call, right, saying something good's gonna happen.*

[119]

IAN HOROWITZ: We'll talk about, how 'bout this, we'll talk when you come in.

RAJ RAJARATNAM: Okay.

IAN HOROWITZ: We'll talk when you come in, okay?

RAJ RAJARATNAM: But I didn't do anything, *you were not there, I asked Ananth to buy some.*

IAN HOROWITZ: You did nothing.

RAJ RAJARATNAM: *Then I went to Gary* … and …

IAN HOROWITZ: You did nothing wrong.

RAJ RAJARATNAM: *Yeah at 3:58*, I can't, I can't yell out in the fucking halls.

> IAN HOROWITZ: No. You did nothing wrong, we'll talk about it when you come in, nothing's wrong.
>
> RAJ RAJARATNAM: It is, I guess, *Leon [Shaulov] was very upset. You know, fuck him, look, I've kept my mouth shut when he gave me WaMu, right*?
>
> IAN HOROWITZ: Get, get upset about what? You got nothing, *this is at 3:58*.
>
> RAJ RAJARATNAM: *Yeah, if it was, one o'clock, I always am good with him, I always call him in, I tell him everything, you know? AMD, IBM, everything*, right?
>
> IAN HOROWITZ: He's not in, so I'm, he hasn't said anything. Listen, if something comes in, I'll let you know.

(GX 22-T ("Second Rajaratnam-Horowitz Call"), at 2-3 (emphases added).)

2. *Galleon Trades of Goldman Sachs Stock on October 24, 2008*

On October 23, 2008, more than halfway through the fourth quarter of Goldman Sachs's fiscal year, Goldman's chairman convened an unofficial board meeting by conference call to bring the directors up-to-date on company events. At that time, Wall Street analysts were projecting that Goldman—which, since becoming a public company, had never reported a quarterly loss—would continue to report profits. In the conference call, which began at 4:15 p.m., Goldman's management informed the board that the company's fourth-quarter result would be a loss.

Records were introduced to show that Gupta, on a telephone in his home office, participated in the Goldman Sachs conference call for approximately 33 minutes and disconnected at 4:49 p.m. At 4:50 p.m., a call was placed from the telephone of Gupta's assistant Renee Gomes to the direct office line of Rajaratnam; Gupta's home office line was conferenced in to that call, and Gomes's line was disconnected. Gupta's home office telephone was connected to Rajaratnam's direct line for some 12½ minutes, until 5:03 p.m.

The next morning, October 24, 2008, in three transactions, Rajaratnam sold a total of 150,000 shares of Goldman Sachs stock. The first 50,000 shares were sold at 9:31 a.m., one minute after the stock market opened—the first opportunity to trade in Goldman shares since the board meeting the previous day. Another 50,000 shares were sold at 10:09 a.m.; and the final 50,000 shares were sold at 10:37 a.m. Goldman Sachs's fourth-quarter losses were not announced to the public until December 16. Based on the decline in Goldman's stock price after that announcement, the government introduced calculations showing that Rajaratnam, by selling his shares on October 24, avoided a loss of more than $3.8 million.

At 12:12 p.m. on October 24, Rajaratnam returned a call to David Lau, a Singapore-based portfolio manager for Galleon International, one of Galleon's hedge funds. Lau had sought to reach Rajaratnam for general investment advice. Galleon Inter- **[120]** national invested in non-U.S. securities primarily (*see* Tr. 1467), but not exclusively (*see id.* at 2415); and it had in the past owned stock in Goldman (*see* GX 90). The conversation began with Rajaratnam advising that, as a general matter, it would be safer to invest in United States companies than in emerging market countries:

RAJ RAJARATNAM: Hey David, you called?

DAVID LAU: Yeah, just to give me, give me a, find the pulse because we are quite shocked overseas and uh long bonds, I mean quite shocked in relative for the VAR … because VAR broke out, blew out and our positions are the same so I just want to find out what you guys are thinking.

RAJ RAJARATNAM: Yeah, I mean, I think, ah we think that *the US is um relatively the safe haven*, right.

DAVID LAU: Um.

RAJ RAJARATNAM: Because all of these um emerging market ah countries, many of them have to reduce interest rates, which is bad for their currencies, right.

DAVID LAU: Um um um.

RAJ RAJARATNAM: And, I mean today for example there is a reasonable calmness in the market you know the market is only down 2 or 3%, right.

DAVID LAU: Yeah, that's why I'm surprised. I thought it would go nuts.

RAJ RAJARATNAM: Yeah I mean our risk here is ah hedge fund redemption risk, right Citadel I hear is in trouble, you know, and things like that but I think generally, not that I want to be long equities, but generally I think one trade in equities would be, you know, buy the Spiders and short the EEMs or something, you know.

DAVID LAU: Hmm Hmm.

RAJ RAJARATNAM: But it looks like here the most cyclical companies the semi equipment companies, and the home builders are the ones that are leading the way out right.

DAVID LAU: Right.

(GX 29-T ("Rajaratnam-Lau Call"), at 1-2 (emphasis added).)

Rajaratnam then proceeded to describe to Lau the confidential negative information he had received the previous day "from somebody who's on the Board of Goldman Sachs," which "they don't report until December." (GX 29-T, at 2.) Rajaratnam noted the current optimistic view of Wall Street analysts of Goldman Sachs's likely profits, and he described the potential for selling the stock short:

RAJ RAJARATNAM: *Um, now I, I heard yesterday from somebody who's on the Board of Goldman Sachs, that they are gonna lose $2 per share. The Street has them making $2.50.*

DAVID LAU: Really?

RAJ RAJARATNAM: You know. Yeah. *Now I can get that number*, you know, one, *they don't report until December*, they, I think their quarter ends in November, but (UI [*i.e.*, unintelligible]) one more, but you know they have these huge marks in ICBC and all of that stuff right. That uh is getting absolutely clobbered. You know.

DAVID LAU: Right.

RAJ RAJARATNAM: *So what he was telling me was that uh, Goldman, the quarter's*

> *pretty bad*. They have zero revenues because their trading revenues are offset by asset losses, and *to date they have lost $2 per share*, they just announced a 10% cut and uh you know, the basic business is ok but uh you know this is uh tough for them. *I don't think that's built into Goldman Sachs stock price. So if it gets to $105,* **[121]** *I'm gonna, it's $99 now, it was at $102. I was looking for $105, I'm gonna whack it you know.*
>
> DAVID LAU: (Laughs) Okay. Okay. Okay (UI) …
>
> RAJ RAJARATNAM: Okay, *I don't think it makes sense to take longer term views right now.…*

(GX 29-T, at 2 (emphases added).)

3. *The Relationship Between Gupta and Rajaratnam*

The government also presented evidence that Gupta and Rajaratnam had a close relationship. Gupta described Rajaratnam as a "close friend[]" (GX 1905)—indeed, "a very close friend" (GX 1922)—and was in frequent communication with him. Rajaratnam's address book noted Gupta as a "Good friend." (Tr. 223.) Rajaratnam had instructed Eisenberg that there were only five people she was authorized to connect with him near the end of the trading day; Gupta was one of them. (*See id.* at 210, 213-14; *see also id.* at 273 (during the two years when Eisenberg was Rajaratnam's assistant, the list was expanded to about 10 names).)

Gupta and Rajaratnam were also involved in several business ventures together. In 2005, they, along with a third partner, formed Voyager Capital Partners

Ltd. ("Voyager"), an investment fund capitalized with $50 million, $5 million of which was contributed by Gupta and $40 million by Rajaratnam; Gupta later borrowed $5 million from Rajaratnam in order to buy out the third partner's share (*see* Tr. 1858-59), giving Gupta a $10 million stake in Voyager. Other collaborations were discussed in a July 29, 2008 call from Gupta to Rajaratnam (*see* GX 9-T ("Gupta-Rajaratnam Call"))—the only call between these two that was captured in the wiretaps. In 2007, Gupta, Rajaratnam, and two others launched another investment fund, New Silk Route, in which Rajaratnam invested $50 million (*see id.* at 8); Gupta was the chairman (*see* GX 2164). Gupta was also heavily involved in Galleon itself. He had invested several million dollars in Galleon funds; he was involved in the planning of a new Galleon fund called Galleon Global (which ultimately was not created); he had a keycard allowing him access to Galleon's New York offices; and he regularly worked on Galleon's behalf in seeking potential investors (*see* GX 9-T, at 13-14). In early 2008, Gupta was made chairman of Galleon International, which, as of April 2008, managed assets totaling some $1.1 billion and could earn "performance fees" (Tr. 1696). Gupta was given a 15 percent ownership stake. (*See, e.g.*, *id.*; GX 9-T, at 6; *id.* at 13 (Gupta: "you've given me … a position in Galleon International").)

In the July 2008 Gupta-Rajaratnam Call, Rajaratnam asked Gupta about a rumor that Goldman Sachs might seek to buy a commercial bank. Gupta responded that there had been "a big discussion" of that possibility, in particular with respect to "Wachovia," as well as of the possibility of buying an insurance company, in particular "AIG." (GX 9-T, at 2-3.) Gupta said the Goldman board was divided and that such purchases were unlikely to be "imminent," but that if certain

banks were "a good deal … it's quite conceivable they'd come and say let's go buy" one. (*Id.* at 3-4.) The board's discussions were confidential. (*See*, *e.g.*, Tr. 856-58.) Even the matter of whether or not a subject had been discussed at a Goldman board meeting was confidential. (*See*, *e.g.*, *id.* at 2048.)

B. *The Defense Case*

Gupta called several witnesses in his defense. Most were character witnesses who testified that they believed Gupta to **[122]** be an honest person; Gupta also sought to have them testify that he had "integrity" and thus would not have been inclined to share inside information with Rajaratnam. Gupta's daughter Geetanjali Gupta ("Geetanjali") testified about certain conversations Gupta had with her about Rajaratnam, and sought to indicate that Gupta would not have been inclined to share inside information with Rajaratnam because Gupta believed Rajaratnam had cheated him out of money with respect to the Voyager investment. Gupta also sought to introduce documentary evidence suggesting that a different Goldman Sachs insider was giving Rajaratnam confidential information about Goldman Sachs, and that Gupta contemplated leaving a substantial portion of his wealth to charity. As discussed in greater detail in Part II.B. below, the trial judge imposed limitations with respect to each category of Gupta's proposed evidence.

C. *The Verdict*

The jury found Gupta guilty on four of the six counts against him: Count One, conspiracy to commit securities fraud in violation of 18 U.S.C. § 371, and three substantive counts of securities fraud in violation of 15 U.S.C. §§ 78j(b) and 78ff. The substantive securities fraud convictions were on Count Three, based on

Rosenbach's purchase of 150,000 shares of Goldman Sachs stock for Rajaratnam on September 23, 2008; Count Four, based on Muniyappa's purchase of 67,200 shares of Goldman Sachs stock for Rajaratnam on September 23, 2008; and Count Five, based on Rajaratnam's sale of 150,000 shares of Goldman Sachs stock on October 24, 2008.

Gupta was sentenced principally to 24 months' imprisonment and ordered to pay a $5 million fine. This Court granted his motion for bail pending appeal.

II. DISCUSSION

On appeal, Gupta argues principally that Rajaratnam's wiretapped conversations with Horowitz and Lau were inadmissible hearsay; that the trial court erred in curtailing evidence proffered by Gupta in his defense; and that the errors, either singly or in combination, entitle him to a new trial. For the reasons that follow, we disagree.

A. *The Wiretap Evidence*

Preliminarily, we note that Gupta's brief on appeal challenged the admission of any wiretapped conversations, including the conversation between Rajaratnam and Gupta himself, on the ground that the wiretap authorizations were obtained in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, *see* 18 U.S.C. §§ 2510-2522, and the Fourth Amendment to the Constitution. Rajaratnam, who was prosecuted and convicted on multiple counts of securities fraud and conspiracy, had raised such challenges in his case; and Gupta's brief on appeal stated that Gupta was raising the same issues as Rajaratnam and was adopting the challenges made in Rajaratnam's appeal. Rajaratnam's challenges were rejected in *United States*

v. Rajaratnam, 719 F.3d at 151-57, 160. Gupta's Title III and constitutional challenges are thus foreclosed.

With respect to Rajaratnam's statements in his two conversations with Horowitz and in his conversation with Lau, Gupta also objected to their admission on the ground that they were hearsay. The government contended that Rajaratnam's statements either were nonhearsay because they were statements in furtherance of a conspiracy of which Rajaratnam and Gupta were members, *see* Fed. R. Evid. 801(d)(2)(E), or were hearsay statements within the exception for declarations **[123]** against penal interest, *see* Fed. R. Evid. 804(b)(3), or within the residual hearsay exception, *see* Fed. R. Evid. 807.

The district court found that the government had sufficiently established the existence of a conspiracy among Gupta, Rajaratnam, and others (*see* Tr. 430-31, 434-35, 440), and that Rajaratnam's statements in each of the three conversations were in furtherance of the conspiracy. The court thus ruled that all three conversations were admissible under Rule 801(d)(2)(E). (*See* Tr. 633-35, 695; *see also* Hearing Transcript, May 16, 2012 ("Hearing Tr."), at 4, 24-25.)

The district court rejected outright the government's contention that Rajaratnam's statements were admissible under the residual hearsay exception. And the court stated that it was "dubious" as to whether the statements could be admitted as statements against penal interest but that it need not resolve that issue in light of its ruling that they were admissible as nonhearsay statements in furtherance of a conspiracy of which Rajaratnam and Gupta were members. (Hearing Tr. 4.)

Gupta challenges the rulings that Rajaratnam's statements to Lau and Horowitz were in furtherance of

a conspiracy of which Gupta was a member. He contends that Lau was not alleged to be a coconspirator and that Rajaratnam's statements to Horowitz were in furtherance only of a separate conspiracy between Rajaratnam and Shaulov. The government defends the court's admission of the Rajaratnam statements as coconspirator statements in furtherance of a conspiracy of which Rajaratnam and Gupta were not the only members; in addition, it argues that Rajaratnam's statements could properly have been admitted as statements against his penal interest. We conclude that, under Rules 801 and 804 of the Federal Rules of Evidence, Rajaratnam's statements in all three conversations were admissible both as nonhearsay statements in furtherance of the Rajaratnam-Gupta conspiracy and under the exception for statements against penal interest. We address these issues separately with respect to the statements to Horowitz and those to Lau.

1. *Statements in Furtherance of a Conspiracy*

Under Rule 801(d), an out-of-court statement offered for the truth of its contents is not hearsay if "[t]he statement is offered against an opposing party and" it "was made by the party's coconspirator during and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E). Thus, "[i]n order to admit a statement under this Rule, the court must find (a) that there was a conspiracy, (b) that its members included the declarant and the party against whom the statement is offered, and (c) that the statement was made during the course of and in furtherance of the conspiracy." *United States v. Maldonado-Rivera*, 922 F.2d 934, 958 (2d Cir. 1990), *cert. denied*, 501 U.S. 1233 (1991). In determining the existence and membership of the alleged conspiracy, the court must consider the circumstances surrounding the statement, as well as the contents of the

alleged coconspirator's statement itself. *See* Fed. R. Evid. 801(d)(2); *see also Bourjaily v. United States*, 483 U.S. 171, 176-81 (1987).

"To be in furtherance of the conspiracy, a statement must be more than 'a merely narrative' description by one co-conspirator of the acts of another." *United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83, 88 (2d Cir. 1999) ("*SKW Metals*") (quoting *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1199 (2d Cir.) ("*Beech-Nut*"), *cert. denied*, 493 U.S. 933 (1989)).

[124]

> While idle chatter between co-conspirators does not further a conspiracy, s*ee United States v. Paone*, 782 F.2d 386, 390 (2d Cir.), *cert. denied*, 479 U.S. 882, 107 S.Ct. 269, 93 L.Ed.2d 246 (1986), we have recognized that "[s]tatements between conspirators which provide reassurance, serve to maintain trust and cohesiveness among them, or inform each other of the current status of the conspiracy, further the ends of [a] conspiracy."

United States v. Simmons, 923 F.2d 934, 945 (2d Cir.) (quoting *United States v. Rahme*, 813 F.2d 31, 35-36 (2d Cir. 1987) (other internal quotation marks omitted)), *cert. denied*, 500 U.S. 919 (1991); *see, e.g., United States v. Maldonado-Rivera*, 922 F.2d at 958-59.

"A finding as to whether or not a proffered statement was made in furtherance of the conspiracy should be supported by a preponderance of the evidence, and such a finding will not be overturned on appeal unless it is clearly erroneous." *United States v. Thai*, 29 F.3d 785, 814 (2d Cir.), *cert. denied*, 513 U.S. 977 (1994); *see*,

e.g., *United States v. James*, 712 F.3d 79, 105-06 (2d Cir.), *petition for cert. filed*, No. 13-632 (U.S. Nov. 22, 2013). "'Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.'" *Beech-Nut*, 871 F.2d at 1199 (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985)). The court's ultimate decision to admit or exclude a proffered statement is reviewed for abuse of discretion. *See, e.g.*, *United States v. Persico*, 645 F.3d 85, 99 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 1637 (2012); *SKW Metals*, 195 F.3d at 87-88.

a. *Rajaratnam's in-Furtherance Statements to Horowitz*

We see no error or abuse of discretion in the district court's admission of the statements by Rajaratnam in his two telephone conversations with Horowitz. Although Gupta insists that Rajaratnam had a "separate conspiracy with Shaulov" (*e.g.*, Gupta brief on appeal at 38, 39), that Rajaratnam's statements to Horowitz were "focus[ed] on placating Shaulov" (*id.* at 37), and that "Rajaratnam's conversation with Horowitz was not 'in furtherance' of the alleged Rajaratnam/Gupta conspiracy" (*id.* at 36; *see id.* at 37 ("placating Shaulov had nothing to do with furthering the alleged conspiracy between Rajaratnam and Gupta")), that argument suffers from multiple flaws. First, the Indictment did not allege a conspiracy only between Rajaratnam and Gupta; it alleged that the conspiracy also encompassed "other coconspirators at Galleon" (Indictment ¶¶ 12(c), 32(d)). Second, so long as a coconspirator statement was in furtherance of the conspiracy, there is no requirement that it have been in furtherance of the interests of the defendant himself or of any particular coconspirator. Third, there was ample evidence that the conspiracy of which Gupta and Raja-

ratnam were members included Horowitz, Rosenbach, and Shaulov.

For example, after receiving the September 23 call at 3:54 p.m. from Gupta, Rajaratnam had a closed-door conversation with Rosenbach; Rosenbach immediately began buying Goldman Sachs stock and shares of an index fund that included Goldman stock; Rosenbach made those purchases not only for Rajaratnam's portfolio but for his own portfolio as well; and after the market closed, Rosenbach returned to Rajaratnam's office for another closed-door conversation (*see* Tr. 254-55). That evening, when Shaulov bitterly complained that he had not been given a **[125]** "heads up" on the Buffett investment, he complained to Rosenbach. (*Id.* at 441-42.) The next morning, Rosenbach sent Rajaratnam an email stating "I spoke to Leon and believe I diffused [*sic*] him." (GX 1632.) Rajaratnam, in his conversations with Horowitz that morning, explained why he had not immediately informed Horowitz and Shaulov upon receipt of the September 23 Goldman Sachs information. In his first call, Rajaratnam pointed out that Horowitz, who was the head of the Galleon trading desk and the trader principally responsible for executing trades for Rajaratnam (*see* Tr. 205, 361), had not been in the office when the call came in. The district court found that this conversation was in furtherance of the conspiracy of which Gupta was a member because Rajaratnam needed to explain to Horowitz, his trader, why the purchases of Goldman stock were made (*see* Hearing Tr. 19-20); and the court found that the ensuing conversation between Rajaratnam and Horowitz "reeks of knowledge, intent, and the need of Mr. Rajaratnam to explain to his lieutenant why in his absence the significant trade occurred" (*id.* at 21). In that second conversation, Rajaratnam told Horowitz that Shau-

lov was upset but should not have been because the call about Goldman Sachs came in late, at "3:58"; had it come in at "one o'clock," Rajaratnam would have informed Shaulov because he "always" relayed "everything" to Shaulov. (GX 22-T, at 3.)

Thus, there was ample evidence to support findings (1) that the members of the conspiracy in which Gupta passed confidential Goldman Sachs information to Rajaratnam included not only Gupta and Rajaratnam but also Rosenbach, Horowitz, and Shaulov, and (2) that Rajaratnam's statements and explanations to Horowitz served to further the conspiracy by informing Horowitz, and eventually Shaulov, of the status of that conspiracy, reassuring them of its continuity, and preserving trust and cohesiveness among the coconspirators. Rajaratnam's statements in his telephone calls to Horowitz were properly admitted under Rule 801(d)(2)(E).

b. *Rajaratnam's in-Furtherance Statements to Lau*

Although the government concedes that Lau was not a member of the alleged conspiracy, the district court admitted under Rule 801(d)(2)(E) Rajaratnam's statements to Lau as well. While that Rule " 'requires that both the declarant and the party against whom the statement is offered be members of the conspiracy, *there is no requirement that the person to whom the statement is made also be a member*.'" *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, 139 (2d Cir. 2008) ("*Terrorist Bombings*") (quoting *Beech-Nut*, 871 F.2d at 1199) (emphasis ours), *cert. denied*, 558 U.S. 1137 (2010). Statements designed to induce the listener's assistance with respect to the conspiracy's goals satisfy the Rule's in-furtherance requirement. *See, e.g.*, *Terrorist Bombings*, 552 F.3d at

139; *Beech-Nut*, 871 F.2d at 1199 ("Coconspirator statements may be found to be 'in furtherance' of the conspiracy within the meaning of Rule 801(d)(2)(E) if they 'prompt the listener to respond in a way that facilitates the carrying out of criminal activity.'" (quoting *United States v. Rahme*, 813 F.2d at 35)).

Applying these principles, we conclude that there was no clear error in the district court's finding that Rajaratnam's statements to Lau were in furtherance of a conspiracy of which Gupta and Rajaratnam were members. Lau was a portfolio manager for Galleon International, seeking to make profitable investment decisions for **[126]** his portfolio. The Rajaratnam-Lau Call resulted from Lau's solicitation of Rajaratnam's view of "the pulse" of the market. (GX 29-T, at 1.) The conversation took place on October 24, 2008, shortly after Rajaratnam had sold his Goldman Sachs stock in the wake of Gupta's call to Rajaratnam, a call placed one minute after the end of the Goldman Sachs board of directors conference call in which Gupta learned that Goldman in December would report a quarterly loss. Rajaratnam responded to Lau's request for guidance on the market by advising that "the U.S. is … relatively the safe haven" and providing his opinion with respect to specific sectors (*id.* at 1-2); but Rajaratnam went on to say that he had nonpublic information that, contrary to the prevailing view of market analysts, Goldman's current quarter would not be profitable (*see id.* at 2 ("I heard yesterday from somebody who's on the Board of Goldman Sachs, that they are gonna lose $2 per share. The Street has them making $2.50."")). Rajaratnam noted that Goldman would not report its quarterly results until December; stated that if the stock price reached a certain level, he would sell short (*see id.*

("whack it")); and concluded, "I don't think it makes sense to take longer term views right now" (*id.*).

