UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,
:
v. CASE NO.: 10-cr-0336 (LAK)
:
CHAD ELIE, *et al*.,
:
Defendants.
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DEFENDANT CHAD ELIE'S REPLY TO GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS COUNT 8 OF THE SUPERSEDING INDICTMENT

In an attempt to tell a story that Mr. Elie and the Poker Companies engaged in a conspiracy to deceive banks about voluntary transactions by the banks' customers, from which the banks profited, the Government makes every effort to cast them as members of a shadowy conspiracy. This description blinks reality. The Poker Companies never concealed the fact that they offered poker games to U.S. residents and despite the Government's insistence that banks would never knowingly process poker-related transactions, the Indictment alleges they knowingly did. As the Government is well aware, the industry repeatedly sought to resolve any legal ambiguities with Government officials, including federal regulators. But the Government ignores all of this as it reaches beyond the facts of the Indictment in an effort to retroactively justify this prosecution.

The Government's characterization of poker as an unlawful, underground game is even more cavalier. Poker is an American cultural institution, and has been enjoyed by "presidents, congressmen, justices, generals, captains of industry, and ordinary Americans for two centuries now." James McManus, *Cowboys Full: The Story of Poker* 403 (2010). Today, more than 55

million Americans play poker, and approximately 15 million of those played real-money online poker. *See* Poker Player's Alliance, Poker Facts, http://theppa.org/resources/facts/ (last visited Nov. 16, 2011).

But the Government skips past all of this in an effort to portray the game of poker as a crime—a form of gambling no different from bookmaking. Even as it presses prosecutions and billion-dollar forfeitures under a theory sustainable only if poker is "plainly" gambling throughout the country, it has acknowledged as "[i]ndusputabl[e]" that "there is skill involved in poker." The reality is that poker is not some inherent unlawful activity such that transactions involving poker are somehow *malum in se*.

Other counts involve efforts to stretch the text of federal statutes. The wire and bank fraud count rests on efforts to ignore well-established circuit precedent and bedrock principles of criminal law. It is not enough to dupe someone into a profitable transaction she might otherwise wish to avoid. It is also not enough simply to parrot the words of the statute and call it a day. As explained further below, the fraud count must be dismissed.

A. Intent to cause actual economic harm or loss is necessary to support a conviction for wire and bank fraud.

As the Government concedes, the Second Circuit has repeatedly found that there is no actionable intent to harm when a defendant's false representations are collateral to the bargain and do not cause any discrepancy between the benefits reasonably anticipated and the benefits actually received. The Government has not alleged that there was any discrepancy between the benefits the banks anticipated receiving for processing these transactions and what they actually received. In *United States v. Shellef*, the Second Circuit recognized that:

> [O]ur cases have drawn a fine line between schemes that do no more than cause their victims to enter into transactions they would otherwise avoid—which do not

> violate the mail or wire fraud statutes—and schemes that depend for their completion on a misrepresentation of an essential element of the bargain—which do violate the mail and wire fraud statutes.

507 F.3d 82, 108 (2d Cir. 2007). The *Shellef* defendants purchased an industrial chemical from a manufacturer, and informed the manufacturer that the product would only be resold internationally. Due to the representations concerning the intended international distribution of the product, the purchase was exempt from excise tax. When the defendants turned around and sold the product domestically without paying tax, the government indicted them for wire fraud on the theory that the misrepresentation of where the goods would be distributed duped the manufacturer and deprived it of the right to define how its product would be sold. The Second Circuit roundly rejected that theory, holding that the indictment must "allege that the defendant contemplated actual harm that would befall victims." *Ibid.* Inducing a party to enter into a transaction that it might not otherwise engage in—absent an alleged intent to inflict actual harm—was found insufficient to support an indictment for wire fraud. So it is here.

The three cases cited by the Government, *see* Govt. Br. at 50, in an attempt to limit *Shellef* are entirely consistent with *Shellef* and underscore the problems with the Government's Indictment on Count 8. For example, in *United States v. Carlo*, 507 F.3d 799 (2d Cir. 2007), the defendant falsely told several real estate developers that the loans he had offered to secure would be forthcoming. *Id.* at 801. The developers relied on those assurances with severe economic consequences to their "own assets" when the promised loans were not delivered. *Id.* at 802. Here, there is no allegation that defendants obtained the banks' assets or sought to harm their "property interests." *Ibid.* Rather, at most, the banks were induced to engage in revenue producing transactions they might have otherwise avoided.

United States v. Dinome, 86 F.3d 277 (2d Cir. 1996), was decided before *Shellef* and thus could not undermine it, but it is inapposite in any event. There, the defendant made false statements about his employment status on an application for a residential mortgage. The Court held that the challenged mail and wire fraud jury instruction, when read as a whole, was not prejudicial, because, *inter alia*, it directed the jury that intent to defraud requires deception "for the purpose of causing some financial or property loss to another," *id.* at 284. Here, in sharp contrast, the facts alleged in the Indictment make clear that defendants had no such purpose and, in fact, had the precise opposite aim.

