UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

V.

PAUL M. DAUGERDAS, DONNA GUERIN, DENIS FIELD, RAYMOND CRAIG BRUBAKER, and DAVID PARSE,

Defendants.

**----------------x**

## ECFCASE

S3 09 Cr. 581 (WHP)

## MEMORANDUM OF LAW IN SUPPORT OF DEFENSE MOTION *IN LIM/NE* NO. 9: TO PRECLUDE EVIDENCE RELATING TO THE MLD TRANSACTION

**(ON BEHALF OF ALL DEFENDANTS)**

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**PRELIMINARY STATEMENT**

Defendant Raymond Craig Brubaker, joined by all defendants, respectfully submits this memorandum oflaw in support of his motion *in limine* to exclude from trial any evidence relating to the Market Linked Deposit transaction ("MLD").

The MLD is a tax-advantaged transaction that, like dozens of other such products, competed in the marketplace with the four Jenkens & Gilchrist transactions referenced in the indictment. MLD is nowhere mentioned in the indictment, is not part of the charged conspiracy, does not involve Jenkens & Gilchrist, and has never been referenced in any of the government's discovery letters, motion briefs, or bills of particulars. Neither the government's original list of 35 relevant taxpayer transactions, nor the revised list of 29, has included an MLD transaction. In short, we have received the polar opposite of notice that the government would seek to introduce evidence relating to MLD; we have essentially been assured that they would not. The appearance of dozens ofMLD documents on the government's exhibit list is a violation of Federal Rule of Evidence 404(b) and any semblance of fair play. All evidence relating to MLI) should be precluded.

As the Court knows, the sprawling nature of the charges in this case, combined with the enormous volume of discovery, presents substantial and unique challenges to the defense in preparing for trial. The Court has repeatedly directed the government to cabin its case to ensure that it does not become "so complex that no one can understand it." (Dec. 4, 2009 Tr. at 27). Indeed, the Court has observed that, "with over 23 million pages at issue, this Court needs to assert some control as a concession to human mortality to ensure that this case is

presented in an understandable and finite way to the jury." (Aug. 2, 20 IO Tr. at 55).

In the face of all of the prior proceedings aimed at forcing the government to give notice of what it actually intended to prove at trial, we are stunned that the government's exhibit list contains documents related to an uncharged transaction never previously mentioned. We respectfully submit that the Court should prevent the government from unfairly expanding a lengthy and complicated trial through the introduction of evidence relating to MLI). The reasons are clear. *First,* the government failed to provide the required notice under Rule 404(b), denying the defense an adequate opportunity to prepare to rebut any allegations relating to the transaction. It would take months of additional time to prepare to rebut allegations relating to MLD or to place the government's proposed MLD exhibits in context, given that a complete set of the relevant documents, witness statements and *Bracry1* disclosures are not included in the 24

million pages of government discovery produced in this case. *Second,* the introduction of such

evidence would result in a "mini-trial" involving a substantial number of additional documents and testimony regarding the origin, structure and economics of the transaction, Deutsche Bank's approval of the transaction, and the legal opinions supporting the tax treatment of the transaction. Such a mini-trial - more like a full-blown second trial - would divert the jury's attention from the four transactions that are actually at issue in this case and needlessly prolong and complicate the trial by multiplying the number of ambiguous and obscure facts the jury must untangle.

Similar considerations led the court in *United States v. Stein* to exclude comparable evidence of uncharged transaction structures, even when the government gave adequate notice. Thus, even if the government had complied here with its obligations under Rule 404(b), evidence relating to MLD would still be inadmissible under Rule 403.

Accordingly, the government should be precluded from offering MLD evidence at

trial.

**FACTUAL BACKGROUND**

By any standard, this is a massive case. The Third Superseding Indictment (the "indictment") charges a conspiracy to defraud the Internal Revenue Service and violate the tax laws through the use of four distinct and intricate tax-advantaged transactions: the Short Sale, Short Options Strategy ("SOS"), Swaps and HOMER transactions. The indictment refers to

these collectively as the "J&G tax shelters." Ind. il 23. The conduct alleged in the 90-page

indictment spans 11 years and involves 931 allegedly illegal transactions and, by the government's most recent count, 144 co-conspirators, including employees of Jenkens & Gilchrist, Deutsche Bank, BOO Seidman, Arthur Andersen, Ernst & Young, Bank One and American Express, as well as a host of individual taxpayers and their independent advisors.