We see no error in the district court's finding that Rajaratnam's statements to Lau, "an important colleague and subordinate who had the ability to execute further trades in Galleon International" (Hearing Tr. 22), were in furtherance of the conspiracy of which Rajaratnam and Gupta were members. Although Gupta argues that in connection with these statements the government was required to "pro[ve] … not merely that Lau was theoretically capable" of trading in Goldman Sachs stock but that Rajaratnam's "purpose was to induce Lau to trade" (Gupta brief on appeal at 33 (emphasis omitted)), this argument ignores the allegation and the proof that one of the goals of the conspiracy was to use inside information to avoid losses—a goal clearly pursued by Rajaratnam in dumping his Goldman Sachs shares as quickly as possible after learning that Goldman would later publicly announce a quarterly loss. Gupta had a 15 percent ownership stake in Galleon International, which was entitled to fees based on its performance. (*See* Tr. 1696.) Although Galleon International invested principally in securities of non-United States companies (*see id.* at 1467), it was not precluded from investing in domestic securities (*see id.* at 2415); and, indeed, it had in the past owned stock in Goldman (*see* GX 90). In light of this evidence, Rajaratnam's statements to Lau could have prompted Lau not to purchase Goldman shares for Galleon International in October 2008. This supports the district court's conclusion that such statements were in furtherance of the conspiracy of which Gupta was a member.

Although Gupta argues that Rajaratnam was simply "bragging" about his sources (Gupta brief on appeal at 35), this was at best an argument for the jury. Fur-

ther, to the extent that it could be permissible to view the conversation as Gupta urges, *i.e.*, that it was merely a "casual conversation about past events," not one in which Rajaratnam's statements were in furtherance of the conspiracy (Gupta brief on appeal at 35-36 (citing *United States v. Lieberman*, 637 F.2d 95, 102 (2d Cir. 1980))), the clear-error standard for reversal has not been met. To the extent that there may be more than one permissible view as to Rajaratnam's purpose in making the October 24, 2008 statements to Lau, the district court's determination that the statements about Goldman shares were made in furtherance of the conspiracy was a choice between or among permissible inferences and hence cannot be deemed **[127]** clearly erroneous, *see Anderson*, 470 U.S. at 574. Gupta's contentions provide no basis for overturning the district court's finding that Rajaratnam's statements to Lau were in furtherance of the insider-trading, loss-avoidance conspiracy of which Gupta was a member and by which Gupta sought to profit, and thus were admissible.

2. *Statements Against Penal Interest*

Rule 804(b)(3) allows the admission of statements against a declarant's proprietary, pecuniary, or penal interest if the declarant is unavailable as a witness. A statement is against such an interest if it is a statement that:

> (A) *a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it* was so contrary to the declarant's proprietary or pecuniary interest or *had so great a tendency* to invalidate the declarant's claim against

> someone else or *to expose the declarant to civil or criminal liability*; and
>
> (B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

Fed. R. Evid. 804(b)(3) (emphases added). This Rule "is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true." *Williamson v. United States* 512 U.S. 594, 599 (1994).

In assessing whether a statement is against penal interest within the meaning of Rule 804(b)(3), the district court must first ask whether "a reasonable person in the declarant's shoes would perceive the statement as detrimental to his or her own penal interest," *United States v. Saget*, 377 F.3d 223, 231 (2d Cir. 2004) ("*Saget*"), *cert. denied*, 543 U.S. 1079 (2005), a question that can be answered only "in light of all the surrounding circumstances," *Williamson*, 512 U.S. at 604; *see also Saget*, 377 F.3d at 231 (an "adequately particularized analysis" is required). The proffered statement "[need] not have been sufficient, standing alone, to convict [the declarant] of any crime," so long as it would have been "probative" in a criminal case against him. *United States v. Persico*, 645 F.3d at 102.

If the court finds that the statement is against the declarant's penal interest, the court must then determine whether there are corroborating circumstances indicating "both the declarant's trustworthiness and the truth of the statement." *United States v. Lumpkin*, 192 F.3d 280, 287 (2d Cir. 1999). Further, "the infer-

ence of trustworthiness from the proffered 'corroborating circumstances' must be strong, not merely allowable." *United States v. Salvador*, 820 F.2d 558, 561 (2d Cir.), *cert. denied*, 484 U.S. 966 (1987). In the context of assessing whether a statement against penal interest was sufficiently reliable to satisfy the Confrontation Clause of the Constitution, we have noted that

> [a] statement incriminating both the declarant and the defendant may possess adequate reliability if … the statement was made to a person whom the declarant believes is an ally, and the circumstances indicate that those portions of the statement that inculpate the defendant are no less reliable than the self-inculpatory parts of the statement.

Saget, 377 F.3d at 230 (internal quotation marks omitted).

[128] The trial court's ultimate decision to admit such evidence is reviewed for abuse of discretion. *See, e.g.*, *United States v. Williams*, 506 F.3d 151, 155 (2d Cir. 2007), *cert. denied*, 552 U.S. 1223 (2008); *Saget*, 377 F.3d at 231; *United States v. Salvador*, 820 F.2d at 562.

a. *Rajaratnam's Self-Incriminating Statements to Horowitz*

Even if Rajaratnam's statements in his conversations with Horowitz on the morning after his September 23 purchases of Goldman Sachs stock were not in furtherance of the Rajaratnam-Gupta conspiracy, the pertinent statements were contrary to Rajaratnam's penal interest and therefore could properly have been admitted pursuant to Rule 804(b)(3). In the First Rajaratnam-Horowitz Call, Rajaratnam said, "I got a call at 3:58 …. [s]aying something good might happen to

Goldman.… [S]o, I told Ananth to buy some" and "I went to Gary and said just buy me" (GX 21-T, at 1-2). In the Second Rajaratnam-Horowitz Call, Rajaratnam's statements included the following:

- I got a call, right, saying something good's gonna happen.
- I asked Ananth to buy some.
- Then I went to Gary ….
- Yeah at 3:58, I can't, I can't yell out in the fucking halls.
- Leon was very upset. You know, fuck him, look, I've kept my mouth shut when he gave me WaMu ….
- [I]f it was, one o'clock, I always am good with him, I always call him in, I tell him everything, you know? AMD, IBM, everything ….

(GX 22-T, at 2-3.)

The corroborating evidence included proof that Rajaratnam did receive a call minutes before the close of trading on September 23; that the call was from Gupta, who had said it was "urgent"; that Gupta was a Goldman Sachs board member who had just received confidential Goldman information; and that something quite good for Goldman did in fact happen and was announced after the close of trading that very day. And Rajaratnam's reference to having shared information with respect to "AMD" provided additional corroboration of Rajaratnam's knowing wrongdoing, as Anil Kumar—who was on Rajaratnam's list of five people to whom he would speak near the close of trading (*see* Tr. 210, 213-14)—testified at trial that he had "pled guilty

to one count of securities fraud for giving insider information to Mr. Rajaratnam about a company called ATI and AMD's acquisition of it in 2006" (*id.* at 1767). Thus, it would have been well within the bounds of discretion for the district court to conclude that the statements by Rajaratnam were contrary to his penal interest because they exposed him to criminal liability for trading on the basis of inside information, and that they were sufficiently reliable to be admitted in evidence under Rule 804(b)(3).

b. *Rajaratnam's Self-Incriminating Statements to Lau*

We reach the same conclusion with respect to Rajaratnam's statements about his inside information on Goldman Sachs to Lau. In his conversation with Lau, Rajaratnam's statements included the following:

- I heard yesterday from somebody who's on the Board of Goldman Sachs, that they are gonna lose $2 per share. The Street has them making $2.50.
- [T]hey don't report until December ….
- So what he was telling me was that uh, Goldman, the quarter's pretty bad.… I don't think that's built into Goldman **[129]** Sachs stock price. So if it gets to $105, I'm gonna, it's $99 now, it was at $102. I was looking for $105, I'm gonna whack it you know.

(GX 29-T, at 2.)

Given that this conversation occurred on October 24, 2008, less than two hours after Rajaratnam unloaded his Goldman Sachs stock—beginning one minute af-

ter the market opened—Rajaratnam's statement that he had "heard yesterday" from a Goldman board member that Goldman would lose money and would not report its losses until December clearly exposed him to criminal liability for trading on inside information. Moreover, Rajaratnam's statement that if the stock reached a certain level he planned to sell it short was an admission of a plan to engage in additional unlawful insider trading in the future.

Although Gupta argues that these statements were not sufficiently reliable to satisfy the statement-against-penal-interest exception, we disagree. The evidence as to the timing of the Goldman Sachs board's after-hours conference call on October 23, which ended at 4:49 p.m. and was followed by a 4:50 p.m. call from Goldman board member Gupta to Rajaratnam, coupled with Rajaratnam's commencing to dump his Goldman stock one minute after the market opened the next morning, provided ample corroboration for the October 24 statement that Rajaratnam had received information "yesterday" of Goldman's yet-to-be-announced "$2 per share" losses from "somebody who's on the Board of Goldman Sachs."

Again, Gupta argues that Rajaratnam was merely attempting to impress Lau. That was a contention that could be argued to the jury; but as "reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true," *Williamson*, 512 U.S. at 599, it would have been within the district court's discretion to find that Rajaratnam, as founder and head of Galleon, would have had no need to attempt to impress his subordinates and that he would not have made these self-incriminating statements without a foundation of truth.

B. *Limitations on Gupta's Defense Evidence*

Gupta also contends that he is entitled to a new trial on the ground that the district court unduly limited evidence proffered by the defense to show that any communication by Gupta of inside information to Rajaratnam in the fall of 2008 was improbable. For the reasons that follow, we conclude that none of the challenged rulings constituted an abuse of the court's discretion and that a new trial is unwarranted.

1. *Testimony by Gupta's Daughter*

The "linchpin" of the defense (Gupta brief on appeal at 46) was the proposition that in mid-September 2008, Gupta was angry with Rajaratnam for having withdrawn $25 million from the Voyager fund (in which Gupta had invested $10 million and Rajaratnam had invested $40 million) without informing Gupta of the withdrawal and without alerting Gupta to withdraw some of his own capital—so angry that Gupta would not have shared inside information about Goldman Sachs with Rajaratnam. To establish Gupta's state of mind—and to suggest that his September 23 and October 23 calls to Rajaratnam were merely efforts to obtain information about Voyager—the defense proffered testimony from Gupta's daughter Geetanjali that on September 20 Gupta was angry with Rajaratnam, believing that Rajaratnam had cheated him. Gupta argues that

[130]

[s]pecifically, Geetanjali would have testified:

> He told me that he was upset about Voyager. He told me that he was worried about the performance of the fund and that *he was frustrated that he couldn't get information from Raj about it*.

