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
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	Burglary	CRIM220
	Robbery	CRIM240
	Illegal Possession of Guns/Firearms	CRIM260
	Miscellaneous	CRIM300

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September 9, 2009

Via ECF Filing & Courtesy Copy via Mail

The Honorable Arthur D. Spatt
United States District Judge
Eastern District of New York
United States Courthouse
1020 Federal Plaza
P.O. Box 9014
Central Islip, New York 11722-9014

Re: *United States v. George M. Motz, et al.*, 08 Cr. 598 (S-1) (ADS)

Dear Judge Spatt:

Defendant George M. Motz respectfully submits this letter in opposition to the government's August 7, 2009 motion in limine submitted in response to the Court's decision on August 14, 2009 (the "August 14 Decision"). In its motion, the government argues that 200 time-barred trades and evidence of purported document alteration should be admitted because they are "inextricably intertwined" with the alleged conduct that remains. In the alternative, the government argues that this conduct is "other crimes" evidence necessary to prove motive, intent and lack of mistake under Federal Rule of Evidence 404(b). This evidence will result in severe, unfair prejudice to Mr. Motz and should not be admitted for the reasons set forth below.

I. STATEMENT OF FACTS

The government has twice sought and obtained an indictment which expressly identifies two separate schemes -- a so-called "Proprietary Trading Scheme" that ran from November 2000 to September 2003 (Indictment, ¶¶ 9-12), and a so-called "Third Millennium Fund and Investment Fund #1 Scheme" that ran from June 2003 to May 2005 (id. ¶¶ 17-22) -- and charged Mr. Motz with securities fraud pursuant to 18 U.S.C. § 1348. Mr. Motz has also been charged with one count of document alteration only in connection with the "Proprietary Trading Scheme." (Id. ¶¶ 13-16.) On November 19, 2008, the government added Melhado, Flynn & Associates Inc. as a

defendant to the securities fraud count in the superseding indictment (hereinafter the "Indictment").

On July 3, 2009, defendants moved to dismiss or transfer the case. The Court decided the motion on August 14, 2009. The Court held that "the Government may only prosecute Motz for allegedly fraudulent trades that occurred within the five years preceding the August 27, 2008 indictment." United States v. Motz, No. 08-CR-598 (ADS), 2009 WL 2586132, at *6 (E.D.N.Y. Aug. 14, 2009). The Court also dismissed the document alteration count "because venue is lacking in the Eastern District of New York." Id., at *8.

As a result of the Court's decision, 200 out of 204 trades alleged to have been part of the "Proprietary Trading Scheme" are dismissed as beyond the statute of limitations because they occurred before August 27, 2003. Of the remaining four trades, one trade lost money for the MFA proprietary account according to the list of trades provided by the government. Another trade appears to have been erroneously included in the "Proprietary Trading Scheme" by the government since it was executed on August 31, 2004 – one year after the government alleges that that Scheme ended. (See Indictment, ¶¶ 9, 17.) As for the remaining two trades, there is no evidence of venue in this District for those trades, among other evidentiary flaws.

With regard to the alleged "Third Millennium Fund and Investment Fund #1 Scheme," the government has not yet identified the 50 trades that comprise the Scheme. The government's list of trades includes hundreds of "Hedge Fund Trades," many of which occurred before August 27, 2003. Thus, certain of the 50 trades alleged as part of the "Third Millennium Fund and Investment Fund #1 Scheme" may also be dismissed as time-barred once the government identifies the trades at issue.

II. ARGUMENT

A. TIME-BARRED TRADES ARE NOT ADMISSIBLE AS DIRECT EVIDENCE

The excluded, time-barred trades are not admissible as direct evidence of a single scheme because, among other things, they did not arise out of the same transaction or series of transactions as the charged offenses, and they are not "inextricably intertwined" with evidence regarding the charged offenses. United States v. Kassir, No. 04-CR-356 (JFK), 2009 WL 976821, at *2 (S.D.N.Y. Apr. 9, 2009); United States v. Nektalov, 325 F. Supp. 2d 367, 370 (S.D.N.Y. 2004).

Contrary to the government's argument that the time-barred trades are admissible because they are part of a single scheme, each trade is a single and separate offense. See Motz, 2009 WL 2486132, at *6 ("each time Motz executed an allegedly fraudulent trade, the requisite elements of securities fraud were satisfied. . . .") Therefore, the 200 trades from the alleged "Proprietary Trading Scheme" and any trades that were executed as part of the "The Third Millennium Fund and Investment Fund #1 Scheme" prior to August 27, 2003 are discrete, completed transactions. See United

States v. Newton, No. 01-CR-635 (CSH), 2002 WL 230964, at * 2-3 (S.D.N.Y. Feb. 14, 2002) (in a visa fraud case the government sought to introduce evidence of prior false visa referrals, and the Court distinguished the holdings in Carboni and Gonzalez – both cited by the government here – and stated that it cannot "be said that the uncharged and charged crimes arose out of the same transaction or series of transactions. While the activity was similar, these were separate visa referrals made with respect to different individuals at different times.")

