UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No.: 04-CR-56

HAIDER BOKHARI,
QASIM BOKHARI,
RAZA BOKHARI,
SHAHIDA BOKHARI, and
KELLY BOKHARI,

Defendants.

KELLY BOKHARI'S MOTION TO DISMISS COUNTS 5 AND 7

I. BACKGROUND

Five members of the Bokhari family are charged in a nine count indictment alleging conspiracy to commit mail fraud, mail fraud, conspiracy to commit money laundering, and money laundering. Haider, Qasim and Raza Bokhari are brothers. Shahida Bokhari is their mother. Kelly Bokhari is Haider's wife.

Kelly Bokhari is charged in Count 5 with conspiracy to commit money laundering, contrary to 18 U.S.C. §1956(h). The conspiracy is alleged to have existed from approximately November, 2001 to March, 2004. She is charged in Count 7 with money laundering, contrary to 18 U.S.C. §1956(a)(1)(B)(i), involving a check she deposited into her bank account on May 9, 2002.

The allegations concern a computer consulting business run by the Bokhari brothers. It is alleged that the brothers defrauded the government of approximately $1.2 million by participating in the E-Rate Program, a federal program designed to help economically disadvantaged schools obtain and use computers. The Bokhari brothers are alleged to have engaged in a number of false representations in order to obtain funds from the E-Rate program, ultimately not providing the goods and services contracted for. Kelly Bokhari is not alleged to have participated in the mail fraud scheme, but rather to have participated in laundering the proceeds of the scheme.

Kelly Bokhari now moves to dismiss Counts 5 and 7, for the following reasons:

- Both counts fail to allege that she acted with the requisite intent, an essential element of the offense.
- Both counts fail to properly allege that she, or someone she conspired with, conducted a financial transaction with proceeds of the mail fraud scheme, an essential element of the offense.
- The money laundering conspiracy count, Count 5, is duplicitous because it incorporates two separate offenses into one count.
- Count 7, the money laundering count, fails to allege an essential element of the offense, concealment, so as to distinguish the money laundering count from the underlying mail fraud scheme.

The rules with regard to sufficiency of an indictment are well known. An indictment is sufficient if it: (1) states all the elements of the offense charged, (2) informs the defendant of the nature of the charge, enabling the defendant to prepare a defense, and (3) enables the defendant to plead the judgment as a bar to later prosecution of the same offense. *United States v. Allender*, 62 F.3d 909, 914 (7th Cir. 1995). Morever, Fed. R. Crim. P. 7(c)(1) requires that an indictment be a "plain, concise, and definite written statement of the essential facts constituting the offense charged." *Id*. In reviewing the sufficiency of the indictment, a court should consider the challenged count as a whole and should refrain from reading it in a hypertechnical manner. *Id*. (citation omitted). The test for validity is not whether the indictment could have been framed in a more satisfactory manner, but whether it conforms to minimal constitutional safeguards. *Id*. It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as the statutory language unambiguously sets out all the elements necessary to constitute the offense. *Id*.

II. COUNT 5: CONSPIRACY TO COMMIT MONEY LAUNDERING

A. Intent

18 U.S.C. §1956(h) provides: "Any person who conspires to commit any offense defined in this section or §1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy."

The essential elements of a conspiracy are: (1) an agreement between two or more persons to commit an unlawful act, (2) intentional participation in the conspiracy by the

defendant, and (3) an overt act by one of the conspirators. *United States v. Brown*, 31 F.3d 484, 488 (7th Cir. 1995). In this case, the unlawful act is money laundering, under both 18 U.S.C. §1956(a)(1)(B)(i) – concealment of the proceeds of a specified unlawful activity (here, mail fraud) and 18 U.S.C. §1956(a)(2)(B)(i) – transporting proceeds from the United States to a place outside the United States.

Count 5 of the indictment alleges that Kelly Bokhari acted "knowingly" – that she knowingly conspired with others, that she knew the money involved came from some unlawful activity, and that she knew the transactions were designed to conceal the nature, location, source, origin and control of the proceeds. The indictment, however, does not allege that she acted intentionally.

Intent is a necessary element for a money laundering conviction under §1956. *See United States v. Shoff*, 151 F.3d 889, 891 (8th Cir. 1998) (stating proof of design to conceal or disguise nature, location, source, ownership or control of proceeds is necessary element for conviction); *United States v. Wilson*, 77 F.3d 105, 109 (5th Cir. 1996) (same); *United States v. Salcido*, 33 F.3d 1244, 1246 (10th Cir. 1994) (same). "Under the Money Laundering Control Act, the government [has] the burden of proving beyond a reasonable doubt that [the defendant] knowingly conducted a financial transaction with the proceeds of [illegal activity] and that he did so with the intent to conceal the nature or source of the proceeds... ." *United States v. Beddow*, 957 F.2d 1330 (6th Cir. 1992), *citing United States v. Blackman*, 904 F.2d 1250, 1258 (8th Cir. 1990).

The Seventh Circuit has required a showing of intent for "concealment money laundering" charged under §1956(a)(1)(B)(i):

> We conclude that a conviction for money laundering under 18 U.S.C. §1956(a)(1)(B)(i) is valid only where there is concrete evidence of intent to disguise or conceal transactions, whether that evidence comes directly from statements by the defendant that indicate an intent to conceal, or from circumstantial evidence like unusual secrecy surrounding transactions, careful structuring of transactions to avoid attention, folding or otherwise depositing illegal profits into the bank account or receipts of a legitimate business, use of third parties to conceal the real owner, or engaging in unusual financial moves culminating in a transaction.

United States v. Esterman, 324 F.3d 565, 573 (7th Cir. 2003) (citation omitted).

Here, the grand jury alleges only that Kelly Bokhari knowingly conspired to commit the named money laundering offenses. The grand jury does not allege that she intentionally conspired, nor does it allege that she intentionally conducted financial transactions to conceal the proceeds of mail fraud, or intentionally transported proceeds out of the country. The grand jury's failure to allege the requisite intent renders Count 5 inadequate, and it should be dismissed.

B. Net Proceeds

Count 5 alleges that Kelly Bokhari conspired to launder the "proceeds of specified unlawful activity," namely mail fraud, in violation of 18 U.S.C. §1341. Indictment, ¶28. The grand jury alleges that the primary object of the money laundering conspiracy "was to transfer the proceeds of specified unlawful activities described above in Counts Two

through Four of this Indictment from the financial account into which the proceeds were originally deposited, namely account #1000415147 at Johnson Bank in Kenosha, Wisconsin in the name of the consulting company and defendant Qasim Bokhari, to other accounts controlled by the defendants for the purpose of concealing and disguising the nature, location, source, ownership and control of those criminal proceeds." Indictment, ¶34.

Turning then to Counts 2-4, they allege substantive mail fraud counts against Haider and Qasim Bokhari. Each count incorporates by reference paragraphs 1-9 and 12-16 of the indictment. One of those paragraphs, paragraph 15, alleges that the defendants "derived approximately $1,288,742.76 in gross receipts" from the mail fraud scheme.

In summary, Count 5 alleges that Kelly Bokhari conspired to launder $1,288,742.76 in gross receipts of the mail fraud scheme. This does not adequately state an offense under 18 U.S.C. §1956(a)(1)(B)(i).

In *United States v. Scialabba*, 282 F.3d 475 (7th Cir. 2002), the Seventh Circuit had the occasion to define the term "proceeds" as it appears in 18 U.S.C. §1956. The Court held that "at least when the crime entails voluntary, business-like operations, 'proceeds' must be net income; otherwise, the predicate crime merges into money laundering (for no business can be carried out without expenses) and the word 'proceeds' loses operational significance." *Scialabba*, 282 F.3d at 475.

The *Scialabba* holding is based in part on the rule of lenity, with Judge Easterbrook noting that Congress could easily have written "receipts" into the statute if that is what

Congress meant. *Id*. at 477. Moreover, this definition of the term proceeds avoids overlap or "merger" problems between the conduct sanctioned by the fraud statutes and that sanctioned by the money laundering statutes. *Id*.