> He also told me *he was angry that Raj had taken money out of the fund without telling him* and that he thought that that—he didn't understand why he had taken the money out of the fund, and why if he had taken money out of the fund, he had not gotten any of it.

(Gupta brief on appeal at 47 (quoting Tr. 3079 (Geetanjali's statement in response to questioning by the court outside the presence of the jury) (emphases in brief)).)

The government objected that this testimony would be hearsay; Gupta argued that it was admissible under Rule 803(3)'s "state of mind" exception to the hearsay rule. After exploring Geetanjali's proposed testimony in the absence of the jury and hearing arguments from both sides (*see* Tr. 2971-74, 3071-89), the district court ruled that Geetanjali could testify to Gupta's "attitude towards Rajaratnam" with respect to Voyager, "at a given point or maybe two or three points" in time, but that Geetanjali could not testify to the "substantive" details of what Gupta said, *i.e.*, that Gupta stated that he believed Rajaratnam had cheated him (*id.* at 3087; *see id.* at 3086-89).

Accordingly, Geetanjali testified that on September 20, 2008, she had a "conversation with [her] father relating to an investment that [he] had with Mr. Rajaratnam called Voyager" (*id.* at 3093) and in that conversation Gupta expressed "significant concern" about his investment in Voyager (*id.* at 3094). Geetanjali continued as follows:

> THE COURT: And in relating this to you, what was his demeanor?

> THE WITNESS: He was upset. He was stressed. He was running his hands through his hair, which he often does when he's stressed. He was walking about. He was quite upset. He's normally a very calm and collected person.
>
> THE COURT: Was it your understanding, if you had one, that this was because of how the investment was doing or because of how Mr. Rajaratnam was treating the investment or what?
>
> THE WITNESS: It was more because of how Mr. Rajaratnam was treating the investment. My father had been very upset that—
>
> THE COURT: No. You've answered the question.

(Tr. 3094.) Geetanjali also testified that Gupta was frustrated by the difficulty he was having in getting information from Rajaratnam about Voyager. (*See id.* at 3095; *see also id.* at 3100 (testifying that at Thanksgiving Gupta was still upset at Rajaratnam about the Voyager investment).) The court instructed the jury that Geetanjali's testimony was to be considered "only on the issue of what bearing it has, if at all, on Mr. Gupta's attitude toward Mr. Rajaratnam during the period of time in question" (*id.* at 3095), and that "the limited purpose for which" Geetanjali's testimony was admitted was "not for … whatever may or may not have been going on at Voyager, but only for what Mr. Gupta's state of mind was with respect to Mr. Rajaratnam at this particular time" (*id.* at 3100).

Gupta contends that the district court erred in preventing Geetanjali from testifying that Gupta believed Rajaratnam had cheated him, because

[131]

> Gupta did not seek to introduce Geetanjali's testimony to prove that Rajaratnam had in fact stolen from him (a point that was undisputed anyway); rather, he wanted to show that he *believed* Rajaratnam had stolen from him at a particular point in time.

(Gupta brief on appeal at 48 (emphasis in original); *see id.* at 49 ("Gupta sought to establish that he *believed at the time* that Rajaratnam was defrauding him" (emphasis in original)).) Gupta argues that Rule 803(3) provides an exception to the hearsay rule for a declarant's then-existing state of mind and that "Geetanjali's testimony—that on September 20, Gupta told her 'he was angry that Raj had taken money out of the fund without telling him' [Tr. 3079]—was classically *admissible* evidence establishing Gupta's state of mind, and directly relevant to his motive for calling Rajaratnam." (Gupta brief on appeal at 48-49 (emphasis added); *see id.* at 49 ("his statement was admissible as evidence of [his] belief that Rajaratnam was defrauding him" (emphasis added)).)

We disagree with the thrust of Gupta's arguments, as we think it clear from the record that the court's limitation on Geetanjali's testimony was not based on a view that the testimony was being offered for its truth but rather was based on its view that the jury would likely be unable to comprehend that the statement could be considered only to show Gupta's belief and not to show the truth of what he believed. For the reasons that follow, we conclude that the limitation imposed

was within the court's discretion, and that, in any event, if it was error to have thus limited Geetanjali's testimony, the error was harmless.

a. *The Exercise of Discretion Under Rule 403*

Generally, a statement made by a person while not testifying at the current trial, offered by that person to prove the truth of the matter asserted in his statement, is hearsay. *See* Fed. R. Evid. 801(a)-(c). Hearsay generally is inadmissible if it does not fall within an exception provided by Rule 803 or 804. *See* Fed. R. Evid. 802. Rule 803 provides an exception for "[a] statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), *but not including a statement of memory or belief to prove the fact remembered or believed*...." Fed. R. Evid. 803(3) (emphasis added).

However, the fact that a statement falls within an exception to the hearsay rule does not mean that the statement is not to be classified as hearsay; nor does it mean that the statement is automatically admissible. It means simply that the statement—assuming that the criteria specified in the exception are met—is "not *excluded by the rule against hearsay*," Fed. R. Evid. 803, 804(b) (emphasis added); *see*, *e.g.*, *Li v. Canarozzi*, 142 F.3d 83, 88 (2d Cir. 1998). "The court retains its normal discretion to exclude the evidence on other grounds such as lack of relevance, *see* Fed. R. Evid. 402, improper purpose, *see*, *e.g.*, Fed. R. Evid. 404, or undue prejudice, *see* Fed. R. Evid. 403." *Li v. Canarozzi*, 142 F.3d at 88; *cf. United States v. Detrich*, 865 F.2d 17, 21 (2d Cir. 1988) (for admissibility, it is not sufficient that a proffered statement is not hearsay: "To be admissible it must also be relevant.").

Under Rule 403, even if proffered evidence is relevant, it may be excluded "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence Fed. R. Evid. **[132]** 403; *see*, *e.g.*, *Huddleston v. United States*, 485 U.S. 681, 687-88 (1988); *United States v. Reifler*, 446 F.3d 65, 91 (2d Cir. 2006); *United States v. Salameh*, 152 F.3d 88, 122-23 (2d Cir. 1998) ("*Salameh*"), *cert. denied*, 525 U.S. 1112 (1999).

> In reviewing Rule 403 challenges, we "accord great deference" to the district court's assessment of the "relevancy and unfair prejudice of proffered evidence, mindful that it sees the witnesses, the parties, the jurors, and the attorneys, and is thus in a superior position to evaluate the likely impact of the evidence."

United States v. Quinones, 511 F.3d 289, 310 (2d Cir. 2007) (quoting *United States v. Paulino*, 445 F.3d 211, 217 (2d Cir.), *cert. denied*, 549 U.S. 980 (2006)), *cert. denied*, 555 U.S. 910 (2008). "A district judge's" ruling following a "Rule 403 analysis is reversible error only when it is a clear abuse of discretion." *Salameh*, 152 F.3d at 122. "To find such abuse, we must conclude that the challenged evidentiary rulings were arbitrary and irrational." *United States v. Quinones*, 511 F.3d at 307-08 (internal quotation marks omitted); *see*, *e.g.*, *United States v. Scott*, 677 F.3d 72, 83-84 (2d Cir. 2012); *Salameh*, 152 F.3d at 110.

We see no arbitrariness or irrationality in the present case. In limiting Geetanjali's testimony, the trial court made a Rule 403 assessment that the admission of testimony that Gupta believed Rajaratnam had cheated

him—which the court observed would be "cumulative," given that the court had (as discussed in Part II.B.1.b. below) admitted other evidence to the same effect (Tr. 3085)—would be unduly prejudicial. Noting that, unlike the other witnesses whose similar testimony had been admitted, Geetanjali had no personal knowledge about Voyager, the court reasoned the jury would have undue difficulty in distinguishing between the aspect of Geetanjali's testimony that could be considered for its truth as to Gupta's state of mind and the aspect that indicated that Gupta had been cheated. When Gupta's counsel argued that the defense would be prejudiced if it could not have Geetanjali testify that Gupta thought Rajaratnam had cheated him, the court responded,

> I think the prejudice is the other way.
>
> *The jury* is going to, I think, draw from this, because the government can't cross-examine the witness in any meaningful way, that Rajaratnam, in fact, cheated Gupta, that Gupta knew it and that Gupta, therefore, was completely outraged; and, hence, it carries a danger here that no other witness carries for the reasons that I've already elaborated on the record.

(Tr. 3086 (emphasis added); *see*, *e.g.*, *id.* at 2972-73 ("[T]here is *no way the jury can make th[e] distinction*" between the belief and the substance of what was said to have been believed. "They are going to inevitably think if they accept this testimony at all that he is telling the truth to his own daughter, and *they will be taking it for its truth*, and I don't see how *under 403* that gross violation of the hearsay rule can be avoided." (emphases added)).) Thus, the court limited Geetanjali's testimony not on the ground that it was offered to

prove that Rajaratnam had in fact cheated Gupta but rather because the court's view was that, if admitted, the jury would likely be unable to comprehend that it was not admitted for that purpose. We see no basis for second-guessing the district court's view as to the likely effect on the jury. Although it would have been within the court's discretion to admit the proposed Geetanjali testimony along with a clear and detailed limiting instruction to the **[133]** jury if it believed such an instruction would be effective, we see no abuse of discretion in the court's decision to limit the testimony in light of its conclusion that there was "no way" such an instruction in this case would be effective.

We note that although Gupta perhaps would have us classify the court's ruling as arbitrary on the ground that Geetanjali was not allowed to state that Gupta was "angry" (Gupta brief on appeal at 22), the record does not support that contention. The court ruled that she would be allowed to testify to Gupta's "attitude" toward Rajaratnam; the record does not indicate that the court placed any restriction on the words she could use to describe his attitude. Geetanjali described Gupta as "quite upset" (Tr. 3094) and "frustrated" (*id.* at 3095) by his inability to get information from Rajaratnam about Voyager—descriptions likely sufficient to imply anger; and there was no ruling barring her from expressly describing him as "angry."

Gupta's additional contention that the limitation on Geetanjali's testimony made it seem "only that Gupta was upset in September 2008 about the *performance* of the Voyager investment" (Gupta brief on appeal at 22 (emphasis in original)) is belied by the testimony itself. The court asked whether Gupta was upset "because of how the investment was doing or because of how Mr. Rajaratnam was treating the investment or what";

Geetanjali responded "It was more because of how Mr. Rajaratnam was treating the investment." (Tr. 3094.)

Finally, Gupta suggests that allowing Geetanjali to testify that Gupta believed Rajaratnam had cheated him by taking money out of Voyager without alerting Gupta also to withdraw some of his capital from that venture would have been no more prejudicial than similar evidence that the court had previously admitted, because "the excluded statement did no more than confirm undisputed facts" (Gupta reply brief on appeal at 21). But this very argument substantiates the district court's view that this aspect of the Geetanjali testimony, with its potential for the jury to infer that Gupta had in fact been cheated, would have been cumulative. We cannot conclude that the court abused its discretion in viewing the potential for jury confusion and undue prejudice as substantially outweighing the cumulative evidence's probative value.

b. *Harmless Error*

The fact that "the excluded statement did no more than confirm undisputed facts" (Gupta reply brief on appeal at 21) also contributes to our conclusion that, if the limitation on Geetanjali's testimony was error, the error was harmless. A party may gain relief for an "error in a ruling to admit or exclude evidence only if," *inter alia*, "the error affect[ed] a substantial right of the party." Fed. R. Evid. 103(a); *see, e.g.*, Fed. R. Crim. P. 52(a) ("Any error … that does not affect substantial rights must be disregarded."). Thus, "[u]nder harmless error review, we ask whether we can conclude with fair assurance that the errors did not substantially influence the jury." *United States v. Oluwanisola*, 605 F.3d 124, 133 (2d Cir. 2010) ("*Oluwanisola*") (internal quotation marks omitted); *see, e.g.*, *Kotteakos v. United*

States, 328 U.S. 750, 764-65 (1946). If defense evidence has been improperly excluded by the trial court, we normally consider such factors as

> (1) the importance of … unrebutted assertions to the government's case; (2) whether the excluded material was cumulative; (3) the presence or absence of evidence corroborating or contradicting the government's case on the factual questions at issue; (4) the extent to **[134]** which the defendant was otherwise permitted to advance the defense; and (5) the overall strength of the prosecution's case.