For this same reason, the time-barred trades that have been dismissed are not "inextricably intertwined" with the remaining charged trades. See Nektalov, 325 F. Supp. 2d at 370 ("the Court is hesitant to find that the 1998 - 2001 transactions are 'intrinsic' or direct evidence of the charged conspiracy. While they are certainly relevant to show the background of the charged conspiracy, they do not appear to be 'inexorably intertwined' . . . ."); United States v. Stein, 521 F. Supp. 2d 266, 271 (S.D.N.Y. 2007) (uncharged tax shelters not "'inextricably intertwined'" as evidence of charged tax shelter). A fortiori, where as here no conspiracy has been charged, the time-barred trades should not be admitted.[1]

It is telling that most cases cited by the government in support of its proposition that dismissed trades should be admitted as direct evidence are conspiracy or enterprise crimes, crimes which by their nature are ongoing and continuous. See, e.g., United States v. Baez, 349 F.3d 90, 93 (2d Cir. 2003) ("it is well settled that in prosecutions for racketeering offenses, the government may introduce evidence of uncharged offenses to establish the existence of the criminal enterprise.... such evidence may be admitted to prove the existence and nature of the enterprise and the conspiracy") (emphasis added) (internal quotations and citations omitted) (emphasis added); United States v. Avendano, No. 02-CR-1059 (LTS), 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 to be "highly probative intrinsic evidence of Defendant's involvement in the conspiracy charged") (emphasis added). These cases are inapplicable here since the government has not charged a conspiracy or an enterprise crime.

B. THE PROPOSED EVIDENCE IS UNFAIRLY PREJUDICIAL AND NOT PROPERLY ADMITTED UNDER FED. R. EVID. 404(b)

Alternatively, the government argues that the proposed evidence of time-barred trades and alleged document alteration is admissible pursuant to Fed. R. Evid. 404(b). Prior bad acts can be admitted under Rule 404(b), which requires (1) use of evidence for a proper purpose (that is, other than as character or propensity evidence); (2) relevance, (3) that the evidence not be substantially more unfairly prejudicial than probative pursuant to Rule 403, and (4) that the court give a limiting instruction, if requested, such that the jury will only consider the evidence for the proper purpose rather than as character or propensity evidence. United States v. Gilan, 967 F.2d 776, 782 (2d Cir. 1992); United States v. Miller, 2009 W: 2460723, at * 3 (E.D.N.Y. Aug. 10, 2009).

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[1] Even if the Indictment contained a conspiracy count, these trades should still be excluded given the severe, unfair prejudice that would arise from their admission.

The proposed evidence does not meet the standard of heightened scrutiny required for the admission of evidence under Fed. R. Evid. 404(b).

(i) The time-barred trades.

Multiple, independent grounds support that evidence of the time-barred trades should not be admitted. First, when properly considered as separate, same-day transactions, the time-barred trades are of dubious relevance and their admission would cause unfair prejudice that substantially outweighs any possible probative value regarding the remaining transactions. The introduction of this evidence would also unnecessarily complicate and prolong this trial and could mislead the jury as to the criminal activity actually charged. See United States v. Stein, 521 F. Supp. 2d 266, 272 -273 (S.D.N.Y. 2007) (denying the government's motion in limine to admit evidence of defendants' other alleged bad acts); United States v. Gardell, No. 00-CR-632 (WHP), 2001 WL 1135948, at *6 (S.D.N.Y. 2001), citing Fed. R. Evid. 403; United States v. Malpeso, 115 F.3d 155, 163 (2d Cir. 1997).

Second, notwithstanding the government's attempt to now argue that it has alleged a single securities fraud scheme running from 2000 to 2005, the Indictment alleges two separate schemes: the "Proprietary Trading Scheme" running from November 2000 to September 2003 and the "Third Millennium Fund and Investment Fund #1 Scheme" running from June 2003 to May 2005. (Indictment, ¶¶ 9-12, 17-22.) Based upon the plain language of its Indictment, the government should be estopped from now arguing that it has alleged a single scheme.

