UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,
-against- MEMORANDUM OF
DECISION AND ORDER
RW PROFESSIONAL LEASING SERVICES 02 CR 767 (ADS) (MLO)
CORP., also known as “Professional Leasing
Services,” ROCHELLE BESSER, also known
as “Rochelle Drayer,” BARRY DRAYER,
ROGER DRAYER, ADAM DRAYER,
MYRNA KATZ, STEPHEN BARKER, and
PAYADDI SHIVASHANKAR,
Defendants.
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APPEARANCES:
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SPATT, District Judge.
This case involves charges of conspiracy to commit bank fraud, wire fraud, and money laundering. Presently before the Court is a motion by the Defendant Barry Drayer for severance of his trial from that of codefendant Stephen Barker, who also joins in the motion. For the reasons set forth below, the motion is denied.
I. BACKGROUND

A. THE ALLEGED FRAUDULENT SCHEME

The government alleges that the evidence at trial will show the following facts. The defendant Barry Drayer ("Drayer") was the leader of a complex fraud scheme in conjunction with a company he controlled known as RW Professional Leasing Services, Inc. ("PLS"). Barry Drayer served as the Vice President of PLS, which maintained business locations in Island Park, New York, and Wellesley, Massachusetts. The scheme allegedly operated from 1991 until mid-2002 and included the use of two "sham" companies operated by the defendant Stephen Barker ("Barker").

PLS provided financing to medical professionals wishing to purchase new medical equipment or otherwise obtain funding in connection with a medical practice. In order to obtain the funding for the medical professionals, PLS had relationships

with a variety of other companies which either had the necessary capital to lend, or were in a position to obtain funding from federally-insured banks. Under the agreements between PLS and the various funding institutions, if an individual borrower, prepaid a loan so as to take advantage of a discount, PLS was required to remit such payment to the funding institution. As a part of the fraudulent scheme, PLS allegedly would not remit the payment, but instead pocketed the prepayments and continued making the monthly payments on behalf of the borrower. To further the scheme, PLS diverted mail such as bills from the funding institution addressed to the borrower into a private mail-drop account that PLS had secretly opened in the borrower's name. Eventually, Drayer learned that if PLS paid the monthly amount prior to the due date no invoice would be sent to the borrower. Therefore, the mail-drop scheme was replaced with a "pay ahead" scheme.

To further hide the fraud, PLS allegedly created phony checks in the name of the borrower, made payable to PLS, to make it look as though the borrower had made a monthly payment to PLS. PLS then provided a copy of the phony check to the lender along with PLS' own original check paying in place of the borrower. This enabled PLS to use the full proceeds prepaid by the borrower, while only paying the lender in small increments over the life of the loan.

Another fraudulent device allegedly used by PLS was to generate phony invoices through a sham company called Riteway Health Services ("Riteway"). This

false invoice was used to make it appear as if Riteway had sold new medical equipment to the borrower, which PLS was being asked to finance. In fact, Riteway was a shell company that had no assets or equipment and never did any business whatsoever. Allegedly, PLS engaged in this kind of fraud over 1,000 times.

Still another fraudulent device allegedly used by PLS was multiple lending. In this regard, PLS would take a legitimate application of a borrower and then fraudulently submit that same application to multiple lenders without the borrower's consent. Upon receiving the multiple loan proceeds from the lenders, PLS would remit

only one set of loan proceeds to the borrower, and would pocket the rest.

B. THE DEFENDANT STEPHEN BARKER'S
ALLEGED ROLE AND STATEMENTS

Barker operated two companies in California known as Medpro Equipment Co. ("Medpro") and Carefree Financial Services ("Carefree"), which remitted loan applications to PLS for submission to the lending institutions. To ensure that inappropriate applications would be approved, Barker included in the financing application a fraudulent invoice from Medpro to PLS, making it appear as though Medpro had sold valuable medical equipment to the doctors, which Medpro was asking PLS to finance. The government intends to show that Medpro was a sham corporation with no assets or business function that existed solely to facilitate Barker's involvement in bank fraud with co-defendant Barry Drayer.

Barker made a series of statements to federal agents both before and after his arrest. Specifically, Barker made incriminating statements to FBI agents in August of 2005, that also inculpated Barry Drayer. Barker also provided the government with a laptop computer and delivered an eight page typewritten single spaced statement. The statement attributes all criminal responsibility to Barry Drayer while attempting to excuse his own involvement in any illegality that he might have unwittingly aided and abetted. Barker states in this statement that Drayer told the unwitting Barker to form Medpro in order to facilitate Drayer's secret frauds. The Barker statement reads as follows:

