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

| | | |
|---|---|---|
| **UNITED STATES OF AMERICA,** | ) | **CRIMINAL ACTION NO.** |
| | ) | |
| **Plaintiff,** | ) | **3:95-CR-030-G** |
| | ) | |
| **v.** | ) | |
| | ) | |
| **XXXX XXXX,** | ) | |
| | ) | |
| **Defendant.** | ) | |
| | ) | |

**DEFENDANT XXXX XXXX'S MOTION FOR SEVERANCE PURSUANT TO FED. R. CRIM. P. 8 AND 14 AND MEMORANDUM OF LAW IN SUPPORT THEREOF**

Defendant XXXX XXXX hereby moves this Court to sever the counts of the indictment filed against him on February 2, 1995 from the counts contained in the same indictment against Michelle M. Monti.

## I. BACKGROUND

Counts 1-3 of the February 2, 1995 charge Michelle Monti with various instances of bankruptcy fraud arising out of the bankruptcy filing of the XXXX XXXX Company ("PBC"). The indictment alleges that Ms. Monti was Vice-President, Secretary and Director of PBC. The gravamen of these charges is that Ms. Monti withdrew monies form PBC's debtor account and did not spend the money on behalf of the debtor estate. Significantly, Mr. XXXX is not charged in counts 1-3 and is not accused of withdrawing any money from PBC's debtor account in circumvention of the bankruptcy statutes.[1]

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[1] In count 1, Ms. Monti is charged with transferring a portion of the withdrawn money to a trust account for an attorney who allegedly represented XXXX XXXX. Nevertheless, the

Counts 4-12 charge XXXX XXXX with various counts of bankruptcy fraud and money laundering arising out of his alleged sales of PBC homes and his alleged failure to deposit the proceeds from the sales into PBC's debtor estate. The indictment alleges that Mr. XXXX was President and Director of PBC. Significantly, there is no allegation in the indictment that Ms. Monti knew about the alleged sales by XXXX XXXX or that she participated in the alleged sales in anyway.[2]

In summary, counts 1-3 accuse Ms. Monti with illegally taking money out of the bankruptcy estate and counts 4-12 accuse Mr. XXXX with illegally failing to deposit money into the bankruptcy estate. There are absolutely no allegations that Mr. XXXX was aware of Ms. Monti's alleged activities or that Ms. Monti was aware of Mr. XXXX's alleged activities. No count in the indictment charges both defendants together in one count.

## II. ARGUMENT

Rule 8(b) of the Federal Rules of Criminal Procedure entitled "Joinder of Defendants" provides that:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all the defendants need not be charged in each count.

The dictates of Rule 8(b) must be met before joinder of defendants in a criminal trial is proper.[3] Moreover, if the dictates of Rule 8(b) are not met, Rule 8(b) requires severance as a

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indictment does not allege that Mr. XXXX knew about this transfer or aided or abetted this transfer in anyway.

[2] There are also forfeiture allegations contained in the indictment against Mr. XXXX alone.

[3] In a multi-defendant case, courts must look exclusively to Fed. R. Crim. P. 8(b), as opposed to Fed. R. Crim. P. 8(a), to determine if joinder is proper. United States v. Harrelson, 754 F.2d

matter of law based upon the pleadings. United States v. Nettles, 570 F.2d 547, 551 (5th Cir. 1978). See also Federal Practice and Procedure at 145, pg. 527.

Significantly, "[t]he propriety of joinder under Rule 8 is determined on the basis of allegations in the indictment." United States v. Faulkner, 17 F.3d 745, 758 (5th Cir.), cert. denied, 115 S.Ct. 193 (1994), citing Kaufman, 858 F.2d at 1003 (5th Cir. 1988) and Harrelson, 754 F.2d at 1176 (5th Cir.). Thus, joinder is proper under Rule 8(b) only if the indictment alleges offenses comprising the "same series of acts or transactions." Usually this will be shown by an overarching conspiracy comprised of all the defendants from which stems substantive counts against one or more of the defendants. See Faulkner, 17 F.3d at 758. Significantly, there is no conspiracy charge in the instant case.

The phrase "same series of acts or transactions" is defined as "a single plan or scheme." Id., quoting, United States v. Lane, 735 F.2d 799, 804-05 (5th Cir. 1984), rev'd in part on other grounds, 474 U.S. 438 (1986). It has been further defined as requiring substantial identity of facts or participants between two offenses. Nettles, 570 F.2d at 552; United States v. Levine, 546 F.2d 658, 662 (5th Cir. 1977); United States v. Marionneaux, 514 F.2d 1244, 1248-49 (5th Cir. 1974). What is important to note is that a "series of acts or transactions" is something more than just similar acts by different defendants. United States v. Diaz-Munoz, 632 F.2d 1330, 1336 (5th Cir. 1980); Marionneaux, 514 F.2d at 1248.

