

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

Case No. 1:04-CR-165

vs.

Hon. Robert Holmes Bell  
Chief District Judge

WESLEY MYRON BOSS,

Defendant

-----/

**PROOF OF SERVICE**

STATE OF MICHIGAN     )  
                                  ) ss  
COUNTY OF KENT        )

Amy Vedder, being first duly sworn, does hereby state and depose that a copy of the Defendant's Motion to Sever was served upon Richard S. Murray, Assistant United States Attorney, P. O. Box 208, Grand Rapids, MI 49501 by depositing a copy of same in the United States Mail, postage prepaid, this \_\_\_Day of November, 2004.

\_\_\_\_\_  
Amy Vedder

Subscribed and sworn before me  
this \_\_\_Of November, 2004

\_\_\_\_\_  
Notary Public

My commission expires:\_\_\_\_\_

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**MEMORANDUM IN SUPPORT OF DEFENDANT'S  
MOTION TO SEVER**

**1. Facts**

On October 27, 2004, the government filed an 83 count indictment naming the defendant and seven other individuals. One of the co-defendants is the defendant's wife. The defendant is charged with mail fraud (counts 1-39), in violation of 18 U.S.C. 1341 and 2, conspiracy to commit mail fraud (count 40), in violation of 18 U.S.C. 371, conspiracy to commit money laundering (count 41), in violation of 18 U.S.C. 1956(a)(1)(A)(I), 1956(a)(1)(B)(I) and 1956(h), conspiracy to defraud the United States (count 42), in violation of 18 U.S.C. 371, substantive money laundering (counts 43-57), in violation of 18 U.S.C. 1956(a)(1)(A)(I) and 2, monetary transactions derived from specified unlawful activity (counts 59-65), in violation of 18 U.S.C. 1957, and with forfeiture allegations (count 83), in violation of 18 U.S.C. 981(a)(1)(C), 28 U.S.C. 2461(c) and 18 U.S.C. 1341.

All of these allegations arise out of the operation of an investment company called Access Financial Corporation. The operator of that company was Janet Mavis Marcusse. As the sentencing factors alleged in the indictment, the defendant is not considered to have held a leadership role, to have abused a position of trust, or to have obstructed justice. The defendant was allegedly employed by Access Financial Corporation as a salesman and as a sales manager between August of 1999 and April of 2001. (Count 1; paragraph 4). The indictment alleges that the defendant received \$173,758.13 in commissions between November 24, 1999 and July 6, 2000. (Count 40; paragraph 4).

The defendant is married to one of his co-defendants Diane Renae Boss; the couple was wed on December 11, 1999. (Count 1, para. 5).

For the reasons set forth herein, the defendant is respectfully asking this Court, pursuant to Rules 8 and 14 of the Federal Rules of Criminal Procedure, to sever him from the other co-defendants and to direct that he be separately tried.

## **2. Legal Principles**

Rule 8(b) of the Federal Rules of Criminal Procedure states that the indictment may charge two or more defendants in this same indictment. Rule 14 of the Federal Rules of Criminal Procedure gives the trial court discretion to grant relief from prejudicial joinder.

In *Zafiro v. United States*, 506 U.S. 534 (1993), the United States Supreme Court noted that there is a preference in the federal system for joint trials of defendants who are indicted together. Joint trials promote efficiency and limit the risk of inconsistent verdicts. The Court also held that “mutually antagonistic defenses” are not prejudicial per-se. Thus, while such defenses may be considered when deciding whether to sever or not, severance is not mandatory.

The Court stated that severance should be granted if a joint trial would compromise a specific trial right of the defendant or prevent the jury from reaching a reliable verdict. One of the specific trial rights identified by the court was the risk that evidence of a co-defendant's wrongdoing would lead the jury to convict the defendant on that evidence rather than basing the verdict on specific evidence of the defendant's own guilt.

Another example was a situation where many defendants are tried together in a complex case and where their relative degrees of culpability are much different. The Court also cited a situation where evidence that is prejudicial as to defendant would only be technically admissible against a co-defendant. The Court suggested that the trial court should consider whether limiting instructions would alleviate the prejudice.

The Sixth Circuit has applied the principles set forth in *Zafiro* in a number of cases. For example, in *United States v. Breinig*, 70 F.3d 850 (6<sup>th</sup> Cir. 1995), the defendant was charged with tax evasion in violation of 26 U.S.C. 7201. Also charged was the defendant's ex-wife. The defendant moved to sever and for a separate trial, arguing that he and his ex-wife had antagonistic defenses. The district court denied the motion, and the defendant was convicted. His ex-wife was acquitted. The defendant renewed his argument in a motion for a new trial, but the trial court denied that motion as well, reasoning that the defendant failed to show substantial or unfair prejudice because of the joint trial.

The ex-wife's defense was diminished capacity. In order to prove the defense, the ex-wife introduced highly prejudicial evidence of the defendant's bad character. This evidence would not have been admissible if the defendant had been tried alone. The Sixth Circuit reversed. The components of its reasoning were:

A. Citing *United States v. Warner*, 971 F.2d 1189 (6<sup>th</sup> Cir. 1992), the Court noted that Rule 8 envisioned that defendants indicted together would be tried together;

B. A defendant is not entitled to severance just because a separate trial would give the defendant a better chance at acquittal;

C. Despite these principles, a trial court has the discretion to sever a defendant if there is sufficient prejudice caused by the joint trial;

D. A mutually antagonistic defense is not prejudicial per-se;

E. The appropriate inquiry is whether there is “a serious risk that a joint trial would compromise a specific trial right of one of the defendants or prevent the jury from making a reliable judgment about guilt or innocence”. 506 U.S. at 539;

