UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 09-CR-65

THOMAS H. BUSKE,

Defendant.

MOTION TO DISMISS COUNTS 13 THROUGH 23 OF THE INDICTMENT

Thomas H. Buske, by his attorney Michael J. Fitzgerald, pursuant to Rule 7(c)(1) of the Federal Rules of Criminal Procedure, moves the Court for an order dismissing Counts 13 through 23 of the indictment.

Count 13, which charges conspiracy to commit money laundering, should be dismissed for the following reasons:

- The indictment fails to state an offense because it does not adequately allege that the defendant conspired to launder the net proceeds of the specified unlawful activity alleged in the indictment.
- The indictment fails to state an offense because it does not adequately allege that the financial transactions outlined in the indictment both promoted and were intended to conceal the specified unlawful activity.

- Count 13 is duplicitous because it improperly charges the defendant with conducting financial transactions that were designed to both promote and conceal the specified unlawful activity.

Counts 14 through 20, which charge money laundering under 18 U.S.C. §1956, should be dismissed for the same three reasons.

Counts 21 through 23, which charge money laundering under 18 U.S.C. §1957, should be dismissed because the indictment fails to adequately allege that the defendant engaged in monetary transactions of a value greater than $10,000 with the net proceeds of the specified unlawful activities.

I. INTRODUCTION

Thomas Buske is charged in a twenty-three count indictment handed down by the grand jury on March 10, 2009.

Buske was the sole owner of Buske Intermodal, LLC, an intermodal trucking company in Edwardsville, Illinois. According to the indictment, in 1999 the S.C. Johnson company began using intermodal providers to fulfill some of its domestic transportation needs. Intermodal shipping – which combines truck and train transportation – is generally believed to be more economical than using trucks alone, and S.C. Johnson saved money by using intermodal. Indictment, ¶5.

The government's theory of the case is that Buske and W.S., a now deceased employee of Buske Lines (Buske's over-the-road trucking company), submitted false and

fraudulent Buske Intermodal invoices to S.C. Johnson for transportation services. Milt Morris, the S.C. Johnson Director of Transportation, approved the invoices for payment, knowing them to be false. Then, according to the indictment, Buske funneled back to Morris approximately $3.88 million of the "money stolen from S.C. Johnson." Indictment, ¶7.

In addition to those kickbacks, the indictment asserts that Buske purchased expensive golf and gambling trips for Morris. This went on from 1999 to October, 2004. According to the indictment, "the total fraudulent profit to defendant Buske and Morris from the fraud against S.C. Johnson was approximately $15 million." Indictment, ¶7(d).

The grand jury charged Buske with six counts of mail fraud, six counts of interstate transportation of stolen property, one count of conspiracy to commit money laundering, seven counts of money laundering under 18 U.S.C. §1956, and three counts of money laundering under 18 U.S.C. §1957. The indictment also contains a forfeiture provision with an extensive list of potentially forfeitable assets.

Counts 1-6 charge Buske with mail fraud pursuant to 18 U.S.C. §1341. The six counts represent payments made by S.C. Johnson to Buske Intermodal, on six separate occasions, in 2004.

Counts 7-12 charge Buske with interstate transportation of stolen property, pursuant to 18 U.S.C. §2314. These six counts allege the transportation of $80,000 by Buske from Edwardsville, Illinois, to Racine on six separate occasions in 2004. A fair inference from

reading the indictment is that these funds represented some of the payments to Morris from the fraud scheme – in other words, kickbacks.

The balance of the indictment adds ten money laundering counts to the array of charges. As the defendant will show, all the money laundering counts suffer from the same infirmity. That is, the indictment does not adequately allege one of the essential elements of the offense of money laundering; namely, that the defendant laundered the net proceeds of the specified unlawful activities (mail fraud and interstate transportation of stolen property), as opposed to the gross receipts or gross profits.

The failure of the government and the grand jury to draw this distinction means that the counts fail to state an offense, as money laundering is currently defined by both the Seventh Circuit and the United States Supreme Court.

