CRIMINAL

Court: United States District Court, Eastern District of New York
Case Title: USA v. Motz
Docket Number: 2:08CR00598
Expert(s): n/a

Mark the Correct Category	Crime Type	LBL2
X	White Collar Crime	CRIM100
	Drugs	CRIM120
	DUI/DWI	CRIM140
	Immigration	CRIM160
	RICO	CRIM180
	Murder	CRIM200
	Burglary	CRIM220
	Robbery	CRIM240
	Illegal Possession of Guns/Firearms	CRIM260
	Miscellaneous	CRIM300

JM:JGM
F.#2007R01013

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

- against - 08 CR 598 (S-1)(ADS)

GEORGE M. MOTZ and
MELHADO, FLYNN &
ASSOCIATES, INC.

Defendants.

- - - - - - - - - - - - - - - - - X

MEMORANDUM OF LAW IN OPPOSITION TO
TO DEFENDANT MOTZ'S MOTION FOR
DISCOVERY AND A BILL OF PARTICULARS

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PRELIMINARY STATEMENT

The government respectfully submits this Memorandum of Law in opposition to Defendant George M. Motz's motion for additional discovery and a bill of particulars. In summary, Defendant Motz's motion requests the court to (1) order the government to produce a bill of particulars; (2) order the government to comply with Rule 16; (3) order the government to immediately produce all Brady, Giglio and Jencks Act materials; (4) order the government to provide the defendants with a witness list; and (5) order the government to disclose all evidence of contact between the Securities and Exchange Commission (the "SEC") and the United States Attorney's Office for the Eastern District of New York. For the reasons described below, Defendant Motz's motion should be denied in its entirety.

FACTS

This case arises from the defendants' participation in a fraudulent "cherry-picking" scheme between November 2000 and June 2005 and the efforts of Defendant Motz to conceal the scheme by altering documents that were the subject of an investigation conducted by the SEC in 2003. As alleged in the indictment, "cherry-picking" occurs when a stock trader executes trades without assigning particular trades to a particular trading account. (Superseding Indictment ¶ 7). The stock trader waits to see which of those trades became profitable and then assigns some or all of the profitable trades to favored accounts, while

assigning the unprofitable trades to disfavored accounts. Id. In this case, the indictment alleges that Defendant Motz engaged in a "cherry-picking" scheme over a span of years, during which he favored MFA's proprietary trading account,[1] from 2000 to 2003, and two hedge fund accounts at MFA, from 2003 to 2005, while disfavoring his other discretionary investor accounts.[2] (Id. at ¶¶ 9-12, 17-22). In an effort to conceal this scheme from the National Association of Securities Dealers (the "NASD") and the SEC, Defendant Motz altered his trading records to make it appear that he had allocated the trades in question earlier in the trading day than he actually had. (Id. at ¶ 13).

Specifically, the indictment alleges that defendant Motz was the President, Chief Executive Officer, Director and Chairman of the Executive Committee at MFA. (Id. at ¶2). The indictment also indicates that Defendant Motz was a registered representative and investment advisor for 183 discretionary client accounts and 6 non-discretionary client accounts at MFA. (Id. at ¶ 3). Apart from advising his own clients, the

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[1] An account created by MFA in which the firm itself traded for its own benefit. Defendant Motz had exclusive authority to trade on behalf of MFA's proprietary trading account.

[2] Discretionary accounts were accounts over which Defendant Motz had been given trading authority by his individual clients.

indictment alleges that Defendant Motz conducted all of the trading in MFA's proprietary trading account. (Id. at ¶ 6).