F. The character evidence introduced in support of the ex-wife’s diminished capacity defense was highly prejudicial. The defendant was portrayed by expert testimony as being adulterous, mentally abusive, and manipulating;

G. This evidence seriously undermined the defendant’s credibility and would not have been admissible in a trial where the defendant was the only defendant; and

H. The Court reaffirmed that the decision to sever or not is entrusted to the sound discretion of the trial judge.

In *United States v. Pierce*, 62 F.3d 818 (6<sup>th</sup> Cir. 1995), members of the Ku Klux Klan burned a church. The defendant had sought to sever his trial from a co-defendant. The district court denied the motion, and the Sixth Circuit affirmed. The components of the Sixth Circuit’s reasoning were:

A. The defendant had argued that he was prejudiced because he and his co-defendant had mutually antagonistic defenses;

B. However, after *Zafiro*, mutually antagonistic defenses are not a per-se reason to sever;

C. Such defenses can warrant a decision to sever, but that decision is entrusted to the sound discretion of the trial court;

D. The Sixth Circuit rejected a claim that FRE 404(b) evidence would not have come in if the defendant had been tried alone. The Court concluded that the evidence could have been introduced as motive evidence even if the defendant was the only defendant. Moreover, the trial court issued limiting instructions which were adequate to protect the defendant as to this evidence;

E. As in *Zafiro*, the defendant argued that his co-defendant was claiming innocence and was accusing the defendant of guilt; and

F. However, if this is the only claim, then limiting or cautionary instructions would usually be sufficient to focus the jury and eliminate any unfair prejudice.

In *United States v. Cope*, 312 F.3d 757 (6<sup>th</sup> Cir. 2003), two defendants were jointly tried for attempted murder and firearms violations. Both defendants asked that the two defendants be severed. On appeal, they argued that “rampant hearsay statements” were introduced in a joint trial. These statements were made by one of the defendant’s brother, a non-testifying co-defendant.

The Sixth Circuit upheld the district court’s refusal to sever. The Court noted that numerous limiting instructions were given and that the defendants had not shown that the antagonistic defenses had misled or confused the jury.

### 3. Discussion

The ringleader of the alleged conspiracy is co-defendant Janet Marcusse. Ms. Marcusse has on a number of occasions claimed her innocence and accused the defendant of being the reason why her investment scheme failed. The defendant understands that mutually antagonistic defenses are not a per-se ground to sever. However, there are several other factors in this case which warrant a decision by this Court to sever the defendant's trial. Specifically:

A. Ms. Marcusse and a number of the co-defendants are ardent tax protestors;

B. At her arraignment, Ms. Marcusse was very disruptive and argumentative, raising many of the meritless arguments that tax protestors commonly make;

C. There is every reason to believe that Ms. Marcusse and several of the other co-defendants will make attempts to disrupt the trial or to present meritless tax protestor defenses. The defendant would ask the Court to consider that the government has charged a conspiracy to defraud the IRS. The tax charge when combined with defendants who are tax protestors will certainly create the risk of a disruptive and confusing trial ;

D. The defendant is not a tax protestor;

E. However, the jury is quite likely to be confused by the distractions caused by tax protestor-defendants and may convict the defendant based on their conduct rather than upon the evidence that the government actually has against him;

F. This Court has presided over numerous tax protestor trials and is fully aware of the management and other problems that can emerge;

G. This is an extremely complex case;

H. There are literally thousands of documents;

I. The alleged fraud supposedly involves numerous bank accounts and numerous efforts to lull investors;

J. The trial will be difficult for the jury even under ideal conditions;

K. The defendant is very concerned that a joint trial with an ardent and vocal tax protestor element will confuse and mislead the jury and put the defendant at risk of being convicted for reasons independent of the evidence against him;

L. This risk is enhanced when Ms. Marcusse is attempting to shift blame away from herself and onto the defendant. The complexity of the trial and her tax protestor mentality create an unfair prejudice that goes beyond a simple claim of mutually antagonistic defenses;

M. *Zafiro* stated that one of the considerations for severance is a situation where the trial is about complex issues and where the relative culpability of the defendants is different;

N. The instant indictment charges various sentencing factors;

O. The defendant is not charged with having an enhanced role, with abusing trust, or with obstructing justice. It is thus clear that his role, if any, is far less culpable than other defendants and that his circumstance fits within one of the severance reasons identified by the United States Supreme Court in *Zafiro*;

P. Another consideration is that the defendant's defense will likely have, as one of its components, the claim that he was unaware that Ms. Marcusse was running a Ponzi Scheme and that the allegations against him have an innocent explanation. That defense requires the jury to assess the defendant's credibility. A joint trial of a complex case with tax protestor overtones will confuse and

mislead the jury and make it impossible, even with limiting instructions, for the jury to assess the defendant's credibility; and

Q. Another consideration is that the defendant's wife is one of the co-defendants. In a joint trial, the defendant might well be unable to testify and to give testimony which would be exculpatory towards his wife. However, if he was being tried separately from his wife, he could conceivably testify and explain to the jury how his wife was deceived by Ms. Marcusse and why his wife should not be found guilty.

In sum, this case presents a situation that is far more complicated than a simple claim of mutually antagonistic defenses. The defendant is respectfully asking this Court to exercise its discretion and to sever his trial from the trial of his co-defendants.

### **Conclusion**

Pursuant to Rules 8 and 14 of the Federal Rules of Criminal Procedure, the defendant is respectfully asking this Court to grant his motion to sever.

Respectfully submitted,

Grand Rapids, MI  
November 24, 2004

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/S/  
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