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

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

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT GEORGE M. MOTZ'S MOTION TO DISMISS THE SUPERSEDING INDICTMENT OR, IN THE ALTERNATIVE, TO TRANSFER FOR THE CONVENIENCE OF PARTIES AND WITNESSES AND IN THE INTEREST OF JUSTICE

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Defendant George M. Motz respectfully submits this reply memorandum of law in further support of his motion to dismiss the Superseding Indictment or, in the alternative, to transfer this case to the Southern District of New York for the convenience of parties and witnesses and in the interest of justice. For the reasons which follow, Mr. Motz's motion should be granted in all respects.

Introduction

In its opposition memorandum, the government does not dispute that the essential conduct constituting the fraud charges in the Indictment occurred in the Southern District of New York. It is uncontraverted that all trades at issue in this case occurred, and were placed into accounts, at the offices Melhado Flynn & Associates ("Melhado Flynn") in Manhattan. The government nevertheless argues, without specifics, that Mr. Motz "transmitted" multiple trades and allocations from Quogue, New York. This shortcoming is particularly notable because the government has never responded to the Court's order to specify "the location from which each of the alleged fraudulent trades were made." For the reasons set forth in our moving brief and herein, Count One fails to plead that the essential conduct took place in this district and should therefore be dismissed as a matter of law for lack of venue.

Alternatively, Count One should be transferred to the Southern District of New York pursuant to Fed. R. Crim. P. 21(b). With the support of sworn submissions, Mr. Motz has demonstrated that the factors to be considered upon a Rule 21(b) motion weigh heavily in favor of transfer for the convenience of the parties and witnesses and in the interest of justice. Nothing in the government's opposition memorandum disputes

that the "nerve center" of this case resides in Manhattan and that the factors to be considered in a Rule 21(b) motion weigh heavily in favor of a transfer there.

With respect to Count Two, the government has acknowledged that it has not developed sufficient evidence to prove venue in this district and, for that reason, does not oppose Mr. Motz's motion. For this reason, and for the reasons set forth in Mr. Motz's moving brief, Count Two should be dismissed.[1]

Argument

I. VENUE FOR THE SECURITIES FRAUD COUNT DOES NOT LIE IN THIS DISTRICT AS A MATTER OF LAW

With respect to Count One, while the government references the well-settled law of venue, it proceeds to ignore it. It is beyond dispute that "[v]enue is only proper where the acts constituting the offense – the crime's 'essential conduct elements' took place." United States v. Ramirez, 420 F.3d 134, 138 (2d Cir. 2005) (citing United States v. Smith, 198 F.3d 377, 384 (2d Cir. 1999)); see also Gov. Mem. 6. Even if, as the government contends, acts constituting the crime occurred in more than one district, venue is still only proper in districts where "an essential conduct element of the crime took place." Ramirez, 420 F.3d at 139 (citing United States v. Rodriguez-Moreno, 526 U.S. 275, 281 (1999) (quoting United States v. Lombardo, 241 U.S. 73, 77 (1916))); see also Def. Mem. 6. An alleged handful of telephone calls and facsimiles from the Eastern District do not amount to "essential conduct elements" of securities fraud, and certainly do not comply with the spirit or substance of the long-established Constitutional protection provided by the rules of venue. Rather, at best, that alleged conduct is

1 Melhado Flynn's and Mr. Motz's other arguments for dismissal need not be addressed if this Court dismisses the Indictment for lack of venue or transfers Count One pursuant to Rule 21(b). However, we expressly preserve all arguments related to the Indictment, including statute of limitations deficiencies and failure to charge cognizable offenses.

preparatory and cannot be the basis for establishing venue. See Ramirez, 420 F.3d at 141–42 (filing of forms in preparation of visa fraud); United States v. Beech-Nut Nutrition Corp., 871 F.2d 1181, 1189 (2d Cir. 1989) (preparatory acts of telephone calls and mailed confirmations); United States v. Bozza, 365 F.2d 206, 220 (2d Cir. 1966) (preparatory acts of making and receiving telephone calls to arrange for the receipt of stolen goods).

The government attempts to divert attention from the lack of essential conduct in this district by seeking to characterize the offense charged in Count One as continuing. This argument fails. The Second Circuit has been clear: courts should be "wary of extending the [continuing offense] label too broadly," see Ramirez, 420 F.3d at 139, and must ask "whether the criminal acts in question bear 'substantial contacts' with any given venue." Id. (quoting United States v. Saavedra, 223 F.3d 85, 93 (2d Cir. 2000) (citing United States v. Reed, 773 F.2d 477, 481 (2d Cir. 1985))). The few acts relied upon by the government to establish venue in this district do not rise to the level of "substantial contacts" within the meaning of that governing law.

