

## Securities Regulation Daily Wrap Up, TOP STORY—2d Cir.: Galleon insider trading defendants' appeal fruitless, (Jul. 1, 2013)

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By Anne Sherry, J.D.

An appellate court affirmed the decision of the U.S. District Court for the Southern District of New York against three defendants in the Galleon insider trading case. Zvi Goffer, Michael Kimelman, and Craig Drimal appealed their convictions for securities fraud and conspiracy to commit securities fraud on the basis that wiretap evidence is inadmissible; the jury lacked sufficient evidence to prove knowledge; the jury instructions were improper in light of *Global-Tech*; the district court improperly excluded a rejected plea bargain; and the sentences were higher than other white-collar defendants receive in comparable thefts. The appellate court found each argument unavailing (*US v. Goffer*, July 1, 2013, Wesley, R.).

**Conviction and appeal.** According to the opinion, Goffer spearheaded the \$10-million Galleon insider-trading conspiracy, in which Kimelman and participated. Goffer and Kimelman were convicted and sentenced to 120 and 30 months' imprisonment, respectively. Drimal pleaded guilty and was sentenced to 66 months' imprisonment. The district court also entered forfeiture orders against the defendants. On appeal, Drimal and Goffer appealed their sentences, and Kimelman and Drimal challenged their convictions based on evidentiary rulings, jury instructions, and sufficiency of the evidence.

**Evidentiary arguments.** The defendants' contention that the district court erred in allowing wiretap evidence was unpersuasive, the appellate court noted. Title III of the Omnibus Crime Control and Safe Streets Act of 1968 prohibits the use of "unlawfully intercepted" communications at trial, but the defendants failed to show that the wiretaps were illegal. The appellate court also found that the jury had sufficient evidence to convict Kimelman of securities fraud and that the district court did not abuse its discretion in excluding evidence that Kimelman rejected a plea bargain.

**Jury instructions.** Kimelman also appealed the issuance and substance of jury instructions on the theory of "conscious avoidance," which permits a jury to convict a defendant for "deliberately closing his eyes to what would otherwise have been obvious to him." The appellate court found, however, that the evidence showed that there was a factual predicate for the instruction and that the content of the instructions was consistent with the Supreme Court's description of the conscious-avoidance case law in *Global-Tech Appliances, Inc. v. SEB S.A.*

**Reasonableness of sentences.** Finally, Goffer and Drimal challenged the reasonableness of their sentences. On an abuse-of-discretion review, the appellate court found that the district court did not err in its loss calculations or fail to consider disparities between co-defendants. Furthermore, the court again gave deference to the district court's judgment that the sentences were substantively reasonable.

The case is No. 11-3591-cr(L).

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Companies: Galleon Group

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