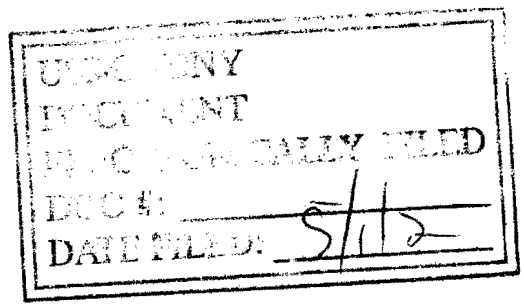

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-v-

RAJAT K. GUPTA and
RAJ RAJARATNAM,

Defendants.

11 Civ. 7566 (JSR)

MEMORANDUM ORDER

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

On April 11, 2012, the parties in the above-captioned case convened a telephone conference with the Court. Defendants Rajat Gupta and Raj Rajaratnam jointly moved to compel the Securities and Exchange Commission ("SEC") to produce documents concerning settlement negotiations between the SEC and cooperating witnesses, including tax returns or other financial statements provided by the cooperators to the SEC during negotiations. Defendants argued these documents were relevant to probing the bias of the cooperators expected to testify against them. The SEC objected, and argued that the final settlement agreements, which it was willing to produce, were sufficient to satisfy defendants' interest in materials relating to bias. The Court tentatively ruled in the SEC's favor, but allowed defendants to submit a letter brief to the Court, and the SEC to respond in kind. Having now carefully reviewed the brief submitted by defendant Gupta and the SEC's response, the Court hereby confirms its tentative ruling, and denies defendants'

motion to compel the SEC to produce documents concerning settlement negotiations beyond the final agreements it has already agreed to produce.

Defendants have not demonstrated that the settlement negotiations are relevant to proving bias. Rather, what is relevant are the actual cooperation agreements themselves. The otherwise protected negotiations that led to the agreements have very limited, if any, additional probative value. This is especially true here, given the SEC's representation that it possesses no "Wells submissions"[1] or statements of fact from any of the witnesses, and could produce only attorney argument. See Letter Brief of the Securities and Exchange Commission dated Apr. 23, 2012 ("SEC Ltr. Br.") at 3. Attorneys stake out adversarial positions in negotiations and engage in "puffing and posturing"

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[1] As previously explained in In re Initial Public Offering Sec. Litig., No. 21 MC 92 (SAS), 2004 WL 60290, at *1 (S.D.N.Y. Jan. 12, 2004) (quoting 17 C.F.R. § 202.5(c)):

> Since 1973, the SEC has permitted targets of its investigations to file "Wells submissions" - so named because New York lawyer John A. Wells chaired the SEC Advisory Committee on Enforcement Policies and Practices that initially recommended the practice - to respond to contemplated charges:
>
> > Persons who become involved in preliminary or formal investigations may, on their own initiative, submit a written statement to the Commission setting forth their interests and position in regard to the subject matter of the investigation. . . . In the event a recommendation for the commencement of an enforcement proceeding is presented by the staff, any submissions by interested persons will be forwarded to the Commission in conjunction with the staff memorandum.

in their attempt to obtain the best deal. Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 981 (6th Cir. 2003). But these posturings have only indirect and attenuated relevance, at best, to anything bearing on proof of their clients' bias.

The negotiations are not the benefit the cooperator is receiving. The best evidence of bias in a cooperator's testimony comes from the actual agreement he struck with the SEC, not from his lawyer's attempt to get him a good deal. Moreover, any limited additional probative value these negotiations may have is substantially outweighed by the policy concern in protecting against unnecessary intrusions into the settlement bargaining table. See Bottaro v. Hatton Assocs., 96 F.R.D. 158, 159-60 (E.D.N.Y. 1982) (requiring particularized showing of likelihood of admissibility for dissemination of terms of settlement agreement); Fed. R. Evid. 408 (settlement offers are generally inadmissible, although they can be admitted to prove bias).

The cases defendants cite where courts have ordered disclosure of settlement agreements or negotiations are inapposite. For example, in S.E.C. v. Downe, No. 92 Civ. 4092 (PKL), 1994 WL 23141 (S.D.N.Y. Jan. 27, 1994), Judge Leisure ordered settlement negotiations produced where the cooperator had not yet actually entered into a settlement agreement. Id. at *6 (allowing discovery as document "may lead to evidence that would

establish Downe's bias, interest or prejudice and would therefore be admissible under Fed. R. Evid. 408" (emphasis supplied)); SEC Ltr. Br. at 2. Here, the SEC has already agreed to provide the settlement agreements, which will allow defendants to establish the bias of the cooperators. In ABF Capital Mgmt. v. Askin Capital, No. 96 Civ. 2978 (RWS), 2000 WL 191698 (S.D.N.Y. Feb. 10, 2000), Judge Sweet evaluated whether to order disclosure of a settlement agreement, and ultimately denied the motion because the agreement was irrelevant to bias, since there was no cooperation clause. Again, the SEC has already agreed to provide the cooperation agreements to defendants. And in United States v. Stein, 488 F. Supp. 2d 350 (S.D.N.Y. 2007), Judge Kaplan ordered disclosure of a "Draft Statement of Facts," which he concluded was relevant discovery material, id. at 358-59, but he declined to order production of the back and forth communications between the Government and the defendant that related to "what offers might be made," not the factual issues, id. at 359-60. Here, as previously noted, the SEC represents that there are no statements of fact to disclose, only exchanges between the SEC and the witness' attorneys. SEC Ltr. Br. at 3.

As for defendants' motion to compel production of the cooperators' financial information given to the SEC, again, the Court fails to see how this information is relevant to bias. The source of any bias in a cooperator's testimony would be the

"break" the cooperator received from the SEC in exchange for the cooperator's testimony, something that is readily apparent from comparing the complaint to the final agreement. Whether that break is based on a cooperator's "ability to pay," as defendants argue, is irrelevant. In the case defendants cite, S.E.C. v. Thrasher, No. 92 Civ. 6987, 1996 WL 94533 (S.D.N.Y. Feb. 27, 1996), Magistrate Judge Dolinger allowed for discovery of financial information where there was a threshold showing suggesting the witness provided false information regarding his finances to the SEC in negotiating his settlement. Defendants make no showing suggesting a cooperator lied to the SEC to procure a better deal.

Accordingly, for the foregoing reasons, the motion to compel is denied.

SO ORDERED.

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

Dated: New York, New York
April 30, 2012