Apart from grounding its venue argument upon a handful of preparatory acts, the government has never complied with the Court's Order to identify "the location from which each of the alleged fraudulent trades were made." (Rizzo Aff., Ex. E at 42:1-16.) The trades and transfers into various accounts at Melhado Flynn that form the basis of the Indictment -- i.e. the "essential conduct" of the fraud alleged -- all occurred in Manhattan.[2] (Def. Mem. 9.) For these reasons, venue has not been established as proper

2 Moreover, given the record in this case, the Indictment's mere recitation that Count One occurred "within the Eastern District of New York and elsewhere" is not sufficient to defeat a motion to dismiss. (Gov. Mem. 4–5.) Where all other allegations in an indictment point to venue in a different district, venue is not properly pled and dismissal is appropriate. United States v. Bezmalinovic, 962 F. Supp. 435, 441

in this district. Ramirez, 420 F.3d at 139 (citing Beech-Nut Nutrition Corp., 871 F.2d at 1188).

II. RULE 21(b) FACTORS WEIGH HEAVILY IN FAVOR OF TRANSFER TO THE SOUTHERN DISTRICT OF NEW YORK

In his moving brief, Mr. Motz provided ample support that the Platt factors weigh heavily in favor of a transfer to the Southern District of New York. See Platt v. Minnesota Mining & Mfg. Co., 376 U.S. 240, 243-44 (1964). Among other things, the sworn declaration of Melhado Flynn principal Robert Dohrenwend identified the "many employees who worked for Melhado Flynn during the relevant time period, including myself, continue to work in Manhattan for different entities." (Dohrenwend Decl. ¶ 3.) Furthermore, "a review . . . of the addresses of Mr. Motz's client accounts for the years 2001 to 2005" revealed that "the majority of Mr. Motz's client accounts for the years 2001 to 2005 . . . have New York City, Westchester, Bronx, upstate New York, Connecticut, or New Jersey addresses." (Rizzo Aff. ¶ 15.) Additionally, Frederick Melhado, the Chairman of Melhado Flynn who resides in Manhattan, attested that it would be "a substantial hardship" to himself and "disruptive" to other potential Melhado Flynn witnesses who live and work in Manhattan to attend a trial in Central Islip. (See Declaration of Frederick A. Melhado dated July 30, 2009 ("Melhado Decl."), ¶¶ 2, 4.)

The government has submitted no opposing affidavits, yet argues that the Platt factors do not favor one district over the other. (Gov. Mem. 11.) To the contrary, the Platt factors decidedly support transfer and demonstrate that the case would be "better

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(S.D.N.Y. 1997) (granting motion to dismiss the indictment where, despite a general allegation that defendant engaged in illegal conduct "in the Southern District of New York and elsewhere" it was clear that the requisite substantial contacts did not exist within the Southern District).

off transferred" to the Southern District. In the Matter of Balsimo, 68 F.3d 185, 187 (7th Cir. 1995) (Posner, C.J.).

First, while conceding that "many potential witnesses work in New York," the government asserts, without support, that "many also live on Long Island." (Gov. Mem. 11.) Such a general assertion should not outweigh the sworn statements submitted by two principals of Melhado Flynn which specify the hardship that a trial in Central Islip will impose on witnesses.

Second, with regard to the location of the parties, even though Melhado Flynn is now "defunct," the Chairman of Melhado Flynn, Frederick Melhado, has stated that he is likely to be the firm's "representative at the trial of this indictment and therefore present on all or many of the trial dates." Mr. Melhado, who is eighty years of age, has further stated that "it would be a substantial hardship for me to be able to travel to Central Islip for the duration of what I understand is likely to be a lengthy trial." With regard to Mr. Motz, the Indictment itself acknowledges that he works in Manhattan four business days per week.

Third, with regard to the location of events at issue, the government does not dispute that all trades were "effectuated out of Melhado Flynn's office in Manhattan," and that all client accounts and trade tickets were maintained at that office. (Def. Mem. 16.) That a handful of alleged "acts" may have occurred in the Eastern District (Gov. Mem. 11–12) does not overcome the overwhelming preponderance of facts establishing that the "nerve center" of this case is plainly Manhattan. United States v. Alter, 81 F.R.D. 524, 526 (S.D.N.Y. 1979).

Fourth, the government does not address the critical Platt factor regarding potential disruption to business. As Mr. Dohrenwend describes in his Declaration, many former Melhado Flynn employees now work for different entities whose respective businesses would all be disrupted by a trial held in Central Islip relating to a former employer. (Dohrenwend Aff. ¶ 4.) Mr. Melhado concurs that a trial in Central Islip "would be far more disruptive to the new business affiliations of [the officers and directors of Melhado Flynn] (and to me) to require them to travel to Central Islip than if their testimony was taken in Manhattan, where most of them now live and work." (Melhado Decl. ¶ 4.)

Fifth, the government also ignores another Platt factor, the location of both Melhado Flynn's and Mr. Motz's counsel in Manhattan.

Sixth, the government does not dispute that nearly all document production was produced by Melhado Flynn in Manhattan to the Manhattan offices of the SEC. (Gov. Mem. 17). This further establishes Manhattan as the "nerve center" of this case. Alter, 81 F.R.D. at 526.

In the end, the government only presents one Platt factor as favoring the the Eastern District, the "docket conditions" in the two districts. The government contends that the "extraordinarily busy" docket of the Southern District weighs against transfer. (Gov. Mem. 12.) Yet, the statistics are to the contrary. Judicial Caseload Profiles obtained from the www.uscourts.gov website indicate that Eastern District Judges were each assigned more criminal felony filings (45 filings) than their counterparts in the Southern District (36 filings) in 2008. (Compare Rizzo Reply Aff., Ex. A with Ex. B.) In short, the government is simply incorrect that there is any

imposition, much less a "severe" one, on the Southern District Judge who would receive the case.

In sum, each of these Platt factors (Gov. Mem. 9) favors transfer to the Southern District. The government has failed to identify a single "countervailing consideration[] which may militate against removal" other than the general proposition that "a criminal prosecution should be retained in the original district." (Gov. Mem. 10-11).[3] The government also offers no challenge to well-established case law in this Circuit standing for the proposition that where, as here, potential (and we submit, dispositive) venue defects have been raised, a case should be transferred to a more appropriate venue. (Def. Mem. 17-18.) For all of these reasons, in the absence of dismissal, we respectfully submit that the Court should transfer Count One to the Southern District of New York.

III. THE ALLEGED SECURITIES FRAUD IS NOT A CONTINUING OFFENSE AND CONDUCT BEYOND THE STATUTE OF LIMITATIONS MUST BE DISMISSED

In our moving brief, we established that at least 638 trades at issue occurred beyond the applicable statute of limitations. The government does not dispute this but now attempts to rescue those 638 trades by asserting that the alleged securities fraud was a "continuing offense." (Gov. Mem. 30-31.) In so doing, the government ignores the Supreme Court's clearly articulated standard for determining whether or not an offense should be deemed continuing. Specifically, the Supreme Court established

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3 The government's citation to United States v. United States Steel Corp., 233 F. Supp. 154 (S.D.N.Y. 1964), is not applicable in view of the facts of this case. In United States Steel, the Court denied a transfer motion brought by eight corporations and two individuals to transfer the case from the Southern District of New York to the Western District of Pennsylvania. The Court found that all eight of the corporations had offices in New York and that "most of the trial evidence will relate to acts and conduct of the defendants, corporate and individual, and other alleged co-conspirators which occurred in [Manhattan] and that in other respects this district is intimately connected with the offense charged in the indictment." Id. at 155-56.

that the applicable standard is whether the "nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." Toussie v. United States, 397 U.S. 112, 115 (1970) (emphasis added). Nothing in the language or legislative history of Section 1348(1) suggests that Congress "assuredly" intended it to be a continuing offense, in fact all indications are to the contrary.[4]

First, the language of Section 1348(1) does not provide any indication that Congress intended it to be a continuing offense. Second, while Congress specifically noted that it was enlarging the statute of limitations for *civil* securities fraud actions, it is significant that it did not in any way address or expand the statute of limitations for criminal securities fraud either by expressing that Section 1348(1) was a continuing offense or otherwise. See S. Rep. 107-146 (May 6, 2002) ("[w]e believe current law likely provides an adequate length of time in which people who have been defrauded can file suit [one year from discovery or three from fraud]"...but "[r]egretably, the sponsors of S. 2010 prevailed in their effort to extend the current statute of limitations"). Moreover, the Supreme Court's caution is important here: the continuing offense doctrine "should be applied only in limited circumstances," and continuing offenses "are not to be too readily found" since "criminal limitations statutes are to be liberally interpreted in favor of repose." Toussie, 397 U.S. at 115-16.

The government devotes its brief to attempting to establish that ongoing schemes are by their nature "continuing offenses." (Gov. Mem. 30-34). This confuses the point. Once again courts have been clear: "[s]eparate offenses may be part of a

4 In addition, all trades that occurred prior to July 30, 2002, the date that 18 U.S.C. § 1348 was enacted, should be dismissed as conduct alleged in violation of the Ex Post Facto Clause of the United States Constitution.

common scheme without being 'continuing' for limitations purposes." United States v. Rivlin, No. 07 Cr. 524 (SHS), 2007 WL 4276712, at *3 (S.D.N.Y. Dec. 5, 2007) (quoting United States v. Yashar, 166 F.3d 873, 877 (7th Cir. 1999) (quoting United States v. Jaynes, 75 F.3d 1493, 1506 n.12 (10th Cir. 1996))). Simply labeling alleged conduct a "scheme" does not suffice to make it continuing.[5]

IV. THE INDICTMENT DOES NOT ALLEGE A COGNIZABLE OFFENSE UNDER 18 U.S.C. § 1348(1)

In his moving papers, Mr. Motz argued that the government has failed to allege a cognizable offense with respect to Count One because the Indictment fails to charge deceptive conduct directed to alleged victims for the purpose of fraudulently obtaining money or property from them. The cases cited by the government confirm this requirement. See, e.g., United States v. Starr, 816 F.2d 94, 98 (2d Cir. 1987). Moreover, an Indictment which acknowledges that so-called "fraudulent" trade allocations to client accounts could indeed become profitable is facially deficient on the crucial issue of intent to harm those clients. See Rizzo Aff., Ex. B, ¶ 5. Rather, the government seeks to rely on the unsupported inference that because Melhado Flynn's proprietary account was profitable in the short term, there must have been damage to client accounts. However, the government ignores that longer term strategies were utilized for client accounts. Accordingly, the Indictment fails to specify deceptive conduct which defrauded clients

5 The only case cited by the government in support of its assertion that Section 1348 is a "continuing offense" is a California District Court opinion, United States v. Nicholas, No SACR 08-00139 CJC, 2008 WL 5233199, at *4 (C.D. Cal. Dec. 15, 2008). Nicholas is inapposite since, among other things, it analyzes the doctrine of continuing offense in the context of an Ex Post Facto argument. Cf. United States v. Hatfield, No. 06 Cr. 0550 (JS), 2009 WL 2182593 (E.D.N.Y. Jul. 22, 2009) (same). Furthermore, unlike the allegation of fraud against Melhado Flynn and Mr. Motz, the charges in Nicholas (and Hatfield) related to defrauding shareholders, an allegation consistent with Congress' intent that Section 1348 be used "to protect shareholders." (Gov. Mem. 19.)

out of money or property. This is fatal. For this further reason, Count One must be dismissed.

Moreover, the government asserts that because the defendant purportedly violated the duty of loyalty to his clients, he is somehow guilty of criminal securities fraud. The government cites multiple cases for this assertion -- all civil actions, not criminal cases. (Gov. Mem. 22.) The government cites to no authority that the criminal law in general -- let alone Section 1348(1) in particular -- was intended to criminalize alleged breaches of fiduciary duty; these duties are readily and sufficiently protected by state statutes and common law. The government should not be permitted to expand and misuse Section 1348(1) in this regard.

V. COUNT ONE SHOULD BE DISMISSED AS UNCONSTITUTIONALLY VAGUE

Finally, the government in effect urges a reading of Section 1348(1) which is unconstitutionally vague as applied to Mr. Motz. It is clear from the legislative history that Section 1348 was limited by Congress "to protect shareholders and prospective shareholders" from schemes to defraud in connection with the purchase or sale of stock. See Gov. Mem. 19 (citing 148 Cong. Rec. S7420-21 (daily ed. July 26, 2002) (statement of Sen. Leahy), available at 2002 WL 1731002); Gov. Mem. 25 (citing Nichols 2008 WL 5233199 at *4, and stating that the "[I]ndictment alleges a scheme to obtain money from . . . shareholders: the corporation used shareholders' money to compensate employees in the form of backdated or repriced options without disclosing this fact") (emphasis added)). Accordingly, as applied here, Count One of the Indictment, which charges Melhado Flynn and Mr. Motz, who did not have shareholder obligations, with fraud in violation of that statute, is vague and should be dismissed.

Conclusion

For the foregoing reasons, George M. Motz respectfully requests that the relief requested herein should be granted.

Dated: New York, New York
July 31, 2009

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