> I can and am willing to testify to the above facts concerning my business dealings with PLS and Barry Drayer. I admit that I made it very easy for Barry Drayer to use me and that I was ignorant in hindsight. But I was NOT a co-conspirator. I was not a part of the "inner family circle" that existed at PLS. PLS was simply a place for me to submit credit applications for loan approval. I had the opportunity to do business with many other funding sources that offered the same programs offered by PLS but we had no reason to ever leave PLS. I would have earned the same referral fees from other funding sources.
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> . . . .
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> Looking at things now, hindsight is always 20/20 but I had no way of knowing that PLS was setting Medpro and Carefree up to "take the fall" if things ever went wrong for PLS. It is completely out of character for me or my family to participate in any type of fraud or co-conspiracy. Not only did we not have the knowledge of how the industry operated in order to perpetrate such a fraud, it completely violates our belief system which is based on strong Christian values.
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> I trusted PLS and Barry Drayer and that trust allowed him to take advantage of me. By following the instructions of Barry Drayer and his

staff I can clearly see now that this fraud was by PLS design. I read an article in Leasing News on-line, regarding Barry Drayer's dealings with Old Kent Bank. It seems that this is not the first time that Barry Drayer has initiated this type of scheme. He also did similar things with AT&T. It is wrong to try and hold me accountable for representations that Barry Drayer and PLS made to his banks with whom I had NO CONTACT or relationship, direct or indirect.

Barker's typewritten statement to federal agents is inconsistent with his prior statements to federal agents. In his first recorded statement to the FBI dated June 12, 2003, Barker said that he formed Medpro in 1996 or 1997 and that it was set up to re-market used medical equipment. No mention of Barry Drayer was made. In addition, he told agents that "he [did] not know whether or not the Medpro name was ever used inappropriately by PLS" and that "while he worked with Drayer at PLS, he was never aware of any fraud, misrepresentations, or illegal activity on the part of Drayer."

In his second substantive conversation with federal agents, Barker said that he "remembered that Drayer was very smooth and well respected ten years ago. Drayer came highly recommended. . ." Barker went on to say that he "had no reason to believe Drayer was dishonest, except toward the end of PLS' business in early 2002."

II. DISCUSSION

A defendant may move for severance under Federal Rule of Criminal Procedure 14, which provides in relevant part:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials

of counts, grant a severance of defendant or provide whatever justice requires.

Fed. R. Crim. P. 14

Under this rule, the decision to sever a joint trial "is committed to the sound discretion of the trial judge." United States v. Blount, 291 F.3d 201, 209 (2d Cir. 2002). There is a preference in the federal system for joint trials of defendants who are indicted together, Zafiro v. United States, 506 U.S. 534, 537, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993), and the Court should sever trials of co-defendants under Rule 14 only 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 about guilt or lack of guilt. Id. at 539, 113 S. Ct. 933, 122 L. Ed. 2d 317; United States v. Rahman, 189 F.3d 88, 122 (2d Cir. 1999). Even if prejudice is shown, Rule 14 does not require severance. See United States v. Haynes, 16 F.3d 29, 32 (2d Cir. 1994). Rather, "limiting instructions often will suffice to cure any risk of prejudice." Zafiro, 506 U.S. at 539, 113 S. Ct. 933, 122 L. Ed. 2d 317.

Drayer contends that there is a possibility that the co-defendants have antagonistic defenses. "Defenses are mutually antagonistic when accepting one defense requires that 'the jury must of necessity convict a second defendant.' " United

States v. Yousef, 327 F.3d 56, 151 (2d Cir. 2003) (quoting United States v. Cardascia, 951 F.2d 474, 484 (2d Cir. 1991)); see also Zafiro, 506 U.S. at 542, 113 S. Ct. 933, 122 L. Ed. 2d 317 (Stevens, J., concurring) (describing "mutually antagonistic"

defenses as those as to which "acceptance of one . . . necessarily preclude[s] acceptance of the other and acquittal of the codefendant").
However, "[a] trial need not be severed simply because codefendants raise conflicting defenses." United States v. Blount, 291 F.3d 201, 209 (2d Cir. 2002); see, e.g., Zafiro, 506 U.S. at 538–39, 113 S. Ct. 933, 122 L. Ed. 2d 317. The Supreme Court and the Second Circuit have both stated that antagonistic defenses in general, without a specific instance of prejudice, "can be cured with proper instructions." Yousef, 327 F.3d 56, 151 (quoting Zafiro 506 U.S. at 540, 113 S. Ct. 933, 122 L. Ed. 2d 317). Indeed the Second Circuit in Yousef, held that the following instructions to the jury "sufficed to cure any possibility of prejudice."
the issue of each defendant's guilt is totally personal to the individual defendant. You must make a separate determination as to whether or not any defendant's guilt as to the specific charge has been proven beyond a reasonable doubt.
In making that judgment, you are to disregard entirely the circumstance that two defendants have been tried together
. . . .
You have also heard testimony of certain statements or admissions made by each of the defendants after each was arrested on these charges. I instruct you that if you find such a statement was made, each of the statements can be used only against the defendant who allegedly made the statement and not against the other defendant.
Id. at 151–52.
The specific trial right that Drayer argues will be violated if the two defendants are tried together is his right to confrontation. In response, the government has

