

Corporate & Financial Weekly Digest

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Government's Request to Serve Subpoena Duces Tecum on Galleon Granted

Co-authored by [Jessica M. Garrett](#)

On October 16, 2009, Raj Rajaratnam was arrested and charged with trading or conspiring to trade in securities on the basis of inside information. Following his arrest, the government served his employer, Galleon Management LP, with three grand jury subpoenas. On December 15, 2009, a grand jury returned an indictment alleging that Mr. Rajaratnam traded or conspired to trade in the securities of nine identified issuers. On February 9, 2010, the grand jury returned a Superseding Indictment alleging that Mr. Rajaratnam conspired to trade in the securities of three additional issuers. By letter dated March 22, 2010, the government identified additional issuers not previously addressed in the Superseding Indictment.

On January 13, 2011, the government filed an application for leave to issue to Galleon a subpoena duces tecum returnable before trial pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure. The subpoena requested, among other things: (1) OMS Data, a form of electronic trading record that identifies the portfolio manager and trader responsible for executing a given trade; (2) documents in which Mr. Rajaratnam acknowledged Galleon's insider trading policies; and (3) certain emails and other communications related to specific issuers. Mr. Rajaratnam, joined by Galleon, moved for an order denying the government's requests on the basis that the government was not entitled to pre-trial production under Rule 17(c). The court denied this motion on February 2 and granted the government leave to serve the subpoena.

In order to require production of documents prior to trial under Rule 17(c), "the moving party must show: (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general 'fishing expedition.'" (*U.S. v. Nixon*, 418 U.S. 683, 699-700 (1974))

Mr. Rajaratnam and Galleon alleged that the requested documents were "otherwise procurable reasonably in advance of trial," and that the government could "properly prepare for trial without such production." As to the first claim, movants argued that the government previously knew about all of the issuers identified in the Superseding Indictment and the March 22 letter and thus could have requested the documents in any one of the multiple grand jury subpoenas. By failing

to make the requests in the grand jury subpoenas, Mr. Rajaratnam and Galleon argued that the government forfeited its chance to subpoena the additional documents pursuant to Rule 17(c).

The court rejected this argument because it would effectively require the government to "request enough documents that it might want to use at trial to avoid forfeiting the chance to obtain them under Rule 17(c), but not so many documents as to turn a grand jury subpoena into a trial subpoena. And the government would have to strike that delicate balance before it [knew] what defendants will be tried for what offenses."

As to the second point, the court held that because OMS Data is relevant to proving trading in furtherance of the alleged conspiracies, and using that data would expedite the trial by more clearly presenting evidence of trading, the third Nixon requirement is satisfied. (*U.S. v. Rajaratnam*, 2011 WL 335170 (S.D.N.Y. Feb. 2, 2011))

Katten Muchin Rosenman LLP

Charlotte Chicago Irving London Los Angeles New York Washington, DC