Oluwanisola, 605 F.3d at 134; *see also United States v. Miller*, 626 F.3d 682, 690 (2d Cir. 2010) (focusing principally on the overall strength of the prosecution's case), *cert. denied*, 132 S. Ct. 379 (2011); *United States v. Song*, 436 F.3d 137, 139-40 (2d Cir. 2006) (focusing principally on the extent to which the defendant was otherwise able to present the defense and on the presence of evidence corroborating the government's case); *United States v. Lawal*, 736 F.2d 5, 9 (2d Cir. 1984) (focusing principally on the overall strength of the prosecution's case and on the cumulative nature and marginal probative value of the excluded evidence).

All five of the factors set out in *Oluwanisola* lead us to conclude that, if there was error, it was harmless. First, as to the assertions in the government's case that Gupta sought to rebut, he pointed to testimony by Kumar suggesting that Gupta did not learn of Rajaratnam's withdrawal of capital from Voyager until 2009 (*see* Tr. 1858-64); Gupta argued that the singular importance of the proposed evidence as to his conversation with Geetanjali was its timing—*i.e.*, that Gupta told her he was upset with Rajaratnam on September

20 (several days prior to his September 23 call to Rajaratnam upon learning of the imminent Buffett investment) rather than not becoming upset until 2009. (*See*, *e.g.*, *id.* at 3086 ("Your Honor, this proof is pretty critical and crucial because they put Kumar on there to try and move the date to fit their theory."); *see also* Gupta brief on appeal at 46-47.) Thus, "Geetanjali's statement that Gupta told her he was angry that Rajaratnam had impermissibly and covertly redeemed money from the Voyager fund … was offered to prove *when* Gupta formed his belief about the redemptions." (Gupta reply brief on appeal at 20 (emphasis in original).) "The importance of this timing question cannot be overstated." (*Id.* at 19.)

But the court placed no restriction at all on the defense's ability to bring out the timing of Gupta's conversation with Geetanjali. Geetanjali testified amply that the conversation occurred on September 20, 2008. She testified that she remembered the date because, *inter alia*, it was her 30th birthday, and it occurred on a trip to Connecticut to celebrate both her birthday and her mother's birthday which was the next day. (*See* Tr. 3092-93.) Further, after Geetanjali proceeded to describe Gupta's being upset with Rajaratnam on account of Rajaratnam's treatment of the Voyager investment, the court highlighted the fact that that testimony was relevant to the "time" of Gupta's anger at Rajaratnam: It instructed the jury that Geetanjali's testimony was to be considered "only on the issue of what bearing it has, if at all, on Mr. Gupta's attitude toward Mr. Rajaratnam *during the period of time in question*" (*id.* at 3095 (emphasis added)), and that "the limited purpose for which" Geetanjali's testimony was admitted was "not for … whatever may or may not have been going on at Voyager, but only for what Mr. Gupta's state of

mind was with respect to Mr. Rajaratnam *at this particular time*" (*id.* at 3100 (emphasis added)). The government's assertions as to the timing of Gupta's animus toward Rajaratnam thus did not go unnoticed or unchallenged.

Second, the testimony that the basis for Gupta's attitude toward Rajaratnam was that Rajaratnam had made a concealed withdrawal from Voyager was plainly cumulative. The government had introduced the testimony of Kumar that Gupta told him that Gupta had discovered that Rajaratnam had withdrawn some of Rajarat- **[135]** nam's capital from Voyager, and that Gupta said that this was "just plain wrong" and wanted to sue Rajaratnam (Tr. 1863). In addition, Gupta had introduced the deposition testimony of Ajit Jain that Gupta had told him "that he had $10 million invested with Raj in some venture and he had been gipped [*sic*], swindled or cheated by Raj and he had lost his entire 10 million that he had invested with Rajaratnam." (Jain Deposition at 6; *see* Tr. 2722-24, 2775.)

As to the third *Oluwanisola* factor, "the presence or absence of evidence corroborating or contradicting the government's case o*n the factual question[] at issue*," 605 F.3d at 134 (emphasis added), which was the timing of Gupta's anger at Rajaratnam, plainly Geetanjali's testimony contradicted the government's theory that Gupta was not angry about Rajaratnam's treatment of Voyager until early 2009. But there was also evidence corroborating the government's contention that Gupta was on friendly terms with Rajaratnam through the fall of 2008. The government introduced a voice mail message from Gupta to Rajaratnam on October 10, 2008, well after the September 20 conversation with Geetanjali, saying "Hey Raj, Rajat here. Just, uh, calling to catch up. I know it must be an awful and

busy week. I hope you are holding up well. Uh, and I'll, uh, try to give you a call over the weekend to just catch up. Uh, all the best to you, talk to you soon. Buhbye." (GX 25-T; *see also* GX 2128-MCK (a January 2009 email from Gupta to Rajaratnam wishing him a "Happy New Year" and "a restful week," forwarding information about a possible Galleon hiree, and concluding "Let's catch up soon").)

Fourth, the record easily establishes that Gupta was able, based on the evidence that was introduced, to advance his defense. The explicit testimony of Kumar and Jain that Gupta believed Rajaratnam had cheated him, along with documentary evidence that Rajaratnam had in fact withdrawn $25 million from Voyager and a tape-recorded conversation in which Rajaratnam stated he had not told Gupta about the withdrawal, were highlights of Gupta's summation to the jury, cited by his counsel Gary P. Naftalis as among Gupta's "badges of innocence" (Tr. 3266; *see id.* at 3270).

> [A] second badge of innocence …. is Rajaratnam's defrauding of Mr. Gupta about the Voyager investment.… Remember Mr. Gupta invested $10 million in this Voyager investment, and ultimately—and it's kind of undisputed—he lost all of his $10 million.… We have heard testimony from a variety of sources about how Mr. *Gupta was very upset about how he was treated with that investment not only losing the money, but the conduct that he came to learn about which Rajaratnam engaged in which consisted of not giving him information.*

(*Id.* at 3270 (emphasis added).) Naftalis argued:

> *[Kumar's] testimony is supportive of the fact that we were swindled, Mr. Gupta was swin-*

dled by Mr. Rajaratnam in his Voyager investment. If you remember, Mr. Gupta made this investment, put a lot of money, $10 million in Voyager, and it turned out that he lost every dime in that investment, every dime. He lost $10 million, and we also established, if you recall, that there was a schedule ….

…. *This is what Government Exhibit 2105 shows, unbeknownst to Rajat Gupta, behind the back of Rajat Gupta, concealed from Rajat Gupta, that Raj Rajaratnam put his hands into the cookie jar and took $25 million out* ….

….

[136]

… *[Y]esterday we put in evidence, an October 2nd tape, wiretap conversation* that the government captured of Rajaratnam speaking on October 2nd with one of his colleagues, Mr. Santhanam, and in this conversation *[Rajaratnam] admitted that he never told Rajat Gupta he had taken the equity out.*

(Tr. 3258-59 (emphases added).)

MR. NAFTALIS: (Continued) Can you stop [the tape] for a second there? Go back to "I told him I didn't take the equity out."

"I didn't tell him, I didn't tell Rajat Gupta that I took the equity out. I didn't tell him I took the $25 million out."

You recall that Mr. Kumar told us … in October he had conversations, *he is one of the many witnesses who testified on this subject about how Rajat Gupta was very upset because*

> *he had lost his money and indeed came to learn that he had been swindled by Mr. Rajaratnam who took the money out, concealed it from him.*

(Tr. 3260 (emphases added); *see also id.* at 3272 ("As we know, because we've just played it a few minutes ago, we know that Mr. Rajaratnam had taken $25 million out of the fund and concealed it from Mr. Gupta.").) Counsel also cited the deposition of Jain:

> He told us, Mr. Jain, he testified by videotape, that on January 12, 2009, he had lunch with Mr. Gupta, and *Mr. Gupta told him that he had $10 million invested with Rajaratnam, and he had been gypped, swindled and mistreated by Raj* and lost his entire $10 million.

(*Id.* at 3276 (emphasis added).)

Counsel also emphasized that "we learned that Mr. Gupta … was very upset about how he had been treated by Mr. Rajaratnam" with respect to Voyager "as early as September 20." (Tr. 3271.) He argued that Geetanjali "told you that on the 20th she had [the] conversation with her father" in which Gupta showed he was quite upset, and counsel pointed out, *inter alia*, that "that is a date that stuck in [Geetanjali's] mind" because she was "celebrating on September 20, 2008 her 30th birthday" and "her mother's birthday … was on the 21st of September." (*Id.*)

In sum, the evidence "from a variety of sources," as defense counsel said (*id.* at 3270), including an exhibit, a wiretapped conversation, and testimony from three witnesses, was clearly sufficient to enable Gupta to present his main defense.

Finally, the government's circumstantial evidence that Gupta in fact passed confidential information to

Rajaratnam on September 23 and October 23 was strong. The timing of Gupta's calls to Rajaratnam—each placed approximately one minute after Gupta received extraordinary news about Goldman Sachs's finances—and the timing and nature of Rajaratnam's large trades in Goldman Sachs stock, *i.e.*, purchases within minutes of the first such call in the wake of Gupta's receipt of favorable information, and sales a month later within the first possible minute of trading after the call following Gupta's receipt of unfavorable information, were powerful evidence that Rajaratnam was given the confidential information by Gupta. And that evidence was supported by Rajaratnam's statements, in the wake of those trades, to Horowitz and Lau.

We see no basis for a conclusion that, if Geetanjali had been allowed to testify that Gupta believed Rajaratnam's actions with respect to Voyager had cheated him—rather than to testify (as she was allowed to) that Gupta was quite upset over Rajaratnam's treatment of the Voyager investment—that testimony would have had any substantial influence on the jury. If it was **[137]** error for the court to limit Geetanjali's testimony as it did pursuant to Rule 403, we conclude that the error was entirely harmless.

2. *Evidence To Suggest an Alternative Tipper*

Gupta's "second defense" at trial was to suggest that Rajaratnam had received the confidential Goldman Sachs information from a person other than Gupta. (Gupta brief on appeal at 53.) The person specified was David Loeb, a Goldman vice president who was "one of the sales guys who would call" Rajaratnam "a lot" (Tr. 274-75). Gupta sought to make this showing by proffering two taped telephone conversations and several dozen emails between Loeb and Rajaratnam (collectively

the "documents" or "Loeb documents") that Gupta contended showed that Loeb had obtained inside information about technology companies including Intel Corporation and Apple Inc. and immediately attempted to reach Rajaratnam to pass that information to him. (*See*, *e.g.*, *id.* at 2982, 2999.)

