

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

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

MEMORANDUM AND ORDER

AND NOW, on this 29th day of November, 2004, presently before the Court is the Motion to Dismiss Counts One, Twenty, and Twenty-One as Duplicitous filed by Defendant Gene Bortnick on January 14, 2004 (Doc. No. 34). For the reasons that follow, Defendant's Motion is DENIED.

At the outset, the Court notes that its Memorandum and Order dismissing Count One of the Indictment for Failure to State a Criminal Offense moots Defendant's instant Motion to the extent that it challenges Count One as duplicitous. This memorandum will discuss only the issues of duplicity that arise with respect to Counts Twenty and Twenty-One of the original indictment. A Second Superceding Indictment ("Indictment") has been filed in this case. The substance of Counts Twenty and Twenty-One have not changed since the original indictment, but those Counts are now listed as Counts Twenty-One and Twenty-Two, respectively.

According to Federal Rule of Criminal Procedure 8(a), a single indictment may contain more than one offense:

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or

constituting parts of a common scheme or plan.

Fed. R. Crim. P. 8(a). Duplicity is the improper joining of distinct and separate offenses in a single count. U.S. v. Haddy, 134 F.3d 542, 548 (3d Cir.1998) (citing United States v. Starks, 515 F.2d 112, 116 (3d Cir.1975)). Duplicity raises several constitutional issues with respect to the Defendant. First, a duplicitous indictment implicates a defendant's Sixth Amendment right to know the charges against him. See United States v. King, 200 F.3d 1207 (9th Cir.1999)(citation omitted). Second, “a general verdict on a duplicitous count does not reveal exactly which crimes the jury found the defendant had committed.” United States v. Gomberg, 715 F.2d 843, 845 (3d Cir.1983), cert. denied, 465 U.S. 1078 (1984). Third, a general jury verdict on a duplicitous count does not reflect whether the jury was unanimous with respect to any of the offenses charged. Starks, 515 F.2d, at 117. Lastly, these uncertainties lead to potential sentencing and appellate review problems. Id.

Though it is impermissible to charge separate offenses in the same count, the Federal Rules specifically state that it is permissible to charge two different methods of committing a crime in a single count. See Fed. R. Crim.P. 7(c)(1) (“It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means.”). The Advisory Committee notes to Rule 7 state that the intent behind this provision was to “eliminate the use of multiple counts for the purpose of alleging the commission of the offense by different means or in different ways.” Id. advisory committee’s note. Other courts have interpreted this language to mean that, if two or more acts can be characterized as part of a single continuous course of conduct or scheme, those acts may be charged in a single count, even if they could otherwise be charged as separate offenses in

separate counts. See United States v. Watt, 911 F. Supp. 538 (D.D.C. 1995) (citations omitted); United States v. Gleave, 786 F. Supp. 258, 264 (W.D.N.Y. 1992) (citing United States v. Shorter, 608 F.Supp. 871, 876 (D.D.C.1985), aff'd, 809 F.2d 54 (D.C.Cir.1987), cert. denied, 484 U.S. 817 (1987)).

Both Counts Twenty-One and Twenty-Two charge the Defendant with violations of 18 U.S.C. § 152(3). Count Twenty-One charges Defendant with three failures to disclose information on the Statement of Financial Affairs filed as part of the Chapter 11 bankruptcy proceeding on behalf of MGL Corporation. Second Superseding Indictment Count 21, ¶ 2(a)-(c). Count Twenty-Two charges Defendant with five misrepresentations on Schedules B and F filed as part of the Chapter 11 bankruptcy proceeding on behalf of MGL Apparel, Inc. Second Superseding Indictment Count 23, ¶ 2(a)-(e).

The question presented to the Court is whether the charging of multiple violations of § 152(3) is permissible. 18 U.S.C. § 152(3) states:

A person who:

...

(3) knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case under title 11;

...

shall be fined under this title, imprisoned not more than 5 years, or both.

18 U.S.C. § 152(3). The statutory language refers to a singular declaration or statement, but it is not clear to this Court that Congress meant to preclude charging multiple false statements or omissions on a single form or filing in one count. The term “statement” may be interpreted to encompass both a single item on a larger form, or the larger form itself.

Though the Third Circuit has not addressed the issue, other courts have agreed that it is

permissible to charge multiple fraudulent omissions or statements in a bankruptcy filing in a single count. For example, the Seventh Circuit treated the fraudulent nondisclosure of several items of property in the petition for bankruptcy as a "single continuous concealment" constituting a single offense for purposes of duplicity analysis. U.S. v. White, 879 F.2d 1509 (7th Cir. 1989). In Edwards v. United States, the Ninth Circuit considered a case in which the defendants were charged with eight counts of bankruptcy fraud under § 152. 265 F.2d 302 (9th Cir. 1959). In each of the eight counts, defendants were charged with the concealment of eight different items of property. Id. at 306. The Ninth Circuit found this to be proper, as “[t]he fact that several different items of property belonging to the estate of a bankrupt were concealed does not multiply the number of offenses, even though the concealment of any one of the items standing alone would constitute the offense denounced by the statute.” Id.

This Court considers the phrasing of Counts Twenty-One and Twenty-Two of the Indictment to be proper. Each count addresses a separate document – the Statement of Financial Affairs for MGL Corporation and the Bankruptcy Schedules for MGL Apparel, respectively. For the former, Defendant’s signature appears on the last page of the Statement of Financial Affairs, averring that all the statements therein were true and correct to his knowledge. For the latter, Defendant signed a “Declaration Concerning Debtor’s Schedules,” which represented that the assertions in all the Schedules filed with respect to MGL Apparel’s bankruptcy filing, including Schedules B and F, were true and correct to his knowledge. Each count therefore addresses a single continuous course of conduct by Defendant, namely the filling out of an individual form and the signing of that form under penalties of perjury. This Court therefore believes that Counts Twenty-One and Twenty-Two of the Indictment are not impermissibly

duplicitous.

Though the Court does not believe that Counts Twenty-One and Twenty-Two are improper, it is sensitive to the possible prejudice that could result from the Indictment as currently written. However, the Court believes that an appropriately worded jury instruction will cure any potential prejudice to Mr. Bortnick that might result from having several different factual bases upon which a jury could convict or acquit Mr. Bortnick under Counts Twenty-One and Twenty-Two. See United States v. Beros, 833 F.2d 445, 460 (1987) (“In the routine case, a general unanimity instruction will ensure that the jury is unanimous on the factual basis for a conviction, even where an indictment alleges numerous factual bases for criminal liability.”); United States v. Pungitore, 910 F.2d 1084, 1136 (3d Cir. 1990)(stating that duplicity concerns were mitigated by a sufficient instruction by the trial judge with regard to unanimity and the use of a special verdict form). The Court will rule on an appropriate jury instruction upon submission of proposed instructions by the parties at trial.

BY THE COURT:

Legrome D. Davis, J.