Between November 2000 and September 2003, the indictment alleges that Defendant Motz implemented his "cherry-picking" scheme to favor MFA's proprietary trading account. (Id. at ¶ 9). The indictment alleges that while Defendant Motz was favoring the proprietary trading account, he was disfavoring his 183 discretionary clients and two hedge funds at MFA, the Third Millennium Fund and Investment Fund #1 (which we herein identify as Mezzacappa Partners, L.P.")("Mezzacappa Fund"). (Id.). The indictment details the "cherry-picking" scheme:

> As part of the scheme, MOTZ frequently submitted orders to purchase securities to the MFA trading desk in the morning. At certain times, MOTZ marked the relevant order tickets "V" or "VARIOUS," which indicated that MOTZ intended the trader to allocate the trades to his clients' accounts. At other times, MOTZ did not mark the tickets to designate the type of account into which he intended to place the trade. In either case, MOTZ usually waited for several hours before informing the trading desk where to allocate particular trades. If the trade became profitable during the day, he frequently placed the trade into the firm's proprietary trading account. He would then close out the profitable position in the firm's trading account by selling the position, thereby locking in a profit.
>
> If the trade did not become profitable, MOTZ allocated the trade to the Third Millennium Fund, Investment Fund #1, MOTZ's discretionary client accounts or all three. He usually allocated trades to client accounts shortly before the close of trading

> at 4:00 pm ET to allow maximum time to determine whether the trade would become profitable. MOTZ generally did not close out the unprofitable trades on the same day he purchased the securities. Instead, he closed those trades out at a later date. Those trades may or may not have become profitable by the time they were closed.

(Id. at ¶ 10-11). As a result of Defendant Motz's "cherry-picking" practice, the proprietary trading account was extremely profitable, earning a profit of $1,379,106. (Id. at ¶ 12). Indeed, of the 204 trades that Defendant Motz executed on behalf of the MFA proprietary account, 202 of them were profitable. (Id.).

Moreover, the indictment alleges that Defendant Motz continued the "cherry-picking" scheme between June 2003 and May 2005 by assigning profitable trades to the Third Millennium Fund, thereby disfavoring his 183 discretionary clients. (Id. at ¶ 17). In detail, the indictment describes how Defendant Motz used his trading success in the proprietary trading account to market MFA to potential investors, particularly the Mezzacappa Fund, which invested $2 million with MFA in 2002. The indictment explains that Defendant Motz used his "cherry-picking" scheme to favor the Third Millennium Fund and the Mezzacappa Fund to improve these funds' performance and to prevent investors from withdrawing their money. (Id. at ¶ 19-20). Accordingly, the indictment indicates that Defendant Motz engaged in a practice of day-trading and multi-day trading through which he allocated

trades to the Third Millennium Fund and Mezzacappa Fund accounts that were generally were more profitable by the end of the day on which they were purchased than the trades he allocated to his discretionary client accounts. (Id. at ¶ 22).

As for the allegations of document alteration, the indictment asserts that, in advance of examinations conducted by the NASD and the SEC in late 2003, Defendant Motz collected all of the trade tickets that he used to effectuate the "cherry-picking" scheme (i.e., the trade tickets associated with MFA's proprietary trading account) and physically altered them to make it appear as though those trades had been allocated earlier in the trading day than they actually were allocated, thereby concealing the "cherry-picking" scheme. (Id. at ¶ 13). The indictment describes the use and purpose of trade tickets and reviews the alleged alteration process in painstaking detail:

> MFA's trade tickets, which were used to instruct MFA's trading desk to execute securities transactions, consisted of three copies attached together. The top copy was white, the middle copy blue, and the bottom copy pink. In the normal course of business, the blue copy was discarded, the white copy was maintained by MFA's trading desk, and the pink copy was maintained by the responsible registered representative.
>
> The registered representative or his/her assistant would prepare a trade ticket by identifying the security and number of shares to be traded and the account to which the trade should be allocated. The trading desk would then place time stamps on the ticket showing when the ticket was received and when

> the trade was executed. The pink copy would then be distributed to the registered representative and the white copy would be maintained by the trading desk.
>
> In 2003, during the regulators' examinations of MFA, MOTZ, with others, gathered together the white and pink copies of the trade tickets representing the trades given to MFA's proprietary trading account. In certain instances, MOTZ, with others, altered tickets by adding a "T" to the white and pink copies to make it appear, at the time he had initially given the tickets to MFA's trading desk, that he had intended that the trade go to MFA's proprietary "Trading" account. In other instances, where the trade tickets originally had a "V," indicating that the trade was destined for various client accounts, MOTZ, with others, altered the tickets by writing over the "V" to make it look like a "T" on both the pink and white copies.

(Id. at ¶¶ 14-16).

