IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICHAEL L. SMITH,

Defendant.

REPORT AND RECOMMENDATION

03-CR-174-S

REPORT

Before the court for report and recommendation is defendant Michael Smith's motion to dismiss Count 1 of the indictment. *See* Dkt. 12. Smith claims that the conspiracy charge in Count 1 fails to plead a sufficient cause of action. For the reasons stated below, I am recommending that this court deny Smith's motion.

Facts

On December 10, 2003, the grand jury returned a five-count indictment against Smith and co-defendant Lawrence Williams. The charges arise out of defendants' allegedly criminally deficient removal of asbestos from the Evangelical Lutheran Church and School in Mt. Horeb during the spring and summer of 2002. Count 1 charges both defendants with conspiracy to violate the Clean Air Act, 42 U.S.C. § 7413(c)(1), while Counts 2 through 5 all charge substantive violations of the same statute against both defendants.

Count 1 alleges that Smith owned Smith Renovations, a company specializing in church renovations, and that Williams worked for the company. Count 1 then recites relevant provisions of the federal Clean Air Act, along with regulatory definitions. At paragraph 10, Count 1 charges that

> From on or about April 20, 2002, and continuing through on or about July 9, 2002, in the Western District of Wisconsin, the defendants, Michael J. Smith and Lawrence J. Williams, knowingly, intentionally, and unlawfully conspired and agreed with each other, and with others known and unknown to the Grand Jury, to commit offenses against the United States, specifically,
>
> > a. to knowingly fail to notify the Wisconsin Department of Natural Resources . . .
> >
> > b. to knowingly fail to adequately wet regulated asbestos-containing material . . .
> >
> > c. to knowingly fail to seal regulated asbestos-containing material . . . and to place labels . . .
> >
> > d. to knowingly strip, remove or otherwise handle or disturb regulated asbestos-containing material without the presence of at least one on-sight representative . . .;
> >
> > All in violation of the Clean Air Act, U.S.C. § 7413(c).

See Dkt. 2 at 3-4.

Section 7413 is the "federal enforcement" section of the Clean Air Act; at subsection (c) it provides criminal penalties for any knowing violation of specified portions of the Act, including § 7412, which sets the framework for handling "hazardous air pollutants" such as asbestos. Count 1 concludes with four more paragraphs alleging acts in furtherance of the conspiracy, including five specific overt acts. *Id.* at 4-5.

Analysis

In his motion to dismiss, Smith alleges that his company, Smith Renovations, LLC, was organized as a domestic limited liability company on June 19, 2002, several months after the alleged start of the conspiracy charged in Count 1. From this, Smith argues that because he elected to negotiate with the victim church through his company, and because the indictment alleges that co-defendant Williams was only an employee, the indictment should have charged the company, not Smith or Williams, with criminal violations of the Clean Air Act. According to Smith, "what the indictment factually alleges without expressly acknowledging the fact is an *intracorporate conspiracy*." Dkt. 12 at 8, emphasis in original.

Smith then speculates about uncharged facts, leavening his conjecture with citations to inapposite cases from other circuits, one of which observes that "a corporate officer, acting *alone* on behalf of the corporation, could not be convicted of conspiring with the corporation." *United States v. Peters*, 732 F.2d 1004, 1008 N. 6 (1st Cir. 1984), emphasis in original. A true enough statement of the law, I suppose, but irrelevant to the charge against Smith, because, just as the court concluded in *Peters*, "this is not such a case." *Id*. More applicable to Smith's motion to dismiss is the actual holding of *Peters*:

> The actions of two or more agents of a corporation, conspiring together on behalf of the corporation, may lead to conspiracy convictions of the agents (because the corporate veil does not shield them from criminal liability) . . .."

Id. at 1008.

Smith's citation to *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 476 (10th Cir. 1990), is equally unhelpful to him. The question in *Suntar* was whether the *corporate* defendant could be convicted of conspiracy; the court observed that the conspiracy verdict could not stand if the only co-conspirators of the corporation were its own employees. Smith also cites *United States v. Notarantonio*, 758 F.2d 777, 789 (1st Cir. 1985) where again the issue was whether a *corporate* defendant could be convicted of conspiracy: the court found that it could, because one of the alleged co-conspirators was not an employee of the corporation. The issue was *not* whether two employees of the same corporation could conspire with each other.