The Bokhari brothers may be appropriately charged with obtaining $1.2 million by virtue of a mail fraud scheme, but simply placing the gross proceeds in bank accounts, and transferring the money between bank accounts, is not a "sufficiently independent sequential step," *id*., to distinguish the mail fraud scheme from the money laundering scheme. Count 5 alleges that the money laundering conspiracy involved the gross proceeds of the mail fraud scheme, not the net receipts (after payment of business expenses), and pursuant to *Scialabba* that is not sufficient to state an offense under §1956.

C. Duplicity

Duplicity is the charging of two or more offenses in a single count. *United States v. Marshall*, 75 F.3d 1097, 1111 (7th Cir. 1996). Duplicitous charging is prohibited for several reasons. It can lead to improper notice of the charges, prejudice in the shaping of evidentiary rulings, sentencing issues and appellate review, exposure to double jeopardy and, perhaps most likely, the possibility that a jury will reach a non-unanimous verdict, i.e., some jury members may find the defendant guilty of one offense and others may find him guilty of another, but all twelve may not agree on a single offense. *Marshall*, 75 F.3d at 1111; *United States v. Kimberlin*, 781 F.2d 1247, 1250 (7th Cir. 1985).

Count 5 charges Kelly Bokhari with conspiracy to commit concealment money laundering under §1956(a)(1)(B)(i) – the transactions involving the proceeds of the specified unlawful activity were designed to conceal the nature, location, source, origin and control of the proceeds. The principal object of the conspiracy is alleged to have been the transfer of the proceeds of the mail fraud scheme from an account at Johnson Bank in Kenosha to "other accounts controlled by the defendants." Indictment, ¶34.

Count 5, however, also cites a separate statutory subsection, 18 U.S.C. §1956(a)(2)(B)(i) and alleges that Kelly Bokhari also conspired to commit what is known as "international money laundering" – transferring the proceeds of the mail fraud scheme to a place outside the United States, in this case Pakistan. This allegation creates a separate offense – a separate conspiracy – involving a different element (transferring funds out of the country) which has been improperly incorporated into a single count with the conspiracy to commit concealment money laundering allegation.

It is true that a single conspiracy can have multiple objects without violating the rule against duplicity. *See, e.g., United States v. Hughes*, 310 F.3d 557, 561 (7th Cir. 2002). However, the grand jury here did not clearly charge a multi-object conspiracy; only one object is alleged. Indictment, ¶34. Instead, the "international money laundering" allegations are alleged as a manner and means of the conspiracy, Indictment, ¶38, when that conduct actually constitutes a separate statutory offense.

The potential breadth of the money laundering laws, and the risk of juror confusion, was noted by the court in *United States v. Jackson*, 935 F.2d 832 (7th Cir. 1991). Specifically, the court noted that the separate provisions under §1956(a)(1)(A) and (a)(1)(B) are "aimed at different activities" (in that case, promotion vs. concealment). *Id*. at 842. As the court noted:

> The different aims suggest that the prosecution in a money laundering case will generally make its case under one provision or the other; only in the unusual case will the government be able to prove that a single transaction was intended to both promote an illegal activity and conceal the origin of the funds used in that activity. This suggests that the government should advise the district court and defense counsel whether it is proceeding under the former, the latter, or both, and that the jury be charged accordingly. The potential breadth of the statute, and the risk that juries will confuse money laundering with money spending, *see United States v. Sanders*, 928 F.2d 940, 946 (10th Cir. 1991), persuades us that their inquiry should be channeled by more specific instructions than the one given in this case.

Jackson, 935 F.2d at 842.

Although the *Jackson* court did not address §1956 in terms of a duplicity challenge, this cautionary language strongly suggests that the allegation of concealment and international transfer money laundering in one conspiracy count, rather than two separate counts, is inappropriate, absent a clear indication by the grand jury that it has charged a conspiracy with two separate objects. Count 5 does not say that, and should be dismissed as duplicitous.

