THOMAS P. O'BRIEN
United States Attorney
GEORGE S. CARDONA (Cal. Bar # 135439)
Chief Assistant United States Attorney
DOUGLAS A. AXEL (Cal. Bar # 173814)
Chief, Major Frauds Section
RICHARD E. ROBINSON (Cal. Bar # 090640)
ROBERT J. McGAHAN (Cal. Bar # 196568)
Assistant United States Attorneys
Major Frauds Section
1100 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 894-8323/0689/0713/5416
Facsimile: (213) 894-6269
E-mail: George.S.Cardona@usdoj.gov
Doug.Axel@usdoj.gov
Richard.Robinson@usdoj.gov
Robert.McGahan@usdoj.gov
Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. MILBERG WEISS LLP, MELVYN I. WEISS, and PAUL T. SELZER, Defendants.	No. CR 05-587(D)-JFW **GOVERNMENT'S OPPOSITION TO DEFENDANT MILBERG WEISS' MOTION TO DISMISS COUNT 18; EXHIBITS A & B** Hearing Date: March 3, 2008 Hearing Time: 10:30 a.m. Hearing Place: Courtroom of the Hon. John F. Walter

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

FEDERAL CASES: **PAGE(S)**

STATUTES:

MISCELLANEOUS:

Plaintiff, United States of America, hereby submits its memorandum in opposition to the motion of defendant Milberg Weiss LLP ("Milberg Weiss") to dismiss Count Eighteen of the Second Superseding Indictment ("SSI"), which charges Milberg Weiss and its senior most partner, Melvyn I. Weiss ("Weiss"), with corruptly endeavoring to obstruct the grand jury's investigation into their criminal conduct, in violation of 18 U.S.C. § 1503 (hereinafter defendant's "Obstruction Motion").

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Consistent with the approach the defendants have taken in several of their "dispositive motions" challenging both the First Superseding Indictment and Second Superseding Indictment, Milberg Weiss ignores the fundamental requirements that the allegations in an indictment be accepted as true, and are insufficient only if they fail adequately to inform the defendant of the nature of the charges. Instead, in an attempt to dismiss Count 18 of the SSI, charging Milberg Weiss and Weiss with corruptly withholding from the Grand Jury a key document responsive to a lawfully issued subpoena, Milberg Weiss argues that the undisputed evidence at trial will establish that "Weiss did produce the document to the government" and therefore his conduct could "not constitute obstruction of justice." (Obstruction Motion at 3). Defendant Milberg Weiss also argues that, as a factual matter, it cannot be held vicariously responsible for the conduct charged in Count 18.

For the reasons described below, defendant's Obstruction Motion should be denied.

/ / /

/ / /

/ / /

II. BACKGROUND[1]

A. The Phony Art Option

As charged in the SSI, the first cases in which Steven Cooperman and Cooperman Plaintiff 1 served as paid plaintiffs for Milberg Weiss was Steven Cooperman, et al. v. The Newhall Land and Farming Co., No. CA001093 (Los Angeles County, California, Superior Court) (related to Steven Cooperman, et al. v. The Newhall Land and Farming Co., No. CV 88-3137-FW (United States District Court, Central District of California)) (collectively referred to as "Newhall Land"). (SSI at 27, Overt Act No. 14). In late 1988, as the Newhall Land case was settling, Cooperman told Milberg Weiss partner William Lerach ("Lerach") that Cooperman wanted to be paid his share of Milberg Weiss's attorneys' fees in the case quickly. (Id. at 28, Overt Act No. 17). Around this same time, Lerach was trying to recruit Cooperman and Cooperman Plaintiff 1 to serve as regular plaintiffs for Milberg Weiss, in exchange for approximately 5% to 10% of Milberg Weiss's fees in all cases they brought to the firm. (Id. at 28, Overt Act No. 18).

After some discussion amongst the Milberg Weiss partners regarding how to get Cooperman and Cooperman Plaintiff 1 their Newhall Land kickback quickly, it was eventually agreed that Weiss would personally pay Cooperman $175,000, disguised as a refundable purchase option on a painting Cooperman owned. (Id. at 28, Overt Act No. 19). Weiss, Lerach, Bershad, and Cooperman all anticipated that Cooperman would eventually repay the option to Weiss and, in the

---

[1] The facts set forth in this section are largely taken from the allegations in the SSI and from the stipulation of facts cited in defendant's Obstruction Motion. In order to put the pertinent allegations into context, the government also recites herein certain additional facts, in the form of an offer of proof at trial. As described below, the issue presented by defendant's Obstruction Motion is limited to whether the allegations in the SSI, accepted as true, charge the elements of 18 U.S.C. § 1503 in sufficient detail to inform defendants of the nature of the charge against them.

meantime, Milberg Weiss would figure out some other way to get the money to Cooperman.

On January 29, 1989, Weiss gave Cooperman a check, drawn on a personal account of Weiss, in the amount of $175,000.[2] (Id. at 29, Overt Act No. 21). As reflected in phony written agreements between Weiss and Cooperman, the payment was purportedly a refundable option on Cooperman's 1932 Pablo Picasso, "Reclining Nude."[3] (Ex. A at MIW 00009-10). In fact, the payment was a secret kickback to Cooperman and Cooperman Plaintiff 1 for having served as plaintiffs in Newhall Land.

B. Cooperman's Repayment of the Phony Art Option to Weiss

After the payment was made, Weiss, Lerach, and Bershad agreed that Milberg Weiss would pay Cooperman $175,000, disguised as consultant fees paid to his brother-in-law, and Cooperman would use this money to repay the phony purchase option payment to Weiss. (SSI at 29, Overt Act No. 23). Between March and September 1989, Milberg Weiss sent to Cooperman's brother-in-law several checks totaling $150,000, falsely characterized as "retainer[s]" in several class action lawsuits. (Id. at 29-30, Overt Act Nos. 24-27, 31). During this same time period, Cooperman had his brother-in-law forward $135,000 of this Milberg Weiss money to a company controlled by Cooperman, and paid Weiss a total of

---

[2] This amounted to just under 10% of Milberg Weiss's $1,815,295 fee in Newhall Land.

[3] This is the same painting that Cooperman later had his attorney James Tierney "steal" from Cooperman's Brentwood home, to set up a fraudulent insurance claim against Cooperman's insurer. See United States v. Cooperman, CR 98-1184-ER; United States v. James Tierney, CR 98-941-ER. Cooperman compensated Tierney for having participated in the insurance fraud by allowing him to keep Milberg Weiss kickbacks paid to Tierney as an intermediary for Cooperman in several class action cases. See United States v. Cooperman, CR 06-776-JFW, Indictment at 27 ¶ 47(c).

$125,000 in three separate checks. (Id. at 30-31, Overt Act Nos. 28-30, 32-34). With the third check to Weiss, sent on September 27, 1989, Cooperman sent a cover letter stating "I think we're almost there . . ." (Id. at 30-31 Overt Act No. 34; see also Ex. A at MIW 00005).

C. The November 15, 1990 Telefax

On December 6, 1989, Cooperman provided Lerach with an accounting of the $125,000 he had paid to Weiss. (SSI at 31, Overt Act No. 37; see also Ex. A at MIW 00004-00008). In 1990, Milberg Weiss made additional payments to Cooperman's brother-in-law, including a $35,000 payment on February 8. (SSI at 32, Overt Act Nos. 39, 41). Cooperman failed, however, to pay any additional monies to Weiss. In or about November 1990, Lerach and Bershad asked Cooperman about the status of his repayment of the phony art option to Weiss. (Id. at 33, Overt Act No. 44). In response, on or about November 15, 1990, Cooperman faxed Bershad a handwritten note in which he stated as follows:

> Dear David [Bershad]:
>
> This is what I've found so far. I faxed Bill [Lerach] copies of 3 checks in 12/89 but so far have not been able to find my copy of these copies – I think he sent them on to you –
>
> My accountant is going thru his files for the 3rd check, in case you don't have those 12/89 copies. According to my records, after 12/89, Mel [Weiss] sent Bruce [Cooperman's brother-in-law] another 35,000, & I think I may still owe that to Mel [Weiss]. Let me know if this agrees with our records –
>
> Regards,
>
> Steve

(Id. at 33, Overt Act No. 45; see also Ex. A at MIW 00002-00003). After this fax (referred to in the SSI as the "11/15/1990 telefax") was sent, it appears that Weiss, Lerach, and Bershad all failed to press Cooperman to make further repayment to Weiss and, without any pressure to do so, Cooperman stopped paying Weiss.