In his reply brief, Smith contends that under the intracorporate conspiracy doctrine, employees acting within the scope of their employment cannot conspire among themselves. His only authority for this proposition is *Bivens Gardens Office Bldg. v. Barnett Banks, Inc.*, 140 F.3d 898 (11th Cir. 1998), a civil RICO case in which there was no invocation of the intracorporate conspiracy doctrine and the conspiracy claim survived pretrial motions and went to trial. *Id.* at 911-12.

Finally, at pages 5-6 of his reply brief, Smith cites *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 603 (5th Cir. 1981), a civil case, for the proposition that the acts of a corporation's agents are considered to be those of a single legal actor; but the court in *Dussouy* held that "in certain circumstances a corporation can conspire with its employees." *Id.* at 602. The court observed that a corporation can be convicted of a criminal conspiracy based solely on

conspiracy with its own employees because such action by an incorporated collection of individuals creates the "group danger" at which conspiracy liability is aimed, and the view of the corporation as a single actor becomes a fiction without a purpose. *Id.* at 603.

Smith cites no Seventh Circuit law in support of his dismissal motion, which is not surprising because there is none. In this circuit it is pellucid that § 371 conspiracy charges may be brought against co-employees who conspire with each other. *See, e.g., United States v. McCulley*, 178 F.3d 872, 873 (7th Cir. 1999) (four employees of Skyway Airlines charged with conspiracy and making false statements in their efforts to cut their maintenance costs and to conceal their practices from the FAA); *United States v. Johnson*, 927 F.2d 999, 1000 (7th Cir. 1991) (business owner and seven employees of a beauty school indicted for mail fraud and conspiracy related to misuse of student loan funds); *United States v. Martel*, 792 F.2d 630, 633 (7th Cir. 1986) (president and vice president of a defense contractor convicted of conspiring with each other to defraud the government); *United States v. Weisman*, 736 F.2d 421, 423 (7th Cir. 1984) (six employees of company, including its president, charged with conspiring to defraud customers).

As the government observes in the instant case, the fact that the defendants may have used Smith's corporation as a tool to assist them in their allegedly criminal conduct is irrelevant to the adequacy of the conspiracy charge and cannot possibly form a basis to dismiss Count 1. *See, e.g., McNamara v. Johnston,* 522 F.2d 1157, 1165 (7th Cir. 1975), cert. denied, 425 U.S. 911 (1976).

The rest of Smith's arguments are his opinion as to what the evidence will and will not show at trial. Smith's reply brief essentially is a closing argument in which Smith contests the government's ability to prove the existence of a conspiracy or any criminal intent. *See* Dkt. 18. But challenging the government's ability to prove its case cannot lead to pretrial dismissal of a charge because summary judgment does not exist in criminal cases. *United States v. Thomas*, 150 F.3d 743, 747 (7th Cir. 1998).

To survive a pretrial sufficiency challenge, an indictment must: 1) state all the elements of the crime charged, generally by tracking the statutory language of the offense; 2) adequately apprise the defendant of the nature of the charge so that he may prepare a defense; and 3) allow the defendant to plead the judgment as a bar to any future prosecutions. Courts are to review challenged indictments practically, rather than in a hypertechnical manner. *United States v. Sandoval*, 347 F.3d 627, 633 (7th Cir. 2003); *United States v. Hausmann*, 345 F.3d 952, 955 (7th Cir. 2003).

In a conspiracy charge, the government need not prove a completed underlying crime, it need only prove the existence of an unlawful agreement. *United States v. Bond*, 231 F.3d 1075, 1079 (7th Cir. 2000). As the court noted in *United States v. Gee*, 226 F.3d 885 (7th Cir. 2000):

> A conspiracy requires the government to prove (1) the existence of an agreement to commit an unlawful act; (2) that defendant knowingly and intentionally became members of the conspiracy; and (3) the commission of an overt act that was committed in furtherance of the conspiracy.

226 F.3d at 893. Here, the language from Count 1 quoted above, clearly establishes that the government has alleged the elements of a conspiracy.

Not so fast, rejoins Smith: "These allegations cannot reasonably be read to infer that Smith intended to interfere with any particular, specific governmental function." Motion to Dismiss, Dkt. 12 at 7. Yes, they can: Count 1 alleges with clarity and particularity that Smith and co-defendant Williams conspired to violate the Clean Air Act by means of acts and omissions that violated that statute and its corollary federal regulations. Most people probably would agree (and this court concludes) that federal efforts to reduce the amount of carcinogenic asbestos particles in the air they breathe are particular and specific governmental functions.

In short, there is absolutely no basis to dismiss Count 1.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendant Michael Smith's Motion to Dismiss Count 1 of the indictment.

Entered this 15th day of April, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge