

WHITE-COLLAR CRIME

The Importance of ‘Particulars’ In Criminal Fraud Cases

The indictment against your client reads in relevant part as follows: “*In or about and between January 2019 and February 2020, the defendants, JOHN DOE and JANE DOE, co-owners of Acme Technology Co., made materially false and misleading statements and omissions to investors regarding, among other things, (i) the current and future revenues of Acme; (ii) the sales forecasts for Acme’s main product; (iii) the amount of debt on Acme’s balance sheet; and (iv) the executive compensation owed to the defendants.*” Such broadly worded charges, which describe the nature of the crime but do not identify specific misstatements, are common in fraud prosecutions.

How can counsel effectively defend against alleged false and misleading statements when the substance and timing of the statements are described only in general terms? The problem is especially acute because the defense may turn not simply on whether a given statement was false but also on what

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the speaker knew and believed at the specific time the statement was made.

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The most obvious procedural move is to seek a bill of particulars, which, if granted, would require the government to provide such “particulars” as the substance and timing of the statements at issue. But success on a motion for particulars is highly uncertain. Courts frequently deny particulars in fraud prosecutions, holding that an indictment that provides the general categories of false statements, together with discovery or other pre-trial disclosures by the government, is sufficient to satisfy the demands of due process.

In this article, we discuss the standard for ordering a bill of particulars in the Second Circuit, drawing a comparison with the standard for civil fraud claims. We then describe a recent

decision ordering a bill of particulars in *United States of America v. Holmes and Balwani*—the high-profile prosecution growing out of the Theranos blood-testing scandal. 2020 WL 666563 (N.D. Cal. Feb. 11, 2020). The decision in that case highlights the importance of seeking bills of particulars in fraud cases.

Bills of Particulars

An indictment must set forth a “plain, concise, and definite written statement of the essential facts constituting the offense charged.” Fed. R. Crim. P. 7(c). This standard applies to all federal crimes, including fraud schemes.

Rule 7(f) of the Federal Rules of Criminal Procedure authorizes a district court to direct the government to give particulars when they are needed “to identify with sufficient detail the nature of the charge pending against [the defendant],” thereby enabling the defendant to “prepare for trial, to prevent surprise, and to interpose a plea of double jeopardy should he be prosecuted a second time for the same offense.” *United States v. Bortnovsky*, 820 F.2d 572, 574 (2d Cir. 1987). The defendant has the burden of showing that the charges in the indictment are so general that they do not advise her of the specific acts of which she is accused. See *United States v. Chen*, 378 F.3d 151, 163 (2d Cir. 2004) (quotation omitted). If “the government [makes] sufficient

disclosures concerning its evidence and witnesses by other means,” such as through pre-trial discovery, courts in the Second Circuit generally do not order bills of particulars. See *United States v. Urso*, 369 F. Supp. 2d 254, 271 (E.D.N.Y. 2005).

Particulars are commonly denied even in the case of broadly worded fraud charges on the ground that the indictment, together with discovery and other disclosures by the government, provides sufficient notice to the defense of the charged misconduct. For example, in *United States v. Burstein*, the district court rejected a defendant’s claim that the government should be required to provide the specific “false statements” in an alleged scheme to obtain loans through false appraisals and other documents. No. 10-cr-623-ARR, 2012 WL 12929661, at *1-4 (E.D.N.Y. June 14, 2012). Applying the black-letter rule that a bill of particulars must be “necessary, not just helpful to a defendant’s preparation for trial,” the court held that the indictment, together with pre-trial discovery and other disclosures, afforded defendants “ample information to prepare for trial.” *Id.* at *4 (quotation marks and citations omitted).

Civil Fraud Claims

The contrast with civil fraud claims is striking. Under the Federal Rules of Civil Procedure, plaintiffs must “state with particularity the circumstances constituting fraud” in civil cases. Fed. R. Civ. P. 9(b) (emphasis added). To meet the pleading standard of Rule 9(b), a plaintiff must set forth the “time, place, and nature” of the misrepresentations, so that the defendant’s “intent to defraud, to employ any scheme or artifice to defraud, to make any untrue statement of a material fact, or to

engage in any act or course of business that would operate as a fraud” is “revealed.” *Ross v. Bolton*, 904 F.2d 819, 823 (2d Cir. 1990).

The Private Securities Litigation Reform Act of 1995 (PSLRA) also imposes heightened pleading requirements. Under the PSLRA, a plaintiff alleging securities fraud must “specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief,” the plaintiff must “state with particularity all facts on which that belief is formed.” 15 U.S.C. § 78u-4(b)(1).

‘United States v. Holmes And Balwani

In June 2018, a grand jury in the Northern District of California returned an indictment against Elizabeth Holmes and Ramesh Balwani, former CEO and COO, respectively, of the biotechnology company Theranos. The indictment charges them with wire fraud and conspiracy arising from an alleged scheme to raise money from investors on the

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basis of false and misleading statements and omissions in regard to supposedly revolutionary blood-testing technology. Holmes touted breakthrough technology that supposedly made blood tests cheaper and significantly more convenient to administer. Based on these claims, Holmes and Theranos raised more than \$700 million from sophisticated investors, and by 2014 the com-

pany had reached a private valuation of \$10 billion.