III. COUNT 7: MONEY LAUNDERING

A. Intent

Similar to Count 5, the substantive money laundering count in Count 7 alleges only that Kelly Bokhari acted knowingly, rather than intentionally. Intent is a necessary element of the offense of money laundering under §1956(a)(1)(B)(i). For the reasons outlined in section II(A) above, Kelly Bokhari submits that Count 7 should be dismissed.

B. Net Proceeds

Similar to Count 7, Count 5 incorporates by reference Counts 2-4 which incorporate by reference the allegation in paragraph 15 that the defendants derived gross proceeds of $1.2 million from the mail fraud scheme. Count 7 specifically alleges that Kelly Bokhari laundered $417,000 of those proceeds by depositing a check in that amount into an account at TCF National Bank in Milwaukee. A fair, common sense reading of the indictment is that the $417,000 was a portion of the gross receipts alleged in paragraph 15 of the indictment.

As noted, for business-like ventures such as the Bokhari's computer consulting company, *Scialabba* defines proceeds as net receipts, not gross proceeds. For the reasons outlined in section II(B) above, Count 7 should be dismissed.

C. Depositing a Check is Not Concealment

In 1991, the Seventh Circuit in *Jackson* expressed concern over the breadth of the money laundering laws. *Jackson*, 935 F.2d at 842-43. Congress originally enacted the money laundering statutes as part of the Anti-Drug Abuse Act of 1986, to "combat the large

amounts of money being laundered by the drug trade and organized crime." *See United States v. Bart*, 973 F. Supp. 691, 695 (W.D. Tex. 1997); *see also United States v. Ferrouillet*, 1997 WL 266627 (E.D. La.), p. 5, *citing* Maura E. Fenningham, Note, A Full Laundering Cycle is Required: Plowing Back the Proceeds to Carry On Crime is the Crime Under 18 U.S.C. §1956(a)(1)(A)(i), 70 Notre Dame L.Rev. 891, 893 (1995).

The Congressional debate surrounding the passage of these statutes reflect this fairly narrow and specific legislative intent. *See Ferrouillet*, *supra*, p. 5; *Bart*, 973 F. Supp at 695. Senator D'Amato (R-NY), a chief sponsor of the money laundering statutes, described the need for this law:

> Money laundering permits the drug traffickers to evade taxes and to finance their drug networks behind a veil of secrecy. It allows them to buy more drugs for resale, and to acquire the planes, boats and front corporations they use to smuggle drugs into the United States.

Ferrouillet, *supra*, p. 5, *citing* Drug Money Laundering; Hearing Before the Senate Committee on Banking, Housing and Urban Affairs, 99th Congress, 1st Session 7 (1985). Similarly, Senator Biden (D-DE) noted:

> Money laundering is a crucial financial underpinning of organized crime and narcotics trafficking. Without [it], drug traffickers would literally drown in cash... . [They] need money laundering to conceal the billions of dollars in cash generated annually in drug sales and to convert [their] cash into manageable form.

Ferrouillet, *supra*, p. 5, *citing* S.Rep.No. 433, 99th Congress, 2nd Session 4, (1986).

Despite the original intent of Congress, in the past fifteen years prosecutors have increasingly used the money laundering statutes in fraud cases having nothing to do with drug dealing or organized crime. In addition to the tactical advantages to the government at trial inherent in this approach, the money laundering sentencing guidelines are generally higher than the guidelines for the related fraudulent conduct. Twelve years after the concerns expressed by the court in *Jackson*, the Seventh Circuit issued an important decision placing limits on the use of §1956 money laundering charges in fraud cases.

In *United States v. Esterman*, 324 F.3d 565 (7thCir. 2003), the defendant was convicted of wire fraud and money laundering in a case arising from a dispute with a former business partner related to the financing of a joint venture they were involved in. The issue on appeal was whether the evidence was sufficient to sustain the defendant's conviction on the money laundering counts; specifically, whether there was sufficient evidence of concealment as required by 18 U.S.C. §1956(a)(1)(B)(i). The court found that there was not, and reversed the convictions.

