UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
	:	
v.	:	No. 3:02CR341(EBB)
	:	
MICHAEL RIVERA	:	

OMNIBUS RULING ON DEFENDANT'S PRE-TRIAL MOTIONS

Before the Court are defendant Michael Rivera's Motion to Dismiss Count One of the Second Superseding Indictment or Strike Allegations as Surplusage (Doc. No. 272) and Motion for Severance or Other Relief (Doc. No. 273). The motions are discussed below.

BACKGROUND

The Second Superseding Indictment ("Indictment") charges Rivera, as well as seven other individuals[1] and Shoreline Motors Corporation ("Shoreline Mitsubishi," the "Corporation," or the "dealership") with conspiracy to commit wire fraud, in violation of 18 U.S.C. § 371, and 21 counts of wire fraud, in violation of 18 U.S.C. § 1343, 2(a), and 2(b).

According to the Indictment, Michael Rivera was a Salesperson at Shoreline Mitsubishi for the period of time relevant to the Indictment. The Indictment alleges that, in his capacity as salesperson, Rivera was involved in a wide-ranging scheme to defraud Shoreline Mitsubishi's customers and Mitsubishi

[1] Several defendants who were charged in the original and Superceding Indictment have pleaded guilty.

Motors Credit of America, Inc. (“Mitsubishi Credit”) in connection with the sale and financing of Mitsubishi automobiles.

The Indictment alleges that Rivera and the other Shoreline Motors defendants falsified material customer credit information by rewriting customer credit applications or entering false customer credit information in an electronic format, and then transmitted or caused to be transmitted via fax or the Internet in interstate commerce to Mitsubishi Credit those falsified customer credit applications. The indictment further alleges that the customer credit information Rivera and his co-workers sent to Mitsubishi Credit contained materially false information such as inflated incomes, understated mortgage or rent payments, and false names, occupations, and/or home addresses. These applications containing materially false information were sent to Mitsubishi Credit on various occasions in order to induce Mitsubishi Credit to approve the extension of credit to those customers of Shoreline that, but for the falsified credit information, would have likely been denied an extension of credit by Mitsubishi Credit.

The Indictment further alleges that Rivera and his co-conspirators willfully failed to disclose to customers the existence of large "balloon" payments at the conclusion of their financing contracts, or willfully misled customers with regard to the terms and conditions of those balloon payments. It also

charges that the defendants removed the "Monroney stickers" which showed the Manufacturer's Suggested Retail Price ("MSRP") from some automobiles prior to delivery of those automobiles so that the customers would not be able to easily ascertain the MSRP for the automobile they were purchasing. According to the Indictment, the defendants then charged a substantially higher price for those automobiles than the customers had agreed to pay.

The Indictment also alleges that the defendants charged customers for optional items such as CD changers that were not in fact installed in the automobiles delivered to the customers. The Indictment further charges that the defendants willfully failed to disclose that customers were being charged for insurance policies and/or extended service contracts that had not been requested by the customer.

Finally, the Indictment specifically charges defendant Rivera with four substantive counts of wire fraud (Counts 2,3, 5, and 6), in that he transmitted or caused to be transmitted in interstate commerce, by means of wire, customer credit applications which contained materially false information from the premises of Shoreline Mitsubishi in Branford, Connecticut, to the premises of Mitsubishi Credit in Cypress, California.

LEGAL ANALYSIS

I. Motion to Dismiss or Strike Allegations as Surplusage

Count 1 of the Indictment charges all defendants in this

case with conspiracy to commit wire fraud pursuant to 18 U.S.C. §371. Defendant Rivera acknowledges that the allegations in the Indictment are sufficient to set forth a charge of conspiracy to commit wire fraud, but nonetheless argues that Count 1 should be dismissed in its entirety because it is duplicitous. Specifically, Rivera claims that Paragraph's 22 - 27 and 30-42, which outline the details of the wire fraud conspiracy, set out acts of fraud under state law, in addition to federal, and therefore have the effect of charging two conspiracies, not one. In the alternative, defendant Rivera asks that Paragraph's 22 - 27 and 30-42 of Count 1 be stricken as surplusage.

Paragraphs 22 - 27 allege, among other activities: the falsification of income on credit applications; the failure to disclose balloon payments in financing contracts to customers; the removal of Monroney stickers from cars so that the customers would not be able to identify the manufacturer's suggested retail price for the car; the failure to disclose insurance policy charges or extended service contract charges; and theft of cash down-payments. Paragraphs 30 - 42 outline specific overt acts alleged to have been committed in furtherance of the conspiracy, such as specific false statements made on customer credit applications, specific instances where customers were victims of fraud and misrepresentation, and transactions in which defendants falsified customer credit applications given to Mitsubishi

Credit.

Defendant argues that Count one alleges two separate conspiracies; one a conspiracy to defraud Mitsubishi Credit through the transmission of false data over the wires and the Internet; and two, a conspiracy to commit state fraud, involving neither the wires nor the Internet, and "being directed solely at Shoreline's intra-state customers." Defendant's Memorandum in Support of Motion to Dismiss, at 3. Defendant therefore argues that Count I is duplicitous, as it joins multiple offenses into one single count. Because the court finds that defendant misinterprets the Indictment and the law of conspiracy, defendant's motion is denied.

In general, the rule against duplicitous indictments prohibits alleging two or more distinct crimes in a single count of an indictment. See Fed.R.Crim.P. 8(a) (requiring that there be "a separate count for each offense" charged in the indictment). Such prohibition protects defendants from "a general verdict of guilty [which would] not reveal whether the jury found defendant guilty of only one crime and not the other, or guilty of both." United States v. Murray, 618 F.2d 892, 896 (2d Cir. 1980). However, "unique issues" arise when determining whether a conspiracy charge is duplicitous, because in a conspiracy case, "a single agreement may encompass multiple illegal objects." Id. As the Second Circuit explained in United

States v. Aracri, 968 F.2d 1512, 1518 (2d Cir. 1992), "[i]n this Circuit it is well established that the allegation in a single count of a conspiracy to commit several crimes is not duplicitous, for the conspiracy is the crime and that is one, however diverse its objects." Id. (internal quotations omitted)(citing Braverman v. United States, 317 U.S. 49, 53 (1942)).

In the case before us, although several substantive offenses have been charged which have affected multiple victims, the government has only alleged one conspiracy to commit wire fraud against the United States, in violation of 18 U.S.C. §1343. The language of the Indictment makes clear that it charges one conspiracy, formed for the purpose of violating the federal wire fraud statute. The fact that both individual customers and Mitsubishi Credit were victims of the fraud does not transform the case into one involving multiple conspiracies. *See* United States v. Tutino, 883 F.2d 1125, 1141 (2d Cir. 1989)("acts that could be charged as separate counts of an indictment may instead be charged in a single count if those acts could be characterized as part of a single continuing scheme.").

Further, the Indictment clearly indicates defendant Rivera's involvement in fraudulent practices that were part of a common scheme. Each of the overt acts defendant is challenging as duplicitous charge specific fraudulent lending practices, but

they all stem from the common goal of obtaining money from Mitsubishi Credit and Shoreline Motors customers through fraudulent means. Indictment ¶ 19. The Indictment alleges the scheme to defraud involved misrepresenting terms and conditions of car purchases to customers, falsifying customer credit information to Mitsubishi Credit, collecting interest and principal from customers as a result of inflating transactions and providing Mitsubishi Credit false credit information (See ¶¶ 22-27 and 30-42 of the Indictment). The Indictment clearly sets out how the Shoreline defendants, including Rivera, fraudulently obtained money from both ends, the customers and their credit agency, through the use of interstate wire transmissions.

Because the defendant allegedly agreed to engage in this scheme which necessitated the use of interstate wires, defendant's conduct became punishable under federal law. This court has previously held that federal law is violated when the mails are used to effectuate a fraudulent scheme. United States v. Markoll, No. 3:00cr133, 2001 U.S. Dist. LEXIS 1994 (D. Conn. 2001). Similarly, despite the fact that some of the criminal conduct alleged occurred within state lines, the use of the wires turned such state fraud offenses into federal crimes of wire fraud. The Indictment makes clear that the Shoreline Defendants would not have been able to defraud Shoreline Motors customers without the use of interstate wires, because it was Mitsubishi

Credit's financing that allowed defendants to secure funding for their customers' purchases. The Indictment alleges that defendant Rivera sent, by fax, customer credit applications with false information to Mitsubishi credit. Accordingly, such transactions furthered defendants' scheme to defraud both Mitsubishi credit and Shoreline Mitsubishi's customers.

Finally, because this court finds that the allegations set out in Count One are not duplicitous, and are in fact highly relevant to the charged conspiracy, the allegations in ¶¶ 22-27 and 30-42 of the Indictment are not surplusage and will not be stricken. A motion to strike surplusage pursuant to Fed. R. Crim. P. 7(d) is "only granted where the challenged allegations are 'not relevant to the crime charged and are inflammatory and prejudicial.'" United States v. Scarpa, 913 F.2d 993, 1013 (2d Cir. 1990)("If evidence of the allegation is admissible and relevant to the charge, than regardless of how prejudicial the language is, it may not be stricken.")(internal citations omitted). Defendant's Motion to Dismiss or Strike is therefore DENIED in its entirety.

II. Motion For Severance or Other Relief

Defendant also moves this court to sever his trial from that of a co-defendant who has allegedly given statements inculpating defendant Rivera. When considering a motion to sever, a court

must engage in a two-part inquiry. First, the court must determine whether the defendants were properly joined under Rule 8(b). Second, the court must consider whether joinder substantially prejudices any defendant.

A. Joinder

The joinder of defendants in a criminal proceeding is governed by Rule 8(b) of Fed. R. Crim. P. *See* United States v. Walker, 142 F.3d 103, 110 (2d Cir. 1998). As provided under the rule:

> two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Fed. R. Crim. P. 8(b).

The Second Circuit has construed Rule 8(b) to mean that "joinder is proper where two or more persons' criminal acts are 'unified by some substantial identity of facts or participants,' or 'arise out of a common plan or scheme.'" United States v. Cervone, 907 F.2d 332, 341 (2d Cir. 1990)(quoting United States v. Attanasio, 870 F.2d 809, 815 (2d Cir. 1989)(internal quotations omitted)). As a general rule, the Rule 8(b) requirements are satisfied where the Government alleges the

existence of an overall conspiracy linking the various substantive crimes charged in an indictment. "The mere allegation of a conspiracy presumptively satisfies Rule 8(b), since the allegation implies that the defendants named have engaged in the same series of acts or transactions constituting an offense." United States v. Friedman, 854 F.2d 535, 561 (2d Cir. 1988) (quoting United States v. Castellano, 610 F. Supp. 1359, 1396 (S.D.N.Y. 1985)); see also United States v. Nerlinger, 862 F.2d 967, 973 (2d Cir. 1983) ("The established rule is that a non-frivolous conspiracy charge is sufficient to support joinder of defendants under Fed. R. Crim. P. 8(b)."); United States v. Bernstein, 533 F.2d 775, 789 (2d Cir. 1975) (a conspiracy charge "provides a common link and demonstrates the existence of a common plan" for purposes of Rule 8(b)), cert. denied, 429 U.S. 998 (1976).

Rivera does not challenge the propriety of joinder in this case, and does not claim that his actions were not unified by some substantial identity of fact or participants, or that his acts did not arise out of a common plan or scheme shared with the acts of the other defendants. In addition, the presumptive satisfaction of Rule 8(b) arises in this case because the Indictment alleges the existence of an overall conspiracy to defraud that links the substantive crimes with the wire fraud charged in the indictment. See United States v. Rucker, 32 F.

Supp.2d 545, 548 (E.D.N.Y. 1999)("Proper joinder is determined from the face of the indictment"). Because the acts alleged in the Indictment all arise out of common objectives sought to be accomplished by the enterprise, defendants are properly joined under Rule 8(b).

B. Prejudice

The court now considers whether, under Rule 14, the joinder of Rivera with his charged co-defendants is prejudicial. Schaffer v. United States, 362 U.S. 511, 515 (1960). Defendant Rivera argues that a joint trial will deprive him of his right of confrontation as guaranteed by the Sixth Amendment. Specifically, defendant argues that one of his co-defendants, Daniel Perez-Torres, could make statements incriminating Rivera at their joint trial. Defendant asserts that, in an interview Torres had with the FBI, he "implicate[s] Rivera and others in some of the unlawful activity that forms the basis of this indictment." (Doc. No. 273-2 at 1). In response, the government explained that on October 30, 2002, defendant Torres was interviewed by a Special Agent from the FBI and a detective from the Branford Police Department, during which he made a number of incriminating statements against himself. The government asserts that the only time Torres referenced defendant Rivera was when he told the investigators that Rivera took advantage of Hispanic

customers, whose down payments were not shown on their purchase orders. (Doc. No. 281 at 2-3).

Rule 14 of the Federal Rules of Criminal Procedure states, in relevant part:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or defendants in an indictment...or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.
>
> Fed. R. Crim. P. 14

Although there is a preference in the federal system for joint trials of defendants who have been indicted together, see Zafiro v. United States, 506 U.S. 534, 537 (1993), "counts charged in the same indictment may be severed, under Fed. R. Crim. P. 14, if joinder presents a risk of prejudice." See United States v. Amato, 15 F.3d 230, 237 (2d Cir. 1994). The defendant seeking severance under Rule 14 bears the heavy burden of establishing that substantial prejudice would result from joinder with other defendants. See id. Moreover, severance under Rule 14 should only be granted if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment as to the defendant's guilt or innocence. See Zafiro, 506 U.S. at 539. See also Cervone, 907 F.2d at 341 (stating that the defendant must show prejudice so substantial as to amount to a miscarriage of

justice).

Even if established, however, prejudice alone does not require severance. See Zafiro, 506 U.S. at 538; United States v. Diaz, 176 F.3d 52, 104 (2d Cir. 1999); United States v. Beverly, 5 F.3d 633, 637-33 (2d Cir. 1993). Severance is proper only when a defendant can sustain the "extremely difficult burden" and "show that he was so severely prejudiced by the joinder that he was denied a constitutionally fair trial." United States v. Tutino, 883 F.2d 1125, 1130 (2d Cir. 1989) (internal quotation marks and citations omitted). A defendant cannot meet the burden under Rule 14 by showing that he would have a better chance of acquittal if he or she were tried alone. See Zafiro, 506 U.S. at 540. Inevitably, in any multiple defendant trial there will be differing levels of culpability and proof, and, standing alone, these are insufficient grounds for separate trials. See United States v. Torres, 901 F.2d 205, 230 (2d Cir. 1990). Moreover, mutually antagonistic defenses are not prejudicial per se and, therefore, are inadequate grounds for separate trials under Rule 14. See Zafiro, 506 U.S. at 538; United States v. Harwood, 998 F.2d 91, 95-96 (2d Cir. 1993). The mere existence of conflicting defenses, or the fact that co-defendants seek to place blame on each other, is not the type of antagonism requiring severance. See United States v. Villegas, 899 F.2d 1324, 1346 (2d Cir. 1990); United States v. Alvarado, 882 F.2d 645, 656 (2d Cir.

1989). When determining whether severance is necessary, the ultimate question for the court to decide is whether the jury will be reasonably able to keep the evidence separate and attribute it accurately to each defendant. See Triumph Capital, 260 F. Supp. 2d 432, 439 (D. Conn. 2002)(citing United States v. Abrams, 539 F. Supp. 378, 381 (S.D.N.Y. 1982) (phrasing the inquiry as "whether the jury will be able to compartmentalize the evidence presented to it, and distinguish among the various defendants in a multi-defendant suit.").

In the case before us, defendant Rivera has not met the heavy burden of showing substantial prejudice will result from being tried with co-defendant Torres. Defendant is correct that the Supreme Court has found that a defendant is deprived of his rights under the Confrontation Clause of the Sixth Amendment when his non-testifying co-defendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the co-defendant. Bruton v. United States, 391 U.S. 123 (1968), However, the Court has since made clear that a defendant's Sixth Amendment rights are not violated when a co-defendant's confession is redacted to omit any reference to the defendant, even if the defendant is nonetheless linked to the confession by evidence properly admitted against him at trial. Richardson v. Marsh, 481 U.S. 200, 201-202 (1987). Accordingly,

the mere fact that Rivera's co-defendant's previous statements may have included information damaging to defendant does not mean that his rights will be violated because they will be tried together.

First, defendant Rivera has not provided this court with any substantive information about the statements Torres made that will be damaging to Rivera at trial, and has therefore failed to show any prejudice by their introduction. However, even assuming Torres has incriminating information about Rivera, this court is confident that there are less drastic means than severing the trial that can be employed in order to assure Rivera a fair trial. "Even where the risk of prejudice is high, measures less drastic than severance, such as limiting instructions, will often suffice to cure any risk of prejudice." Diaz, 176 F.3d at 104 (internal quotation marks and citations omitted); Yousef, 327 F.3d at 150. In addition to issuing limiting instructions to the jury, the court may employ other remedial steps designed to minimize the prejudice to a defendant such as, for example, redacting out-of-court statements that refer to a co-defendant by name. Id. Accordingly, should this court find it necessary, defendant Torres' statements can be redacted to eliminate his co-defendant's names and other reference to Rivera in accordance with Richardson. Richardson, 481 U.S. at 209-10. *See also* United States v. Williams, 936 F.2d 698, 700 (2d Cir.

1991)("[s]ince Richardson, we have on several occasions admitted redacted confessions in which names of co-defendants were replaced by neutral pronouns and where the statement standing alone does not otherwise connect co-defendants to the crimes.")(internal quotations omitted).

The fact that the parties estimate this trial will last two to three weeks, and involve extensive documentary and testimonial evidence, gives this court further support for denying defendant Rivera's severance motion. To grant each defendant in this case a separate trial merely because another defendant has made statements implicating another would run contrary to principles of judicial economy and efficiency. Zafiro, 506 U.S. at 540. Because this court is confident that appropriate redactions and limiting instructions can be made to ensure that Rivera's Sixth Amendment right to confront a witness against him will not be jeopardized, defendant's motion to sever is denied.[2]

Conclusion

For the above stated reasons, defendant Rivera's Motion to Dismiss Count One of the Second Superseding Indictment or Strike Allegations as Surplusage (Doc. No. 272) and Motion for Severance or Other Relief (Doc. No. 273) are DENIED.

[2] Upon the government's motion to introduce Torres' statement made by FBI agents, prior to its admission, this court will review such statement and ensure appropriate redactions have been made with respect to any statements referencing a co-defendant.

SO ORDERED

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ELLEN BREE BURNS
SENIOR UNITED STATES DISTRICT JUDGE

Dated at New Haven, Connecticut this _____ day of August, 2004.