The district court refused to admit the Loeb documents on grounds of hearsay, relevance, lack of foundation, and, given the absence of a proper foundation, the likelihood that the documents would cause jury confusion. On appeal, Gupta argues that the trial court's exclusion of these documents was error because "'the accused may introduce any legal evidence tending to prove that another person may have committed the crime with which the defendant is charged'" (Gupta brief on appeal at 54 (quoting *Holmes v. South Carolina*, 547 U.S. 319, 327 (2006))), and that the proffered documentation showing "Loeb's history of providing Rajaratnam with inside information was sufficient to place an alternative-perpetrator theory before the jury" (Gupta brief on appeal at 53-54). Although Gupta's legal premise is sound, we disagree with his contention that his proffer was sufficient.

"Evidence is relevant if … it has any tendency to make a fact" that is "of consequence in determining the action" "more or less probable than it would be without the evidence." Fed. R. Evid. 401. The assessment of the relevance of evidence for the purpose of its admission or exclusion is committed to the sound discretion of the district court. *See*, *e.g.*, *George v. Celotex Corp.*, 914 F.2d 26, 28 (2d Cir. 1990). The trial court also has considerable discretion in deciding whether an adequate foundation has been laid for the introduction of relevant documents. *See*, *e.g.*, *Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 166 (2d Cir. 1998). We accord particular def-

erence to the trial court's rulings as to foundation and relevance, and we will not overturn those rulings except for abuse of discretion. *See, e.g.*, *Krieger v. Gold Bond Building Products*, 863 F.2d 1091, 1097 (2d Cir. 1988) (relevance); *LaForest v. Former Clean Air Holding Co.*, 376 F.3d 48, 58 (2d Cir. 2004) (foundation).

At trial, in response to the government's contention that the Loeb documents were hearsay, Gupta argued that the information in the documents was "not being offered for the truth. It is being offered for the fact that Loeb is saying I have information for you urgently or information that is important, please give me a call or may I call you." (Tr. 2986.) The government pointed out, however, that Gupta was seeking to introduce the documents without calling any witness to provide a foundation indicating that the information was in fact confidential. The government argued that to the extent that the documents themselves portrayed the information as confidential, they were, in the absence of other evidence to show confidentiality, necessarily being offered for the truth of that **[138]** portrayal; otherwise the documents were not relevant to indicate that Rajaratnam received confidential information about Goldman finances from Loeb, and their admission could only confuse the jury. Likewise, as to documents in which Loeb referred to information characterized as important without stating that it was confidential, there was, in the absence of other evidence to establish confidentiality, no foundation for a finding that the documents—none of which related to information concerning Goldman Sachs—were relevant. (*See id.* at 2994-95.)

Although Gupta argued that "[t]here [wa]s substantial evidence that supports the argument that Mr. Loeb could well have been the source of the alleged

tips[,] if they happened[,] relating to Goldman Sachs" (*id.* at 2998-99), he proffered no evidence to show that Loeb had access to the confidential information about Goldman finances that triggered Rajaratnam's trading following the September 23 and October 23 calls. To the contrary, there was evidence that Goldman kept its "securities division [of] salespeople and traders that interacted with investors" physically and technologically separated from its equity capital markets division (*id.* at 1588-89); the latter division was "privy to a lot of confidential information" (*id.* at 1589) and developed the Buffett investment, which was "extremely confidential" because of its potential impact on Goldman's share price (*id.* at 1590; *see id.* at 1588-95). Loeb was in the securities division, not the equity capital markets division. (*See id.* at 2873-75 ("Loeb was an institutional salesperson," whose job it was to attempt to sell securities based on research done by Goldman analysts).) And although there was evidence that Loeb was on Rajaratnam's list of 10 important persons (*see*, *e.g.*, *id.* at 273-75)—Loeb was in charge of Galleon's securities account at Goldman (*see id.* at 2875)—and that he called Rajaratnam "a lot" (*id.* at 274-75), Eisenberg, Rajaratnam's assistant, testified that the man who called asking "urgent[ly]" to speak to Rajaratnam near the close of the market on September 23 (*id.* at 238-39) was not Loeb (*see id.* at 327).

The district court concluded that the Loeb documents were replete with inadmissible hearsay (*see* Tr. 3000, 3065); that they "suffer[ed] from," *inter alia*, a "lack of foundation" (*id.* at 3000); and that in the absence of explanatory testimony by a witness the jury would be unable to understand the documents without representations by counsel or speculation, either of which would be improper (*see id.* at 3065). As Gupta

insisted on relying solely on the documents themselves, choosing not to call a witness or to present other evidence to lay a foundation for his contention that the information referred to in the Loeb documents was "inside" information (Gupta brief on appeal at 54), we see no error in the trial court's rulings. *See generally United States v. Harwood*, 998 F.2d 91, 97 (2d Cir.) (a "statement [that] is irrelevant unless it was true … would be hearsay[] and inadmissible"), *cert. denied*, 510 U.S. 971 (1993).

3. *Evidence of Proposed Charitable Giving*

During the government's case, a portion of the notes taken by Gupta's financial advisor during an April 2008 meeting with Gupta was admitted in evidence to show that Gupta had an ownership interest in Galleon International. Pursuant to the rule of completeness, *see* Fed. R. Evid. 106, the court allowed Gupta to introduce other parts of those notes concerning other sources of his wealth. The court rejected, however, Gupta's attempt to introduce still other portions of the notes that read, in part, "want to give to charity while alive" **[139]** and "? 80% to charity & 20% to extended family? perhaps" (GX 5517) (the "wealth distribution notes"). The court ruled that, as offered by Gupta, the wealth distribution notes were inadmissible hearsay, that they would be unduly confusing and prejudicial, and that their admission was not justified under Rule 106. Gupta challenges this ruling, arguing that the portion of the notes that "recorded Gupta's intent to donate most of his wealth to charity" (1) "was not hearsay, as it went to Gupta's state of mind," and (2) in any event "should have been admitted to ensure a fair and impartial understanding of the admitted portion." (Gupta brief on appeal at 50-51.) Neither contention has merit.

Gupta's first argument is doubly flawed. To the extent that the above text reflected statements by Gupta, it was plainly hearsay when offered by Gupta. It did not become nonhearsay even if it reflected his state of mind; if it did so reflect, it merely had the potential to fall within an exception to the general rule that hearsay evidence is to be excluded. More importantly, as discussed in Part II.B.1.a. above, the fact that a hearsay statement falls within an exception does not make the statement admissible. It must meet the requirements of, *inter alia*, relevance, and it must not be excludable on the grounds of undue confusion or prejudice under Rule 403. Even if the wealth distribution notes—which were surrounded by question marks and followed by the word "perhaps"—reflected Gupta's actual intent to give 80 percent of his wealth to charity, such intentions were irrelevant to whether Gupta had achieved (or was about to achieve) some of his wealth unlawfully.

Nor were the wealth distribution notes admissible under Rule 106 for purposes of completeness. That Rule provides: "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—*that in fairness ought to be considered at the same time*." Fed. R. Evid. 106 (emphasis added). "The completeness doctrine does not, however, require the admission of portions of a statement that are neither explanatory of nor relevant to the admitted passages." *United States v. Johnson*, 507 F.3d 793, 796 (2d Cir. 2007) (internal quotation marks omitted), *cert. denied*, 552 U.S. 1301 (2008). We see no abuse of discretion, *see*, *e.g.*, *id.*, in the ruling that the wealth distribution notes were not necessary for completeness here. The notes as to Gupta's ownership interest in Galleon In-

ternational were relevant to show that Gupta had a financial stake in the profitability of Galleon International; that stake was relevant to show that Rajaratnam's advising Lau in October 2008, just after learning that Goldman would report a quarterly loss, not to buy shares of Goldman was in furtherance of the conspiracy among Rajaratnam, Gupta, and others to profit and avoid losses by trading on the basis of inside information. Whatever thought Gupta may have had as to how to distribute his wealth was not relevant to whether or not he had a stake in Galleon International.

4. *Character Evidence*

At trial, Gupta called several character witnesses who testified to their opinions that Gupta was an honest person. Gupta also sought to have the witnesses testify to their opinions that he had "integrity" (Tr. 2331). The government objected to the giving of opinions on "integrity" to the extent that the defense wanted to elicit testimony "that [Gupta] obeys the law." (*Id.*) The court noted that there were several dictionary definitions of integrity (*see* **[140]** *id.* at 2331-32) and asked what, other than honesty, Gupta expected the jury to understand by the word "integrity" (*id.* at 2333). Defense counsel responded with the dictionary definition that read "moral soundness, honesty, uprightness." (*Id.*) The court upheld the government's objection, concluding that moral soundness and uprightness themselves were unduly ambiguous and would convey concepts not pertinent to the present case. The court allowed Gupta's character witnesses to give their opinions only as to Gupta's honesty—the relevant aspect of the dictionary definition cited by defense counsel.

Gupta contends that the district court erred in not allowing him to question witnesses about his "integri-

ty," arguing that his honesty was not at issue in the case because he was not charged with making any false statement. We reject his contention.

The trial court has broad discretion in its rulings on the admissibility of character testimony, and such decisions "will be reversed only upon a clear showing of prejudicial abuse." *United States v. Morgan*, 554 F.2d 31, 33-34 (2d Cir. 1977). We see no abuse of discretion in the court's conclusion that, other than honesty itself, the aspects of the "integrity" definition cited by defense counsel were not pertinent to this case.

Gupta also argues that the district court should have instructed the jury that "character testimony may in and of itself raise a reasonable doubt" as to a defendant's guilt of the charges against him (Tr. 3039). The district court declined to give such an instruction because it "artificially singles out one aspect of the proof and gives it sort of prominence above all others by implication," and noted that, although such an instruction is "commonly given," no case law required him to give it. (*Id.* at 3039-40.)

The district court's understanding of the law of this Circuit was correct. We have held that an instruction that character testimony may by itself raise a reasonable doubt is not required. *See United States v. Pujana-Mena*, 949 F.2d 24, 27-28 (2d Cir. 1991) ("*Pujana-Mena*"). Although Gupta asks us to "reconsider" *Pujana-Mena*, arguing, in part, that it is "contrary" to two Supreme Court cases (Gupta brief on appeal at 60-61), we decline to do so. Both of the Supreme Court cases cited by Gupta—*Edgington v. United States*, 164 U.S. 361 (1896), and *Michelson v. United States*, 335 U.S. 469 (1948)—preceded *Pujana-Mena* and were cited in and distinguished by *Pujana-Mena*, *see* 949 F.2d at 28-30.

Gupta has cited no intervening change in the law suggesting that *Pujana-Mena* was wrongly decided; and even if this panel had the authority to overturn a prior panel decision in another case, we would see no basis for concluding that *Pujana-Mena*'s interpretation of those Supreme Court precedents was incorrect.

CONCLUSION

We have considered all of Gupta's arguments on this appeal and have found them to be without merit. The judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, v. Rajat Gupta,	**JUDGMENT IN A CRIMINAL CASE** Case Number: S 1:11cr907-01 (JSR) USM Number: 65892-054 Gary Naftalis, Esq. Defendant's Attorney

[November 9, 2012]

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s)_____ which was accepted by the court.

☑ was found guilty on count(s) 1, 3, 4 & 5 _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. 371	CONSPIRACY TO COMMIT SECURITIES FRAUD	1/31/2009	1
15 U.S.C. 78j(b) & 78ff	SECURITIES FRAUD	9/23/2008	3
15 U.S.C. 78j(b) & 78ff	SECURITIES FRAUD	9/23/2008	4

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☑ The defendant has been found not guilty on count(s) 2 & 6

☑ Count(s) of the underlying indictment ☐ is ☑ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

10/24/2012
Date of Imposition of judgment

/s/ Jed S. Rakoff
Signature of Judge

Hon. Jed S. Rakoff, U.S.D.J.
Name of Judge Title of Judge

11/8/12
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
15 U.S.C. 78j(b) & 78ff	SECURITIES FRAUD	10/24/2008	5

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

On Counts 1, 3, 4, and 5: TWENTY FOUR (24) MONTHS TO RUN CONCURRENT ON ALL COUNTS.

☑ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends incarceration in Otisville's minimum security prison, if the B.O.P. finds the defendant qualifies.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☑ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☑ before 2 p.m. on 1/8/3013 .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
a _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

On Counts 1, 3, 4 and 5: ONE (1) YEAR TO RUN CONCURRENT ON ALL COUNTS.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☑ The above drug testing condition is suspended, based on the court's determination that the defend-

ant poses a low risk of future substance abuse. (*Check, if applicable.*)

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (*Check, if applicable.*)

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (*Check, if applicable.*)

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. (*Check, if applicable.*)

☐ The defendant shall participate in an approved program for domestic violence. (*Check, if applicable.*)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall make restitution, as shall be set at a future date, pay the fine imposed and special assessment as ordered on the financial penalties page of this judgment.

2. The defendant shall provide the probation officer with access to any requested financial information.

3. The defendant shall not incur any new credit charges or open additional lines of credit with the approval of the probation officer unless the defendant is in compliance with the installment payment plan.

4. The defendant shall participate in an alcohol aftercare treatment program under a co-payment plan, which may include testing via Breathalyzer at the direction and discretion of the probation officer.

5. The Court recommends that the defendant be supervised by the district of residence.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$400.00	$5,000,000.00	

☑ The determination of restitution is deferred until 1/24/2013. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS	$ 0.00	$ 0.00	

* Findings for the total amount of losses are required under Chapter 109A, 110, 110A and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $400.00 due immediately, balance due

☐ not later than _____, or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (*e.g.*, *weekly*, *monthly*, *quarterly*) installments of $ _____ over a period of _____ (*e.g.*, *months or years*), to commence

_____ (*e.g., 30 or 60 days*) after the date of this judgment; or

D ☐ Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of $ _____ over a period of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (*e.g., 30 or 60 days*) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

The defendant shall make restitution and pay the fine imposed at the rate of 15% of his gross monthly income beginning with the second month of supervised release.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX C

TRIAL TRANSCRIPT EXCERPTS: CHARACTER EVIDENCE JURY INSTRUCTIONS

[3039]

MR. NAFTALIS: Then my last point, I think it is my last point, my last point in the first page goes down to the next, the charge for character testimony.

THE COURT: Yes.

MR. NAFTALIS: I guess I had two points there.

One is I'd always believed or benefited from, maybe that is the right word, instructions to the jury that character—and I think we made a submission of proposed a instruction—that character testimony may in and of itself raise a reasonable doubt, where a reasonable doubt would not—and I think—

THE COURT: I saw that, but I tell you why, and I won't say that that hasn't been given, although there are other cases where the failure to give that has been upheld as proper.

The reason I don't give it is because I think it artificially singles out one aspect of the proof and gives it sort of prominence above all others by implication, which seems to me inappropriate.

If it were up to me frankly—but it is not, it is up to the Second Circuit—I would not give any special instructions about any witness' testimony because I think the [3040] general instruction is you have to look at what the witness said, what is its relevance, its weight all in all really covers the ballpark.

But, for example, on cooperating witnesses, the Second Circuit says you have to point out to the jury

that they have to scrutinize it with particular care and caution, so I give that instruction.

I don't know of any authority that says with respect to character witnesses that I have to give the instruction you just gave. It is commonly given. It is also commonly not given. If you can show me a Second Circuit case that says I have to give it, I will certainly, of course, then give it.

But short of that, it seems to me to be unbalanced, very unbalanced.

MR. NAFTALIS: Let me see if I can give you some authority.

THE COURT: All right.

MR. NAFTALIS: The second, my second objection to the character witness instruction there is not only didn't I get my, "in and of itself sufficient to raise a reasonable doubt," but I think the way it is now, it is a little imbalanced, to the benefit of the government because by the addition of the words since each of these witnesses has stated he has no personal knowledge of the transactions and discussions at issue in this case, I mean that is—I agree that is accurate.

[3041]

On the other hand, it is a commentary on their testimony where we're not commenting on anybody else's testimony there. I think that does imbalance the character witness charge and sort of takes the heart out of it.

THE COURT: What I was trying—I see your point—what I was trying to do, there is, as part of the standard charge, the first part of that sentence, this testimony is not to be taken by you as the witness's

opinion whether the defendant is guilty or not guilty. I was trying to explain why that was, but I agree that my language there was particular to this case, and so let me—what is the government's view of that?

MR. BRODSKY: It is the reason I think that the testimony is not to be taken as to whether the defendant is guilty or not guilty and it is undisputed.

I don't think there Mr. Naftalis is disputing that statement. You're just saying what is true and what each of the witnesses said. I don't think it is an imbalance because I just think every witness said that.

THE COURT: All right. I will rethink the whole character witness thing, but on the first point you made, unless you show me cases that say I have to say "reasonable doubt," I am not going to say that. I am more concerned about your second point which I think may need some modification.

* * *

[3154]

THE COURT: In the following paragraph, I have made the following changes: "The defendant has called several witnesses who, although having no personal knowledge of the transactions at issue in this case, have formed an opinion of the defendant's general character for honesty based on other contacts. This testimony is not to be taken by you as the witness' opinion as to whether the defendant is guilty or not guilty of the crimes charged, but you may consider it as **[3155]** character evidence together with all the other facts and all the other evidence in the case and give it such weight as you deem appropriate."

Now, that incorporates some of what the defense asked for. The defense also asked for "it may be suffi-

cient in itself to establish reasonable doubt." I indicated why I didn't think that was a good instruction, but I knew that other courts have sometimes given it. I asked for authority requiring me to give it and no such authority was produced. So I am sticking with the instruction in the modified form I just gave.

* * *

[3366]

[Charge:] In all other respects, however, the law permits the use of testimony from cooperating witnesses. Indeed, such testimony, if found truthful by you, may be sufficient in itself to warrant conviction if it convinces you of the defendant's guilt beyond a reasonable doubt. The law requires, however, that the testimony and motives of a cooperating witness be scrutinized with particular care and caution. After carefully scrutinizing the testimony of a cooperating witness, and taking into account its special features, you may give it as little or as much weight as you deem appropriate.

The defendant has called several witnesses who, although having no personal knowledge of the transactions at issue in this case, have formed an opinion of the defendant's general character for honesty based on other contacts. This testimony is not to be taken by you as the witness's opinion as to whether the defendant is guilty or not guilty of the crimes charged, but you may consider this character evidence, together with all the other facts and all the other evidence in the case, and give it such weight as you deem appropriate.

APPENDIX D

TRIAL TRANSCRIPT EXCERPTS: GEETANJALI GUPTA TESTIMONY AND PROFFER

[2971]

Q. I want to direct your attention to September 19, 2008.

A. Yes.

Q. Is that a date that sticks in your mind?

A. It is, yes.

Q. Why is that?

A. My 30th birthday was on September 20, 2008, and I had come to New York to celebrate it with my family and friends. It was also my mother's birthday on the 21st. So we had a family celebration over the weekend in Connecticut.

Q. I want to direct your attention to September 20th. Did you have a conversation with your father, Rajat Gupta, relating to an investment he had with Raj Rajaratnam?

A. Yes, I did.

Q. What did Mr. Gupta say to you about that?

MR. BRODSKY: Objection. Hearsay.

THE COURT: Sustained.

MR. NAFTALIS: May I approach on this, Judge?

THE COURT: I assume your claim is that it's being offered not for its truth but for the fact that it was said, and I have considered that, but if you want, if there is something else, I will certainly hear you at the sidebar.

[2972]

(At the sidebar)

THE COURT: So, what are you going to say?

MR. NAFTALIS: I was going to say that he told her that he lost his money with Rajaratnam and that Rajaratnam had taken money out of the fund, and this is similar to the testimony, your Honor has allowed.

THE COURT: Yes, I understand. The difference is this: Under these circumstances, the daughter testifying as to what he said in this situation, there is no way the jury can evaluate this other than as an assertion for its truth. It carries freight under Rule 403 that none of the other permissions that I've granted to put this in on state of mind carry.

The Court had serious issues as to whether to allow and even the other statements, but I did because of your argument, which is a fair one, that he would not have said these things, for example, to his business associate, Mr. Jain, if they still had a warm and friendly relationship or things to that effect. That is the modest basis on which it was received.

But here, where the daughter is being told whatever you are about to say was said, there is no way the jury can make that distinction. They are going to inevitably think if they accept this testimony at all that he is telling the truth to his own daughter, and they will be taking it for its truth, **[2973]** and I don't see how under 403 that gross violation of the hearsay rule can be avoided.

MR. NAFTALIS: The hill looks high, but I'll try. Two things: First, number one, the government went into this area first; we didn't. The government went into this area with Mr. Kumar. What they did was—

and I think inaccurately and they think accurately; obviously, the jury will determine who's right or who's wrong on the facts—is try to push the dates back. Indeed, you remember, I may have cross-examined effectively or not, Mr. Kumar as to whether he had said earlier dates. But they, according to Kumar, he said, well, that Rajat Gupta only complained about money being taken out sometime between February, I think, and April as opposed to it being earlier in the fall. The government obviously resisted as hard as they could on cross of Mr. Jain to try and push his dates out further, I don't think very successfully, but the jury will decide that.

I think here the government wanted to put their accomplice witness on Mr. Kumar to testify that the complaints about the taking of money only occurred after the tipping was completed here.

I have to be able to refute that, and this woman will refute it, and the jury can take it—look, when I say it's—it doesn't matter really for the admissibility whether he's right or Rajaratnam is right on the dispute. This is what he **[2974]** believed.

It also goes to present sense impression. I think it's admissible for non-hearsay purpose, if that's 803(3), but I wouldn't mind having a chance to brief that to your Honor. When I say brief it, find a case or two. But I think it could come in also for a non-hearsay resistant state of mind.

THE COURT: Since we are almost at 5:00—on the present showing I would sustain the objection. But if you want to brief it tonight, the government can brief it as well, and I will make a ruling at 9:00 tomorrow morning, and either she will testify or not. I am certainly willing to give you that opportunity.

* * *

[3077]

VOIR DIRE EXAMINATION

* * *

THE COURT: And then where were you when this conversation took place physically?

THE WITNESS: The conversation on the 20th?

THE COURT: Yes.

[3078]

THE WITNESS: I was in my house, library in the house.

THE COURT: Just the two of you?

THE WITNESS: My father and I think my uncle was there as well.

THE COURT: What did he say to you and what, if anything, did you say to him?

THE WITNESS: He told me that he was upset about Voyager. He told me that he was worried about the performance of the fund and that he was frustrated that he couldn't get information from Raj about it.