Other defects in the indictment unique to each count will be set forth below.

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. Knowles*, 2 F. Supp. 2d 1135, 1140 (E.D. Wis. 1998) (citation omitted). 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. 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*., *citing United*

States v. Allender, 62 F. 3d 909, 914 (7th Cir. 1995). 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 standards. *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.

II. COUNT 13: CONSPIRACY TO COMMIT MONEY LAUNDERING

A. Count 13 fails to state an offense because it does not allege that the defendant conspired to launder the net proceeds of the specified unlawful activities set forth in the indictment.

The indictment alleges that Buske, from 1999 through October 20, 2004, conspired with W.S. and Morris to "commit money laundering offenses" under 18 U.S.C. §1956(a)(1) by "conducting financial transactions involving proceeds of specified unlawful activities, specifically mail fraud and interstate transportation of stolen property." Indictment, ¶13. The indictment alleges that the object of the conspiracy was to "transfer the proceeds of the specified unlawful activities from the accounts into which the proceeds had originally been deposited, to other accounts controlled by the defendant Buske, Morris and W.S., for the purposes of: (a) distributing the proceeds among the conspirators and thereby promoting the carrying on of the specified unlawful activities, and (b) concealing and disguising the nature, location, source, ownership, and control of the proceeds." Indictment, ¶14.

The indictment sets forth nine overt acts in furtherance of the conspiracy. Four overt acts involve the issuance of a check drawn on the account of Buske Intermodal made

payable to S.A.S. Logistics. Five overt acts involve the deposit of Buske Intermodal checks by Buske to his personal checking account, each time taking some cash back.

Both the Buske Intermodal checking account and Buske's personal account were located at the Bank of Edwardsville in Edwardsville, Illinois.

To have money laundering in the first place (or a conspiracy to commit money laundering) – regardless of whether the intent is to promote the specified unlawful activity or conceal it – the financial transactions must involve the proceeds of the specified unlawful activity. This is required by statute, 18 U.S.C. §1956(a)(1), and is reflected in the pattern Seventh Circuit instruction. *See* Federal Jury Instructions – Criminal (7th Cir., 1999), p.306.

The problem is that Congress did not provide a definition of the term "proceeds."

In *United States v. Santos*, __ U.S. __, 128 S. Ct. 2020, 170 L. Ed. 2d 912 (2008), the United States Supreme Court undertook that task and, applying the rule of lenity, defined proceeds as the net receipts from the specified unlawful activity (the gross receipts minus the payment of business expenses), not the gross receipts or gross profits.

Santos affirmed a Seventh Circuit decision and a definition of proceeds that originated in this circuit in *United States v. Scialabba*, 282 F.3d 475 (7th Cir. 2002). The court in *Scialabba* 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.

Similar to the Supreme Court's approach in *Santos*, the *Scialabba* holding was based on the rule of lenity, with Judge Easterbrook noting that Congress could have easily 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*.

Santos involved an illegal lottery operation. The money laundering counts in the case involved payments to runners, winners, and "collectors." If the payment of such expenses of the operation fell within the definition of proceeds, the Court said, then "nearly every violation of the illegal lottery statute would also be a violation of the money laundering statute, because paying a winning bettor is a transaction involving receipts that the defendant intends to promote the carrying on of the lottery." *Santos*, 128 S. Ct. at 2026. The problem, then, is that the two statutes would "merge," improperly giving prosecutors leverage and increasing potential penalties. *Id*.

The Supreme Court made it clear that a merger problem is not limited to the application of the money laundering laws to illegal lottery operations:

> Anyone who pays for the costs of crime with its proceeds – for example, the felon who uses the stolen money to pay for the rented getaway car – would violate the money-laundering statute. *And any wealth-acquiring crime with multiple participants would become money-laundering when the initial recipient of the wealth gives his confederates their shares*.

Id. at 2026-2027 (emphasis added).