As a result of their conduct, the defendants are charged in the indictment with securities fraud, in violation of 18 U.S.C. § 1348 (Counts One), and Defendant Motz is charged with alteration of documents in a federal investigation, in violation of 18 U.S.C. § 1519 (Count Two). (Id. at ¶¶ 23-26).

ARGUMENT

POINT ONE

THE REQUEST FOR ADDITIONAL PARTICULARS AND DISCOVERY SHOULD BE DENIED

Defendant Motz now moves for an order directing the government to produce a bill of particulars and to respond to various other discovery requests. None of those requests are within the scope of Federal Rule of Criminal Procedure 16 or Brady, Giglio and their progeny, and, therefore, these requests are completely without merit.

A. The Defendants' Request For a Bill of Particulars Should Be Denied

Defendant Motz claims that he has been given 1.8 million documents by the government without "any guidance to navigate." (Br. 7). Moreover, he asserts that the indictment "omits crucial factual particulars relating to the charges, including which specific trades constitute the alleged misconduct and when and where the purportedly offending misconduct took place." (Br. 7). For these and other reasons, Defendant Motz argues that he is entitled to a bill of particulars. The government disagrees.

As a threshold matter, the government notes, and Defendant Motz concedes, that the SEC filed a civil lawsuit against him and MFA in February 2007, almost a year and a half before the criminal case was filed, which was "based on the same

conduct at issue in this matter." (Br. 21). That case, Defendant Motz further concedes, was within a month of trial when the criminal authorities intervened in the civil action and asked that it be stayed pending the outcome of a criminal investigation. (Id.). In fact, the vast majority of the 1.8 million documents Defendant Motz complains about in his motion were provided to him by the SEC in the first half of 2007 and were originally produced to the SEC by MFA. (See Government's Discovery Letter, attached hereto as Exhibit "A"). Nevertheless, Defendant Motz now contends that he is confused by the allegations and requires a bill of particulars to fully understand the allegations against him. (Br. 11).

The Second Circuit has held that a bill of particulars should be granted only when "the charges of the indictment are so general that they do not advise the defendant of the specific acts of which he is accused." United States v. Torres, 901 F.2d 205, 234 (2d Cir. 1990) (quotations and citations omitted); United States v. Leonard, 817 F. Supp. 286, 301 (E.D.N.Y. 1992); United States v. Larracuenti, 740 F. Supp. 160, 163 (E.D.N.Y. 1990). A bill of particulars is not a discovery device, and it is not a device by which the government may be required to preview its evidence, or otherwise state its legal or evidentiary theory regarding the means by which the defendant committed a specific criminal act. United States v. Feola, 651 F. Supp.

1068, 1133 (S.D.N.Y. 1987), aff'd mem., 875 F.2d 857 (2d Cir. 1989); United States v. Gottlieb, 493 F.2d 987, 994 (2d Cir. 1974); United States v. Schwimmer, 649 F. Supp. 544, 550 (E.D.N.Y. 1986). "Generally, if the information sought by the defendant is provided in the indictment or in some other acceptable alternate form, no bill of particulars is required." United States v. Bortnovsky, 820 F.2d 572, 574 (2d Cir. 1987).

"It is not the function of a bill of particulars to obtain a preview of, and to proscribe, the government's evidence before trial; to learn the legal theory upon which the government will proceed to prove its case or to assist the defendant's investigation." United States v. Kyongja Kang, 2006 WL 208882, *1 (E.D.N.Y. 2005) (Glasser, J). Moreover, "demands for particular information with respect to where, when and with whom the Government will charge the defendant with conspiring are routinely denied." United States v. Sattar, 314 F. Supp.2d 279, 318 (S.D.N.Y. 2004) (quoting United States v. Trippe, 171 F. Supp.2d 230, 240 (S.D.N.Y. 2001)). The ultimate test is whether the information sought is *necessary*, not whether it might be helpful to the defense. United States v. Weinberg, 656 F. Supp. 1020, 1029 (E.D.N.Y. 1987) (citations omitted, emphasis added); United States v. Leighton, 265 F. Supp. 27, 35 (S.D.N.Y. 1967).