As set forth above, the Indictment establishes that each alleged scheme had different objectives and involved different securities allocated to different clients who had different holding periods, risk tolerance, and investment objectives. (Compare ¶¶ 9 and 20-22.) In fact, the government alleges that accounts disfavored in the first scheme, the hedge fund accounts, become favored accounts in the second scheme. (Id.) The MFA proprietary account was also traded differently from the hedge fund accounts. (Id.) Evidence, therefore, of one purported scheme should not be presented as proof of a separate alleged scheme. To do so would result in substantial unfair prejudice to Mr. Motz. See United States v. Mermelstein, 487 F. Supp. 2d 242, 263 (E.D.N.Y. 2007) (evidence of defendant's falsification of one patient's records to avoid malpractice or professional misconduct charges was not relevant to prove that he altered other patient's records to obtain fraudulent payments from health insurers).

Third, admitting the time-barred trades would be highly prejudicial to Mr. Motz because of the government's mischaracterization of the trades in the MFA proprietary account as wrongful acts. A more complete record will show that the government's analysis fails to account for commissions that the firm would have to charge to clients and tax consequences that would affect individual clients, thus turning what might have been profitable trades into losses for the clients. It further does not take into account portfolio disruption (including churning) that would have resulted from day-trading in individual client accounts as the government suggests defendants should have done, the balance of investment sectors in the portfolio, the clients' available capital, and

clients' instructions regarding risk tolerance. We respectfully submit that a more complete record, including a review of proposed expert submissions, should be developed and is critical to the evidentiary ruling requested by the government. We also request the opportunity to address this issue further at the conference on September 11, 2009.

(ii) The proposed evidence of purported document alteration.

Proposed evidence of purported document alteration from a dismissed count should not be admissible to prove the remaining securities charge. If such evidence were admitted, it would be inflammatory and highly prejudicial to Mr. Motz.

It is well established in the Second Circuit that evidence should be excluded when it is "more inflammatory than the charged crime." See United States v. Livoti, 196 F.3d 322, 326 (2d Cir. 1999). See also United States v. Mercado, 573 F. 3d 138, 145 (2d Cir. 2009) (stating "[t]he district court was correct in concluding that evidence which is more inflammatory than the conduct charged in the indictment would likely be unfairly prejudicial"); United States v. Midyett, 603 F. Supp. 2d 450, 456 (E.D.N.Y. 2009) (deeming evidence of a prior assault of a police officer more "inflammatory, sensational and/or disturbing to the jury than the charged offenses of drug possession and distribution" therefore holding it was inadmissible as evidence); United States v. Nachamie, 101 F.Supp.2d 134, 145 (S.D.N.Y. 2000) (holding that arson is more sensational and disturbing than medicare fraud and therefore inadmissible as background evidence at fraud trial). Here, allegations of document alteration are, on their face, more inflammatory than the remaining trades charged in a securities fraud count.

Any evidence of document alteration should also be excluded on a second, independent ground. Specifically, the Indictment alleges that the document alteration occurred only in connection with the alleged "Proprietary Trading Scheme" -- only four transactions of which remain. There is no allegation of document alteration in connection with the later "Third Millennium Fund and Investment Fund #1 Scheme." Mr. Motz's intent to allegedly engage in the "Proprietary Trading Scheme" and then supposedly conceal it by altering trade tickets cannot be simply imputed to the wholly separate "Third Millennium Fund and Investment Fund #1 Scheme" that came later.

C. A LIMITING INSTRUCTION WOULD BE INSUFFICIENT

Finally, a limiting instruction would not protect Mr. Motz from the overwhelming prejudice that will result in admitting the excluded trades and evidence of document alteration. "Curative instructions are not fool-proof." Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris Inc., 138 F. Supp. 2d 357, 370 (E.D.N.Y. 2001) "There are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." Richardson v. Marsh, 481 U.S. 200, 207 (1987), quoting Bruton v. United States, 391 U.S. 123, 135-136 (1968). When risk of prejudice is overwhelming and the probative value relatively

small, a limiting instruction provides insufficient protection. United States v. Nachamie, 101 F.Supp.2d 134, 146 (S.D.N.Y. 2000).

In essence, the government's motion asks the Court to conduct a trial of time-barred trades. As discussed above, only four out of 204 allegedly fraudulent trades remain from the "Proprietary Trading Scheme." No jury instruction would be able to cure the dramatic prejudice that would occur if the 200 trades that occurred beyond the statute of limitations are admitted into evidence to prove three (possibly four) trades that were part of the alleged "Proprietary Trading Scheme" and the trades that are alleged to have been executed as part of the "Third Millennium Fund and Investment Fund #1 Scheme."

Similarly, there is no limiting instruction that would eradicate the substantial unfair prejudice that would result from allowing the government to introduce evidence of alleged document alteration in connection with an alleged securities fraud.

III. CONCLUSION

For the reasons set forth herein, the Court should deny the government's motion in limine for a ruling that evidence of trades that took place prior to August 27, 2003 and purported document alteration will be admissible at trial.

Respectfully submitted,

G. Robert Gage, Jr.

cc: AUSA Roger Burlingame
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