

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

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
THE UNITED STATES OF AMERICA, :

-against- :

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

Defendants. :
-----X

**REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT MOTZ'S
MOTION FOR DISCOVERY AND A BILL OF PARTICULARS**

GAGE SPENCER & FLEMING LLP
410 Park Avenue
New York, New York 10022

*Attorneys for Defendant
George M. Motz*

Of Counsel: G. Robert Gage, Jr.
Laura-Michelle Rizzo

TABLE OF CONTENTS

Argument.....1

A. Bill of Particulars Issues.....2

 1. Request for Identification of the Trades at Issue.....2

 2. Request for the Identification of Victims.....2

 3. Request for the Location and Timing of the Trades at Issue.....3

 4. Request for the Particulars of the Alleged Alterations.....3

B. The Government’s Failure to Produce an Index for the 1.8 Million Pages of Document Production in this Matter.....4

C. The Government Has Failed to Comply with the Court’s Order Relating to Rule 16 Discovery.....5

D. *Brady, Giglio*, and Jencks Act Materials and a Witness List.....5

E. Discovery of Contacts Between the U.S. Attorney’s Office and the SEC is Appropriate.....6

Conclusion.....9

TABLE OF AUTHORITIES

Cases

Dowd v. Calabrese,
101 F.R.D. 427, 430 (D.D.C. 1984).....8

Enron Corp. v. Borget,
No. 88 Civ. 2828 (DNE), 1990 WL 144879 (S.D.N.Y. Sept. 22, 1990).....9

Leka v. Portuondo,
257 F.3d 89 (2d Cir. 2002).....5

Grand Central Partnership, Inc. v. Cuomo,
166 F.3d 473 (2d Cir. 1999).....7

SEC v. Collins & Aikman Corp.,
No. 07 Civ. 2419 (SAS), 2009 WL 94311 (S.D.N.Y. Jan. 13, 2009).....4, 7, 9

United States v. American Telephone and Telegraph Co.,
524 F. Supp. 1381 (D.D.C. 1981).....8

United States v. Coppa,
267 F.3d 132 (2d Cir. 2001).....6

United States v. Gil,
297 F.3d 93 (2d Cir. 2002).....5

United States v. Kordel,
397 U.S. 1 (1970).....7

United States v. Savin,
No. 00 CR 45 (RWS), 2001 WL 243533 (S.D.N.Y. March 7, 2001).....6

United States v. Scrushy,
366 F. Supp. 2d 1134 (N.D. Ala. 2005).....7

United States v. Sabhnani,
No. 07 Cr. 429 (ADS), 2007 WL 2908105 (E.D.N.Y. Oct. 5, 2007).....5

United States v. Tweel,
550 F.2d 297 (5th Cir.1977).....8

Statutes

Fed. R. Crim. P. 16(a)(1)(E).....1, 6

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X	:	
UNITED STATES OF AMERICA,	:	<u>MEMORANDUM OF LAW</u>
	:	
-against-	:	
	:	CR-NO-08-598(S-1)(ADS)
GEORGE M. MOTZ and	:	
MELHADO, FLYNN & ASSOCIATES, INC.,	:	
	:	
Defendants.	:	
-----X		

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF
DEFENDANT GEORGE M. MOTZ'S
MOTION FOR DISCOVERY AND FOR A BILL OF PARTICULARS**

Defendant George M. Motz respectfully submits this memorandum of law in further support of his motion for an order requiring the government to: (1) furnish a bill of particulars; (2) comply with Fed. R. Crim. P. 16(a)(1)(E); (3) provide an index for the 1.8 million pages produced by the government; (4) promptly produce all Brady, Giglio, and Jencks Act materials; (5) produce a witness list; and (6) disclose contacts between representatives of the United States Securities and Exchange Commission (the "SEC") and the United States Attorney's Office for the Eastern District of New York (the "U.S. Attorney's Office"). For the reasons which follow, Mr. Motz's motion should be granted in all respects.

