

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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United States of America,

03 Cr. 717 (MGC)

- against -

MEMORANDUM OPINION

Martha Stewart and Peter Bacanovic,

Defendants.

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Cedarbaum, J.

The Government has moved in limine to preclude the defendants from arguing in opening statements or presenting evidence that would tend to show: (1) that the Government's motives in investigating and prosecuting Stewart were improper; (2) that the fact that the indictment does not charge either defendant with the crime of insider trading shows that the Government does not believe that either defendant committed the crime of insider trading; (3) that Stewart is being prosecuted for asserting her innocence and exercising her First Amendment right to free speech; and (4) that Count Nine is a novel application of the securities laws. For the reasons that follow, the motion is granted.

Discussion

I. Prosecutorial Motive

The Government first seeks to prevent defendants from presenting arguments or evidence that would invite the jury to question the Government's motives in investigating and indicting Ms. Stewart, as opposed to other individuals who may also have committed the crimes charged or similar crimes. Such arguments are essentially claims of selective prosecution. "In this Circuit, a defendant who advances a claim of selective prosecution must do so in pretrial proceedings." United States v. Sun Myung Moon, 718 F.2d 1210, 1229 (2d Cir. 1983) (citing United States v. Taylor, 562 F.2d 1345, 1356 (2d Cir. 1977)). A selective prosecution claim must be directed to the court, not the jury, because it raises an issue that is independent of the question of the defendants' guilt or innocence. See United States v. Regan, 103 F.3d 1072, 1082 (2d Cir. 1997). Therefore, the defendants may not argue that the government's motives in prosecuting Ms. Stewart are improper.

Stewart responds that prosecutorial motive may be relevant to some matters in dispute. For example, the defense wishes to elicit from witnesses who are cooperating with the Government their understanding of the Government's eagerness to obtain evidence against Ms. Stewart. But any evidence that

raises questions of prosecutorial bias against Stewart has no bearing on the issues properly before the jury, including the credibility of cooperating witnesses. Therefore, such evidence is inadmissible. The defendants are, of course, free to raise questions about the credibility and reliability of cooperating witnesses. But defendants may not use their ability to impeach such witnesses to introduce impermissible evidence of prosecutorial motive.

II. The Absence of an Insider Trading Charge Against the Defendants

The Government seeks to prevent defendants from inviting the jury to speculate about why the indictment does not charge the crime of insider trading.

Clearly, defendants may inform the jury that the indictment does not charge them with the crime of insider trading. But defendants may not invite the jury to speculate as to why that charge was not included in the indictment. Nor may they argue that the absence of an insider trading charge proves their innocence of such activity.

If the Government presents arguments or evidence that tend to show that defendants were motivated not only by the fear that they would be accused of trading illegally, but also that such a fear was justified -- that is, that Stewart's trading was illegal -- then it will open the door to defense evidence that

the conduct was not illegal.

III. Arguments Concerning Stewart's Assertion of Her Innocence and First Amendment Rights

The Government also seeks to preclude Stewart from making arguments or offering evidence that she is being prosecuted for asserting her innocence or that Count Nine violates her First Amendment rights.

Scienter is an element of the crime charged in Count Nine. Stewart of course may rebut the Government's evidence of scienter by arguing that her intent in making the public statements charged in that count was only to assert her innocence and not to prop up the market price of MSLO securities.

I have already ruled as a matter of law that the First Amendment does not protect false statements of fact that are part of a course of criminal conduct. The defense may not reopen this issue by inviting the jury to draw legal conclusions as to the constitutionality of Count Nine. Cf. Marx & Co. v. Diner's Club, Inc., 550 F.2d 505, 509-12 (2d Cir. 1977) (holding that the district court committed error by permitting plaintiff's expert to testify as to the legal duties owed by the parties under the applicable contract law, because "[i]t is not for witnesses to instruct the jury as to applicable principles of law, but for the judge").

IV. Stewart's Ability to Inform the Jury That Count Nine Is a Novel Charge

Any characterization of the securities fraud charge in Count Nine as "novel" is irrelevant to the jury's consideration of the indictment in this case. The defense may not argue or present evidence to the jury that tends to show that this count is an unusual or unprecedented application of the securities laws. Such evidence improperly invites the jury to make legal determinations. Those determinations are the exclusive province of the court. See United States v. Ingredient Tech. Corp., 698 F.2d 88, 97 (2d Cir. 1983) (upholding the district court's exclusion of expert testimony on the question of the defendants' legal duties under the applicable Treasury Regulations, because "[q]uestions of law are for the court"). I have already ruled that Count Nine does not violate Stewart's Due Process rights.

The defense contends that the "novelty" of Count Nine is relevant to Stewart's awareness of whether she was committing securities fraud when she made the public statements charged in that count. *Scienter* is an element of the crime charged, but whether the defendant knew that she was violating the law is irrelevant. The state of mind required is the intent to defraud investors, not knowledge of the securities laws. "It has been uniformly held that 'willfully' in [the context of the securities laws] means intentionally committing the act which constitutes the violation. There is no requirement that the actor also be

aware" that she is violating the securities laws or regulations. Arthur Lipper Corp. v. S.E.C., 547 F.2d 171, 180 (2d Cir. 1976) (quoting Tager v. S.E.C., 344 F.2d 5, 8 (2d Cir. 1965)). Defendants are free to rebut the prosecution's evidence of scienter through cross-examination or presentation of their own evidence. But the novelty of the crime is not relevant to Stewart's intention in making the statements charged in Count Nine.

Conclusion

For the foregoing reasons, the Government's motion in limine is granted.

SO ORDERED.

Dated: New York, New York
January 26, 2004

MIRIAM GOLDMAN CEDARBAUM
United States District Judge