Because of the nature of the plurality opinion in *Santos*, some courts have struggled with the appropriate definition of proceeds to now be applied in money laundering cases. *See, e.g., United States v. Van Alstyne*, 584 F.3d 803, 811 (9th Cir. 2009). As the Seventh Circuit put it recently in a post-*Santos* decision:

> Four Justices in *Santos* concluded that "proceeds" in §1956 always means net income. Four concluded that the word always means gross income. Justice Stevens concluded that the meaning depends on the nature of the crime – that it means net income for unlicensed gambling (the subject of *Santos* and *Scialabba*) but could mean gross income for drug rings.

United States v. Hodge, 558 F.3d 630, 633 (7th Cir. 2009).[1]

As the *Hodge* court noted, the government conceded in that case "that the net income approach of *Scialabba* remains controlling." *Id*. There really is no uncertainty in the Seventh Circuit about what *Santos* means, and this was a prudent concession by the government, considering that the net income approach applied in this circuit well before *Santos*.

Hodge involved massage parlors that fronted prostitution, and the money laundering charges involved the payment of business expenses such as rent, utilities, and advertising, as well as paying the prostitutes their share of the proceeds of the operation. The *Hodge*

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[1] Congress has since amended the statute. Effective May 20, 2009, §1956(c)(9) now reads: "the term proceeds means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity." The Fraud Enforcement Recovery Act of 2009, Pub. L. 111-21, §2(f)(1)(B), 123 Stat. 1617, 1618 (2009). The bill is silent on retroactivity; therefore, it only applies to conduct which occurs post-amendment. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 280, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994); *United States v. Bueno*, 585 F.3d 847, 853 n.4 (5th Cir. 2009).

court could not have been more clear that these payments did not constitute money laundering because proceeds means "net proceeds," and "net proceeds" mean gross receipts minus "all costs of doing business." *Hodge*, 558 F.3d at 632.[2]

As a matter of law, business expenditures "do not come from net proceeds and so do not violate §1956(a)(1)." *Id*. at 634. The jury in *Hodge* was erroneously instructed that it could convict on money laundering if it found that the defendant "spent money on advertising, or rent, or utilities, or almost anything else, in order to carry on the business." *Id*. The *Hodge* jury also returned a general verdict that did not distinguish between gross receipts and net proceeds. Consequently the court reversed the money laundering convictions.

In a related decision issued that same day, also involving prostitution at massage parlors, the Seventh Circuit in *United States v. Lee*, 558 F.3d 638 (7th Cir. 2009), reversed money laundering convictions for the same reasons. *Lee* and *Hodge* make it clear that the jury must be instructed that *all* ordinary business expenses, as a matter of law, do not constitute proceeds. It was not sufficient in *Lee*, for example, for the instructions to simply define "proceeds" as "net rather than gross proceeds." *Id*. at 644. A more detailed instruction is required. The two cases also suggest that the jury must return a special verdict

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[2] The government argued in *Hodge* that everything that remained "after the prostitutes received their cut was the business's net profits, which could not be spent on anything without violating §1956." *Id*. The court characterized this understanding of net receipts as "preposterous." *Id*.

in which it identifies the net receipts upon which any conviction for money laundering is based. *Id*.

It follows, then, that to return a valid indictment for money laundering the grand jury must be properly instructed, consistent with *Scialabba*, *Santos*, *Lee* and *Hodge*. For the indictment to be valid, it must properly set forth that the financial transactions at issue involve net proceeds, as defined by these cases.

Although *Lee* and *Hodge* were decided the day after the grand jury returned the Buske indictment, *Santos* was handed down in 2008, the *Santos* Seventh Circuit decision came in 2006, and *Scialabba* was issued in 2002. Nevertheless, it appears unlikely that the grand jury in this case was instructed on the correct definition of proceeds. Regardless of the manner in which the grand jury was instructed – and the defendant has filed a separate motion addressing that issue – the indictment on its face is not sufficient.