/ / /

/ / /

D. Defendants' Withholding of the November 15, 1990 Telefax From the Grand Jury

By 2001, Cooperman had been extensively debriefed by the government. Among the information Cooperman had disclosed to the government was information concerning Weiss's sham art option payment and Milberg Weiss's efforts to recycle the money back to Weiss through Cooperman's brother-in-law. Cooperman had provided the government with his copies of the 12/6/1989 telefax to Lerach and the 11/15/1990 telefax to Bershad. The government viewed this latter document as a critical piece of evidence because: (1) it established that Milberg Weiss's payments to Cooperman's brother-in-law were being cycled back to Weiss as Cooperman's purported repayment of the art option; and (2) it strongly supported the conclusion that all three senior Milberg Weiss partners at the time – Weiss, Lerach, and Bershad – knew that Milberg Weiss's payments to Cooperman's brother-in-law were being cycled back to Weiss. Without obtaining Milberg Weiss's copy of this document, however, the government had no proof, other than Cooperman's word, that the document had ever been sent to Bershad.

Thus, the January 8, 2002 grand jury subpoena served on Milberg Weiss called for the production of the 11/15/1990 telefax from Milberg Weiss's files. (SSI at 61 ¶ 80). And in fact, at the time the subpoena was served on Milberg Weiss, the document was in its files, in one of Bershad's desk drawers. (Id. at 63 ¶ 83). Yet, prior to August 8, 2007, Milberg Weiss never produced this document in response to the grand jury subpoena. Instead, the following events occurred:

- Unbeknownst to the government, Bershad found the 11/15/1990 telefax, along with other documents relating to the phony art option, in his desk drawer when searching for documents responsive to the January 8, 2002 grand jury subpoena. (Id.).

- Although Bershad knew that the documents were responsive to the grand jury subpoena, he did not turn them over to Milberg Weiss's records custodian or outside counsel. Instead, he called Weiss into his office and showed Weiss the documents. Weiss took them from Bershad, falsely stating, "David, you had nothing to do with the art option." Weiss then put the documents in his safe, concealing them from Milberg Weiss's document custodian who was searching for documents responsive to the subpoena.
- In August 2003, Weiss's lawyer at the time, Stephen E. Kaufman, met with the United States Attorney's Office ("USAO"). (Ex. A at 1 ¶ 2). During the meeting, Kaufman provided to the USAO the documents that Weiss had taken from Bershad, but only after first requiring an agreement from the USAO that imposed certain restrictions on the evidentiary use the USAO could make of the documents, including an agreement not to use them as evidence against Weiss or Milberg Weiss. (Id. ¶ 3). Kaufman, with the authorization of Weiss, was able to extract such a concession only by falsely representing to the USAO that the documents "did not have to be produced pursuant to [the January 2002 grand jury subpoena] because they were personal records of Weiss and were not records of Milberg Weiss." (Id. at 2 ¶ 4(d)).
- In a follow-up call two days later, Weiss caused Kaufman's false representation that the documents were personal to Weiss to be bolstered with additional false and misleading information provided to the USAO, namely that they were found in Weiss's safe "in which he keeps personal items," and that "Weiss had found the [d]ocuments in his safe only a couple of months before, and had forgotten the documents were there." (Id. ¶ 5) .

Prior to Bershad's decision in 2007 to plead guilty and cooperate in the government's investigation, Milberg Weiss and Weiss knew that any indictment of Weiss would rely heavily on Cooperman's proffered testimony concerning the phony art option payment. As these defendants also knew, Cooperman's criminal background made his uncorroborated testimony insufficient evidence upon which to base an indictment. Thus, defendants' strategy was to frustrate the grand jury's ability to corroborate Cooperman's proffered testimony, while at the same time vigorously attacking Cooperman's credibility.[4] Milberg Weiss's and Weiss's improper withholding from the grand jury of Milberg Weiss's copy of the 11/15/1990 telefax fell neatly within this strategy. Fortunately, the grand jury was able to discover the true facts despite defendant's corrupt endeavor to obstruct its investigation. On August 8, 2007, after Bershad had disclosed to the government the true facts regarding the nature and provenance of the 11/15/1990 telefax, Milberg Weiss's custodian finally produced the document to the Grand Jury in response to the January 8, 2002 grand jury subpoena.

