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2nd Circuit Upsets Order Requiring Wiretap Turnover in SEC Case Against Galleon

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09-30-2010

A unanimous federal appeals panel in Manhattan on Wednesday overturned an order requiring the defendants in the sprawling Galleon securities fraud case to turn over to the Securities and Exchange Commission approximately 18,000 wiretapped conversations they had been given by prosecutors in a parallel criminal prosecution.

Judge Gerard E. Lynch of the 2nd U.S. Circuit Court of Appeals, writing for the panel, concluded that Southern District of New York Judge Jed S. Rakoff, who is handling the SEC's civil disgorgement proceeding against Galleon Group, had "clearly exceeded" his jurisdiction "by ordering the disclosure of thousands of conversations involving hundreds of parties, prior to any ruling on the legality of the wiretaps and without limiting the disclosure to relevant conversations."

In its civil action, the SEC is seeking access to communications involving 550 separate individuals recorded during a 16-month period within the criminal investigation.

Judges Reena Raggi and Denny Chin joined the 54-page decision in *Securities and Exchange Commission v. Rajaratnam*, 10-462-cv, and issued a writ of mandamus lifting Rakoff's February order.

The SEC action was filed the same day as criminal charges were filed by the Southern District U.S. Attorney's Office accusing Raj Rajaratnam, the founder and manager of the Galleon Group, of netting \$52 million from an insider trading scheme involving Galleon's hedge funds. A total of 22 defendants were charged with participating in the scheme. Several months later, prosecutors filed a second set of related charges against other defendants. The criminal cases have been assigned to two Southern District judges.

The SEC sought the wiretaps through discovery in the civil case, and Rakoff agreed the agency was entitled to them because "the notion that only one party to a litigation should have access to some of the most important non-privileged evidence bearing directly on the case runs counter to the basic principles of civil discovery."

The circuit panel reversed, finding that without an initial ruling on the legality of the wiretaps, it was "impossible" for Rakoff to have conducted the required balancing of the SEC's need for the discovery materials against the privacy of the individuals whose conversations were recorded in government wiretaps.

Despite Rakoff's error, Judge Lynch suggested that the agency would have a good chance of gaining access to the records should the legality of the wiretaps be sustained.

As a government agency, the SEC has "a presumptive right" to discovery of the wiretaps to place it "on a level playing field ... the very purpose for which civil discovery exists," Lynch wrote. Additionally, should the wiretaps be upheld, the privacy interests would be "less weighty."

SEC spokesman John Nestor said, "We are pleased with the 2nd Circuit ruling today that the commission has a legitimate right to obtain relevant, legally intercepted wiretap materials from defendants prior to their disclosure in criminal proceedings."

Rajaratnam posted a notice on his website, rajdefense.com, which noted that Rakoff's order "directing the wholesale disclosure of wiretapped conversations" had been reversed.

Judge Richard J. Holwell, who is presiding over the criminal case against Rajaratnam and Galleon, has scheduled an evidentiary hearing on Monday on the defendants' motions to suppress the wiretaps (*United States v. Rajaratnam*, 09 Cr. 1184).

The second related criminal case, *United States v. Goffer*, 10 Cr. 56, has been assigned to Judge Richard J. Sullivan, who has ordered briefing completed in December.

In sending the case back to Rakoff, Lynch wrote, that "at a minimum, however, ordering of the wiretap materials before any determination of the legality of the surveillance involved exceeded the district court's discretion."

In any event, he added, there is "no need" for Rakoff to conduct an inquiry into the legality of the wiretaps because proceedings are under way in two criminal cases to make that determination.

Lynch also noted that "the more prudent course" may have been to adjourn the civil trial until after the criminal trial. That course, he added, "apparently" had been agreed to by all parties.

Lynch wrote that both sides had agreed that any disclosure order should be limited to wiretapped conversations that are relevant to the criminal charges.

The SEC was represented by Kevin P. McGrath and Valerie A. Szczepanik, both senior trial counsels in its New York office.

Rajaratnam was represented by Patricia A. Millett, John M. Dowd, Terrance J. Lynam, William E. White, Kevin R. Amer, Isaac J. Lidsky and Ann J. Lee of the Washington, D.C., office of Akin Gump Strauss Hauer & Feld.

A second appellant, Danielle Chiesi, was represented by Alan R. Kaufman, James M. Keneally and Thomas B. Kinzler, of Kelley Drye & Warren.

Assistant U.S. Attorneys Reed M. Brodsky and Andrew L. Fish filed an amicus brief supporting the SEC for the Southern District U.S. Attorney's Office.