Count 13 charges a conspiracy between Buske, Morris and W.S. to commit money laundering, pursuant to 18 U.S.C. §1956(h). There are no other conspirators referred to in the indictment. The indictment cannot adequately set forth a conspiracy if it does not adequately set forth the underlying offense of money laundering. The question is: What does the indictment say about how the defendant conducted financial transactions with the proceeds of a specified unlawful activity?

What the indictment says is that on four occasions Buske drew a check on the Buske Intermodal account, made payable to S.A.S. Logistics, in the amount of $150,000. The

indictment does not specifically say what those payments were for, but it does allege that one of the objects of the conspiracy was to distribute the proceeds among the conspirators. Indictment, ¶14.[3]

Santos makes it clear that the distribution of fraud proceeds among the conspirators does not qualify as money laundering because "[a]ny wealth acquiring crime would become money laundering when the initial recipient of the wealth gives his confederates their shares." *Santos*, 128 S. Ct. at 2026-2027. Similarly in *Hodge*, even under the expansive definition of proceeds put forth by the government, the government conceded that the defendant's payment to prostitutes of "their cut of the proceeds" did not constitute money laundering. *Hodge*, 558 F.3d at 632.

Because Buske was the original recipient of the fraud proceeds, and then is alleged to have distributed those proceeds to his confederate W.S., these transactions, as a matter of law, do not constitute the offense of money laundering. What they do constitute is conduct which is part and parcel of the fraud scheme alleged in the first six counts of the indictment.

So it is with the other five financial transactions listed in the indictment as well. Here the indictment alleges that Buske deposited fraud proceeds into his personal checking account in the form of Buske Intermodal checks made payable to himself, taking some cash back. Indictment, ¶17. Presumably these transactions represent a portion of Buske's share

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[3] In reviewing the open file discovery materials provided by the government, it is apparent that the government's theory is that S.A.S. Logistics was a consulting company controlled by W.S., and these payments by Buske were for W.S.'s share of the fraud proceeds.

of the fraud proceeds. Simply depositing the proceeds to his personal account does not constitute money laundering. Even if the cash did not go to Buske, and was distributed to Morris (as the indictment alleges), that conduct again fails to qualify as money laundering, as a matter of law.

The indictment says nothing more. Consistent with the rule of lenity and the "benefit of the doubt goes to the defendant" approach that the Supreme Court applied in *Santos*, the indictment should be strictly construed against the government. Count 13 fails to adequately allege an offense and consequently must be dismissed.

B. Count 13 fails to adequately allege that the financial transactions listed in the indictment both promoted and were intended to conceal the specified unlawful activity.

Under 18 U.S.C. §1956, it is not enough for the defendant to engage in financial transactions with the net proceeds of the specified unlawful activity. The transaction must be designed to conceal or disguise the nature, location, source, ownership or control of the proceeds, *see* §1956(a)(1)(B)(i), or promote the carrying on of the specified unlawful activity. *See* §1956(a)(1)(A)(i).

For whatever reason, the government has chosen to allege that Buske did both, and Count 13 is charged in the conjunctive. Indictment, ¶13. If the indictment fails to adequately set forth either one of these statutory requirements, Count 13 fails.

The indictment fails to set forth both of these statutory requirements. As a matter of law, simply depositing fraud proceeds into an account, or distributing them to confederates, neither conceals nor promotes the specified unlawful activity.

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 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 13 alleges that Buske sent fraud proceeds to W.S. by writing checks to S.A.S. Logistics. It further alleges that he deposited fraud proceeds to his personal bank account and took cash back (and/or gave the cash to Morris). These appear to be simple transactions that constitute nothing more than distributing the ill-gotten gains of the alleged fraud. There is no allegation in the indictment that Buske concealed his identity or the identity of the accounts. Not only were the accounts in his name and the name of his company, but they were at the same bank. There is no allegation of anything unusual, secretive or complicated about the transactions. There is nothing alleged about these transactions that would distinguish them from the fraud scheme alleged in the indictment.

This is precisely the scenario that the court found in *Esterman* and *Scialabba* to be insufficient to establish money laundering.