The defendant argued that the evidence of concealment was missing because he merely transferred his ill-gotten gains to a separate account and then spent them in an "open and notorious way." *Esterman*, 324 F.3d at 569. The court indicated that, under subpart (B)(i), there must be a separate transaction – not the original unlawful activity – that is designed to conceal or disguise what is happening to the original proceeds. *Id*.

The court began its analysis by noting that subpart (B)(i)'s insistence on proof of concealment is "consistent with the general purpose of the statute." *Id*. The money laundering laws (as the defendant has noted here) were enacted as part of a "crackdown on organized crime and drug trafficking" in order to "target the transformation of funds derived from illegal activities into 'clean' or usable form." *Id*. at 570, *citing United States v. Koller*, 956 F.2d 1408, 1411 (7th Cir. 1992).

In a typical money laundering case, the criminally derived property is "folded into" a legitimate business, but the court noted that the fact patterns vary widely. *Id*. The court surveyed some of its cases, and acknowledged that it had "struggled in the past to define precisely what amount of concealment must occur before mere use of ill-gotten gains becomes money laundering prohibited by subpart (B)(i) of the statute." *Id*.

However, the court found that two underlying principals have emerged from its analysis. First, the court has tried to maintain some separation between the initial transaction from which the illegal proceeds were derived and further transactions designed to conceal the source of those proceeds. *Id*. Here, the court specifically noted its prior decision in *Scialabba*, defining proceeds as net receipts rather than gross proceeds. Second, the court has stressed that "the mere transfer and spending of funds is not enough to sweep conduct within the money laundering statute; instead, subsequent transactions must be specifically designed "to hide the provenance of the funds involved." *Id*., *citing Jackson*, 935 F.2d at 843.

Turning to the evidence, the court noted that the defendant made no effort to conceal his withdrawal and deposit of funds; "[t]here was nothing complicated about his disposition of funds: to the contrary, he simply made deposits into bank accounts that were correctly identified and he engaged in some retail transactions." *Id*. at 571.

Significantly, the court said that merely placing ill-gotten proceeds in an account, even if the victim of the fraud is unaware of this, is not sufficient to prove money laundering: "If that were enough to show money laundering at the same time, there would be no distinction left between money laundering and the underlying fraud, and individuals who perpetrate simple fraud by transferring ill-gotten funds into a personal account would always be triable as money launderers." *Id*. at 572.

Finally, the *Esterman* court noted that simple transferring of proceeds between accounts is not sufficient to show concealment, particularly where there is no attempt to transform ill-gotten gains into apparently innocent assets and the government is able to "easily trace" the transactions. *Id*.

Here, Count 7 alleges only that Kelly Bokhari deposited a single check, representing ill-gotten proceeds, into her back account. This was a simple transaction. There is no allegation that she did anything to conceal her identity or the identity of the account. There is no allegation of anything unusual, secretive or complicated about the transaction. There is nothing alleged by the grand jury that would distinguish this transaction from the mail

fraud scheme itself. This is precisely the scenario, where the money laundering offense merges into the underlying fraud, that the court prohibited in *Scialabba* and *Esterman*.

Without more, under *Esterman* Kelly Bokhari should not be "triable as a money launderer," at least with respect to Count 7.[1] The government will probably respond that *Esterman* dealt with the sufficiency of the trial evidence, so the issue here should await a ruling by the trial judge.

The defendant disagrees. The grand jury returned an indictment with very detailed factual allegations. The court in *Esterman* could not have been more clear – simply depositing proceeds into a bank account is not money laundering under §1956(a)(1)(B)(i). There is no legitimate reason to incur the time and expense of the parties, as well as the use of judicial resources, to postpone a decision that is a non-starter in the first place. If the government has additional concealment evidence of the kind required by *Esterman*, it should present that evidence to a grand jury. And that grand jury should be instructed in a manner consistent with *Esterman* and *Scialabba*, something that is not likely to have occurred here.

IV. CONCLUSION

For the reasons outlined in this motion, Kelly Bokhari respectfully requests that the Court enter an order dismissing Counts 5 and 7 of the indictment.

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[1]The analysis for Count 5 is similar, but somewhat different because Count 5 arguably charges international money laundering as well, but the defendant will await the government's response in that regard.