

Securities Regulation Daily Wrap Up, TOP STORY—2d Cir.: Gupta conviction in Galleon insider case upheld, (Mar. 25, 2014)

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By Mark S. Nelson, J.D.

The district court in which a jury convicted Rajat K. Gupta on four of six counts related to securities fraud properly admitted, limited or excluded wiretap and character evidence, said a panel of the U.S. Court of Appeals for the Second Circuit. The case against Gupta, a former director at The Goldman Sachs Group, Inc. (Goldman Sachs), arose from a lengthy federal investigation of The Galleon Group's (Galleon's) Raj Rajaratnam, to whom Gupta allegedly passed inside information about Goldman Sachs. (*U.S. v. Gupta*, March 25, 2104, Kearse, A.).

Background. According to the superseding indictment against Gupta, he allegedly passed confidential information about Goldman Sachs, which he learned in his position as a Goldman Sachs director, to Rajaratnam, who both acted on that information himself and shared that information with other alleged co-conspirators. Federal investigators' use of wiretapped phone calls between key figures in the Galleon investigation led to Gupta's conviction.

Specifically, Gupta, a former McKinsey & Co. managing director, participated in a September 2008 Goldman Sachs board meeting by phone from McKinsey's New York office. The meeting had been called to approve financier Warren Buffet's \$5-billion investment to bolster Goldman Sachs during the onset of the 2008 financial crisis. Gupta allegedly tried to call Rajaratnam soon after the Goldman Sachs board meeting ended.

Two of the substantive securities fraud counts against Gupta involved purchases on the same day in September 2008 of 150,000 shares Goldman Sachs shares by Galleon's co-founder, Gary Rosenbach, and of 67,200 shares by Ananth Muniyappa, a Galleon trader. The third substantive count against Gupta involved Rajaratnam's sale of 150,000 Goldman Sachs shares in October 2008.

U.S. District Court Judge Jed S. Rakoff sentenced Gupta to 24 months in prison and one year of supervised release. Gupta also must pay a \$5-million fine. An amended judgment issued by Judge Rakoff requires Gupta to pay over \$6.2 million in restitution. The Second Circuit had granted Gupta's request for bail during his appeal.

Wiretaps. Gupta's appeal made both a broadside attack on the government's use of wiretap evidence and also urged the court to grant him a new trial based on the district court's admission into evidence of wiretapped calls to which Gupta was not a party.

The Second Circuit, noting that a different panel of the court had previously upheld Rajaratnam's conviction in the face of a broad attack on the use of all wiretap evidence in that case, likewise rejected Gupta's constitutional arguments based on the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Rajaratnam has asked the Supreme Court review his case, including the Second Circuit's ruling on the wiretap evidence.

Lawyers for Gupta also argued that evidence obtained via wiretapped calls to which Gupta was not a party were inadmissible hearsay. In two September 2008 calls, Rajaratnam allegedly told Ian Horowitz, Rajaratnam's principal trader, that he had received a call "Saying something good might happen to Goldman."

In an October 2008 call, Rajaratnam allegedly told David Lau, a Galleon hedge fund portfolio manager based in Singapore, who asked for general investment advice, that the U.S. markets were safer than those in emerging markets. Rajaratnam also mentioned Goldman Sachs. Said 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." Rajaratnam also told Lau, "I can get that number" and "they don't report until December."

The Second Circuit sided with the government in holding that both the Rajaratnam-Horowitz and Rajaratnam-Lau calls could be admitted in Gupta's trial as non-hearsay statements in furtherance of a conspiracy between Rajaratnam and Gupta. The court also held that the statements could be admitted as hearsay within the exception for statements against penal interest.

Character evidence. Gupta asked the Second Circuit to let him have a new trial so he can put on a defense free of the evidentiary limits the district court placed on testimony by character witnesses he called to say that he was unlikely to have usurped his directorship at Goldman Sachs by passing confidential information about the investment bank to others. The Second Circuit denied Gupta's request for a new trial because it found the district court did not abuse its discretion, or that any errors were harmless.

Gupta's daughter, Geetanjali Gupta (Geetanjali), was to testify that Gupta was upset with Rajaratnam because Rajaratnam had suddenly pulled tens of millions of dollars out of a Gupta-Rajaratnam business venture (Voyager Capital Partners Ltd.). The district court limited Geetanjali's testimony to statements about Gupta's "attitude" about Rajaratnam and the venture, but forbid her from saying that Gupta felt "cheated" by Rajaratnam.

In upholding the district court's limitation on Geetanjali's testimony, the Second Circuit said the limit was needed to avoid a situation in which jurors could possibly misunderstand the purpose of admitting a statement about Gupta feeling "cheated" and improperly conclude that the statement was admitted to prove its truth.

The Second Circuit also upheld the district courts' refusal to admit evidence claiming to show that someone other than Gupta tipped Rajaratnam. Gupta had proffered two taped calls and dozens of emails alleging that Goldman Sachs vice president, David Loeb, may have been Rajaratnam's tipper. The district court excluded the evidence on the grounds of hearsay, relevance, lack of foundation, and potential jury confusion.

The court said that while Gupta's "legal premise" was "sound," his proffer fell short because, although Loeb allegedly spoke to Rajaratnam often regarding Galleon's Goldman Sachs securities account, and was one of Rajaratnam's top 10 "important persons," Gupta did not show that Loeb had access to the confidential information Rajaratnam received because Loeb's work for Goldman Sachs's securities division was walled-off from the firm's equity capital markets division. One of Rajaratnam's assistants also testified that someone other than Loeb tried to speak with Rajaratnam before Rajaratnam's wiretapped calls in September 2008.

The Second Circuit also upheld the district court's exclusion of evidence about Gupta's planned charitable giving because this evidence did not go his state of mind and was unneeded for completeness purposes. The district court also properly excluded other character evidence by allowing testimony about Gupta's "honesty," but not his "moral soundness" or "uprightness."

Lastly, the Second Circuit said the district court did not err by refusing to give the jury Gupta's requested instruction that character evidence can raise a reasonable doubt. The court said Second Circuit precedent does not require this instruction. The court also rejected Gupta's invitation to rethink whether its 1991 opinion in *Pujana-Mena* conflicted with the Supreme Court's *Edington* (1896) and *Michelson* (1948) opinions, which the court said it had reviewed and distinguished in *Pujana-Mena*.

The case is No. 12-4448.

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Companies: The Goldman Sachs Group, Inc.; The Galleon Group; McKinsey & Co.; Voyager Capital Partners Ltd.; New Silk Route; Galleon Global; Galleon International; AIG; Intel Corp.; Apple, Inc.

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