UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *ex rel.* **RICHARD F. MILLER,**	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 95-1231 (RCL)**
BILL HARBERT INTERNATIONAL CONSTRUCTION, INC., ***et al.*****,**	)	
Defendants.	)	

MEMORANDUM OPINION & ORDER

Before the Court are a number of evidentiary motions, most of which spawn from the criminal proceedings that presaged this case.[1] Upon consideration of the motions, the memoranda in support and opposition thereto, the applicable law, and the entire record herein, the Court disposes of the motions as follows:

EVIDENCE OF OR REFERENCE TO CRIMINAL PROCEEDINGS

Defendants HII and HC have lodged a Motion [566] to exclude any evidence of or reference to the prior criminal proceeding related to this matter – a Northern District of Alabama case in which Roy Anderson was convicted, Bilhar pleaded guilty, and BHIC was indicted but later dismissed. With limited exceptions discussed more fully below, this Motion [566] is GRANTED. Under the Federal Rules of Evidence, evidence should only be admitted if it is relevant, meaning it has "any tendency to make the existence of any fact that is of consequence to

[1]As to most motions, the non-moving defendants filed notices indicating that they wished to join in the motion.

the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 402, 401. But, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

Certain components of the criminal trial are of distinct relevance. First, Roy Anderson's conviction is of a certain relevance. Plaintiffs point out that there is an exception to the hearsay rule for "[e]vidence of a final judgment, entered after a trial or upon a plea of guilty . . . adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment." Fed. R. Evid. 803(22). As the Court has determined elsewhere, the "fact[s] essential to sustain the judgment" against Anderson, which are far fewer than what plaintiffs contend, are to be given preclusive effect here, foreclosing Anderson from contesting his liability as to participation in the conspiracy – though the conviction does not foreclose him from contesting the extent of his participation in the conspiracy, his liability for any substantive violations of the FCA, and the issues of causation and damages on all counts. *See* Memorandum Opinion & Order [713].

Because the conviction against Anderson will be given preclusive effect, either by jury instruction or the granting of an appropriate motion, the probative value has been extracted from his criminal conviction. All that is left is the purely prejudicial effect of tarring him as a criminal. This alone may not counsel exclusion, were it not for the fact that Anderson's jury did not have to make a finding as to who his co-conspirators were. Introducing evidence of Anderson's trial invites the jury to speculate that his co-conspirators must have been the same

parties who are defendants in this case. In addition, introducing the fact that there was a criminal trial invites confusing, time-consuming, and ultimately unproductive side litigation explaining who was and was not a party to that case, what the disposition was, and on and on.

Much the same is true as applies to Bilhar, the company that executed a guilty plea agreement with the United States. That agreement has been given broad preclusive effect by the Court. *See* Memorandum Opinion & Order [713]. Since the essential facts embraced in Bilhar's plea have been given applied to this case, there is little of probative value that remains from its criminal case – with the exception of the plea agreement and the Joint Rule 11 Memorandum that accompanied it, wherein Bilhar admits to a certain recitation of facts. Evidence of a guilty plea is admissible under Rule 803(22) as evidence, but is not conclusive as to the statements made therein. *Scholes v. Lehmann*, 56 F.3d 750, 762 (7th Cir. 1992) (Posner, J.); *RSBI Aerospace, Inc. v. Affiliated FM Ins. Co.*, 49 F.3d 399, 403 (8th Cir. 1995).

The guilty plea is probative and helpful to the jury here. Both documents pose certain problems insofar as they refer to other parties who are defendants here, such as suggesting that those other parties must be criminals, having been found guilty or plead guilty themselves. For that reasons, the case caption and any other references in these documents to parties to this case, other than Bilhar, should be redacted. This is because the plea agreement and Rule 11 Memorandum, which are probative in admitting that Bilhar and "others" engaged in a conspiracy, do not identify which parties are the "others." Without guidance, the jury could become confused and assume that unrelated references in those documents to defendants in this case must mean that they were the others with whom Bilhar conspired. But beyond that one potential pitfall, which can be cured by way of redaction, the recitation of facts admitted to by Bilhar is

highly probative, and, under these conditions, poses relatively little risk of undue prejudice.

A few other specific remnants of the criminal matter are dealt with below. Unless specifically addressed below, there is to be no evidence of or reference to the criminal matter.

ANDERSON TRIAL TESTIMONY

Plaintiffs' Motion [600] to admit testimony from the Anderson trial that was given by now-unavailable witnesses stands in opposition to defendant's Motion [574] to exclude *all* testimony from that trial. As stated below, defendants' Motion [574] is GRANTED in part and DENIED in part, as is plaintiffs' Motion [600].

Plaintiffs seek to admit former testimony from unavailable witnesses, particularly Rainer Hermann and Giovanni Greselin. Their motion indicates that other former testimony might be proffered, but does not indicate whose. As to Hermann and Greselin, unavailability is not contested. But Rule 804(b)(1), under which this evidence is offered as an exception to the hearsay rule, only allows hearsay in "if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Fed. R. Evid. 804(b)(1).