Argument

Mr. Motz's motion seeks discovery essential to his motion practice and preparation for trial. Although specific issues are addressed herein, Mr. Motz's position remains that the government should be required to respond in full to his demand for a bill of particulars and other discovery requests.

A. Bill of Particulars Issues

1. Request for Identification of the Trades at Issue

Initially, the government refused to provide Mr. Motz with a bill of particulars and forced him to go through motion practice. Now, the government has agreed to produce the trades alleged to have been part of the purported “cherry-picking” scheme. (Gov. Mem. 12.) However, the government has not yet provided that list, nor has it indicated when that list might be forthcoming. (Id.) This list, proffered over five months after Mr. Motz’s demand for bill of particulars, should be produced immediately by the government. The government should also be required to identify any other acts or transactions, other than these trades, that it alleges were part of the alleged scheme. (See Motz’s First Demand for a Bill of Particulars, ¶ 1 at Ex. B of Def. Mem.) The government should further be required to identify any other persons the government claims participated in this scheme as sought in Mr. Motz’s demand for a bill of particulars. (Id. at ¶ 2.)

2. Request for the Identification of Victims

In response to requests for the identification of which clients were disfavored by the alleged misallocations at issue, the government states in a general fashion that every one of the more than 180 clients who did not receive favorable trades are, by virtue of that fact, victims. (Gov. Mem. 12.) This is not an adequate response. For instance, it is possible that not all clients of the firm would have or could have been allocated the trades at issue. Those day trades might not have been appropriate for some clients in view of the levels of their capital gains/losses at that time. They might have been contrary to others’ particular investment profile. Still others might not have had the

cash levels to afford such investments. These are just a few of many possible considerations. Accordingly, it is necessary to know which particular clients the government alleges were victimized by which particular trades in the purported allocation scheme. (See Motz's First Demand for a Bill of Particulars, ¶ 10 at Ex. B of Def. Mem.)

3. Request for the Location and Timing of the Trades at Issue

In its response, the government once again refuses to identify which of the allegedly improper trades it claims were executed in this District. (Gov. Mem. 13 – 14.) Rather than identify the location of the trades at issue, the government relies upon the general allegation that Mr. Motz worked in Suffolk County on Fridays and communicated with his office in Manhattan. (Gov. Mem. 14.) Moreover, contrary to the government's assertion in its response, Mr. Motz certainly does not admit that the government's general response is adequate. (Id.) Rather, as set forth in Mr. Motz's moving papers, the government's production of an unexplained "sampling" of documents fails to satisfy Mr. Motz's demand to identify the location of each of the allegedly improper trades. (Def. Mem 13.) Similarly, the government does not respond with any specificity about the timing of the allegedly improper trades, including when during the day the trades were executed and when they were allegedly improperly allocated. (Gov. Mem. 13.)

4. Request for Particulars of the Alleged Alterations

With regard to the document alteration count, the government has failed to identify the location where the alleged alteration(s) occurred. (Gov. Mem. 14 – 15.) The government should be required to produce this information because, as set forth in the moving papers, it forms the basis for a dispositive motion for lack of venue.

Additionally, the Indictment and the government's brief are vague at best about when the alleged alteration(s) occurred. (Indictment, ¶ 13 at Ex. A of Def. Mem.; Gov. Mem. 5 – 6.) The government should be required to provide these particulars because, they too, could form the basis for dispositive motion practice.

B. The Government's Failure to Produce an Index for Its 1.8 Million Pages of Document Production in this Matter

The government previously advised Mr. Motz's counsel that it would produce an index from the SEC for electronic documents on a Concordance database and hard copy documents produced by Melhado Flynn & Associates, Inc. ("Melhado Flynn"). (Def. Mem. 3.) On March 11, 2009, the government produced Melhado Flynn's index of its production in the SEC matter to Mr. Motz. This index is not sufficient to search the Concordance database, however, because the files on the database are organized by SEC Enforcement Bates numbers which do not correspond to the Melhado Flynn index. To avoid undue hardship upon Mr. Motz, we request that the government comply with its representation and produce an index that will reasonably assist Mr. Motz in the review of the 1.8 million pages of document production. See SEC v. Collins & Aikman Corp., No. 07 Civ. 2419 (SAS), 2009 WL 94311, at *5 – 8 (S.D.N.Y. Jan. 13, 2009) (finding that the "significant expense and delay" associated with searching a database of 1.7 million documents was an "undue hardship" by any definition" upon an individual defendant and ordering the SEC to organize its production into documents responsive to each of the defendant's requests).