Finally, because a bill of particulars serves merely to inform the defendant of the nature of the charges, it may not be

used to acquire "evidentiary detail," Torres, 901 F.2d at 234, or as an investigative tool for the defense, United States v. Salazar, 485 F.2d 1272, 1277-78 (2d Cir. 1973). Nor should it be used as a device to obtain detailed disclosure of the Government's evidence prior to trial, or as a means to inquire into the Government's legal or evidentiary theory of its case. United States v. Gottlieb, 493 F.2d 987, 994 (2d Cir. 1974); United States v. Lebron, 222 F.2d 531, 535-36 (2d Cir. 1955). The Government cannot be compelled in a bill of particulars to disclose the manner in which it will attempt to prove the charges against the defendant or to describe the precise manner in which the defendant committed the crime charged. Torres, 901 F.2d at 233-24; United States v. Facciolo, 753 F. Supp. at 450-51, aff'd, 968 F.2d 242 (2d Cir. 1992); United States v. LaMorte, 744 F. Supp. 573, 577 (S.D.N.Y. 1990). The decision whether to grant a bill of particulars rests within the sound discretion of the district court. United States v. Panza, 750 F.2d 1141, 1148 (2d Cir. 1984).

As noted above, Defendant Motz claims that he requires a bill of particulars because of "the confusing nature of th[e] allegations [in the indictment] and the lack of clarification by any reasonable means." (Br. 11). On the contrary, the charges in the indictment are both specific and detailed. The indictment contains a detailed description of the "cherry-picking" scheme

(superseding indictment ¶¶ 7-12, 17-22), the number of individual stock trades at issue (id. ¶¶ 12, 22) and Defendant Motz's related efforts to conceal his the scheme from the NASD and the SEC (Id. at ¶¶ 13-16). The indictment identifies the relevant period of the scheme (id. at ¶¶ 9, 13, 19, 24, 26), and the roles Defendant Motz and MFA played in the execution of the scheme. (Id. ¶¶ 1-22).

Defendant Motz makes several arguments in favor of his bill of particulars motion, all of which lack merit. First, Defendant Motz contends that the indictment fails to "provide any description of the trades at issue. (Br. 11). That is simply not the case. When the "cherry-picking" scheme was favoring the proprietary account, the indictment alleges that Defendant Motz, between November 9, 2000 and September 30, 2003, assigned 204 trades to the proprietary trading account, and that 202 of those trades were profitable.[3] When Defendant Motz later used the scheme to favor The Third Millennium and Mezzacappa Funds, between June 2003 and May 2005, all of the 50 day-trades he did were profitable. Defendant Motz has been in possession of MFA's

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[3] To be clear, as set forth in the language of Count One, the government does not allege that there were two "cherry-picking" schemes. Rather, the indictment alleges that there was one scheme and that the favored accounts changed over time: from November 2000 to September 2003, Defendant Motz favored the proprietary trading account; from June 2003 to May 2005, Defendant Motz favored the Third Millennium Fund and Mezzacappa Funds.

trade blotter, which itemizes all of Defendant Motz's trading activity during the relevant time period, since, at the very least, May 2007. (See Exhibit "A," p. 2). Certainly, it would be quite easy for Defendant Motz to review the trade blotter to determine which trades he executed on behalf of the proprietary trading account and which he executed on behalf of the Third Millennium and Mezzacappa Funds between June 2003 and May 2005. In any event, the government will provide the defendants with a list of all the trades Defendant Motz executed as part of the "cherry-picking" scheme, thereby obviating the need for any further particulars on this issue.

Defendant Motz also claims that the government should be required to identify "which particular clients were disfavored by the alleged misallocation." (Br. 12). Obviously, as the indictment plainly alleges, if Defendant Motz "cherry-picked" the profitable trades for MFA's own account, and later did so for the two hedge fund accounts, his victims were all of his discretionary clients. But for Defendant Motz's fraudulent scheme, these clients could have received the profitable trades. The indictment plainly indicates that while Defendant Motz was favoring MFA's account, his 183 discretionary clients and the hedge funds were the victims; when he was favoring the hedge funds, his 183 discretionary clients were the victims. (Superseding Indictment ¶¶ 9, 22).

Defendant Motz next requests that the government particularize "the timing of the allegedly improper trades." (Br. 12). Within his own argument, however, Defendant Motz observes that the indictment alleges that he frequently submitted trade orders in the morning, waited several hours to see if the trades became profitable, and then informed the trading desk where to allocate the trades. (Id.; Superseding Indictment ¶ 10). The government is simply not required to provide the level of particularity the defendant demands. See United States v. Mitlof, 165 F. Supp.2d 558, 569 (S.D.N.Y. 2001) (denying request for bill of particulars where defendant sought details of the "wheres, whens and with whoms" that courts have held to be beyond the scope of a bill of particulars); United Staes v. Leonelli, 428 F. Supp. 880, 882 (S.D.N.Y. 1977)(rejecting request for a bill of particulars regarding the names, dates and places for the entire case as "an attempt to discover the minutia of the government's case"). Regardless, Defendant Motz can easily glean such information from MFA's trading records, which he has and which detail the times and dates that securities were bought and sold by him.

Defendant Motz also claims that the indictment "does not specify the location from which each of the allegedly improper trades was made." (Br. 13). On the contrary, the indictment specifically indicates that the defendant worked at

MFA in New York, New York, and, on Fridays during much of the relevant period, "from an office located in Suffolk County, New York, communicating with his office in Manhattan via telephone and facsimile." (Superseding Indictment ¶¶ 1, 3). In addition, Defendant Motz admits that the government provided him with a series of documents on March 1, 2009, which evidenced that he was perpetrating his "cherry-picking" scheme while working from locations in the Eastern District of New York. (Br. 13; Defendant Motz's Exhibit B at 1-2). In short, the indictment's description of the location of the crime is sufficient for the purposes of Federal Rule of Criminal Procedure 7(c)(1).

Finally, Defendant Motz contends that the indictment insufficiently articulates the document alteration charge, in that it fails to identify where the alteration occurred and "which specific tickets were purportedly altered." (Br. 13-14). For the reasons set forth above, the indictment sufficiently identifies the location where the document alteration crimes were committed. Moreover, the indictment sufficiently alleges that Defendant Motz "gathered together the white and pink copies of the <u>trade tickets representing the trades given to MFA's proprietary trading account</u>" for the purpose of altering them. (Superseding Indictment ¶ 16)(emphasis supplied). To the extent that Defendant Motz desires further clarification of which trade tickets were altered, the government is attaching hereto reports

prepared by the Federal Bureau of Investigation's Questioned Documents Unit and the United States Secret Service's Forensic Services Division. (See FBI Report, Exhibit "B"; USSS Report, Exhibit "C"). These documents set forth in scientific detail which trade tickets were altered and by what means the alterations were detected. These reports should likewise eliminate Defendant Motz's concerns about his ability to retain a defense expert to opine on the absence of evidence of alteration of the trade tickets. (Br. 16).

B. The Government Is In Compliance With the Court's Rule 16 Order

On January 9, 2009, the government agreed to review its files to determine which, of the over one million documents provided to the defendants in discovery, it plans to use at trial. On March 11, 2009, the government sent the defendants a preliminary list of such documents, identifying the corresponding Bates range numbers; the government intends to supplement this list in the near future.[4] (Government's March 11, 2009 Letter; attached hereto as Exhibit "D"). As for the Court's direction that the government disclose the existence of any items that were obtained from or belonged to Defendant Motz, the government is still researching that issue. As nearly all of the documents at

[4] Unfortunately, this process took longer than expected, as the government encountered substantial problems obtaining electronic copies of the documents that had been previously provided to the defendant.

issue in this case were produced to the government by either MFA or third-parties, the government does not anticipate producing anything in response to this order. Nevertheless, should the government discover responsive materials, it will, of course, comply with the Court's instructions.