Anderson himself is, of course, a party to this case. As the Court has noted elsewhere, there are certain similarities between the criminal case and this one. There is every reason to believe that Anderson himself had the same motive – and note, the rule requires a "similar" motive, not identity of motives – to develop testimony in that trial as he would in this. In short, his motive was to argue his way out of the conspiracy. That said, the evidence is admissible under 804(b)(1) insofar as it is used against Anderson.

But it is precisely the nature of Anderson's motive in the criminal trial that makes the

evidence inadmissible if offered against other defendants. Anderson was not a "predecessor in interest" to any of the other defendants at the time of his trial. Plaintiffs feebly point to Anderson's officer positions at certain corporate defendants; but they do not argue he held these positions when tried, or that he represented the interests of the corporate defendants in any way at his trial. While plaintiffs argue that courts have read the "predecessor in interest" requirement loosely to include anyone with "similar motives," that does not help them here, even if the Court were willing to stretch this Rule beyond its plain meaning.[2]

Plaintiffs fail to establish that Anderson's motive in developing testimony was even remotely similar to the motives of the defendants in this case. Courts have recognized that different defendants in successive criminal and civil trials based on similar facts often have different motives in developing testimony; and sometimes those motives are directly at odds. *See In re Screws Antitrust Litig.*, 526 F.Supp. 1316, 1318-19 (D.Mass. 1981); *In re IBM Peripheral EDP Devices Antitrust Litig.*, 444 F.Supp. 110, 113 (N.D. Cal. 1978).

Anderson's motive at trial was to protect himself, not the corporations who were not parties to that trial – let alone the companies, like HC and HII, at which he apparently never held positions. There may have been points in his trial where his interests aligned with the companies; for instance, opportunities to argue there was no conspiracy at all. But for the most part, Anderson had every motive to not tilt against windmills, and simply to argue that whether or not there was a conspiracy, *he* was not in it. It may have been the case that Anderson's best

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[2]In addition, the cases plaintiffs cite for the expansive reading of "predecessor in interest" all involved two factors not present here: an almost total identity of interests between the party present during the testimony and the party against whom it is offered, and a degree of ownership or control by one party over the other that trends toward the alter ego line.

strategy was to not contest any of the evidence of conspiracy, but simply to exculpate himself by pointing fingers at other individuals, which would leave the corporate defendants in the lurch. Finally, plaintiffs completely neglect the presence in this case of another individual, Bill Harbert. It is quite possible that Anderson's defense was to get himself out of the jackpot by putting Harbert in, and plaintiffs do not address this point. This is a classic case of conflicting defenses, and does not satisfy Rule 804(b)(1).

Plaintiffs argue that this evidence is such a near-miss that it should fall under Rule 807. But this testimony fails on almost every prong of that Rule. First, Rule 807 can only apply to a "statement not specifically covered by Rule 803 or 804." This Circuit has made clear that this provision is more residual than catchall, meaning that it is meant to pick up the residue of reliable and probative hearsay evidence not otherwise admissible, and is not meant to catch all of the arguably admissible evidence that rightly does not fit within the existing categories.[3] This evidence is clearly meant to be channeled through Rule 804(b)(1), and clearly fails. This is a strong indication that it is not meant to be admitted via Rule 807.

The residual exception next requires that a statement "hav[e] equivalent circumstantial guarantees of trustworthiness." The testimony here does not have equivalent guarantees of trustworthiness. Granted, the testimony was taken under oath, is captured in verbatim transcripts, and was presided over by a federal judge – these are all trappings which suggest trustworthiness. But for all of the hearsay exceptions, there is always some factor or factors that make up, at least in part, for the fact that the party against whom the evidence is offered cannot cross-examine the

[3]The residual exception "is 'extremely narrow and require[s] testimony to be very important and very reliable.'" *United States v. Washington*, 106 F.3d 983, 1001 (D.C. Cir. 1997) (quoting *United States v. Kim*, 595 F.2d 755, 765 (D.C. Cir. 1979)).

declarant. Former testimony usually must satisfy the requirements of Rule 804(b)(1) so that the loss of the ability to cross-examine is made up for by the fact that when the former testimony was given, the party against whom it is now offered, or someone with very similar interests, had a chance to develop that testimony. The defendants against whom this testimony is offered in this case did not have that opportunity, and no one who did have that opportunity also had the interests of these defendants at heart. Nothing in this testimony makes up for the inability to cross-examine here, and so it cannot be offered against anyone but Anderson.[4]

Since the former testimony can be offered against Anderson but not against anyone else, this means that it might have to be pruned considerably. The Court is aware that in a conspiracy case, cleansing testimony of evidence adverse to other conspirators who are before the Court may be a difficult task, but it is a necessary product of the collision between the Rules of Evidence and the litigation plaintiffs have chosen to undertake. Any use of the former testimony will be carefully monitored, and need not include any reference to the fact that the testimony was given in a criminal matter. It is sufficient to say that the testimony was given in another matter, under oath, in conditions similar to those at this trial, and that Mr. Anderson's counsel had a chance to cross-examine the witnesses.

ROY ANDERSON'S GRAND JURY TESTIMONY

The logic outlined above dictates the result of HII and HC's Motion [556] to exclude the

[4]This is not to say that the former testimony would satisfy the remaining prongs of Rule 807. *See United States v. Hsia*, 87 F.Supp. 2d 10 (D.D.C. 2000) (Friedman, J.) (summarizing requirements for admission under Rule 807). For instance, plaintiffs have not established that the evidence is more probative than other, admissible evidence or that defendants had sufficient notice that it was to be used. The Court is also puzzled as to the failure to even attempt to secure admissible testimony by way of letters rogatory.

grand jury testimony of Roy Anderson, which is GRANTED in part and DENIED in part. The testimony may be used against Anderson as it constitutes his own party admissions. Plaintiffs argue that it can be used against other defendants as the admissions of an agent or co-conspirator. Plaintiffs again misapprehend how those concepts work under Rule 801(d)(2). Anderson was not the agent of any of the corporate defendants at the time he testified to the grand jury – or at least, plaintiffs make no such showing. Anderson certainly was not a co-conspirator of anyone at the time. Rule 801(d)(2)(E) classifies as non-hearsay "a statement by a coconspirator of a party during the course of and in furtherance of the conspiracy." Anderson's testimony fails on both the pendency and furtherance prongs; the conspiracy was over at the time and thus Anderson's testimony could not further it.

As explained above, the testimony does not qualify as former testimony that could be used against other parties under 804(b)(1). At the time Anderson testified, he was not a predecessor in interest to any other defendant now on trial. Nor did any of the other defendants have an opportunity and similar motive to develop his testimony – only Anderson, acting without counsel, had an opportunity to shape his testimony. Even more egregiously than the former testimony offered above, here the only party that had a chance to develop the testimony is the very party that offers it, the government. This makes the testimony even less reliable than the former testimony offered above, which the Court held cannot satisfy the residual Rule 807 exception, because it lacks any indicia of trustworthiness significant enough to make up for the defendants' inability to cross-examine the declarant.[5] As with the testimony above, Anderson's

[5]As another Judge of this District has observed, "[s]ince grand jury testimony is specifically covered by another rule, it is questionable whether grand jury testimony is ever admissible under Rule 807." *United States v. Hsia*, 87 F.Supp. 2d 10, 18 (D.D.C. 2000)

grand jury testimony can only be used against him and must be cleansed of any other evidence.[6]

EVIDENCE OF INDICTMENTS *VEL NON*

Plaintiffs' Motion [580] to Exclude Reference to or Evidence of the Absence of a Criminal Indictment Against Any Party is GRANTED. Plaintiffs argue, correctly, that the absence of a criminal indictment has very little probative value because, *inter alia*, there are many reasons why a prosecutor might forego indicting a party, and the burden of proof in a criminal case, which informs the indictment decision, is much different than the burden of proof in a civil case. On top of that, any such evidence is likely to be given undue weight by the jury, to lead to confusion, and to lead to time-consuming and distracting litigation of side issues. For those reasons, evidence of the absence of an indictment would be excluded under Rule 403, if the Court had not already decided to exclude all references to the criminal matter.

Comes now the plaintiff, having argued that evidence of the *absence* of an indictment is irrelevant and far too dangerous to be brought before a jury, and argues that evidence of the *existence* of an indictment is highly probative and harmless in the hands of a jury. They are wrong, and the Motion in Limine [576] to Exclude Reference to Indictment of Bill Harbert International Construction Inc. ("BHIC") is GRANTED. As a result of the plea agreement executed by Bilhar International Establishment, a defendant in the same criminal matter, the indictment against BHIC was dismissed. A criminal "indictment is not evidence of the charges

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(Friedman, J.)

[6]Defendants also argued that the testimony might be confusing because Anderson's Alzheimer's disease – or some other health condition – made it difficult for him to recollect and recount facts. If the testimony is offered against Anderson, this point can be explored, as it goes to the weight the testimony should be given.

contained in it, any more than a complaint is." *Scholes v. Lehman*, 56 F.3d 750, 762 (7th Cir. 1995) (Posner, J.); *see also In re Worldcom, Inc. Secs. Litig*., 2005 U.S. Dist. LEXIS 2214, *26 (S.D.N.Y. Feb. 18, 2005).

Plaintiffs claim that they do not want to admit the indictment, nor prove its contents, but merely present evidence that there was an indictment. The historical fact of an indictment is of no moment to this case; its worth to plaintiffs is that it suggests to the jury in this case that a grand jury saw evidence indicative of criminal guilt. It is especially likely to mislead the jury because it may leave them with the impression that the grand jury was privy to evidence not available here. Further, allowing only evidence *of* an indictment is worse than letting in the indictment itself, since the jury would be left with uncertainty as to the precise charges raised against defendant. Allowing the introduction of evidence regarding the indictment, or the indictment itself, adds no probative value but invites great prejudice, adds to jury confusion, and embarks the parties on confusing side litigation to establish the outcome of the criminal matter.

SO ORDERED.

Signed by United States District Judge Royce C. Lamberth, March 16, 2007.