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

Arkadi Nisenzon and Lilia Shukhatian,	:	CIVIL ACTION
	:	05-5832
Plaintiffs	:	
v.	:	
Morgan Stanley DW, Inc.,	:	
Defendant/ Third-Party Plaintiff	:	
v.	:	
Citizens Financial Group, Inc., Citizens Bank of Rhode Island, Citizens Bank of Pennsylvania, Michael Kogan,	:	
Third-Party Defendants.	:	

MEMORANDUM AND ORDER

Joyner, J. **January 18, 2007**

Presently before the Court is Citizens Financial Group, Inc., Citizens Bank of Rhode Island and Citizens Bank of Pennsylvania's (collectively "Citizens") Motion to Compel the Deposition of Third-Party Defendant Michael Kogan ("Mot. to Compel") (Doc. No. 17). For the reasons below, the Court GRANTS in PART Citizens' Motion to Compel.

Background

More than three years ago, a federal grand jury in the Eastern District of Pennsylvania indicted Michael Kogan of 169 counts of mail fraud, in violation of 18 U.S.C. § 1341, and 6 counts of wire fraud, in violation of 18 U.S.C. § 1843. See Doc.

No. 31 in 03-CR-306-1 (Second Superceding Indictment). On September 18, 2003, Mr. Kogan pled guilty to two (2) counts of wire fraud (Counts 10 and 172) and fifteen (15) counts of mail fraud (Counts 26, 45, 93, 130, 144, 153, 160-169) before the Honorable Herbert J. Hutton per a plea agreement reached with the Government. See Doc. Nos. 50 (Entry of Judgment in Criminal Case) and 51 (Transcript of Change of Plea Hearing) (both in 03-CR-306-1). As part of the plea agreement, the Government dismissed the remaining mail and wire fraud counts. See Doc. Nos. 37 (Guilty Plea Agreement) and 43 (both in 03-CR-306-1). The plea agreement makes no mention, however, of whether the charges were dismissed with prejudice or not. It also did not contain any provisions barring the Government from either: (1) bringing further charges based on the conduct described in the Second Superceding Indictment; or (2) simply re-indicting Mr. Kogan for the crimes charged therein.[1]

Plaintiffs in this civil matter were among the victims of Mr. Kogan's fraudulent scheme (as described in the Second Superceding Indictment). They brought suit against Morgan Stanley DW, Inc. ("Morgan Stanley") claiming breach of contract

[1] The final paragraph of the agreement makes explicit that the Mr. Kogan's "plea agreement contains no additional promises, agreements or understandings other than those set forth in this written guilty plea agreement, and that no additional promises, agreements or understandings will be entered into unless in writing and signed by all parties." Guilty Plea Agreement ¶ 12.

and violations of UCC § 4-401 (13 Pa. C.S.A. § 4401). Briefly, Plaintiffs allege that Morgan Stanley breached these contractual and statutory duties by improperly honoring checks that Mr. Kogan had fraudulently endorsed. Morgan Stanley, in turn, filed a Third-Party Complaint against both Citizens (where Mr Kogan deposited the checks) and Mr. Kogan for breach of presentment warranties (in violation of UCC §§ 3-417, 4-208), breach of transfer warranties (in violation of UCC §§ 3-416, 4-207), and common law contribution and/or indemnity. See Morgan Stanley's Third-Party Complaint (Doc. No. 4) ¶¶ 31-42. To prepare its case, Citizens of course sought to depose Mr. Kogan and tried doing so on October 19, 2006. But he refused to answer, which led to Citizens filing this motion.[2]

Citizens claims that Mr. Kogan has exhausted his Fifth Amendment privileges because of his guilty plea. And so he must answer its questions. This is wrong.

