

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES,	:	CRIMINAL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
GENE BORTNICK,	:	NO. 03-CV-0414
Defendant.	:	

MEMORANDUM AND ORDER

AND NOW, this 15th day of November, 2004, upon consideration of Motion to Take Deposition of Foreign Witnesses in the Ukraine and Russia filed by the United States on December 16, 2003 (Doc. No. 28) and the Motion for Depositions of Foreign Witnesses, and Motion for Issuance of Letter Rogatory to the Federal Republic of Germany filed by the United States on March 19, 2004 (Doc. No. 49), it is hereby ORDERED that the Motion to Take Deposition of Foreign Witnesses in the Ukraine and Russia is GRANTED in part and DENIED in part, and the Motion for Depositions of Foreign Witnesses, and Motion for Issuance of Letter Rogatory to the Federal Republic of Germany is GRANTED in party and DENIED in part.

Depositions are generally disfavored in criminal cases. The Third Circuit has expressed a “strong preference for live testimony.” United States v. Ismaili, 828 F.2d, 161 153 (3d Cir.1987). This preference is especially acute in the context of a deposition taken in a foreign country because of the absence of procedural protections given parties in the United States, the resulting infringement on a defendant’s Sixth Amendment rights, and the factfinder’s inability to observe the demeanor of the deposition witness. See United States v. Drogoul, 1 F.3d 1546, 1551 (11th Cir. 1993)(citations omitted).

The movant bears the burden of proof in a Rule 15(a) motion. Ismaili, 828 F.2d at 159.

That party must demonstrate the necessity for preserving prospective witness' testimony by a deposition, as required by Rule 15 of the (in relevant part):

Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place

In assessing whether the proponent has established the required exceptional circumstances, the trial court must consider, in addition to the potential injustices to the non-moving party as discussed above, two critical factors – the materiality of the witness’s testimony and the unavailability of the witness. Ismaili, 828 F.2d at 159.

The government has made a showing of exceptional circumstances with regard to three witnesses: Herman Poorhuis, who is located in the Federal Republic of Germany, Ovanes Petrosyan, who is located in Russia, and Aleksandr Matantsev, who is located in the Ukraine. These witnesses have been satisfactorily shown to be unavailable and can offer material testimony with respect to the bankruptcy fraud charges in the Second Superseding Indictment.

The government has failed to make an affirmative showing that the following proposed witnesses are unavailable to testify as trial: Nina Babich, Valentyna Onischuck, and Alexandr Chernenko from the Ukraine, and Sergey Tokmakov and Valentina Yevdokimova from Russia. As such, the Motion to Take Deposition of Foreign Witnesses in the Ukraine and Russia is denied with respect to these witnesses.

Lastly, the government has failed to show that the testimony of the two remaining

witnesses, Matthew North of the Federal Republic of Germany and Shamset Kozina of Russia, is material to its case in chief. The United States expects that both Mr. North and Ms. Kozina would offer testimony that would be in some way related to the amount of Defendant's overseas inventory. The gravamen of the United States' bank fraud case against Defendant is that Defendant, in his reports to Congress Financial Corporation, fraudulently inflated the amount of inventory that was eligible to serve as the basis for a loan extended him by Congress. Paragraph 7 of the Second Superseding Indictment states that, under the terms of Defendant's agreement with Congress, "inventory held outside of the United States" was not to be used as a basis for the loan and therefore was not to be reported. Second Superseding Indictment at 3-4 (Doc. No. 87). If the United States' theory of the bank fraud case is that Defendant inflated the amount of inventory present in the United States in his periodic reports to Congress, the amount of inventory located overseas is irrelevant. Assistant United States Attorney Hardy confirmed this at a December 18, 2003 hearing on these Motions by stating that, with respect to the inventory inflation charges, "the Government's case is not really about what happened overseas, it's about what happened in Trevese, Pennsylvania." Hr'g Tr. at 15. The Court thus finds that the testimony of Mr. North and Ms. Kozina is not material to the United States' case in chief. The Motion to Take Deposition of Foreign Witnesses in the Ukraine and Russia is denied with respect to Ms. Kozina and the Motion for Depositions of Foreign Witnesses, and Motion for Issuance of Letter Rogatory to the Federal Republic of Germany is denied with respect to Mr. North.

An appropriate order follows.

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It is further ORDERED that the Motion for Depositions of Foreign Witnesses, and Motion for Issuance of Letter Rogatory to the Federal Republic of Germany is GRANTED with respect to Herman Poorhuis and DENIED with respect to witness Matthew North.

It is further ORDERED that at least one copy of the letter rogatory will be retained by the Court, and that two original signed copies will be delivered to Assistant United States Attorney Peter D. Hardy for translation and transmittal through suitable channels to the appropriate judicial authorities in the Federal Republic of Germany.

BY THE COURT:

Legrome D. Davis, J.