

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

<b>UNITED STATES OF AMERICA,</b>	)	<b>CRIMINAL ACTION NO.</b>
	)	
<b>Plaintiff,</b>	)	<b>3:02-CR-164-D</b>
	)	
<b>v.</b>	)	
	)	
<b>XXXX,</b>	)	
	)	
<b>Defendants.</b>	)	
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**DEFENDANT XXXX, 'S MOTION FOR A BILL OF PARTICULARS**

Defendant XXXX, hereby moves this Court, pursuant to Fed. R. Crim. P. 7(f) to require the government to file a Bill of Particulars setting forth the alleged false statements it contends were made by Mr. XXXX in furtherance of the charges alleged in the indictment and to set forth what about the statements are allegedly false.

**I. Introduction**

“[A] request to particularize allegations of false statements, [is a request] which courts routinely award.” *United States v. Lino*, 2000 U.S. Dist. Lexis 18753, \*20 (S.D.N.Y. January 20, 2001).

**II. Background**

\_\_\_\_\_The defendant is charged in a seven count superseding indictment (the “indictment”) containing various allegations of securities fraud, money laundering and tax fraud.

In Count One, a conspiracy count, the government alleges that “[a]ll of the 10-Qs and 10-Ks filed during the relevant time period contained

false and fraudulent statements in that they overstated the value of Continental's assets and potential business outlook." *See* Superseding Indictment at p. 5 ¶ 2. Nevertheless, the indictment never identifies which statements "overstated the value of Continental assets and potential business outlook."

Count One further alleges that Mr. XXXX persuaded investors to invest in Continental "through false claims and misrepresentations." It goes on to state "[t]hese claims included *but were not limited to* engineering reports...and that [Mr. XXXX] was connected to Atlanta's power brokers." *See* Superseding Indictment at p. 6 ¶ 4 (emphasis added). In other words, but for the two allegedly false representations, Mr. XXXX is left to guess as to what other claims that he made that are thought by the government to be false.

Count One further alleges that Mr. XXXX was responsible for the issuance of "false stock reports, financial statements, business publication articles, SEC filings, and press releases." *Id.* Nevertheless, the indictment never identifies the false statements contained in stock reports, financial statements, business publication articles, SEC filings or press releases.

Count One further alleges that Mr. XXXX persuaded investors to invest in Continental by "false claims and material misrepresentations" (*id.* at p. 7 ¶ 5), without any attempt to identify the false claims and/or material misrepresentations.

Finally, Count Two and Count Three alleges that Mr. XXXX used "fraudulent means" to commit security fraud but never identifies the alleged 'fraudulent means.' *Id.* at p. 8.

### **III. Discussion**

In accordance with Fed. R. Crim. P. 7(f), a court may direct the filing of a bill of particulars in order to give a defendant more particular information about the details of the charges against him and to allow him to prepare his defense. *United States v. Diecidue*, 603 F.2d 535, 563 (5th Cir. 1979), *cert. denied sub nom., Gisport v. United States*, 445 U.S. 946 (1980). The simple fact that an indictment is sufficient is not an argument against granting a bill of particulars. *United States v. Debrow*, 346 U.S. 374, 378 (1953). Likewise, the fact that a defendant is aware of the general nature of the charges against him does not answer a defendant's request for a bill of particulars. *United States v. Gordon*, 780 F.2d 1165, 1172 (5th Cir. 1986). Indeed, Fed. R. Crim. P. 7(f) was amended in 1966 to "encourage a more liberal attitude by the courts toward bills of particulars." *See* Advisory Committee Note to 1966 amendment of Fed. R. Crim. P. 7(f).

\_\_\_\_\_Recently, in *United States v. Trie*, 21 F.Supp. 2d 7 (D.D.C. 1998), the District Court for the District of Columbia was faced with a case in which a defendant was accused of making false statements in violation of 18 U.S.C. § 1001. The defendant then sought, by way of a Motion for a Bill of Particulars, the particular statements the government alleged to be false.

*Id.* at 21. The Court's ruling on the motion is instructive:

Mr. Trie first requests that the government be required to identify the particular statements alleged to be false (and what about them is false), as well as the specific contributions alleged to be falsely reported. The government maintains that the requested information need not be provided in a bill of particulars because it has provided Mr. Trie with 45 pages of excerpts in which it represents that all the false statements at issue are contained. The problem is that these 45 pages contain 175 names along with a variety of information about each person or entity listed. The government contends that with due diligence Mr. Trie can readily identify which of the

175 names and what part of the related information constitute the actual false statements. This argument fails.

Not only does the government's position presume that the defendant knows what the government alleges that he did and with whom he dealt and therefore has all the information he needs, a premise inconsistent with the presumption of innocence, but it smacks of gamesmanship. A defendant faced with false statements charges should not have to waste precious pre-trial preparation time guessing which statements he has to defend against or which contributors may be witnesses against him at trial when the government knows precisely the statements on which it intends to rely and can easily provide the information. The government must provide information as to exactly what the false statements are, what about them is false, who made them, and how Mr. Trie caused them to be made.

*Id.* (citations and footnote omitted).