He also told me he was angry that Raj had taken money out of the fund without telling him and that he thought that that—he didn't understand why he had taken the money out of the fund, and why if he had taken money out of the fund, he had not gotten any of it.

* * *

[3084]

THE COURT: I'll hear any further argument from counsel. It seems to me that the jury would have ex-

treme difficulty distinguishing what this witness has to say from testimony that they should regard as for its truth as opposed to state of mind, but let me hear from counsel.

MR. NAFTALIS: Your Honor, two things.

I apologize, I neglected to ask her on the stand, but she would, apropos her observations of him, she would testify he was visibly upset. Consistent with how your Honor would allow us to—

THE COURT: Yes.

MR. NAFTALIS: —she would say things like that.

THE COURT: That sounded like it was true only at the first of the conversations from what she said right here.

MR. NAFTALIS: The answer is I know she would say that with respect to the September 20th conversation. I don't know what she would say regarding the lunch or dinner in Boston, and I am not sure I know the answer. It may have been—I think the Thanksgiving she may—it would be a similar piece, but I am not sure it was in Boston. I just put that in the record because I neglected to ask her that, although it may have been obvious to the court she would say something to that effect.

THE COURT: Let me ask the government actually on that point. If this testimony alluded to is the subject of Voyager **[3085]** and Mr. Rajaratnam would come up and say yes, and what was Mr. Gupta's demeanor? She answer is, he was visibly upset, why should that not be—

MR. BRODSKY: That came out from Kumar's testimony, your Honor.

THE COURT: I agree it is cumulative. The question is are you going to be challenging—your position on, as I understand it, on summation is they may or may not have had a tiff, but it didn't stop him from continuing in the overall relationship. It was a spat but nothing more. So the defense, aside from the whole timing issue, the defense wants to argue that well, this was serious enough that he was visibly upset. So that is their counter-argument.

Why shouldn't the fact that one witness has already admitted it, why shouldn't they be able to corroborate that with a second witness when at least from their standpoint it is the strength of the dislike that is significant for their defense.

MR. BRODSKY: I agree, your Honor, we wouldn't, because we wouldn't challenge that, her testimony regarding him being visibly upset, and, therefore, it wouldn't, there wouldn't be a question of the government not being able to challenge her on that basis because she is the daughter of the defendant. In context, you know, we have to agree, your Honor. If it was limited to that, it wouldn't put the government in **[3086]** any worse position, it wouldn't be unduly prejudicial.

THE COURT: That is where I am leaning. Let me hear from defense counsel.

MR. NAFTALIS: May I be heard on this?

THE COURT: Yes.

MR. NAFTALIS: Your Honor, I think without the content of the conversation, we are being really prejudiced in putting forward a defense in a substantial way because the government—

THE COURT: I think the prejudice is the other way.

The jury is going to, I think, draw from this, because the government can't cross-examine the witness in any meaningful way, that Rajaratnam, in fact, cheated Gupta, that Gupta knew it and that Gupta, therefore, was completely outraged; and, hence, it carries a danger here that no other witness carries for the reasons that I've already elaborated on the record.

MR. NAFTALIS: Your Honor, this proof is pretty critical and crucial because they put Kumar on there to try and move the date to fit their theory.

When Jain, he was a thoroughly disinterested witness is on the stand, they try to cross-examine him in the hope, oh, couldn't it have been in December '09?

And they're probably going to try to argue that Jain, Jain may be uncertain or whatever and that, therefore, that **[3087]** conversation might have happened later in the year although Jain was perfectly clear this couldn't have happened after Rajaratnam's problems were public. They're going to do everything they can to undermine this argument and try and move it there.

She is a clear, straightforward witness. She testifies—

THE COURT: The force, the reason for the admissibility of her testimony which is your client's attitude towards Rajaratnam at a given point or maybe two or three points, can be brought out without the danger of getting into the details of what your client said of a substantive nature which presents all sorts of hearsay problems, and for the reasons I just don't want to keep repeating them, seem to me to be unusually prejudicial.

MR. NAFTALIS: Most respectfully, I don't think it is unusually prejudicial. I think we are entitled to

put on a defense. What we're going to see is the government, in my view, trying to mislead the jury in summation by arguing that this issue of the redemptions and taking the money out was only part of the mix in his mind after the tipping. That just isn't true because he tells her that.

The issue here in terms—the issue here, indeed, one could argue the other way that gee, you know, gee, it is his daughter, she has a motive to help him and all the rest of [3088] that, so it seems to me that is always the argument on the other side. They may well even make it, I wouldn't be surprised, but it seems to me that this is a critical piece of evidence, there it is highly probative.

No question it is highly probative. As your Honor said many, many times, and I accept it, this is an intelligent jury. They do listen to you, your Honor. I am not saying the others don't, but this jury does really pay attention. I think they take very seriously your instructions.

[3089]

THE COURT: All right. I am going to allow some of this testimony. I think we have to cabinet it carefully. It may be that the Court will have to put some of the questions to the witness. Let's bring in the jury and we will put the witness on the stand.

MR. BRODSKY: Your Honor, while you are considering that, consider that although the defense says they have a right to call whomever they want, they do. They have Orman available to them without hearsay. Orman also participated in the Thanksgiving conversation as she said. Orman was a firsthand participant in

that. Orman was his financial adviser. Orman knew all about Voyager. Orman was intimately involved in—

THE COURT: I agree, I think it is troubling, but I think it is within their rights, but I think that the government is right to point out that what is going on as a tactical matter here—and this is part of the Court's concern of the difference between hearsay and non-hearsay—the defendant is not taking the stand, as is his right. The person with knowledge of, for example, whether he is going to sue or not sue is not taking the stand even though he was available.

Now, of course, you can point to all of that. You can't point out the first, but you can point out the second one on summation, but it's a bit of a gimmick. I don't say that as a basis for ruling, however, because it's within their tactical rights.

[3090]

MR. NAFTALIS: May I say something in response, your Honor?

THE COURT: Yes, go ahead.

MR. NAFTALIS: There's something else which I think I should put on the record in light of the letter that the government wrote and the arguments they made involving—there was another witness we had at one time the possibility of calling, a man named Trehan. Trehan was interviewed by us and told us that he had brought the issue of the redemptions to Mr. Gupta's attention back in the summer of 2008. He also, when he was first interviewed by the FBI, told them it exactly the same way.

Subsequently, as Mr. Brodsky advised the Court and as he puts in his letter, Trehan changed his story, and now says he can't remember when it was. So

Trehan no longer became an available witness to us. I don't want to get into a debate about why he changed his story and what happened.

THE COURT: I really want to get the jury in here and the witness in here.

MR. BRODSKY: Just for the record, Mr. Naftalis is incorrect. Mr. Trehan is represented by counsel. Mr. Trehan never told the government that. He's misreading the FBI 302. Mr. Trehan's counsel has informed us that Mr. Trehan remembers it was in February of '09. We interviewed Mr. Trehan multiple times. It was February of '09. Mr. Trehan's counsel has **[3091]** spoken to Mr. Naftalis about this multiple times prior to the Court proceeding. Raina Shakdher was the CFO of Broad Street Capital. Raina Shakdher has a clear recollection of when this happened because she is the one who discovered the redemptions, and it was in February of '09.

MR. NAFTALIS: I will hand up to the Court.

THE COURT: Oh, no. I will tell you what—

MR. NAFTALIS: I need to just because I must correct the misrepresentation—

THE COURT: At the next break—

MR. NAFTALIS: I apologize.

THE COURT: —I will go have a snack, and you two can stay here and put on the record all the conferences. Let's bring in the jury.

[3092]

(Jury present)

GEETANJALI GUPTA, resumed.

called as a witness by the Defendant, having been previously duly sworn, testified further as follows:

DIRECT EXAMINATION CONTINUED BY MR. NAFTALIS:

THE COURT: Good morning, ladies and gentlemen. Sorry for the delay. We were very busy with numerous legal issues that had to be taken up. Plus, of course, I was celebrating another Yankee win last night. Who's counting?

But we are ready to proceed. Mr. Naftalis.

MR. NAFTALIS: Thank you, your Honor.

BY MR. NAFTALIS:

Q. Good morning, Ms. Gupta.

A. Good morning.

Q. I think when we left off yesterday, I think I had asked you about September 19, 2008?

A. Yes.

Q. I think I'd asked you why it is that you remembered that date?

A. Yes.

Q. Could you remind the people of the jury and the Court about that.

A. Yes. September 20, 2008 was my 30th birthday. I had come **[3093]** into New York City on the 19th to have dinner with my family and friends to celebrate; and then since it was my mother's birthday on the 21st, I went to Connecticut the next day to celebrate with my family.

Q. I want to ask you whether on September 20 you had any conversation with your father relating to

an investment that Mr. Gupta had with Mr. Rajaratnam called Voyager?

A. Yes, I did.

THE COURT: Did you have an understanding of who Mr. Rajaratnam was?

THE WITNESS: Yes, I did.

THE COURT: Who did you understand him to be?

THE WITNESS: I understood him to be a hedge fund manager who managed a hedge fund named Galleon.

THE COURT: Did you have an understanding of whether your father had business relations with him?

THE WITNESS: I knew that my father had at some point was in the process of raising a fund with him called NSR, which—

THE COURT: Anything else?

THE WITNESS: I knew that he had an investment in a hedge fund called Voyager with him.

THE COURT: Anything else?

THE WITNESS: No.

THE COURT: All right. Go head.

[3094]

BY MR. NAFTALIS:

Q. Do you recall what your father said to you regarding his investment in Voyager?

MR. BRODSKY: Objection, your Honor.

THE COURT: Well, for the reasons already discussed, just answer these questions yes or no. Did your

father express to you some concern about his investment in Voyager?

THE WITNESS: Yes, significant concern.

THE COURT: And in relating this to you, what was his demeanor?

THE WITNESS: He was upset. He was stressed. He was running his hands through his hair, which he often does when he's stressed. He was walking about He was quite upset. He's normally a very calm and collected person.

THE COURT: Was it your understanding, if you had one, that this was because of how the investment was doing or because of how Mr. Rajaratnam was treating the investment or what?

THE WITNESS: It was more because of how Mr. Rajaratnam was treating the investment. My father had been very upset that—

THE COURT: No. You've answered the question. All right I think we need to move on now to the next conversation, Mr. Naftalis.

Q. Did there come a point in time when you had a further **[3095]** conversation with your dad about this?

A. Yes, there did.

Q. Do you remember when that was?

A. The next conversation I can remember is on October 10. It was a brief conversation. We had dinner with my father and my husband, and because my father had been so upset about the investment when I spoke with him in September, I asked him how it was going, and he told me that he was still

having difficulty getting information from Mr. Rajaratnam. He was very frustrated about it.

MR. BRODSKY: Objection.

A. And he was still very upset about the money that Mr. Rajaratnam—

MR. BRODSKY: Objection.

THE COURT: So, ladies and gentlemen, this witness obviously doesn't know of her own personal knowledge whether Mr. Gupta was or was not having difficulty getting information from Mr. Rajaratnam. All she is relaying is what she was told, which may or may not be accurate. So you need to consider this and this whole testimony only on the issue of what bearing it has, if at all, on Mr. Gupta's attitude toward Mr. Rajaratnam during the period of time in question.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 12-4448

UNITED STATES OF AMERICA,
Appellee,

v.

RAJAT K. GUPTA,
Defendant-Appellant.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of July, two thousand fourteen.

Appellant Rajat K. Gupta filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk