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

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F.#2007R01013

August 27, 2009

The Honorable Arthur D. Spatt
United States District Court
Eastern District of New York
Long Island Courthouse
100 Federal Plaza
Central Islip, New York 11722

Re: United States v. George Motz, et al.,
Criminal Docket No. 08-598 (S-1) (ADS)

Dear Judge Spatt:

The Government respectfully moves in limine for the admission of evidence of defendants' conduct that is "inextricably intertwined" with the conduct charged in the superseding indictment. In the alternative, the Government seeks to admit this evidence to prove motive, intent and lack of mistake under Federal Rule of Evidence 404(b). This evidence relates to (i) trades that took place prior to August 27, 2003 which were part of the charged securities fraud scheme, and (ii) trade tickets that defendant George Motz altered to cover-up the fraudulent trading scheme.

BACKGROUND

The Charged Conduct

As the Court is aware, this case arises from the defendants' participation in a fraudulent "cherry-picking" scheme between November 2000 and June 2005. Defendant George Motz executed block trades at the beginning of the day and, at the end of the day, allocated profitable trades to favored accounts and unprofitable trades to disfavored accounts.

Between November 2000 and September 2003, Motz favored the proprietary trading account of defendant Melhado, Flynn and Associates ("MFA"), of which Motz was President, CEO and a minority owner. During this period, trial evidence will show that Motz disfavored 183 discretionary clients and two hedge funds with accounts at MFA, the Third Millennium Fund and Mezzacappa Partners, L.P. (hereinafter, the "Mezzacappa Fund").

This phase of the scheme drew to a close on approximately September 30, 2003, while the National Association of Securities Dealers (hereinafter, the "NASD") was conducting an audit of MFA and an SEC audit was looming.

The evidence will also show that defendant Motz altered trade tickets relating to these fraudulent trades to make it appear as though the trades had been allocated earlier in the trading day than they actually were. The alterations served the purpose of concealing the "cherry-picking" scheme from the auditors and others.

Trial evidence will further show that during this initial phase of the scheme, as a result of Motz's "cherry-picking" practice, the MFA proprietary trading account was extremely successful. Of the 204 trades that Motz executed on behalf of the proprietary account, 202 were profitable.[1] The government will introduce witness testimony that MFA's financial situation was perilous during this period, and that the profits Motz directed to the MFA proprietary account were crucial to the firm's ability to meet NASD's capital requirements.

While Motz favored the MFA proprietary account, the disfavored accounts performed poorly. Following a threat by the Mezzacappa Fund to close its MFA account, Motz shifted his "cherry-picking" scheme to favor the Mezzacappa Fund. During the nearly two-year period of the scheme in which the Mezzacappa Fund enjoyed favored account status, from approximately June 2003 through June 2005, 50 of the 50 trades Motz allocated to it were profitable. This two-year period constitutes the second phase of the cherry-picking scheme.

Evidence Sought to Be Introduced at Trial

On August 14, 2009, this Court granted the defendants' motion for partial dismissal of Count One, ruling that "[t]he government may only prosecute Motz for allegedly fraudulent trades that occurred within the five years preceding the August 27, 2008 indictment." See Memorandum of Decision and Order, page 14.[2]

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[1] The government expects to introduce expert testimony that such a successful day-trading strategy is astronomically unlikely.

[2] This motion essentially explores the impact of the Court's August 14, 2009 ruling on the Government's case. The

The Government seeks to introduce testimony and documents relating to Motz's trades prior to August 27, 2003 that were part of his fraudulent "cherry-picking" scheme. This evidence would include the fact that prior to August 27, 2003, approximately 200 of 201 trades Motz allocated to the proprietary account were profitable — exceedingly strong and direct evidence of the existence of the scheme. Evidence concerning Motz's trading patterns prior to August 27, 2003 would also include testimony concerning his motive to allocate profitable trades to the proprietary account to address MFA's financial problems; his use of his track record with the proprietary account as a marketing tool; his allocation of unprofitable trades to the Mezzacappa Fund; the hedge fund's threat to close its MFA account; and the resulting conversion of the Mezzacappa Fund to favored account status in the second phase of the cherry-picking scheme. The government also seeks to introduce evidence that Motz altered scores of trading tickets to cover-up his fraudulent scheme. The vast majority of the altered tickets concern trades that took place prior to August 27, 2003.

ARGUMENT

Evidence Of Trading Activity That Took Place Prior to August 27, 2003 Is Admissible As Direct Evidence of the Scheme

The Second Circuit has made clear that "evidence of uncharged criminal activity is not considered other crimes evidence under Fed. R. Evid. 404(b) if it arose out of the same transaction or series of transactions as the charged offense, if it is inextricably intertwined with the evidence regarding the charged offense, or if it is necessary to complete the story of the crime on trial." See United States v. Carboni, 204 F.3d 39, 44 (2d Cir. 2000) (quoting United States v. Gonzalez, 110 F.3d 936, 942 (2d Cir. 1997); see also United States v. Baez, 349 F.3d 90, 94 (2d Cir. 2003); United States v. Avendano, 2004 WL 2734435, at *2 (S.D.N.Y. Nov. 30, 2004) (finding defendant's agreement to act as a cocaine courier for a cooperating witness to be "inextricably intertwined with the evidence regarding the charged heroin conspiracy and necessary to complete the story of that alleged offense," "highly probative intrinsic evidence of

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Government is reviewing its options regarding the Court's August 14, 2009 ruling. Because the Government has 30 days to file a notice of appeal, which expires on September 14, 2009, the Government respectfully requests, if at all possible, an expedited briefing schedule and ruling on this motion by the next status conference, scheduled for September 11, 2009.

Defendant's involvement in the conspiracy charged," and not other crime evidence within the meaning of Rule 404(b)); accord United States v. Leavitt, 878 F.2d 1329, 1338-39 (11th Cir.) ("Evidence of criminal activity other than the offense charged is not extrinsic evidence under Rule 404(b) if it is inextricably intertwined with the evidence of the charged offense or is necessary to complete the story of the charged offense").

Other Circuits, in the context of the mail fraud statute, have found evidence occurring outside of the statute of limitations period to be admissible if the evidence provides proof of the scheme, the defendant's intent, motive, or the lack of inadvertent action. See United States v. Blosser, 440 F.2d 697, 699 (10th Cir. 1971) ("Such evidence bore on the existence of the scheme to defraud, the falsity of representations made, and intent"); see also United States v. Garvin, 565 F.2d 519, 523 (8th Cir. 1977) (evidence of events extending beyond the statute of limitations is admissible to show motive, intent, a continuing scheme, and lack of inadvertent action).

As this Court has noted, regardless of whether Motz's securities fraud scheme is to be considered a "continuing offense" for statute of limitations purposes, the cherry-picking scheme constituted a continuing course of criminal activity. See Memorandum of Decision and Order, page 12. Accordingly, all evidence relating to Motz's perpetration of the scheme from its initiation is relevant and admissible. "[E]vidence of uncharged conduct is appropriately treated as 'part of the very act charged,' or, at least, proof of that act." United States v. Vilar, No. 05 Cr. 621 (RJS), 2008 WL 4178117 at *2 (S.D.N.Y. September 5, 2008) (quoting United States v. Quinones 511 F.3d 289, 309 (2d Cir. 2007); see also United States v. Scop, 846 F.2d 135 (2d Cir. 1988) ("While it is true that the great majority of criminal acts [relating to the securities fraud scheme] occurred prior to the limitations date..., the evidence of continued stock purchases and sales at prices affected (or so the jury might find) by the earlier artificial trades, or of the mailings of stock certificates, and of the reassurances to customers after this date was sufficient to permit a rational jury to conclude that the conspiracy and substantive scheme to defraud continued").

Among other things, the jury will have to decide whether the Government has proven that the defendants engaged in a scheme to defraud. The evidence of trade allocations prior to August 27, 2003 is thus admissible proof of the requisite 18 U.S.C. § 1348 element of a "scheme or artifice to defraud." Any issue relating to the statute of limitations can be resolved with

an instruction that the jury must find that the defendants' scheme to defraud continued after August 27, 2003.

Evidence Of Trading Activity That Took Place Prior to August 27, 2003 Is Also Admissible To Show Motive, Knowledge, Intent, And Absence Of Mistake

In the alternative, the Government submits that evidence of the pre-August 27, 2003 trades is not only admissible for the reasons set forth above, but is also admissible pursuant to Fed. R. Evid. 404(b) to show motive and to show that the defendants committed the charged crime intentionally and not as a result of accident or mistake. See e.g., United States v. Smith, 727 F.2d 214, 219-20 (2d Cir. 1984) (affirming admission of similar acts of securities fraud to show defendant's knowledge of, and intent to engage in, "free-riding" securities scheme"); United States v. Lauersen, No. S2 98 Cr. 1134 (WHP), 2000 WL 1677931 at *3 (S.D.N.Y. November 8, 2000) (evidence of false diagnoses attributed by defendant to patients not undergoing fertility treatments admitted to show intent and lack of mistake when making identical false representations attributable to patients undergoing fertility treatments).

The Second Circuit has "adopted the inclusionary or positive approach to the Rule." United States v. Levy, 731 F.2d 997, 1002 (2d Cir. 1984); see also United States v. DeVillio, 983 F.2d 1185, 1194 (2d Cir. 1993). Consistent with this approach, "evidence of other crimes, wrongs, or acts is admissible for any purpose other than to show a defendant's criminal propensity." United States v. Brennan, 798 F.2d 581, 589 (2d Cir. 1986) (emphasis added); see also United States v. Pipola, 83 F.3d 556, 565 (2d Cir. 1996) (Second Circuit's "inclusionary interpretation of the rule allows evidence of other wrongs to be admitted so long as it is relevant and is not offered to prove criminal propensity").

For example, the Second Circuit has held that prior bad acts are admissible background evidence where used to complete the story of the crime charged. See Gonzalez, 110 F.3d at 942; United States v. Pitre, 960 F.2d 1112, 1119 (evidence of prior narcotics transactions relevant background information to explain relationship among alleged co-conspirators); United States v. Roldan-Zapata, 916 F.2d 795, 804 (2d Cir. 1990) ("The pre-existing drug-trafficking relationship between [the co-conspirators] furthered the jury's understanding of how the instant transaction came about and their role in it."); Brennan, 798 F.2d at 589 (prior-act evidence admitted since it "show[ed] to the jury how [racketeers'] illegal relationship developed,"

"inform[ed] the jury of the background of the charged conspirac[ies,]" and "show[ed] the basis for [each] defendant's trust of the others"). Such evidence is also admissible if it tends to rebut a defense of good faith. See Carboni, 204 F.3d at 44.

The Second Circuit has set forth three requirements for the proper admission of evidence of "other crimes" under Rule 404(b). First, the trial court must determine that the evidence is offered for a purpose other than to prove the defendant's bad character or criminal propensity. See United States v. Mickens, 926 F.2d 1323, 1328 (2d Cir. 1989). Second, the trial court must make a determination that the evidence is relevant under Rules 401 and 402 and that it is more probative than it is unfairly prejudicial under Rule 403. See United States v. Thomas, 54 F.3d 73, 81 (2d Cir. 1995); Mickens, 926 F.2d at 1328; United States v. Ortiz, 857 F.2d 900, 903 (2d Cir. 1988); Levy, 731 F.2d at 1002; United States v. Mohel, 604 F.2d 748 (2d Cir. 1979). Third, the court must provide an appropriate limiting instruction to the jury, if one is requested. See Thomas, 54 F.3d at 81; Mickens, 926 F.2d at 1328-29; Levy, 731 F.2d at 1002. The district court has broad discretion regarding the admissibility of similar act evidence and such rulings are reversed only for a clear abuse of discretion. See United States v. Pipola, 83 F.3d at 566; United States v. Sappe, 898 F.2d 878, 880 (2d Cir. 1990). To find such an abuse, an appellate court must be persuaded that the trial judge ruled in an arbitrary and irrational fashion. See Pipola, 83 F.3d at 566; Pitre, 960 F.2d at 1119.

In this case, the evidence of trade allocations to favored accounts prior to August 27, 2003 proves that the defendant had the requisite intent to defraud. Moreover, because the Government intends to prove that Motz's motives to cherry-pick--that is, to impress potential clients with his trading abilities and to report to the NASD sufficient capital--developed long before August 27, 2003, the evidence of favorable proprietary account trade allocations before that date is necessary to demonstrate the defendant's motives for the scheme. Therefore, in addition to being direct evidence of the scheme, the trades prior to August 27, 2003 are properly admissible under Rule 404(b).

Evidence Of Motz's Document Alteration Is Admissible For The Same Reasons

The Government intends to prove that when confronted in late 2003 with the possibility that the scheme would be revealed to NASD and SEC auditors, defendant Motz began altering trading

tickets to conceal the fraudulent allocations. He continued altering tickets at least until September 2003, after which he almost exclusively allocated winning day trades to the Mezzacappa Fund until the end of the charged scheme in June 2005. These document alterations enabled Motz to continue perpetrating the cherry-picking scheme because his fraudulent trading practices were less likely to be uncovered by the NASD and SEC auditors. Thus, evidence of Motz's alteration of the trade tickets is admissible as part of the scheme and therefore is inextricably interwoven with the charged crime. It is also admissible pursuant to Rule 404(b) because the document alterations tend to prove that Motz knew what he was doing was wrong, and tend to prove the requisite fraudulent intent. Furthermore, evidence of Motz himself altering the tickets, or evidence of Motz directing the alteration of tickets, tends to prove his identity as the perpetrator of the cherry-picking fraud. For these reasons, the evidence of document alteration during the course of the scheme, including prior to August 27, 2003, is admissible.

The Proffered Evidence Is Not Unduly Prejudicial

The strong probative value of this evidence is not substantially outweighed by any of the dangers identified in Rule 403. Evidence is unfairly prejudicial "only when it tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue that justified its admission into evidence." United States v. Figueroa, 618 F.2d 934, 943 (2d Cir. 1980). Other crimes evidence is not unfairly prejudicial where it is not "any more sensational or disturbing than the crimes" with which the defendant has been charged. Roldan-Zapata, 916 F.2d at 804; see also United States v. Smith, 727 F.2d 214, 220 (2d Cir. 1984) (essential inquiry under Rule 403 for admission of other crimes evidence is whether it involves "conduct likely to arouse irrational passions").

As discussed above, the probative value of the proffered evidence is substantial. The defense, however, cannot claim prejudice based on the substantial probative value of this evidence. Indeed, "evidence is prejudicial only when it tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue that justified its admission into evidence." United States v. Gilliam, 994 F.2d 97, 100 (2d Cir. 1993). The proffered evidence, by definition, because it is part of the cherry-picking scheme, is no more sensational than the charged conduct. Moreover, insofar as the proffered evidence is admissible under Rule 404(b), any potential danger of the jury using the evidence as propensity evidence will be dispelled by an instruction from the Court regarding the limited purpose for

which the evidence is being offered. See United States v. Ramirez, 894 F.2d 565, 570 (2d Cir. 1990).

CONCLUSION

For the reasons stated above, the evidence described herein should be admissible at trial.

Very Truly Yours,
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