

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA :
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 v. : No. 3:00-CR-217 (EBB)
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 TRIUMPH CAPITAL GROUP, INC., :
 ET AL. :

RULING ON MOTIONS IN LIMINE TO EXCLUDE STATEMENTS

Before the Court is Defendant Frederick W. McCarthy's ("McCarthy") motion in limine to exclude evidence of statements allegedly made at a meeting on March 9, 2000 of the Advisory Committee of Triumph Partners III, L.P. Defendants Triumph Capital Group, Inc. ("Triumph"), Charles B. Spadoni ("Spadoni"), and Ben F. Andrews ("Andrews") have adopted McCarthy's motion, and, in the event McCarthy's alleged statements are deemed admissible against McCarthy, these defendants move to exclude evidence of the alleged statements as against them. For the reasons set forth herein, McCarthy's motion [Doc. No. 505] is DENIED. In addition, the evidence in question is admissible as against all named co-defendants.

BACKGROUND

The Superseding Indictment ("Indictment") in this public corruption case¹ alleges, inter alia, a RICO enterprise

¹ The facts of this case have been fully set forth in prior rulings and will not be repeated herein.

consisting of an association-in-fact involving all of the named defendants. According to the Indictment, included among the core activities of the alleged RICO enterprise was the offering and agreeing to pay bribes and gratuities in return for the investment of Connecticut state pension assets, and then concealing the criminal activity. For example, the Indictment alleges that defendants McCarthy, Spadoni and Triumph conferred consulting contracts valued at approximately \$2 million for Connecticut State Treasurer Paul J. Silvester's close associates, Lisa Thiesfield, a defendant in this case, and Christopher Stack. See Indictment, Count 1, ¶ 65. These contracts, the Indictment alleges, were consideration for Silvester's role in increasing investment of state pension assets in Triumph Connecticut-II ("Tri-Conn II"), a Triumph-related investment fund. Id.

On March 9, 2000, during the time period of the charged RICO violation, RICO conspiracy and scheme to defraud, an investors' Advisory Committee Meeting for Triumph Partners III, L.P. ("Triumph Partners III") was held. Triumph Partners III, like Tri-Conn II, is a limited partnership managed by Triumph and established for the purpose of making investments. The partnerships share a common investor, the State of Connecticut, which held a 99% interest in Tri-Conn II and a

24% interest in Triumph Partners III. The two limited partnerships are distinct entities, however, and unlike Tri-Conn II, Triumph Partners III is not implicated in the Indictment.

Among those present at the March 9, 2000 meeting was McCarthy, the Chairman and CEO of Triumph III Advisors, L.P., which is the General Partner of Triumph Partners III. McCarthy is also President and majority shareholder of Triumph.

The Government has stated that it intends to introduce at trial certain statements that McCarthy allegedly made at the March 9, 2000 meeting. The Government has identified three of McCarthy's specific statements that were allegedly false and which "concealed [McCarthy's] and other defendants' roles in the criminal activity charged in the Indictment and served to further the unlawful objectives of the conspiracy and RICO enterprise." Government's Opposition at 6.

According to the Government, the sum and substance of those alleged false statements made at the March 9, 2000 meeting is:

1. That the Connecticut investigation had nothing to do with the departure of three professionals from Triumph Capital on February 8, 2000, and that the three professionals left because of money and generation changes.

2. That Triumph cancelled Chris Stack's consulting arrangement after a few months because Stack failed to perform. And that, soon after the contract was cancelled, Stack pled for immunity with the U.S. Attorney for paying kick-backs to Silvester.
3. That defendant Thiesfield was hired because of her contacts and ability to network; that she was formerly an investment professional at Bigler Crossroads; and that Watson Wyatt was her contact.

Id. at 7.

The Government further contends that McCarthy's alleged statements misled those in attendance at the March 9, 2000 investors' Advisory Committee Meeting for Triumph Partners III by "mask[ing] the fact that both Thiesfield's and Stack's 'consulting contracts' were actually shams designed to convey bribes in connection with state investments in Triumph-managed financial vehicles." Id. at 13. The Government also alleges that McCarthy's statements "concealed the fact that [Triumph Capital professionals] were terminated for raising questions about the firm and the Connecticut investigation--questions that might have uncovered the true relationships among the various members of the RICO enterprise." Id. Lastly, the Government alleges that McCarthy's statements revealed his desire to "insulate from scrutiny the true relationships among the other members of the enterprise," a fact which "tends to show that he, too, was working towards the enterprise's

'common purpose' of promoting and concealing the schemes undertaken by the enterprise." Id.

Based on the foregoing proffer, the Government argues that the alleged statements are relevant and admissible because they (1) tend to establish the RICO enterprise alleged in the Indictment, (2) tend to prove the continuity of the enterprise's criminal activity, and (3) are evidence of consciousness of guilt. Furthermore, the Government argues that the statements are admissible as to all defendants as statements made in furtherance of the conspiracy.²

The defendants move in limine to exclude evidence of any such statements on the grounds that they are not probative of any fact at issue, and that any marginal probative value that does exist would be substantially outweighed by the danger of unfair prejudice, confusion or unnecessary delay. In addition, assuming, arguendo, that the statements were admissible against McCarthy, the other defendants argue that the statements are inadmissible against all other co-defendants because they were not made in the furtherance of, or during the course of, the alleged RICO conspiracy.

DISCUSSION

² The Government asserts that it is not offering the alleged statements as "other crimes" evidence pursuant to Rule 404(b).

Evidence is "relevant" if it has "any tendency" to prove or disprove a fact of consequence in the trial. FED. R. EVID. 401. Two facts of consequence to the Government's case are the existence of an "enterprise" that includes the defendants, as well as the pattern of racketeering activity alleged in the Indictment.

Evidence of uncharged acts may be properly admitted as relevant evidence in establishing both the existence of a RICO enterprise and the pattern of the alleged racketeering activity. As to the latter, evidence of uncharged acts may be properly admitted to prove the continuity of the enterprise's criminal activity. See, e.g., United States v. Miller, 116 F.3d 641, 682 (2d Cir. 1997) (finding that the trial court did not abuse its discretion by concluding that proof of uncharged murders "was relevant to show the existence and nature of the enterprise and the conspiracy"); United States v. Brady, 26 F.3d 282, 287 (2d Cir. 1994) (upholding admission of evidence of murders committed by non-defendants because evidence was, inter alia, "relevant to demonstrate the existence of the RICO enterprise"); United States v. Clemente, 22 F.3d 477, 479 (2d Cir. 1994) (noting with approval district court's admitting into evidence uncharged acts of extortion for the purpose of "establishing an enterprise and an association in fact, and

the establishment of the relationship of trust between the parties, for purposes of the enterprise"); United States v. Kaplan, 886 F.2d 536, 542-43 (2d Cir. 1989) (noting that, in addition to defendant's racketeering acts and the nature of the conspiracy, "external facts may of course also provide evidence of the requisite threat of continuity").

While acknowledging the controlling case law, the defendants argue that the connection between McCarthy's alleged statements and the enterprise and pattern elements of the RICO charge is simply too tenuous to allow the former to be admitted as tending to prove the latter. The defendants argue that the proffered evidence neither bears directly on the nature of the alleged RICO enterprise or pattern, nor constitutes proof of some elements actually charged against the defendants.

The Government, on the other hand, contends that McCarthy's alleged false statements are probative of both the alleged RICO enterprise and pattern. For example, the Government argues that McCarthy's false statement reveals an attempt to conceal the true nature of relationships among members of the RICO enterprise. By speaking falsely about Thiesfield's experience and performance, as well as about Stack's termination, the Government alleges, McCarthy was

attempting to hide the fact that "both Thiesfield's and Stack's 'consulting contracts' were actually shams designed to convey bribes in connection with state investments in Triumph-managed financial vehicles." Government's Opposition at 13.

Similarly, the Government argues, McCarthy's false statements reveal an attempt to "insulate from scrutiny the true relationships among the other members of the enterprise," which "tends to show that he, too, was working toward the enterprise's 'common purpose' of promoting and concealing the schemes undertaken by the enterprise." Id.

The Government also argues that the false statements are relevant to prove the pattern of racketeering activity charged in the Indictment, namely, to prove the continuity of the enterprise's criminal activity. For example, the Government argues that McCarthy's false statements tend to prove the continuity of the charged pattern of racketeering activity because they reveal that a member of the enterprise continued to conceal the enterprise's criminal activities after Paul Silvester left office.

The Court agrees that evidence concerning McCarthy's alleged statements at the March 9 meeting is relevant. The evidence in question suggests that McCarthy lied about the true nature of the relationships between Stack, Thiesfield,

and Triumph, and that McCarthy misrepresented the true circumstances of the departure of three professionals from Triumph in early 2000, all of which implies an attempt to protect the enterprise from detection. Thus, the lies allegedly uttered by McCarthy, in and of themselves, operate as probative evidence tending to prove facts of consequence in this case.

Having concluded that the proposed evidence is relevant to the charged crime, the Court next considers whether the probative value of the proffered evidence "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." FED. R. EVID. 403.

The defendants argue that the alleged statements, even if deemed relevant, must be excluded because any probative value is substantially outweighed by the danger of unfair prejudice through the deprivation of McCarthy's Sixth Amendment rights, the risk that the jury will use the evidence to infer that McCarthy has a "propensity" to commit crimes, and confusion or unnecessary delay.

The Court is not persuaded that any of the stated risks of unfair prejudice compel the exclusion of the evidence in question. First, McCarthy does not stand to be deprived of his Sixth Amendment right to representation by his counsel of

choice should evidence of his alleged statements be admitted. Although McCarthy's attorney, R. Robert Popeo, was, by all accounts, present at the March 9 meeting, it has already been determined that the facts and circumstances of that meeting did not create a per se conflict necessitating the disqualification of attorney Popeo as McCarthy's counsel. See Tr. Nov. 29, 2001 at 85 (Court's finding that "the facts and circumstances of the March 9th meeting do not compel a finding that there is a per se conflict" with regard to attorney Popeo); see also id. at 86-100 (McCarthy's waiver colloquy).

Nonetheless, the Court will impose certain protective measures to avoid any potential problems pertaining to Popeo's participation at the meeting. Specifically, all counsel, for both the Government and all defendants, are precluded from referring to, or eliciting testimony concerning, Popeo's presence at the March 9 meeting, including his name, his firm, or what he allegedly did or did not say at that meeting. Counsel will, however, be permitted to refer to, or elicit testimony concerning, the presence of "a Triumph attorney" at that March 9 meeting who spoke about the "Connecticut situation." No counsel may inquire of, or refer to, anything more specific or particular concerning the statements made by, or identity or affiliation of, Popeo.

These protective measures, as well as McCarthy's knowing and intelligent waiver of any potential conflict of interest stemming from attorney Popeo's presence at the March 9 meeting, will eliminate any Sixth Amendment issue that could arise.

The Court also rejects the defendants' claim that evidence of the alleged statements will lead the jury to inappropriately believe that McCarthy has a propensity to commit crimes. Although the evidence in question might tend to have some adverse effect upon McCarthy beyond tending to prove the fact or issue that justifies its admission into evidence (e.g., that the evidence might be viewed by the jury as indicating a "propensity" to commit a crime), the Court believes that any such risk of prejudice is, at best, slight, and can be effectively minimized by a cautionary instruction to limit the jury's improper consideration of the evidence for any purpose other than what it is offered to prove.

Lastly, the Court rejects the defendants' argument that the evidence would be cumulative and its admission would constitute a waste of time.

In sum, the Court finds that the probative value of McCarthy's statements at the March 9 meeting is not substantially outweighed by its alleged prejudicial impact.

In addition to finding that the evidence of the alleged statements is admissible against McCarthy, the Court also finds that the evidence is admissible against the other RICO defendants as statements of a co-conspirator made in the course and in furtherance of a conspiracy. See United States v. Tracy, 12 F.3d 1186, 1196 (2d Cir. 1993) (citing Bourjaily v. United States, 483 U.S. 171, 175 (1987)).

Thus, the Court rejects Spadoni's contention that McCarthy's statements were not made during the course of, or in furtherance of, the alleged bribery conspiracy because they were made after the central criminal purpose of the conspiracy was complete and were intended to conceal the crime.

See Grunewald v. United States, 353 U.S. 391, 402 (1957) (Jackson, J., concurring) (holding that post-crime statements of concealment "cannot themselves constitute proof that concealment of the crime after its commission was part of the initial agreement among the conspirators")

It is clear that McCarthy's alleged statements were made during the course of the charged RICO conspiracy, see Indictment, Count 2, ¶ 2 (alleging RICO conspiracy from March, 1997, to date of the Indictment), and were "designed to promote or facilitate achievement of the goals of the

conspiracy." United States v. Tracy, 12 F.3d 1186, 1196 (2d Cir. 1993).

As alleged in the Indictment, the central objectives of the conspiracy included self-enrichment, through the receipt of bribes and investment of pension assets, and concealment of that criminal activity. See Indictment, Count 1, ¶¶ 27-29. McCarthy's alleged statements on March 9, made to persons including representatives from the Connecticut Treasurer's Office, were made in furtherance of the conspiracy because, as alleged, they were intended to conceal the real reasons for why Stack and key Triumph employees were terminated, and the real reasons for hiring Thiesfield and her performance to date. As the Government persuasively argues in its pleading, "[c]oncealment of the corrupt activity was necessary to avoid detection and ensure that the defendants continued to receive the bribe payments and to retain the investment assets, as well as limit any action by Triumph investors detrimental to the defendants as a result of the 'Connecticut Situation.'" Government's Opposition at 25. The Court agrees, and finds that McCarthy's alleged statements from the March 9 meeting are admissible as to all defendants.

CONCLUSION

In conclusion, the Court finds that evidence of McCarthy's alleged statements at the March 9, 2000 meeting are relevant to show the existence and nature of the charged enterprise and pattern, and that the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice. Moreover, the Court finds that the alleged statements are admissible as to all defendants. Thus, the motions in limine [Docs. No. 505, 514, 519 and 525] are DENIED.

SO ORDERED.

ELLEN BREE BURNS
SENIOR DISTRICT JUDGE

Dated at New Haven, Connecticut, this ____ day of June, 2003.