/ / /

---

[4] The strategy is reflected in several public statements made on behalf of Milberg Weiss during the course of the investigation. Indeed, as recently as February 1, 2007, the day after a plea agreement was filed by which Cooperman agreed to plead guilty to a charge arising out of the paid plaintiffs conspiracy (after the government determined that Cooperman had breached his earlier cooperation agreement), Milberg Weiss's counsel was quoted in the press as stating that Cooperman's claims "have never been credible and they are no more so today. . . This new plea bargain demonstrates Mr. Cooperman's willingness to say anything for a shorter sentence and the government's willingness to urge him to do so." The New York Sun, "Serial Plaintiff in Milberg Weiss Case to Plead Guilty" (February 1, 2007) (Ex. B). At the same time Milberg Weiss's counsel was impugning the government's integrity by suggesting the government was "urg[ing]" Cooperman to provide false testimony, Milberg Weiss and Weiss were corruptly obstructing the grand jury's investigation by willfully withholding key evidence corroborating that very same testimony.

III. LEGAL STANDARDS

When considering the sufficiency of an indictment on a motion to dismiss, all of the allegations in the indictment are presumed to be true. United States v. Jensen, 93 F.3d 667, 669 (9th Cir. 1996); United States v. Buckley, 689 F.2d 893, 897 (9th Cir. 1982). The indictment is to be "read in its entirety, construed according to common sense, and interpreted to include facts which are necessarily implied." United States v. Hinton, 222 F.3d 664, 672 (9th Cir. 2000) (citation omitted). "An indictment is sufficient if it contains the elements of the charged crime in adequate detail to inform the defendant of the charge and to enable him to plead double jeopardy." Buckley, 689 F.2d at 896 (citing Hambling v. United States, 418 U.S. 87, 117 (1974)); see also Hinton, 222 F.3d at 672 (same); United States v. Givens, 767 F.2d 574, 584 (9th Cir. 1985) ("An indictment which tracks the words of the statute charging the offense is sufficient so long as the words unambiguously set forth all elements necessary to constitute the offense.").

IV. ARGUMENT

Defendant does not dispute that Count 18 of the SSI properly charges all that is necessary to establish a violation of 18 U.S.C. § 1503, namely, that Milberg Weiss and Weiss "corruptly influenced, obstructed, and impeded, and endeavored to influence, obstruct, and impede, the due administration of justice in the Grand Jury Proceeding by causing the 11/15/1990 telefax to be withheld from production in response to the Grand Jury Subpoena." (SSI at 61-62 ¶ 81).

Nevertheless, defendant argues that Count 18 must be dismissed because the parties' "Stipulation Re: Documents Provided and Representations Made By Stephen E. Kaufman," a complete copy of which is attached as Exhibit A hereto, establishes that defendant Milberg Weiss failed to produce the 11/15/1990 telefax in response to the grand jury subpoena only because Weiss "asserted that the document was personal." (Obstruction Motion at 3). According to defendant, this assertion, coupled with Weiss's assertion of his Fifth Amendment act-of-

production privilege, absolved both Milberg Weiss and Weiss of any obligation to produce the document in response to the grand jury subpoena. It was sufficient, argues defendant, that Weiss produced the document to the government "pursuant to a Fifth Amendment privilege over its use at trial."[5] (Obstruction Motion at 3-4).

Of course, had the document truly been personal to Weiss, and had his assertion of an act-of-production privilege been truthful and sincere, there would be no obstruction charge here. In truth, however, Bershad found the 11/15/1990 telefax when searching for documents responsive to the grand jury subpoena; Weiss took the document from Bershad and locked it in his safe, intending to conceal it from the Grand Jury; Weiss caused his attorney to falsely represent to the USAO that the document was a personal document of Weiss that he had forgotten in his personal safe since the time of the art option transaction; and, relying on these fraudulent representations, Weiss asserted a Fifth Amendment act-of-production privilege and conditioned the disclosure of the document to the USAO on an agreement that guaranteed it could not be disclosed to the Grand Jury or otherwise directly used against him or the firm.[6] These facts, when proven at trial, will unquestionably establish a violation of § 1503. See United States v. Lench, 806 F.2d 1443, 1445 (9th Cir. 1986) (a corrupt "failure to provide

---

[5] This description of events is not precisely accurate. By asserting that the document was personal, Weiss was able to assert a Fifth Amendment act of production privilege. Weiss then conditioned his waiver of the privilege on the government's agreement not to use the document directly against him or Milberg Weiss in seeking an indictment or at trial.