In addition to not proving concealment, it should be noted that the Supreme Court in *Santos* found that the distribution of fraud proceeds among conspirators does not promote the carrying on of the specified unlawful activity under §1956(a)(1)(A)(i). *Santos*, 128 S. Ct. at 2027-2028. Paying a bettor his share of the winnings may "promote" an illegal lottery in the general sense, (just as paying fraud proceeds to a co-conspirator would promote the scheme), but it doesn't constitute "promotion" as money laundering because the conduct is part of the illegal scheme in the first place. *Id.* at 2026.

The courts could not be more clear. Simply depositing fraud proceeds to a bank account, or distributing them to confederates, satisfies neither the concealment nor promotion prongs of the money laundering statute. Consequently this is a second basis upon which Count 13 should be dismissed.

C. Count 13 is duplicitous because it improperly charges the defendant with conducting financial transactions that were designed to both promote and conceal the specified unlawful activity.

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 13 charges Buske with conspiracy to commit money laundering under both the concealment and promotion prongs of 18 U.S.C. §1956(a)(1). The indictment charges Buske with conspiring to commit money laundering offenses "knowing that the transactions were designed in whole or in part to conceal and disguise the nature, location, source, ownership and control of the proceeds of the specified unlawful activities, *and* to promote the carrying on of the specified unlawful activities, and also knowing, while conducting and attempting to conduct such financial transaction that the property involved in the transactions represented the proceeds of some form of unlawful activity." Indictment, ¶13 (emphasis added).

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 potential breadth of the money laundering laws, and the risk of juror confusion, was discussed by the court in *United States v. Jackson*, 935 F.2d 832 (7th Cir. 1991). Specifically, the court indicated that the separate promotion and concealment provisions of §1956(a)(1)(A) and §1956(a)(1)(B) are "aimed at different activities." *Id.* 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, the concerns underlying a duplicitous count – risk of juror confusion, erroneous evidentiary rulings, and improper notice of the charge – are present when the government alleges that a financial transaction both promoted and concealed the specified unlawful activity at the same time.

If Count 13 survives the other grounds for dismissal raised in this motion, it should be dismissed on duplicity grounds. In the alternative, the government should be ordered to file a bill of particulars in which it elects the statutory subsection upon which it will proceed at trial.

III. COUNTS 14-20: §1956 MONEY LAUNDERING

A. Counts 14-20 should be dismissed because they fail to adequately allege that the defendant laundered the net proceeds of the specified unlawful activities alleged in the indictment.

Counts 14-20 allege substantive money laundering counts under 18 U.S.C. §1956. Each count alleges that Buske conducted a financial transaction with the proceeds of the specified unlawful activities by cashing a check drawn by him on his personal account at the Bank of Edwardsville. Indictment, ¶24.

The defendant's argument here is similar to that set forth in §II (A) above, and he incorporates it by reference here.

Similar to *Hodge* and *Lee*, in which the defendant paid the prostitutes their "cut of the proceeds," the simple act of cashing a check so Buske could obtain the fraud proceeds for himself, or for one of his confederates, does not constitute money laundering under the net proceeds definition of the offense. Accordingly, Counts 14 through 20 do not, as a matter of law, state an offense and should be dismissed.

B. Counts 14-20 fail to state an offense because they do not adequately allege that the financial transactions charged in the indictment both promoted and concealed the specified unlawful activity.

Counts 14-20 suffer from the same defect as Count 13 in that they charge Buske with conducting financial transactions that, as a matter of law, neither concealed nor promoted the specified unlawful activity.

The defendant's argument here is similar to that set forth in §II (B) above, and it is incorporated by reference here.

Scialabba, Esterman, and *Santos* make it clear that the act of cashing a check made out in one's own name, from one's own account, in order to receive or distribute fraud

proceeds does not constitute concealment or promotion money laundering. Similar to the transactions listed in Count 13, there was nothing unusual, secretive or complicated about the cashing of these checks. The account bore Buske's name and was located at the same bank as the Buske Intermodal account. Nor does the mere deposit, receipt or distribution of fraud proceeds constitute promotion money laundering

This alleged conduct is part and parcel of the fraud scheme set forth in Counts 1 through 6 of the indictment. Consequently, Counts 14 through 20 fail to adequately establish the offense of money laundering under §1956 and should be dismissed.