Discussion

The Fifth Amendment guarantees that "no person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. But invocation of the privilege against self-incrimination is not limited to a criminal

[2] Citizens' motion is unopposed. Ordinarily, this Court may grant unopposed motions as a matter of course. See Loc. R. Civ. P. 7.1(c). But in this instance, the Court refuses to do so because Citizens' motion implicates Mr. Kogan's constitutional right against self-incrimination.

defendant's right not testify at trial. Rather, the privilege is broadly understood to permit any person "not to answer official questions put to him in any [] proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." United States v. Warren, 338 F.3d 258, 262-63 (3d Cir. 2003) (citing Minnesota v. Murphy, 465 U.S. 420, 426 (1984) (quoting Lefkowitz v. Turley, 414 U.S. 70, 77 (1973))); see also SEC v. Graystone Nash, Inc., 25 F.3d 187, 190 (3d Cir. 1994) ("[T]he privilege against self-incrimination may be raised . . . during the discovery process as well."). Thus, the privilege extends "not only to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant." United States v. Yurasovich, 580 F.2d 1212, 1215 (3d Cir. 1978) (citation and internal quotes omitted).

A person rightfully invokes the privilege when he "is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." Marchetti v. United States, 390 U.S. 39, 53 (1968) (citations omitted). And a court "should not attempt to speculate whether the witness will in fact be prosecuted" once it determines that the requested answers would tend to incriminate the witness. United States v. Yurasovich, 580 F.2d at 1215-16; see also United States v. Jones, 603 F.2d 473, 478 (10th Cir. 1983) (citing Yurasovcich). The Court concludes

that Mr. Kogan faces a "real" or "substantial" risk of incrimination if it forces him to answer Citizens' questions without qualification.

Citizens suggests, unequivocally, that Mr. Kogan's guilty plea "exhausted" his Fifth Amendment privilege against self-incrimination. See Citizens' Memorandum of Law ("Citizens Memo.") at 3. It offers no authority for this proposition. Had Citizens made even a cursory review of this Circuit's Fifth Amendment case law, it would have quickly realized that none of it supports its position. In a recent decision, for example, the Third Circuit commented that a "district court's statement swept too broadly to the extent it said that the *Fifth Amendment* was 'gone' because Warren 'ple[aded] guilty . . . and waived his right not to incriminate himself . . . .'" United States v. Warren, 338 F.3d at 263 (italics, alterations in original).[3] But even more to the point, the Third Circuit has already addressed the very issue of whether a criminal defendant's guilty plea effectively waives his Fifth Amendment right against self-incrimination in United States v. Yurasovich.

In Yurasovich, the defendant was indicted on four charges stemming from a scheme to burglarize mailboxes and pled guilty to two of them. The other two were dismissed and he never testified

[3] This was in fact the lone Fifth Amendment case cited in Citizens' brief.

about these charges. See United States v. Yurasovich, 580 F.2d at 1214, 1219. At his co-conspirator's trial, he refused to answer any questions relating to the dismissed charges, invoking his right against self-incrimination. See id. at 1214. Despite being ordered by the district court to answer, Yurasovich continued to refuse and was convicted of contempt. See id. at 1215. The Third Circuit reversed. It held that a defendant who enters a guilty plea and has been sentenced waives his Fifth Amendment rights "solely with respect to the crime to which the guilty plea pertains." Id. at 1214. Therefore, a criminal defendant who pleads guilty to some, but not all of the charges in an indictment, still retains his Fifth Amendment right not to incriminate himself with respect to those charges that were dismissed.[4]

This describes Mr. Kogan's case. He pled guilty to only seventeen of the 175 substantive fraud counts for which he was indicted. And for these seventeen counts, Mr. Kogan may not assert the Fifth Amendment to impede Citizens' questioning. But he need not answer any other questions about the fraudulent

[4] Assuming, of course, that the Government and defendant did not enter into an immunity agreement as part of the plea agreement. See, e.g., Marshall v. Hendricks, 307 F.3d 36, 56 (3d Cir. 2002 ("[T]he purpose of an immunity agreement is to put a person in the same position she would have been had she invoked her Fifth Amendment privilege against self-incrimination instead of testifying.") (citing Kastigar v. United States, 406 U.S. 441, 459 (1972)). Mr. Kogan does not have an immunity agreement with the Government.

