

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.07-80138-CR-MARRA/VITUNAC

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK SARCONA,

Defendant.

_____ /

DEFENDANT'S MOTION FOR RELIEF
FROM PREJUDICIAL JOINDER

Frank Sarcona ("Sarcona"), by counsel, pursuant to Federal Rules of Criminal Procedure 8 and 14, hereby files this Motion for relief from prejudicial joinder, to sever counts 60, 61, and 62, and any reference to *SlimAmerica*, for the following reasons:

In July 1999, in *Federal Trade Commission v. SlimAmerica, Inc. et. al.*, 97-6072-CIV-*FERGUSON*, Sarcona, was ordered, pursuant to a permanent injunction, to post a \$5 million performance bond in the event he engaged directly or indirectly in the weight loss business to compensate any person as a result of any deceptive practice, misrepresentation or violation of the court's order.

The Government alleges that Sarcona did violate 18 U.S.C. § 401(3) and the permanent injunction in three counts (60, 61, and 62 of the superseding indictment) in the conducting of business without satisfying the \$5 million performance bond requirement of the permanent injunction. The charges are alleged in addition to 59 other counts of criminal behavior including

conspiracy to commit mail fraud, mail fraud, wire fraud, conspiracy to commit money laundering, money laundering, and misbranding of food.

Rule 8, Federal Rules of Criminal Procedure, states: (a) Joinder of Offenses. The indictment ... may charge a defendant in separate counts with 2 or more offenses if the offenses charged-...are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.

Rule 14, Federal Rule of Criminal Procedure, states:(a) Relief. If a joinder of offenses... in an indictment...appears to prejudice a defendant..., the court may order separate trials of counts, ... or provide any other relief that justice requires.

Sarcona moves to sever counts 60, 61, and 62, and any reference to *SlimAmerica* where a joint trial of these offenses with the other criminal allegations will result in specific and compelling prejudice to Sarcona's defense. The effect of the charge of the contempt will allow evidence and argument of a prior act which would overwhelm the other 59 counts such that the jury may make a determination of guilt for the non-contempt charges predicated on a finding of contempt alone. Additionally, the jury will very likely allow any finding of contempt to establish guilt for the other alleged violations where those allegations are based on different acts at a different time.

As such, counts 60, 61, and 62, and any reference to *SlimAmerica* should be severed so that the defendant does not suffer specific and compelling prejudice to his defense.

Conclusion

_____ WHEREFORE, Frank Sarcona hereby moves to sever counts 60, 61, and 62, and any reference to *SlimAmerica*, to avoid specific and compelling prejudice and confusion of the jury.

KATHLEEN M. WILLIAMS
FEDERAL PUBLIC DEFENDER

s/ Samuel J. Smargon
Samuel J. Smargon
Assistant Federal Public Defender
Attorney for Defendant
Florida Bar No. 150230
500 South Australian Avenue, Suite 450
West Palm Beach, Florida 33401
(561) 833-6288 - Telephone
(561) 833-0368 - Fax
Samuel_Smargon@FD.org

CERTIFICATE OF SERVICE

I HEREBY certify that on **December 3, 2007** I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/ Samuel J. Smargon
Samuel J. Smargon

SERVICE LIST

UNITED STATES OF AMERICA V. FRANK SARCONA
Case No. 07-80138-CR-MARRA/VITUNAC

Kerry Baron
Kerry.Baron@usdoj.gov
500 Australian Avenue, Suite 400
West Palm Beach, Florida 33401
(561) 659-4772 - Telephone
(561) 820-8777 - Fax
Attorney for United States of America

S:\SMARGON\Clients\Sarcona, Frank WPB\Pleadings\Sever.01.wpd