C. The Government Has Failed to Fully Comply with the Court's Order Relating to Rule 16 Discovery

In a letter dated March 11, 2009 and received in the evening after Mr. Motz filed his moving papers, the government provided what it characterized as a "preliminary list" of documents that the government may introduce at trial and stated that it "intends to supplement this list in the near future." (Gov. Mem. 15.) We request that the government provide any supplement promptly. Likewise, although the government states that it is "still researching" the issue of identifying any documents that were obtained from or belonged to Mr. Motz (Gov. Mem. 15 – 16), we ask that the government come into compliance with the Court's Order promptly.

D. Brady, Giglio, and Jencks Act Materials and a Witness List

The government has failed to respond to Mr. Motz's request for Brady, Giglio, and Jencks Act material with anything other than the usual rote response that it "intends to comply with the Jencks Act and all other legal disclosure requirements" without any indication of when. (Gov. Mem. 16 – 17.) In this Circuit, the rule is that Brady and Giglio material "must be disclosed in time for its effective use at trial." United States v. Gil, 297 F.3d 93, 105 (2d Cir. 2002), United States v. Sabhnani, No. 07 Cr. 429 (ADS), 2007 WL 2908105, at *1 (E.D.N.Y. Oct. 5, 2007). See also Leka v. Portuondo, 257 F.3d 89, 98-101 (2d Cir. 2001) (reversing conviction of criminal defendant based upon late disclosure of Brady material.) Given the complexity of the issues in this case, early disclosure is essential to allow for the effective use of these materials, including adequate time to pursue investigative leads and prepare examinations. Moreover, the U.S. Attorney's Office itself has long had the policy of turning over all Jencks Act material voluntarily and in advance of trial. The Second

Circuit recognizes early production of Jencks Act material by the government to be a “salutary practice.” United States v. Coppa, 267 F.3d 132, 146, n.12 (2d Cir. 2001). In a case of this complexity, Jencks Act -- and Brady and Giglio -- material should be turned over now.

Finally, contrary to the government’s argument in response to defendant’s request for a witness list, Mr. Motz does not make a “general assertion” that a witness list would assist him in his trial preparation. (Gov. Mem. 17 – 18.) Rather, as set forth in Mr. Motz’s moving brief, a witness list is essential here where “the Indictment reflects over four years of investigation,” “alleges crimes spanning six years,” and involves an “enormous volume of 1.8 million pages of documents produced in the case.” (Def. Mem. 20 - 21.) Moreover, despite its tepid reference to alleged document alteration (Gov. Mem. 18), the government has not and cannot seriously contend that Mr. Motz poses a threat of witness intimidation or injury. See United States v. Savin, No. 00 Cr. 45 (RWS), 2001 WL 243533, at *7 - 8 (S.D.N.Y. March 7, 2001). Accordingly, Mr. Motz requests the immediate production of the government’s witness list.

E. Discovery of Contacts Between the U.S. Attorney’s Office and the SEC Is Appropriate

Mr. Motz seeks disclosure of communications between the U.S. Attorney’s Office and the SEC -- communications that obviously occurred and apparently resulted in turning a garden variety SEC investigation, the facts of which were known virtually from the beginning, into a criminal indictment four years later. (Def. Mem. 21 – 22.) First, Mr. Motz seeks discovery of these communications to the extent that they contain Brady, Giglio, Jencks Act or other information that may be material to the preparation of the defense pursuant to Rule 16(a)(1)(E)(i) of the Federal Rules of

Criminal Procedure. Also, material which is purely factual is not protected by the deliberative process doctrine and should be produced. Collins & Aikman Corp., 2009 WL 94311, at *10 (stating that the deliberative process privilege “does not extend to purely factual material”). See Grand Central Partnership, Inc. v. Cuomo, 166 F.3d 473, 482 (2d Cir. 1999) (noting that segregable factual portions of inter and intra-government memoranda, which also contained protected deliberations, could be subject to compelled disclosure).