Similarly, in *United States v. Rogers*, 617 F.Supp. 1024 (D. Col. 1985), the defendant was charged with various fraud counts and requested a Bill of Particulars. In granting the request, the Court wrote:

[T]he government must provide particularization of allegedly false statements made by defendants. General allegations of false statements and testimony are not sufficient. This criminal case should not differ from any civil matter where allegations of fraud and misrepresentations must be pleaded with particularity under Fed.R.Civ.P. 9(b). In fact, application of this rule in criminal cases is even more compelling than in civil matters because defendants' liberty interests are at stake. Accordingly, defendants' requests for particularization of allegedly false statements are granted. The government must reveal the substance, date, time, and place of each false statement or concealment and the persons involved.

*Id.* at 1029 (citations and footnote omitted).<sup>1</sup>

In the instant case, it has become increasingly impossible for the defense to prepare for trial given the broad allegations that Mr. XXXX has

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<sup>1</sup> See also, *United States v. Risk*, 672 F.Supp 346, 360 (S.D. Ind. 1987) (“Here, the indictment, while constitutionally adequate to inform the defendant of the offense charged, is insufficient to enable him to prepare for trial and to prevent surprise. The court does not expect the Government to provide a detailed evidentiary disclosure of such matters as names of witnesses or a complete explication of its theory of the case, but the court does expect, and hereby ORDERS, the Government to disclose to the defendant the specific portions, segments, or sentences of the bank report that are alleged to be and that the Government intends to prove are false.”), *aff’d*, 843 F.2d 1049 (7th Cr. 1988); *United States v. Konefal*, 566 F. Supp 698, 703 (N.D.N.Y. 1983) (“Count III charges the defendants with concealing material facts and causing to be made certain false statements concerning transactions in currency. Such actions are alleged to violate 18 U.S.C. §§ 1001, 1002 (1976). The Government has not alleged what statements it contends are false, nor has it alleged the material facts which it contends the defendants concealed. While the Government need not disclose the evidentiary details of its case, the Court finds that defendants should be apprised of these basic details concerning count III.”) ; *United States v. McCoy*, 492 F.Supp. 540, 545 (M.D. Fl. 1980) (“The defendant is entitled to a bill of particulars setting forth each false and fraudulent pretense and representation described generally in the indictment.”); *United States v. Caine*, 270 F.Supp. 801, 806 (S.D.N.Y. 1967) (same).

made false statements and representations without the government further identifying the statements that are alleged to be false and what makes them false. Indeed, without knowing what statements that the government alleges are false, how can Mr. XXXX possibly be in a position to establish at trial that the statements are, in fact, true?

In short, Mr. XXXX fears the “bait and switch.” The government only alleges two representations in the indictment that it contends are false (*i.e.* the engineering reports and that Mr. XXXX was connected to Atlanta’s power brokers.).<sup>2</sup> Nevertheless, the government explicitly refuses to limit itself to those statements and, as currently plead, could wait until trial to point to any of the thousands of statements that Mr. XXXX made to investors over the three year period covered by the indictment and allege that such a selected statement is false. Given that Mr. XXXX would not be in a position to refute the government’s claim at that point in order to show the selected statement to be true, he would be forced to request the Court to recess the trial.

Granting Mr. XXXX’s Motion for a Bill of Particulars will accomplish two goals. First, it will allow Mr. XXXX to effectively prepare his defense and it will allow him to be prepared to meet the government’s allegations. Second, it will assure that Mr. XXXX will not have to ask the Court to recess the trial in order to conduct an investigation to meet the government’s allegations.<sup>3</sup>

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<sup>2</sup> Of course, the government does not even identify what about the engineering reports it alleges to be false.

<sup>3</sup> Mr. XXXX notes that a Motion for a Bill of Particular must be filed within ten days after the arraignment or at such time as the court may

Respectfully submitted,

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Attorney for Defendant  
XXXX,

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permit. Mr. XXXX has yet to be arraigned on the superseding indictment which is the focus of this motion.

## **CERTIFICATE OF CONFERENCE**

Pursuant to Local Rule 5.1 of the Northern District of Texas, I, F. Clinton Broden, certify that a conference on the attached motion was held between the undersigned and Michael Snipes, the Assistant United States Attorney assigned to the case. During the conference, it was determined that the government **OPPOSES** this motion.

F. Clinton Broden

**CERTIFICATE OF SERVICE**

I, F. Clinton Broden, certify that on February \_\_\_\_, 2003 I caused a copy of attached motion to be mailed first class mail, postage prepaid, to Michael Snipes, Assistant United States Attorney, at 1100 Commerce Street, Third Floor, Dallas, Texas and to be hand-delivered to Franklyn Mickelsen, 2715 Guillot, Dallas, Texas 75204.

F. Clinton Broden

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<b>Defendants.</b>	)	
_____	)	

**ORDER**

Defendant XXXX, 's Motion for a Bill of Particulars is this \_\_\_\_ day of \_\_\_\_\_, 2003 GRANTED

ORDERED as to each and every alleged false statement or representation the government intends to offer proof at trial was made by XXXX, , the government is to file a Bill of Particulars identifying the statement and setting forth what about each identified statement is false.

FURTHER ORDERED as to Counts 2 and 3, the government is to file a Bill of Particulars setting forth each and every "fraudulent means" it intends to allege was used by XXXX, to commit securities fraud.

FURTHERED ORDERED the Bill of Particulars is to be filed within seven days of the date of this order.

SIDNEY A. FITZWATER  
UNITED STATES DISTRICT JUDGE