U.S. Department of Justice

United States Attorney
Eastern District of New York

271 Cadman Plaza East
Brooklyn, New York 11201

F.#2007R01328

August 18, 2009

VIA ECF
The Honorable Frederic Block
United States District Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Ralph Cioffi and Matthew Tannin
Criminal Docket No. 08-415 (FB)

Dear Judge Block:

By this letter, the government respectfully moves in limine for admission at trial of evidence of prior uncharged acts of Defendant Ralph Cioffi ("Cioffi") in the above-referenced case. For the reasons set forth below, evidence of Cioffi's prior acts is admissible pursuant to Federal Rule of Evidence 404(b).

I. Introduction

Count Four of the indictment charges Cioffi with one count of insider trading. Specifically, the indictment alleges that, on or about and between March 23 and April 1, 2007, Cioffi knowingly and willfully committed securities fraud in connection with the sale of shares he owned in the Bear Stearns High Grade Structured Credit Strategies Enhanced Master Fund Ltd. (the "Enhanced Fund"), in violation of 15 U.S.C. §§ 78j(b) and 78ff and 18 U.S.C. §§ 2 and 3551 et seq. Relying on alternative theories of liability, the government will contend at trial that Cioffi breached the fiduciary duties he owed to the Enhanced Fund, its investors and Bear Stearns Asset Management ("BSAM") when he redeemed $2 million worth of his holdings in the Enhanced Fund based on material, non-public information that he acquired as the result of his relationship with BSAM, his employer. The government will prove that the defendant redeemed his investment in the Enhanced Fund so that he

could re-invest the $2 million in another, more profitable fund under his control.

At trial, the government intends to offer into evidence uncharged acts that Cioffi engaged in during his tenure as Senior Managing Director, Investment Adviser, and Director of BSAM. Those acts include evidence of Cioffi's conversations with Bear Stearns compliance personnel regarding the conflict of interest reporting processes for the funds he managed and evidence of his failed attempt to pledge his investment in the Enhanced Fund as security for a loan. This evidence is admissible under Federal Rule of Evidence 404(b).

II. The Proffered Evidence

A. Conversations With Compliance Personnel

The government seeks to introduce evidence that Cioffi was repeatedly counseled by BSAM's compliance staff concerning conflicts of interest involving principal trade transactions and related-party deals.

Principal trade transactions arose when the Enhanced Fund engaged in any transactions with BSAM's principal, Bear Stearns Co. ("BSC"). Because Cioffi served both as a registered representative of BSC and as Senior Managing Director, Investment Adviser and Director at BSAM, there existed potential conflicts between BSAM and BSC and between BSAM and other investment vehicles advised by BSAM. In order to manage these conflicts, BSAM's offering memorandum for the Enhanced Fund assured its investors that when the fund was buying or selling to an affiliated broker-dealer, special purpose vehicle or other related party, such as BSC, the fund would disclose the trade to an independent executive committee (the "Unaffiliated Directors") for consent and approval. The Unaffiliated Directors' responsibility was to ensure that when Cioffi engaged in transactions with BSC, or another conflicted party, on behalf of the funds, those transactions would be in the interest of the fund, and not solely in the interest of the conflicted party, thereby resolving any conflict of interest.

The government's evidence will demonstrate that Cioffi rarely adhered to the principal trade compliance measures. Hundreds of transactions that presented conflicts did not obtain the approvals required by federal law and by the offering memoranda. Of the transactions that required prior approval by the Unaffiliated Directors, 78.95 % were missing such approval in 2006, 58.66% in 2005, 29.73% in 2004 and 18% in 2003. To remedy

this poor record of compliance, during the fall of 2006, Bear Stearns placed a moratorium on all trades between BSC and BSAM. In the period leading up to the moratorium, Cioffi was advised by the compliance staff at BSAM that a conflict existed between BSC and BSAM for these principal trades and that Cioffi needed to develop and enforce procedures to ensure the notification of the Unaffiliated Directors. The government's evidence will establish that the moratorium was viewed by Bear Stearns management as necessary to prevent further conflicts of interest committed by Cioffi and his management team.

B. Sarasota Loan Collateral

The government also seeks to offer evidence concerning Cioffi's attempt, in late 2006, to pledge his investment in the Enhanced Fund as collateral for a building loan. At the time, Cioffi and his brother were building a luxury condominium complex in Florida, and the proposed loan was necessary to complete the construction project. At some point, Cioffi advised BSAM management of his intention to enter into the loan agreement, using his stake in the Enhanced Fund as security for the loan, and was rebuffed by BSAM management. BSAM management refused to permit Cioffi to encumber his holdings in the Enhanced Fund. Upon learning of BSAM's decision not to allow him to use his stake in the Enhanced Fund as collateral, Cioffi became extremely upset and accused the general counsel of BSAM of being behind the decision.

III. Discussion

Evidence of uncharged "other" acts is admissible pursuant to Rule 404(b) if relevant to the issues of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. See United States v. Ortiz, 857 F.2d 900, 903 (2d Cir. 1988). Rule 404(b) evidence is admissible if, under Rule 403, the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice or by considerations of judicial economy such as the needless presentation of cumulative evidence. Id.

The Second Circuit has established a three-prong test for the admission of "other . . . acts" evidence under Rule 404(b). First, a trial court must determine that the evidence is offered for a purpose other than to prove the defendant's bad character or criminal propensity. See United States v. Pitre, 960 F.2d 1112, 1119 (2d Cir. 1992); United States v. Mickens, 926 F.2d 1323, 1328 (2d Cir. 1991). Second, the trial court must determine that the evidence is relevant under Rules 401 and 402

of the Federal Rules of Evidence and that its probative value is not substantially outweighed by the danger of unfair prejudice. See Pitre, 960 F.2d at 1119; Mickens, 926 F.2d at 1328. Third, the court must provide an appropriate limiting instruction to the jury, if one is requested. See Pitre, 960 F.2d at 1119.

While the government "must explain in detail the purposes for which the evidence is sought to be admitted," United States v. Levy, 731 F.2d 997, 1002 (2d Cir. 1984) (citing United States v. O'Connor, 580 F.2d 38, 40 (2d Cir. 1978)), the Second Circuit has emphasized that Federal Rule of Evidence 404(b) is a rule of broad reach and liberal application. Id. ("We have adopted the inclusionary or positive approach to [404(b)]; as long as the evidence is not offered to prove propensity, it is admissible.").

Here, the government offers evidence of Cioffi's participation in uncharged acts -- not to show propensity -- but rather as relevant evidence of the defendant's knowledge, intent and absence of mistake. See United States v. Rubin, No. 92 CR 1195, 1993 WL 227615, at *2-3 (S.D.N.Y. June 21, 1993) (finding that evidence of other acts was admissible to show knowledge and intent to commit bank fraud); United States v. Zackson, 12 F.3d 1178, 1182 (2d Cir. 1993) ("Where a defendant claims that his conduct has an innocent explanation, prior act evidence is generally admissible to prove that the defendant acted with the state of mind necessary to commit the offense charged."); United States v. Mills, 895 F.2d 897, 907 (2d Cir. 1990) ("Under Rule 404(b), relevant evidence of 'other crimes, wrongs, or acts' may be admitted at trial to show that a defendant who claims that his conduct had an innocent explanation had the intent to commit the offense.").

These prior uncharged acts provide probative evidence that Cioffi knowingly engaged in insider trading. Where, as here, the defendant's state of mind is likely to be in dispute, "other act" evidence carries substantial probative value because the "only means of ascertaining that mental state is by drawing inferences from conduct." Huddleston v. United States, 485 U.S. 681, 685 (1988). The government intends to use evidence of the principal trade transaction issue to prove that Cioffi was fully aware of the role of the Unaffiliated Directors and of the processes in place at BSAM to protect the interests of investors. Certainly, against the backdrop of the principal trade transaction problem and its attendant moratorium, Cioffi understood that he was required to notify the Unaffiliated Directors before engaging in a conflicted transaction, such as his $2 million redemption from the Enhanced Fund, which was based

on material, non-public information he learned in his roles as Senior Managing Director, Investment Adviser and Director at BSAM.

The uncharged acts constituting non-compliance with the conflict reporting process are evidence that Cioffi was aware that (1) his management of multiple funds and leadership roles at BSC and BSAM presented a serious potential for conflicts to arise and (2) that he had a duty to disclose such conflicts to the Unaffiliated Directors. See Zackson, 12 F.3d 1178. Likewise, the subsequent moratorium on trading between BSAM and BSC is evidence that Cioffi knew he was required to make a disclosure when he engaged in his own "conflicted transaction" in redeeming $2 million of his investment from the Enhanced Fund.

The evidence of Cioffi's attempt to pledge his investment in the Enhanced Fund as collateral for the Sarasota loan will show that Cioffi knew that his request to withdraw money from the Enhanced Fund would have been scrutinized and, in all likelihood, refused by BSAM management. The government will show that this anticipated denial contributed to Cioffi's decision to conceal the existence of his redemption from relevant management, and in particular, the general counsel of BSAM. Furthermore, this evidence will refute any argument Cioffi may make that his acts lacked the requisite mens rea, or that there is an innocent explanation for his behavior. See Zackson, 12 F.3d at 1182; Mills, 895 F.2d at 907.

Additionally, evidence of Cioffi's conflict with BSAM management over his attempted use of his investment in the Enhanced Fund as collateral for a loan will demonstrate not only that Cioffi knew he was supposed to inform BSAM of his sale of securities in the Enhanced Fund, but that he intentionally concealed it from the Enhanced Fund, its investors and BSAM. Indeed, when Cioffi withdrew his money from the Enhanced Fund he intentionally avoided informing BSAM's management or legal department and, instead, notified only Ken Mak, a low-level BSAM administrator, whom Cioffi needed to process the redemption.

The probative value of the proposed testimony here is not substantially outweighed by any prejudice that the defendant might claim by virtue of its introduction. In fact, neither of the prior acts in question approach the gravity of the allegations set forth in the indictment. Evidence of other acts is admissible when offered for a proper purpose through the various types of evidence so long as the evidence "'[does] not involve conduct any more sensational or disturbing than the crime[] with which [the defendant has been] charged.'" Pitre,

960 F.2d at 1120 (quoting United States v. Roldan-Zapata, 916 F.2d 795, 804 (2d Cir. 1990)). The essential inquiry under Rule 403 for admission of evidence of other crimes is whether it involves "conduct likely to arouse irrational passions." United States v. Smith, 727 F.2d 214, 220 (2d Cir. 1984). Plainly, evidence of the defendant's non-compliance with a conflict reporting process and his wish to pledge his holdings to secure a building loan do not even constitute crimes, let alone raise concern that the prior acts involved "conduct any more sensational or disturbing than the crimes [] charged." Pitre, 960 F.2d at 1120 (quoting United States v. Roland-Zapata, 916 F.2d 795, 804 (2d Cir. 1991)). See also United States v. Livoti, 196 F.3d 322, 326 (2d Cir. 1999) (upholding admissibility of evidence that the defendant, a police officer charged with engaging in excessive use of force with arrestee, choked another arrestee on the basis that "the evidence did not involve conduct more inflammatory than the charged crime, and the district court gave a careful limiting instruction").

Finally, any potential prejudice to Cioffi can be effectively mitigated by a cautionary instruction limiting the jury's consideration of the evidence to the purposes for which it is offered. See, e.g., United States v. Mickens, 926 F.2d 1323, 1328-29 (2d Cir. 1991).

IV. Conclusion

For the reasons set forth above, the Court should permit the government to introduce testimony concerning prior uncharged acts as evidence of the defendants knowledge, intent and absence of mistake as they relate to the insider trading count in the indictment.

Respectfully submitted,

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