expressly stated that it does not intend to offer any statements that may give rise to an issue under Bruton v. United States, 391 U.S. 123, 126, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). The only statements that the government intend to offer in its case in chief are from interviews conducted on June 12, 2003 and February 13, 2004. As conceded by Drayer, Barker's statement from this time period do not incriminate Drayer. Therefore, severance is not warranted based on the possibility that the defendants will have antagonistic defenses.
As to the use of the Barker statements for impeachment purposes should he testify at the trial, there is no danger of violating Drayer's Right to Confrontation because Barker will be subject to cross examination. See Richardson v. Marsh, 481 U.S. 200, 206, 107 S. Ct. 1702, 1707, 95 L. Ed. 2d 176 (1987) ("[W]here two defendants are tried jointly, the pretrial confession of one cannot be admitted against

the other unless the confessing defendant takes the stand."); Nelson v. O'Neil, 402 U.S. 622, 91 S. Ct. 1723, 29 L. Ed. 2d 222 (1971). However, although the statements would be admissible to impeach the credibility of Barker without implicating Bruton should he testify, the statements may not be used to incriminate Drayer. The postarrest statements were not made in furtherance of the conspiracy and would be inadmissible hearsay. See, e.g., United States v. Sauza-Martinez, 217 F.3d 754, 758 (9th Cir. 2000); United States v. Brown, 699 F.2d 585, 592 (2d Cir. 1983).
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In joint trials of criminal defendants, it is often the case that evidence of what one defendant said or did is inadmissible against another defendant. Generally, various remedies other than severance are available to protect the codefendant from the potential of "spillover," such as issuing limiting instructions to the jury or redacting out-of-court statements that refer to a codefendant by name. See United States v. Alvarado, 882 F.2d 645, 651 (2d Cir. 1989), overruled on other grounds, Bailey v. United States, 516 U.S. 137, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995); see also Gray v. Maryland, 523 U.S. 185, 192–93, 196, 118 S. Ct. 1151, 140 L. Ed. 2d 294 (1998) (holding that redactions should not be obvious); United States v. Castro, 813 F.2d 571, 576 (2d Cir. 1987). "Ordinarily, a witness whose testimony is introduced at a joint trial is not considered to be a witness 'against' a defendant if the jury is instructed to consider that testimony only against a codefendant." Richardson, 481 U.S. at 206, 107 S. Ct. at 1707. Indeed, the Second Circuit has stated that a multi-defendant trial is not beyond the "ken of the average juror." United States v. Villegas, 899 F.2d 1324, 1347 (2d Cir. 1990).
In Richardson, the Supreme Court wrestled with the issue of joint trials and incriminating statements and found that limiting instructions and other remedies were more desirable than severance.
One might say, of course, that a certain way of assuring compliance would be to try defendants separately whenever an incriminating statement of one of them is sought to be used. That is not as facile or as just a remedy as might seem. Joint trials play a vital role in the criminal justice system,
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accounting for almost one-third of federal criminal trials in the past five years. Many joint trials-for example, those involving large conspiracies to import and distribute illegal drugs-involve a dozen or more codefendants. Confessions by one or more of the defendants are commonplace-and indeed the probability of confession increases with the number of participants, since each has reduced assurance that he will be protected by his own silence. It would impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma)

of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand. Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability-advantages which sometimes operate to the defendant’s benefit. Even apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts. The other way of assuring compliance with an expansive Bruton rule would be to forgo use of codefendant confessions. That price also is too high, since confessions are more than merely ‘desirable’; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.

Richardson, 481 U.S. at 209–10, 107 S. Ct. at 1708–09, 95 L. Ed. 2d 176 (citations, quotations, and footnotes omitted).

Nevertheless, in this case the Court is of the opinion that limiting instructions will be insufficient to offset the potential for prejudicial spillover of evidence. See, e.g., United States v. Davidson, 936 F.2d 856, 861 (6th Cir. 1991). “ ‘Prejudice’ ” occurs in joint trials when proof inadmissible against a defendant becomes a part of his trial solely due to the presence of co-defendants as to whom its admission is proper.” United States v. Salameh, 152 F.3d 88, 115 (2d Cir. 1998). Given the incriminating

nature of Barker’s statements, the Court is reasonably certain that if such statements were introduced, even solely for impeachment of Barker, limiting instructions would have little curing effect on the prejudicial spillover to Drayer.

However, granting severance based on the possibility that Barker’s post-arrest written statements will be introduced as impeachment evidence at the trial is speculative at this juncture. Making a decision on such a contingency would require the Court to issue an improper advisory opinion. As such, based on the government’s agreement not to use the post-arrest statements in its case in chief, the request for severance pursuant to Rule 14 is denied. If the government seeks to use Barker’s postarrest

written statements at the trial to impeach Barker should he testify, the Court would then, at that time, have to decide whether such statements would be so prejudicial as to warrant further remedial action.

III. CONCLUSION

For all the foregoing reasons, it is hereby

ORDERED, that the motion by the Defendants for severance pursuant to Rule 14 is DENIED.

SO ORDERED.

Dated: Central Islip, New York

November 29, 2005

/s/ Arthur D. Spatt
ARTHUR D. SPATT
United States District Judge