scheme. The fact that all of the charges against Mr. Kogan arose from the same fraudulent scheme also makes no difference to this analysis. See, e.g., Raimo v. Waddy, 03-3792, 2004 U.S. Dist. LEXIS 20499, at *12 (E.D. Pa. Oct. 8, 2004) (holding that Defendant Waddy did not have to answer additional question relating to a driver's log beyond those relating to the ten occasions for which he pled guilty to falsifying it).

While Citizens didn't raise this in its briefing, it might have asked whether double jeopardy[5] bars the Government from re-indicting Mr. Kogan on the charges that were dismissed pursuant to the plea agreement or bringing new charges arising from the same fraudulent scheme.[6] The consensus answer seems to be no. Although the Third Circuit has apparently not considered the issue, at least five other courts of appeals have concluded that "jeopardy does not attach when a charge is dismissed to a plea agreement, [even if] . . . the charges were dismissed with prejudice." 415 F. Supp. 2d 191, 199 (E.D.N.Y. 2006) (citing

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[5] The Double Jeopardy clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Supreme Court has interpreted the clause as prohibiting "successive punishments . . . and prosecutions for the same criminal offense." United States v. Dixon, 509 U.S. 688, 696 (1993).

[6] This is worth asking because double jeopardy bars re-prosecution for the same criminal offense. See, e.g., Dixon, 509 U.S. at 696. Thus, a plea agreement which eliminates the possibility of a future criminal prosecution moots the attendant dangers of self-incrimination.

decisions from the First, Second, Eighth, Ninth and Eleventh Circuits). This makes sense because jeopardy attaches only when the defendant risks a determination of guilt. See Sefrass v. United States, 420 US. 377, 391-92 (1975).[7] If charges are dismissed pursuant to a plea agreement, the defendant never risked conviction and jeopardy cannot attach. See Lockett v. Montemango, 784 F.2d 78, 84 (2d Cir. 1986) ("Since jeopardy can attach only at a proceeding where the defendant risks conviction, no jeopardy attached at appellee's plea proceeding.") (internal quotes omitted). Therefore, there is no double jeopardy bar precluding the Government from re-indicting Mr. Kogan for the charges dismissed pursuant to a plea agreement. And without a double jeopardy bar, Mr. Kogan continues to faces a "real" or "substantial" risk of incrimination.

Finally, Citizens might have wondered further if it can ask Mr. Kogan about events that took place more than five years ago. That after all is the applicable statute of limitations period for both mail and wire fraud. See 18 U.S.C. § 3282 ("Section 3282") ("Except as otherwise expressly provided by law, no person shall be prosecuted . . . for any offense, not capital, unless

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[7] More specifically: "In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn. In a non-jury trial, jeopardy attaches when the court begins to hear evidence. The Court has consistently adhered to the view that jeopardy does not attach . . . until a defendant is 'put to trial before the trier of facts . . . .'" Sefrass, 402 U.S. at 388 (quoting United States v. Jorn, 400 U.S. 470, 479 (1971)).

the indictment is found . . . within five years next after such offense shall have been committed.").[8] And so Citizens might have thought to argue that Mr. Kogan cannot incriminate himself because the Government is time-barred from bringing mail and/or wire fraud charges for incidents that occurred more than five years ago. There is a problem with this argument, however. This is because the Supreme Court, despite the seemingly unambiguous language of Section 3282, has recognized an exception to the five-year statute of limitations period for so-called "continuing offenses."

A continuing offense does not necessarily refer to one that continues in a factual sense (i.e. that has ongoing criminal conduct). Instead, "an offense is deemed continuing for statute of limitations purposes only when (a) the explicit language of the substantive criminal statute compels such a conclusion, or (b) the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." United States v. Yashar, 166 F.3d 873, 875 (7th Cir. 1999) (quoting Toussie v. United States, 397 U.S. 112, 115 (1970) (internal quotes omitted)). And so for "continuing offenses" the statute of limitations does not begin to run when all of the offense's elements are initially present, but rather upon its

[8] A criminal offense is typically completed when each element of that offense has occurred. See, e.g., United States v. McGoff, 831 F.2d 1071, 1078 (D.C. Cir. 1987).

termination. See United States v. Yashar, 166 F.3d at 876. The classic examples of such offenses are conspiracy, kidnapping and escape. See Toussie, 397 U.S. at 134-35 (White, J., dissenting). Thus, if mail and/or wire fraud are continuing offenses, Citizens would not be able to question Mr. Kogan about alleged incidents of mail and wire fraud that took place more than five years ago and were part of the scheme for which he was indicted.

Now having raised the issue of whether mail and/or wire fraud are continuing offenses for statute of limitations purposes, the Court must abstain from deciding it for a number of reasons. First, the Third Circuit has never considered the issue. Second, those courts of appeals that have (albeit tangentially in most instances) are to a certain degree split on the issue. See United States v. Reitmeyer, 356 F.3d 1313, 1323-24 (10th Cir. 2004) (discussing other circuits' treatment of wire, mail and bank fraud as "continuing offenses" in deciding whether a Major Fraud Act violation is one); see also United States v. Yashar, 166 F.3d at 877-880 (surveying case law on "continuing offenses"). And finally, the Court will not decide an open question of law (especially one which could compromise an individual's Fifth Amendment right against self-incrimination) without the benefit of briefing from all interested parties.

Conclusion

For the foregoing reasons, Citizens may depose Mr. Kogan

solely on the factual circumstances underlying the seventeen counts of the Second Superceding Indictment to which he pled guilty on September 18, 2003.

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Morgan Stanley DW, Inc.,	:	
Defendant/ Third-Party Plaintiff	:	
v.	:	
Citizens Financial Group, Inc., Citizens Bank of Rhode Island, Citizens Bank of Pennsylvania, Michael Kogan,	:	
Third-Party Defendants.	:	

ORDER

AND NOW, this 18th day of January, 2007, upon consideration of Third Party Defendants Citizens Financial Group, Inc.'s, Citizens Bank of Rhode Island's and Citizens Bank of Pennsylvania's (collectively "Citizens") Motion to Compel the Deposition of Third-Party Defendant Michael Kogan (Doc. No. 17), the Court GRANTS in PART Citizens' Motion to Compel and ORDERS that:

1. Citizens may depose Mr. Kogan solely on the factual circumstances underlying the seventeen counts of the Second Superceding Indictment in Criminal Action 03-CR-306-1, United States v. Michael Kogan (Doc. No. 31), to which Mr. Kogan pled

guilty on September 18, 2003.[9]

2. Mr. Kogan may otherwise invoke his Fifth Amendment privilege against self-incrimination to all other questions relating to scheme described in the Second Superceding Indictment that do not relate to the factual circumstances giving rise to the seventeen counts to which he pled guilty. But to do so, the Court ORDERS that Mr. Kogan must invoke affirmatively the Fifth Amendment during the course of the deposition.[10]

BY THE COURT:

s/J. Curtis Joyner
J. CURTIS JOYNER, J.

[9] The seventeen counts to which Mr. Kogan pled guilty were: Counts 10 (wire fraud), 26 (mail fraud) , 45 (mail fraud), 93 (mail fraud), 130 (mail fraud), 144 (mail fraud), 153 (mail fraud), 160-169 (mail fraud), and 172 (wire fraud).

[10] See, e.g., Nat'l Life Ins. Co. v. Hartford Acc. & Indem. Co., 615 F.2d 595, 598-600 (3d Cir. 1980).