[6] Defendant argues that the government could have moved to compel production of the document, had it disagreed with Weiss's assertion of privilege over its production. (Obstruction Motion at 5). The resolution of such a motion, however, would largely have turned on a credibility determination between Cooperman and Weiss. Had Milberg Weiss or Weiss disclosed the true facts concerning the nature of the document or the manner in which it was found, such a motion would not have been necessary.

documents requested by a grand jury subpoena duces tecum" constitutes a violation of 18 U.S.C. § 1503) (citing United States v. Rasheed, 663 F.2d 843, 852 (9th Cir. 1981)). In any event, the allegations in Count 18 clearly charge "the elements of [§ 1503] in adequate detail to inform the defendant of the charge and to enable [it] to plead double jeopardy." Buckley, 689 F.2d at 896.

Nor can Milberg Weiss escape responsibility for the corrupt withholding of the 11/15/1990 telefax from the Grand Jury by asserting that Weiss was acting as an individual and not within the scope of partnership business. (Obstruction Motion at 5). Both Weiss and Bershad acted to conceal the document from the Grand Jury. In so doing, they both were acting within the scope of their authority[7]

---

[7] For purposes of affixing corporate criminal liability, an agent acts within the scope of his agency, if the agent performs "acts of the kind which he is authorized to perform." United States v. Cincotta, 689 F.2d 238, 241-42 (1st Cir. 1982). See New York Central and Hudson River Railroad Co. v. United States, 212 U.S. 481, 493-94 (1909) ("A corporation is held responsible for acts not within the agent's corporate powers strictly construed, but which the agent has assumed to perform for the corporation when employing the corporate powers actually authorized, and in such cases there need be no written authority under seal or vote of the corporation in order to constitute the agency or to authorize the act."); see also 1 R. Brickey, Corporate Criminal Liability, § 3.02 at p. 40 (1984)("In the context of corporate criminal prosecutions, then, 'within the scope of employment' is a term of art signifying little more than that the employee's crime must be committed in connection with his performance of some job-related activity."); United States v. Automated Medical Laboratories, Inc., 770 F.2d 399, 407 (4th Cir. 1985) ("The term 'scope of employment' has been broadly defined to include acts on the corporation's behalf in performance of the agent's general line of work."); United States v. Carter, 311 F.2d 934, 942 (6th Cir. 1963) ("the courts have held that so long as the criminal act is directly related to the performance of the duties which the officer or agent has broad authority to perform, the corporate principal is liable for the criminal act also, and must be deemed to have 'authorized' the criminal act"). Weiss and Bershad, as "Managing Partners" of Milberg Weiss, expressly possessed unlimited authority under the firm's partnership agreement to make "all decisions relating to or affecting the management, business, affairs, operations and policies" of the firm, including

and with an intent to benefit Milberg Weiss in whole or in part.[8] Accordingly, defendant Milberg Weiss is properly charged with, and should be held responsible for, their crimes.

V. CONCLUSION

For the foregoing reasons, defendant's Obstruction Motion should be denied.

DATED: February 4, 2008

Respectfully submitted,

THOMAS P. O'BRIEN
United States Attorney

GEORGE S. CARDONA
Chief Assistant United States Attorney

/s/ *Douglas A. Axel*
DOUGLAS A. AXEL
RICHARD E. ROBINSON
ROBERT J. McGAHAN
Assistant United States Attorneys
Major Frauds Section

Attorneys for Plaintiff
UNITED STATES OF AMERICA

---

deciding whether to produce to 11/15/1990 telefax in response to the grand jury subpoena served on Milberg Weiss.

[8] For an agent to bind a corporation criminally, it is necessary that he be "motivated –- at least in part –- by an intent to benefit the corporation." Cincotta, 689 F.2d at 242. Courts have consistently rejected the notion that a corporation can be held criminally liable only if the agent was motivated solely or predominately to benefit the corporation. See United States v. Gold, 743 F.2d 800, 823 (11th Cir. 1984) (corporate conviction upheld where employees were "simultaneously pursuing both their own interests and those of their corporate employer;" "[t]o the extent that [defendant's] requested instructions implied that an agent had to be acting for the exclusive benefit of the corporation for corporate liability to exist, however, they clearly misstate the law"); Federal Savings and Loan Insurance Corporation v. Shearson-American Express, Inc., 658 F.Supp. 1331, 1338 (D. Puerto Rico 1987) ("the servant need not be acting for the 'exclusive benefit' of the principal, it is enough that the agent intended his acts to produce some benefit to himself and to the principal second").