Nowhere in the sprawling indictment is there any mention of MLD, another tax­ advantaged transaction - and for good reason. MLD is not a part of the charged conspiracy.

Jenkens & Gilchrist did not design MLI), nor did it provide a legal opinion for the transaction. MLI) was structured and promoted by the law firm of Cantley & Sedacca, and Bryan Cave and Pryor Cashman were the two law firms that issued legal opinions supporting the tax treatment of the transaction. Mr. Brubaker served as a broker on some MLD transactions, but many of those were executed at Societe Generale, not Deutsche Bank.

In our February 5, 2010 letter to the government, we specifically requested that the government provide Rule 404(b) disclosure. No notice has even been given. There has also been extensive motion practice and discussions among the parties and the Court relating to discovery. As a result, the government has been required to produce a list of co-conspirators, a witness list, a list ofrelevant taxpayer transactions, and separate bills of particulars for wires, mailings, false statements and acts of obstruction. In none of these lists has an MLI) transaction

been listed or referenced. The architects of the MLD structure at Cantley & Sedacca are neither co-conspirators nor prospective witnesses. Taxpayers who engaged in MLD transactions are not included in the 3500 material or in the *Brady* disclosures.

Nevertheless, on January 17, 2011, the government provided the defense with a list of more than 2,700 exhibits, spanning more than 60,000 pages, that it intends to offer at trial. Forty-two of the government's proposed exhibits appear to relate to MLD. The government's list even includes draft opinion letters and correspondence relating to Deutsche Bank's approval of the transaction and the economics of the trade, (e.g., Gov't Ex. 69-9; Gov't Ex. 400-112), all of which raise substantial factual and legal issues that the defense would need to address at trial. More than a year and a half after indictment and with just over one month remaining before trial, the government has not proffered any explanation for why these materials or any other evidence relating to MU) are admissible, and it is too late to start now.

## ARGUMENT

## The Government Has Not Provided the Required Notice under Rule 404(b)

fn order to afford the defense an adequate opportunity to prepare for trial in this exceedingly complex case, we specifically requested Rule 404(6) disclosure nearly a year ago. Given the scope of the charges in the indictment, and the enormity of the government's production, we wanted to ensure that we had sufficient time to prepare to rebut any allegations - charged or uncharged - that Mr. Brubaker might face at trial. But the government provided no notice and waited until there were just weeks remaining before the start of trial to provide any indication that it would seek to offer evidence relating to MLD at trial. The inclusion of MLD documents on the exhibit list at the 11th hour satisfies neither the letter nor the spirit of the notice requirement of Rule 404(b) and renders any evidence relating to MLD inadmissible at trial.

Under Rule 404(6), evidence of other crimes, wrongs or acts may be admissible if offered "for some other purpose than to show a probability that the defendant committed the alleged crime because he is a man of bad character." *United States. v. Cushing,* No. S3 00 CR. 1098 (WHP). 2002 WL 1339101, at \*1 (S.D.N.Y. June 18, 2002) (citing *UnitedStatesv.*

*Germosen,* 139 F.3d 120, 127 (2d Cir. 1998)). In order to seek admission of other act evidence

under the Rule, the government must first provide the defense with "reasonable notice" of its intent to do so. Fed. R. Evid. 404(b). As the Advisory Committee's Note to the 1991 amendment explains, the notice requirement is "intended to reduce surprise and promote early resolution on the issue of admissibility." Fed. R. Evid. 404(6) advisory committee's note (1991). Notice is also "necessary for a defendant to prepare for trial." *United States v. Heatley,* 994 F. Supp. 483,491 (S.D.N.Y. 1998).

Courts in this Circuit routinely require the government to specifically identify Rule 404(6) material and "explain in detail the purposes for which the evidence is sought to be admitted." *United States v. Le1y,* 731 F.2d 997, 1002 (2d Cir. I 984); *see also Heatley,* 994 F. Supp. at 491 (under Rule 404(6) government must provide "a full and particularized explanation of the grounds for admissibility"). As a matter of discretion, a district court may determine that a pmiicular "notice was not reasonable, either because of the lack of timeliness or completeness." Fed. R. Evid. 404(6) advisory committee's note (1991). Moreover, "[b]ecause the notice requirement serves as condition precedent to admissibility of 404(b) evidence, the offered evidence is inadmissible if the court decides that the notice requirement has not been met." *Id.;*

*see also United States v. Gasparik,* 141 F. Supp. 2d 361,368 n.4 (S.D.N.Y. 2001) (precluding

introduction of 404(b) material where the government failed to provide the required notice).

Here, there can be no doubt that the government has failed to comply with the notice requirement of Ruic 404(6). Although we specifically requested Rule 404(6) disclosure almost a year ago, no notice has ever been given. Instead, the government sought to sidestep its disclosure obligations and sandbag the defense by intermingling MLD documents among the more than 2,700 exhibits identified by the government last week.

Any claim by the government that it provided the defense with adequate notice by including MLD-related documents in its voluminous production should be swiftly rejected by this Court. The government cannot satisfy its Rule 404(6) obligation by burying 404(6) material in a mountain of Rule 16 discovery. Doing so in no way provides the defense with "reasonable notice" of the other acts evidence the government intends to introduce at trial or enables the defense adequately "to prepare for trial," because the defense is left to speculate about which documents the government may ultimately contend are admissible under the Rule.

*United States v. Soliman,* No. 06 CR. 236A, 2008 WL 4490623, at \*8 (W.D.N.Y. Sept. 30, 2008), is illustrative. In that case, the defendant was charged with health care fraud in a 64-count indictment. As part of its Ruic 16 discovery, the government produced over 60,000 pages of documents that were seized from the defendant. When the defendant requested disclosure of Rule 404(6) materials, the government asserted that the requested materials were included among the 60,000 pages and refused to provide any further detail until sometime closer to trial. The court squarely rejected the government's response as inadequate: "Given the volume of documents in this case, the notice ... is not sufficient. The Government should specifically identify the documents responsive to Rule 404(6) disclosure." *Id.* (citation omitted).

The same analysis applies with even greater force in this case, where the government's production (which is still growing) consists of more than 24 million pages and the

government has never even suggested that the defense was obliged to comb the haystacks for

evidence of uncharged crimes. Scattered among this mass of discovery are documents relating to many uncharged tax-advantaged transactions, including MLD. Until we received the government's expansive exhibit list, we could not know which if any of the documents relating to which if any uncharged transactions the government would seek to offer as 404(b) evidence.

While the government has now identified 42 MLD documents it intends to offer at trial, the government still has not satisfied the reasonable notice requirement of the Rule. With only weeks remaining before the start of trial, the government has not provided "a full and particularized explanation of the grounds for admissibility" of any of these MLD-related exhibits as it is required to do. *Heatley,* 994 F. Supp. at 491; *see also Levy,* 731 F.2d at 1002.

The government cannot cure these deficiencies by providing the information

required under the Rule in response to this motion. *United States v. Garde!!,* No. S4 00 CR. 632 (WHP), 2001 WL 1135948, at \*6 (S.D.N.Y. Sept. 25, 2001) (rejecting government's notice as insufficient when provided for the first time in response to defendant's motion to preclude). In light of the particular facts of this case, any such notice would plainly be unreasonable "because of the lack of timeliness." Fed. R. Evid. 404(6) advisory committee's note (199 I).

As this Court is aware, given the broad scope of this case, the defense has repeatedly sought information from the government to minimize the burden of reviewing the 24 million pages of discovery and to afford the defense an adequate opportunity to prepare for trial. The government resisted our requests at every turn. Only after this Court granted the defendants' motion for a bill of particulars did the government identify which of the 931 transactions referenced in the indictment would actually be the subject of proof at trial. And even then, the defendants were compelled to seek an order directing the government to further cabin its case in

### accordance with representations the government had previously made to the Court, which yielded the current list of 29 "taxpayer group transactions" that the government produced on December 29, 20 I 0.

In reliance on the disclosures that trickled out last fall about what transactions would really be at issue at trial, we have been painstakingly reviewing the unprecedented volume of discovery to identify relevant documents. For any transaction or factual issue, it takes weeks of searching among a myriad of disorganized collections from Jenkens & Gilchrist, Deutsche Bank, outside accountants, taxpayers, the **IRS** and other sources, just to assemble the essential documents. Finding emails, memoranda and handwritten notes related to any specific factual issue requires diligence, creativity, some luck and, above all, time.

If the government is allowed to interject allegations relating to MLD at this late date, Mr. Brubaker will be unfairly prejudiced at trial. With approximately one month remaining before the trial is scheduled to begin, the defense cannot meaningfully prepare to rebut any claims relating to MLD, a complicated transaction that is distinct from the Short Sale, SOS, Swap and HOMER transactions that are at issue in this case. To do so, we would have to start our trial preparation all over again and not only re-comb the 24-million-plus pages of discovery to identify any documents relevant to MLD, but also subpoena a host of third parties to ensure a complete factual record with respect to the transaction.

The government's production does not include all of the relevant documents from Cantley & Sedacca, the law firm that promoted the MLD transaction, Pryor Cashman and Bryan Cave, the two law firms that provided legal opinions relating to the transaction, or John Ivsan, another attorney who played an important role in structuring MLI). Nor does it include documents from Clarion Capital, the investment advisory and trading firm responsible for

directing the underlying investments, or transaction documents from the two banks that executed the 183 individual trades. The production similarly does not include documents from the taxpayers who participated in the transaction or their independent advisors. Without these materials, the defense cannot fully appreciate, let alone convey to the jury, the context of the MU) evidence the government proposes to offer at trial.

It has taken more than a year and a half for the defense to prepare to meet the charges in the indictment. Even working at full capacity, it will be a tremendous struggle to be prepared at trial for the 29 transaction groups, 65 potential witnesses, 144 potential co­ conspirator hearsay declarants, and 2,700 other potential government exhibits on the government's various lists. There simply is not enough time to add an entirely new non-Jenkens transaction to the mix. Accordingly, we respectfully submit that the Court should reject the MLD evidence for lack of notice under Rule 404(b).

#### Admission of MLD Evidence Will Unduly Lengthen the Trial and Confuse the Jury

Even if the government had complied with the notice requirements of Rule 404(6), evidence relating to MLD would still be inadmissible under Rule 403, because any conceivable relevance the evidence may have is vastly outweighed by the prejudicial effect of the "mini-trial" that will certainly result if the evidence is allowed.

Under Rule 403, courts have the discretion to exclude other act evidence if the probative value of the evidence is outweighed by its potential to confuse or mislead the jury or waste time. Fed. R. Evict. 403. Exercising that discretion, courts in this Circuit, including this Court, have repeatedly excluded other acts evidence under Rule 403 where the evidence would lead to a collateral litigation that would unduly prolong the trial and distract the jury from the main charges in the case. *See, e.g., United States v. Schatzle,* 901 F.2d 252,256 (2d Cir. 1990) (evidence properly excluded when "potential delay from allowing a mini-trial" outweighed

probative value); *United States v. Kahn,* 472 F.2d 272, 279 (2d Cir. 1973) (upholding exclusion of proffered evidence because it "presented the very real danger of degenerating into a side trial"); *United States v. Fasciana,* 226 F. Supp. 2d 445, 459 (S.D.N.Y. 2002) (finding that "admission of evidence concerning [a prior similar act] will lead to a confusion of the issues and unduly lengthen the trial"); *United States v. Gardell,* No. S4 00 CR. 632 (WHP), 2001 WL 1135948, at \*6 (S.D.N.Y. Sept. 25, 2001) (precluding 404(b) evidence that would require defendant to submit proof to refute government's allegations, "assume disproportionate significance at trial, lead to a mini-trial ... and engender confusion among the issues").

There can be no question that the admission of evidence relating to MLD will lead to just such a "mini-trial" in this case. Even in the absence of such evidence, this case will be long and complicated. The indictment alleges that the Short Sale, SOS, Swaps and HOMER transactions generated unlawful tax losses for 931 taxpayer-clients who invested in them. In order to evaluate these claims, the jury will have to gain an understanding of the complex structure of each of these transactions and the financial instruments that lie at their core.

Moreover, because the government has alleged that the legal opinion letters relating to the four transactions, which indicated that the transactions were more likely than not to survive scrutiny by the IRS, contained fraudulent misrepresentations, the jury will have to decide whether the facts in the opinion letters correspond to the manner in which the transactions were executed. To reach conclusions on these issues, the jury will have to analyze the testimony of the 65 witnesses and 60,000 pages of exhibits the government intends to offer at trial and also weigh any evidence introduced by the defense to rebut the indictment's claims.

In the face of similar circumstances, Judge Kaplan precluded the government from introducing evidence of uncharged tax-shelters in *United States v. Stein,* 521 F. Supp. 2d

266, 270-71 (S.D.N.Y. 2007). Although the government had argued (on proper notice to the defendants) that the evidence was admissible to show knowledge or intent and to show the relationship among co-conspirators, Judge Kaplan excluded the evidence, finding that it "risk[ed] confusion of the issues and undue delay" and was "likely to divert the jury's attention from the charged transactions, which [were] sufficiently complicated in themselves." *Id.* The same is true here. The evidence relating to MLD should be excluded to "ensure that this case is presented in an understandable and finite way to the jury." (Aug. 2, 20 l 0 Tr. at 55).

If the government is also allowed to raise questions regarding the origin, structure, or economics of the MLD transaction, the length and the complexity of this case will expand dramatically, because Mr. Brubaker will have "to mount a substantial defense to refute those allegations." *Gare/ell,* 2001 WL 1135948, at \*6. Such a defense would include, at a minimum, evidence relating to Deutsche Bank's approval of the transaction, as well as certain communications by various lawyers, accountants and advisors who expressed an opinion on the appropriate structure and tax treatment of the transaction. Not only would such evidence unnecessarily prolong this trial, but it would also distract the jury from the four transactions that are actually at issue in this case and multiply the number of complex factual issues the jury must

resolve.

Moreover, at this late date, we cannot plausibly be in a position to address MLD at trial without several additional months of preparation. We would need to serve subpoenas on Cantley & Sedacca and the other law firms that wrote opinion letters opining that MLD was legal and proper under the tax laws, litigate potential privilege issues, attempt to interview witnesses, re-comb the existing discovery, synthesize the information and prepare again for trial. It would be the height of unfairness for the government to inject MLI) into the trial at the last minute and

thereby deprive the defense of any meaningful opportunity to prepare to rebut myriad new factual and legal arguments. Accordingly, MLD evidence should be excluded under Rule 403.

#### CONCLUSION

For the foregoing reasons, we respectfully request that this motion *in limine* to preclude the government from introducing any evidence relating to the MLD transaction be granted.

Dated: New York, New York January 27, 2011

Respectfully submitted,

#### s/ Barry H. Berke

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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

- against - ORDER

PAUL M. DAUGERDAS, et al.,

Defendants.

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WILLIAM H. PAULEY III, United States District Judge:

At the February 9, 2011 conference (the "February Conference"), this Court ruled on various motions in limine filed by the parties. At that time, this Court reserved on other motions in limine to consider the arguments raised by the parties. This Court now rules on Defendants' First, Third, Seventh, Ninth, Thirteenth and Fourteenth motions in limine and the Government's motion in limine with respect to Ken Brown as set forth below. This Court reserves decision on any motions not previously decided at the February Conference, or addressed in this Order.1

1 The in limine motions on which this Court reserves decision are: Defendants' Second (evidence of civil cases), Fourth (reference to the demise of Jenkins & Gilchrist), and Eighth (expert) motions in limine, portions of Defendants' Sixth (bad acts), Tenth (joint defense privilege), and Thirteenth (as to GX 500-2) motions in limine, and the Government's motion in limine regarding failure to assess civil fraud penalties as affecting witness bias.

IV. Defendants' Ninth Motion In Limine

Defendants move to exclude forty-two exhibits relating to the Market Linked Deposit ("MLD") transaction, asserting that it (i) was not included in the Government's Rule 404(b) disclosure and (ii) is likely to confuse the jury and spawn a mini-trial. The Government seeks to introduce only four exhibits related to the MLD transaction: GX 400-80, GX 400-81, GX 400-230, and GX 400-232.

Fed. R. Evid. 404(b) requires the Government to provide Defendants with "reasonable notice" of any extrinsic "acts" evidence it intends to offer at trial. While Defendants requested Rule 404(b) disclosure on February 5, 2010, the Government did not disclose its intent to offer evidence on the MLD transaction until it produced its exhibit list on January 17, 2011.

This Court has cautioned the Government repeatedly about the need to cabin its proof and provide advance disclosure of the transactions to be offered at trial. Given the magnitude of this case, Defendants cannot adequately prepare to rebut evidence related to the MLD transaction

with approximately one month remaining before trial. See Fed. R. Evid. 404(b) advisory committee's note, 1991 Amendment ("The amendment to Rule 404(b) adds a pretrial notice requirement in criminal cases and is intended to reduce surprise and promote early resolution on the issue of admissibility."). Accordingly, the Government is precluded from introducing any evidence relating to the MLD transaction.

Dated: February 16, 2011 New York, New York

SO ORDERED:

 "'- *C¼,*

WILLIAM H. PAULEY III

US.DJ.

*All Counsel of Record*