In the instant case, there is absolutely no allegation contained in the indictment of "a single plan or scheme" between Mr. XXXX and Ms. Monti. As noted above, there is no

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1153, 1176 n.17 (5th Cir.), cert. denied, 474 U.S. 908 (1985); United States v. Kaufman, 858 F.2d 994, 1003 (5th Cir. 1988). See also 1 Charles Alan Wright, Federal Practice and Procedure/ 144 at 494-95 (1985 2d ed.). Thus, the government "cannot tack the two subsections of Rule 8 together and in one indictment charge different persons with committing offenses of similar character." United States v. Velasquez, 772 F.2d 1348, 1352 (7th Cir.), cert. denied, 475 U.S. 1021 (1985).

allegation whatsoever that Mr. XXXX was aware of or participated in Ms. Monti's alleged activities or that Ms. Monti was aware of or participated in Mr. XXXX's alleged activities. In point of fact, all that is alleged is that Ms. Monti and Mr. XXXX allegedly defrauded the same debtor's estate through arguably "similar acts" in violation of 18 U.S.C./ 152. However, "similar acts" without more is insufficient to sustain joinder under Fed. R. Crim. P. 8(b). Diaz-Munoz, 632 F.2d at 1336; Marionneaux, 514 F.2d at 1248.

Almost the exact same fact scenario that confronts this Court was confronted by the United States Court of Appeals for the Ninth Circuit many years ago. In United States v. Metheany, 365 F.2d 90; 91-92 (9th Cir. 1990) (attached hereto as Exhibit A), Dotson was the sole defendant named in five counts of a six count indictment and Metheany was the sole defendant named in the remaining count. Count one charged Dotson with concealing funds from a bankruptcy estate in violation of 18 U.S.C. / 152 and count two charged Metheany with concealing different funds from the same bankruptcy estate also in violation of 18 U.S.C./ 152. Id. at 91-92.[4] The District Court denied Metheany's motion for severance from the joint trial and the Court of Appeals reversed holding that joinder was not proper under Fed. R. Crim. P. 8(b).

> Here, as appears from the face of the indictment, the appellant [Metheany] and Dotson were not charged with participation in the same acts nor can it be concluded from the fact that separate but similar allegations were made with respect to one type of offense with which each was severally charged that appellant and Dotson were engaged in the "same series of acts."

Id. at 94.[5]

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[4] Dotson was charged in counts 3-6 with making false oaths in matters relating to the bankruptcy proceeding. Id. at 92.

[5] The ruling in Metheany can be contrasted to the ruling by the Ninth Circuit in United States v. Rogers, 722 F.2d 557 (1983), cert. denied, 469 U.S. 835 (1984). In Rogers, also involving alleged violations of 18 U.S.C./152, the two defendants "were accused of working together in a common plan to make fraudulent transfer of the ranch out of Global [the bankruptcy debtor], to convert Global Funds to themselves, and to conceal their acts from the bankruptcy court." Id. at

561. Thus, joinder in Rogers were held to be proper. In Metheany and in the instant case no "common plan" was

The Metheany case is almost identical to this case. Based upon Metheany, as well as the binding precedent in Diaz-Munoz and Marionneaux, it is clear that there is misjoinder in this case under Fed. R. Crim. P. 8(b). Therefore, a severance is mandatory. Nettles, 570 F.2d at 551.

In any event, when unrelated transactions involving several defendants are joined together, "[i]t cannot be said...that all the defendants [would not be]...embarrassed and prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon the distinct and independent transactions." United States v. Bova, 493 F.2d 33, 36 (5th Cir. 1974), quoting, McElroy v. United States, 164 U.S. 76, 81, 17 S.Ct. 31, 33, 41 L.Ed.2d 355 (1986). In this case, Mr. XXXX is likely to be prejudiced by allegations that his fellow director and former girlfriend defrauded the same bankruptcy estate that he is accused of defrauding. Therefore, even assuming that a severance is not required pursuant to Fed. R. Crim. P. 8(b), this Court should exercise its discretion and grant a severance pursuant to Fed. R. Crim. P. 14.

## III. CONCLUSION

Based upon the forgoing, Mr. XXXX respectfully requests this Court to sever counts 1-3 of the February 2, 1995 from counts 4-12 of the same indictment based upon misjoinder under Fed. R. Crim. P. 8(b) or in the alternative, based upon prejudicial joiner under Fed. R. Crim. P. 14.

Respectfully submitted,

F. Clinton Broden
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Broden & Mickelsen

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214-720-9552
214-720-9594 (facsimile)

Attorney for Defendant
XXXX XXXX

**CERTIFICATE OF CONFERENCE**

Pursuant to Local Rule 5.1 of the Northern District of Texas, I, F. Clinton Broden, certify that a telephone conference on the attached motion was held on July _____, 1995, between the undersigned and Linda Groves, the Assistant United States Attorney assigned to the case. During the conference, it was determined that:

Ms. Groves opposes the motion.

F. Clinton Broden

**CERTIFICATE OF SERVICE**

I, F. Clinton Broden, certify that on July _____, 1995, I caused a copy of Defendant XXXX XXXX's Motion for Severance Pursuant to Fed. R. Crim. P. 8 and 14 and Memorandum of Law in Support Thereof to be hand-delivered to Linda Groves, Assistant United States Attorney, at 1100 Commerce Street, Third Floor, Dallas, Texas and to be deposited in the United States Mail, first-class, postage paid, addressed to William Foreman, 649 N. 4th Avenue, Phoenix, AZ 85003.

F. Clinton Broden

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**O R D E R**

Upon consideration of Defendant's Motion for Severance Pursuant to Fed. R. Crim. P. 8 and 14 and Memorandum of Law in Support Thereof, said Motion is this ___ day of July, 1995 GRANTED.

ORDERED that counts 1-3 of the indictment filed in this case are hereby severed from counts 4-12 of the indictment.

A. JOE FISH
UNITED STATES DISTRICT JUDGE