C. The Request For Immediate Production of *Brady*, *Giglio* and Jencks Act Materials Should Be Denied

Noting nothing other than the complexity of this case and the likelihood of pretrial witness interviews, Defendant Motz requests the Court issue an order directing the government to immediately produce all prior witness statements, pursuant to 18 U.S.C. § 3500, and any exculpatory evidence pursuant to Brady, 373 U.S. at 83, and Giglio v. United States, 405 U.S. 150 (1972). (Br. 17-19). The government intends to comply with the Jencks Act and all other legal disclosure requirements. Moreover, as noted in prior correspondence with defense counsel, the government is aware of and will comply with its continuing obligations under Brady, 373 U.S. at 83, and Giglio, 405 U.S. at 150. (Exhibit A, p. 3). Defendant Motz's bald and unsupported claims that some unspecified "Brady" material exists does not entitle him to early disclosure of Jencks Act materials. See United States v. Coppa, 267 F.3d 132, 144 (2d Cir. 2001) (noting that Brady and Giglio require the production of exculpatory and impeachment material in sufficient time for the defense to use it

effectively); United Staes v. Dolney, No. 04 Cr. 159, 2005 WL 1076269, at *8 (denying motion to compel the production of Brady and Giglio material); United States v. Martinez-Martinez, No. 01 Cr. 307, 2001 WL 1287040, at *5 (S.D.N.Y. Oct. 24, 2001)(same). Defendant Motz's request for immediate production of Brady, Giglio and Jencks materials should therefore be denied.

D. The Request For a Witness List Should Be Denied

Defendant Motz also requests an order directing the government to produce a list of the witnesses it intends to call at trial. (Br. 19). A defendant is not entitled to the government's witness list prior to trial. See United States v. Bejasa, 904 F.2d 137, 139 (2d. Cir. 1990). A district court has discretion, however, to compel pretrial disclosure of the government's witnesses where the defendant makes "a specific showing that disclosure is both material to the preparation of his defense and reasonable in light of the circumstances surrounding his case." United States v. Cannone, 528 F.2d 296, 298, 301 (2d Cir. 1975).

Defendant Motz's assertion, in general terms, that a witness list would assist him in his trial preparation, given the span of time covered in the indictment, the amount of documents he has to review and the legal costs attendant to that document review is insufficient to justify his request. (Br. 20-21); see Dolney, 2005 WL 1076269, at *7 (E.D.N.Y. May 3, 2005)(defendant's

"general assertion that access to a witness list would benefit his trial preparation is simply insufficient to justify its disclosure at this point."). Moreover, "the possible disclosure of the government's witness list well in advance of trial 'should be balanced against the possible dangers accompanying disclosure (i.e., subornation of perjury, witness intimidation, and injury to witnesses')." United States v. Coffey, 361 F. Supp.2d 102, 126 (quoting United States v. Cafaro, 480 F. Supp. 511, 520 (S.D.N.Y. 1979)). As it stands, no trial date has been set in this case, and Defendant Motz has represented that he has additional dispositive motions to file in advance of trial. In addition, Defendant Motz is already in possession of lengthy depositions of persons with knowledge of the "cherry-picking" scheme, which were conducted by the SEC in connection with the civil case. Importantly, the indictment alleges that Defendant Motz engaged in acts of obstruction of justice when he altered the trade tickets to avoid detection of his crimes by the NASD and the SEC. (Superseding Indictment ¶¶ 13-16). Under these circumstances, the government submits that the equities weigh in favor of denying Defendant Motz's request for a witness list at this point.

E. No Legal Basis Exists For Ordering The Government To Produce All Evidence Of Contact Between The United States Attorney's Office And The SEC

Citing absolutely no legal authority for his position, Defendant Motz contends that the Court should issue an order directing the government to produce all evidence of contact between the United States Attorney's Office for the Eastern District of New York and the SEC. (Br. 21-22). Defendant Motz argues that disclosure of such contact is "important and necessary to evaluate whether or not a motion to dismiss based on prosecutorial misconduct or some other relief is appropriate. (Br. 22). There is no legal basis for this request, and it should be denied accordingly. See United States v. Stringer, 531 F.3d 1189, (9th Cir. 2008)(parallel civil and criminal investigations do not violate due process unless civil investigation used only to obtain evidence for use in criminal prosecution).

CONCLUSION

For the foregoing reasons, Defendant Motz's motion for additional discovery and a bill of particulars should be denied in its entirety.

Respectfully submitted,

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