According to a superseding indictment, Holmes and Balwani defrauded investors, doctors and patients by misstating the use, efficacy and accuracy of Theranos’s blood-testing technology and misrepresenting the company’s financial health. As a result of the allegedly fraudulent conduct, investors lost hundreds of millions of dollars and patients received unreliable and inaccurate medical results from the Theranos blood tests. Both Holmes and Balwani entered not guilty pleas, and trial is scheduled for August 2020.

The indictment describes the alleged false and misleading statements in the broadly-worded manner described at the outset of the article. As to the fraud on doctors and patients, the government alleges implicit and explicit representations containing “materially false and misleading information concerning the accuracy and reliability of Theranos’s blood testing services.” As to the fraud on investors, the government alleges “false and misleading written and verbal communications” and omissions – including, for example, that “Theranos was presently a financially strong and stable company,” Theranos had expanding and profitable business relationships with Walgreens and the Department of Defense, and Theranos had proprietary blood test analyzers that were capable of accomplishing certain tasks with greater precision and at a faster rate than other available blood test analyzers.

The indictment alleges that Holmes and Balwani made the misrepresentations to the media, via the Theranos website, and in advertisements and marketing materials. The indictment does not give the specific wording, the date or the recipients of the misstatements.

Motion for Bill of Particulars

In December 2019, the defendants moved to dismiss the superseding indictment for lack of notice and, in the alternative, for a bill of particulars. They argued that the superseding indictment was “short on details,” “bare-bones,” “skimpy,” “stingy” and contained “paltry” factual allegations. In their view, the superseding indictment failed to provide adequate notice of the charges against them.

As to a bill of particulars, defendants argued that the lack of specifics in the superseding indictment impaired their ability to prepare a defense given the long duration (three years) and wide scope of the conduct at issue (Theranos once employed up to 800 people and administered blood tests on thousands of patients). The defendants also contended that because discovery was so voluminous—the government produced over 20 million pages of documents—they could not be expected to glean from the discovery the particulars of the government’s case.

Under these circumstances, the defendants sought an order requiring the government to provide the following: (1) details concerning the alleged false or fraudulent representations or omissions, including who made the representations, the precise content of the representation, the form of the representation (i.e., oral or written), the date of the representations, to whom the representation is alleged to have been made, and the manner in which the representation is claimed to be false or fraudulent; (2) names of the investors, doctors or patients who might testify about being deceived; (3) names of all known co-conspirators; and (4) facts giving rise to an alleged duty to disclose and any material omissions that

are alleged to have violated that duty.

The government opposed the motion, arguing that pre-trial discovery—and the fact that it “ha[d] not withheld” the “key evidence in [the] case” as “summarized in the reports of witness interviews”—obviated the need for a bill of particulars. As to the four categories of information the defendants sought, the government further argued (i) it has no obligation to provide “verbatim quotes” of the allegedly fraudulent misstatements; (ii) the government already disclosed to the defense the identities of victims referenced in the indictment; (iii) Holmes and Balwani would receive the names of the other co-conspirators prior to trial under local criminal rules, and therefore the government need not provide those names in the indictment; and (iv) the superseding indictment already alleged some of the material omissions of fact.

In an order issued on Feb. 11, 2020, the district court denied the motion to dismiss the indictment, holding that it was “particularized enough,” but granted in part defendants’ request for a bill of particulars. 2020 WL 666563, at *6-12. (In a separate part of its order, the court dismissed the fraud and conspiracy charges to the extent they reached doctors and non-paying patients; the charges were sustained as against paying patients.) The court ordered the government to provide particulars as to the specific misrepresentations constituting the fraud on the doctors and patients. Id. at *9. The court found that “the universe of potential misrepresentations” was “vast,” and the discovery “immense,” which created a “substantial risk” that the defendants would be unfairly surprised at trial. Id. These concerns, heightened by the government’s theory of “implicit” representations to doctors and patients, warranted

an order requiring the government to provide particulars on the doctor/patient fraud. Id. However, as to the alleged fraud on investors, the court found that the allegations adequately described the type of misrepresentations at issue and did not leave defendants guessing about the government’s theory. Id.

The court also ordered the government to provide the names of co-conspirators. Id. at *11. The court rejected the government’s argument that the local criminal rules, which require pre-trial disclosure of co-conspirator statements, sufficiently alleviated the risk of unfair surprise at trial. Id. The court held that the vast number of co-conspirators, the scope of the alleged conspiracies, the vagueness of the superseding indictment as to the non-defendant co-conspirators, and the volume of discovery all weighed in favor of requiring the government to disclose the names of unindicted co-conspirators. Id.

Conclusion

Criminal fraud charges are often described in broad terms, which means a defendant might not know until trial the specific misstatements that are central to the prosecution’s case. This contrasts with civil fraud cases, in which false statements must be particularized in the pleadings to survive a motion to dismiss. A bill of particulars can be a vital tool to help the defense identify the key alleged misstatements and avoid surprise at trial, as suggested in the *Holmes and Balwani* case.