C. Counts 14-20 are duplicitous because they improperly charge the defendant with conducting financial transactions that were designed to both promote and conceal the specified unlawful activity.

Similar to Count 13, Counts 14-20 charge the defendant with money laundering under both the concealment and promotion prongs of 18 U.S.C. §1956(a)(1).

For the same reasons asserted in §II (C) above, these counts should be dismissed as duplicitous. In the alternative, the government should be ordered to file a bill of particulars in which it elects the statutory subsection upon which it will proceed at trial.

IV. COUNTS 21-23: §1957 MONEY LAUNDERING

A. Counts 21-23 fail to adequately allege that the defendant conducted a financial transaction in an amount greater than $10,000 with the net proceeds of the specified unlawful activities set forth in the indictment.

Counts 21-23 charge Buske with money laundering under 18 U.S.C. §1957. Section 1957 prohibits financial transactions in an amount greater than $10,000 with the proceeds

of specified unlawful activity. *See* 18 U.S.C. §1957(a) (requiring "a monetary transaction in criminally derived property" which is "derived from specified unlawful activity"); 18 U.S.C. §1957(f)(2) (defining "criminally derived property" as property constituting, or derived from, proceeds obtained from a criminal offense); 18 U.S.C. §1957(f)(3) (giving the term "specified unlawful activity" the same meaning that it has in §1956).

Congress enacted §1956 and §1957 as part of the Money Laundering Control Act of 1986. *See* Pub. L. No. 99-570, Title XIII, §1352, 100 Stat. 3207-21. "[T]he normal rule of statutory construction under these circumstances is that identical words used in different parts of the same act are intended to have the same meaning." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570, 115 S. Ct. 1061, 131 L. Ed. 2d 1 (1995). Additionally, both statutes share the same predicate offenses, of which there are many. *See* 18 U.S.C. §1956(c)(7) and 18 U.S.C. §1957(f)(3).

Giving the term "proceeds" in §1957 the same definition that it has in §1956 would unify the two sections and make them coherent. *See Santos*, 128 S. Ct. at 2025. It would also be consistent with the rule of lenity as applied by the Supreme Court in *Santos*. "Because the profits definition of proceeds is always more defendant-friendly than the receipts definition, the rule of lenity dictates that it should be adopted." *Id*. All of which compels the conclusion that the term "proceeds" should be given the same meaning under §1957 as it has under §1956.

Counts 21-23 allege that the illegal financial transactions were three checks written by Buske, in an amount greater than $10,000, on his personal account at the Bank of Edwardsville to the Bellagio Hotel & Casino in Las Vegas. Indictment, ¶30. The indictment says nothing more than that.

Business travel and entertainment, in general, is one of the most common forms of business expense and is recognized under the Internal Revenue Code. There probably is not a more popular business travel and entertainment destination in the world than Las Vegas, and the Bellagio is one of the most popular and successful resorts in that town. Not a week goes by when Las Vegas does not host an industry conference, and the Bellagio is filled on a daily basis with business persons writing off the expenses of the trip as a legitimate business expense.

Specifically in this case, the grand jury has alleged that part of the fraud scheme was for Buske to use the proceeds of the scheme to give Morris "expensive golfing and gambling trips." Indictment, ¶7(d).

The indictment alleges nothing more than transactions that were part of the fraud scheme set forth in Counts 1 through 6. Applying the net proceeds approach to §1957, these counts consequently fail to adequately allege a financial transaction involving net proceeds of the specified unlawful activity and therefore must be dismissed.

CONCLUSION

For the reasons set forth in this motion, the defendant respectfully requests that the Court enter an order dismissing Counts 13 through 23 of the indictment.