Secondly, there are specific facts in this case about the way the SEC conducted an investigation for almost four years -- with no hint of a criminal referral -- and then suddenly and inexplicably referred it for criminal prosecution that raise the very real possibility of improper conduct by the government. For years, Mr. Motz was lulled into the belief that this case would be brought, if at all, as a civil administrative case only to discover after four years that it was a criminal case. The inference of improper coordination between the U.S. Attorney's Office and the SEC is also supported by the fact that, to our knowledge, there was no identification of new facts which would prompt a criminal referral for at least 18 months prior to notice of a criminal investigation.

Improper coordination between governmental agencies would violate a defendant's due process rights. United States v. Kordel, 397 U.S. 1, 11 (1970) (stating that parallel criminal and civil investigations conducted by the government in bad faith would violate a defendant's due process rights and suggesting that the government may act in bad faith if it brings a civil action solely for the purpose of gathering information for a criminal prosecution and does not advise the defendant of the planned use for a criminal prosecution); United States v. Scrushy, 366 F. Supp. 2d 1134, 1139-40 (N.D.

Ala. 2005) (stating that “[w]hen a defendant does not know about the criminal investigation, the danger of prejudice increases. Failing to advise Mr. Scrushy or his attorneys about the criminal investigation of which he was a target . . . cannot be said to be in keeping with the proper administration of justice. Our justice system cannot function properly in the face of such cloak and dagger activities by those charged with upholding the integrity of the justice system.”) Accordingly, Mr. Motz is entitled to discover whether there has been improper coordination or contact between the SEC and the U.S. Attorney’s Office. See Dowd v. Calabrese, 101 F.R.D. 427, 430-432 (D.D.C. 1984) (granting defendants’ pre-trial request for discovery of intra-agency documents and holding that “the deliberative process privilege is not absolute...the particular documents which embody the views of the plaintiffs as to why and how [defendant] should be prosecuted represent a concrete and particularized basis for disclosure which far outweighs the government’s generalized interest in the confidentiality of its deliberations”); see also United States v. American Telephone and Telegraph Co., 524 F. Supp. 1381, 1389 (D.D.C. 1981).

We respectfully submit that the government should be ordered to produce these materials and that, if appropriate, the Court hold a hearing to address the government’s conduct. See United States v. Tweel, 550 F.2d 297, 298-300 (5th Cir.1977) (finding that the IRS, by failing to disclose that an audit was not a routine civil audit but in fact had been conducted at the request of the Organized Crime and Racketeering Section of the Department of Justice was a “flagrant disregard” for the defendant’s rights and remanding the case back to the District Court for a hearing to determine what evidence was tainted as a result of the government’s violation of the

defendant's rights). Alternatively, we request that the Court conduct an *in camera* review. See Collins & Aikman Corp., 2009 WL 94311, at *10 (ordering the government to submit withheld documents for *in camera* review); Enron Corp. v. Borget, No. 88 Civ. 2828 (DNE), 1990 WL 144879, at *1 (S.D.N.Y. Sept. 22, 1990) (*in camera* review of government documents pertaining to SEC and Justice Department investigation conducted by the court.)

Conclusion

For the foregoing reasons, George M. Motz respectfully requests that the instant motion should be granted in its entirety.

Dated: New York, New York
April 10, 2009

GAGE SPENCER & FLEMING LLP

By: G. Robert Gage, Jr. / LMR
G. Robert Gage, Jr. (GG-3951)
Laura-Michelle Rizzo (LR-7799)

410 Park Avenue
New York, New York 10022
Tel.: (212) 768-4900
Fax: (212) 768-3629

*Attorneys for Defendant
George M. Motz*