In the final case relied on by the Government, *United States v. Kinney*, 211 F.3d 13 (2d Cir. 2000), fundraisers were charged with making false statements to potential contributors about how their donations would be used and what the contributors would receive in return. The Second Circuit sustained the mail fraud convictions finding the requisite harm because the victims decided to donate their money based on the defendants' false representations about where the money was going and what they would receive in return. *Id.* at 18. The *Kinney* case might be of use to the Government had it indicted the Poker Companies for lying to the banks' customers about where their money was going. But the Government has alleged the exact opposite. The banks' customers had their money transferred for the very purpose they intended. The banks also got the full benefit of their bargain to process customer funds to a designated account and received the anticipated fee.

Perhaps in recognition of the fact that these cases are unavailing, the Government argues that the types of "harm" cognizable under the bank and wire fraud statutes should be interpreted "broadly" and that an intent to deprive the banks of "information necessary to make discretionary economic decisions" is sufficient. Govt. Br. at 50. But Second Circuit precedent makes clear

that is not enough. Inducing a party to engage in a revenue-producing transaction that it might choose to avoid is simply not what the wire fraud statute seeks to prohibit.

The Indictment in this case is deficient because it fails to allege facts concerning the defendants' intent to cause actual harm and actual or potential loss—facts that even the Government concedes are necessary to establish violations of the wire and bank fraud statutes. Gov't. Br. at 49-50. In light of that basic failure, the Indictment must be dismissed. *See United States v. Bonallo*, 858 F.2d 1427, 1431 (9th Cir. 1988) ("When construing the meaning of an indictment, the description of the alleged conduct is far more critical than the indictment's prefatory language or its citation of a particular provision of a statute."); *United States v. Polychron*, 841 F.2d 833, 834 (8th Cir. 1988) ("If the acts alleged in the indictment do not constitute a violation of law, the indictment is properly dismissed."); *United States v. Coia*, 719 F.2d 1120, 1123 (11th Cir. 1983) ("It is perfectly proper, and in fact mandated, that the district court dismiss an indictment if the indictment fails to allege facts which constitute a prosecutable offense.").

B. Mere repetition of the language used in the wire and bank fraud statutes cannot establish the validity of the Indictment.

Because it recognizes that the Second Circuit law is against it on this point, the Government suggests that Count 8 cannot be dismissed because it tracks the language of the statutes involved. *See* Govt. Br. at 49. That is incorrect. It is black letter law that an indictment must not only parrot the statutes it seeks to enforce, but also allege facts showing that the essential elements of the relevant offenses were committed. *See*, *e.g.*, *United States. v. Berlin*, 472 F.2d 1002, 1008 (2d Cir. 1973) ("[A]n indictment that fails to allege all the elements of the offense required by the statute will not be saved by simply citing the statutory section."). This

requirement has its roots in the Constitution and the Federal Rules of Criminal Procedure. Both the Notice Clause of the Sixth Amendment and the Grand Jury Clause of the Fifth Amendment require that an indictment "apprise [a criminal] defendant of what he must be prepared to meet." *Russell v. United States*, 369 U.S. 749, 763-64 (1962) (internal quotation omitted). As the Supreme Court declared more than a century ago, "facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances." *United States v. Cruikshank*, 92 U.S. 542, 558 (1876); *see also Russell*, 369 U.S. at 765 ("An indictment not framed to apprise the defendant with reasonable certainty, of the nature of the accusation against him . . . is defective, although it may follow the language of the statute.") (internal citation omitted); *Hamling v. United States*, 418 U.S. 87, 117-18 (1974) (statutory language in indictment "must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged.") (quotations omitted). The protections afforded by the Constitution are further vouchsafed through Rule 7(c)(1) of the Federal Rules of Criminal Procedure, which requires that an indictment include "a plain, concise, and definite written statement of *the essential facts constituting the offense charged*." Fed. R. Crim. P. 7(c)(1) (emphasis added).

The Government relies on *United States v. Stavroulakis*, 952 F.2d 686, 693 (2d Cir. 1992), in advancing its argument that a carbon copy of the statutory language is sufficient to support an indictment. *See* Govt. Br. at 49. But *Stravroulakis* does not assist the Government on this point. In that case, the indictment did not merely track the language of the statute setting forth the contours of the crime alleged; it "provided a brief explanation of how Stravroulakis attempted to execute the scheme: by selling stolen checks drawn on two federally chartered and

insured banks." *Id.* The fact that the *Stravoulakis* indictment was found sufficient cannot salvage the inadequate Indictment in this case.

C. Because the Indictment alleges that defendants acted to *benefit* the banks, the bank and wire fraud counts must be dismissed.

The Indictment contains allegations that critically undermine what the Government concedes it must prove in this case. Indeed, the Indictment sets forth in considerable detail how the defendants intended to *benefit* banks.

While the Indictment contains boilerplate language that the defendants conspired "to obtain any of the monies [sic], funds, credits, assets, securities, and other property owned by" the banks, and to obtain "money or property" of the banks, Ind. ¶¶ 49-50, the factual allegations in the Indictment are to the contrary. The Indictment alleges, for example, that the banks made money by processing online poker transactions for its customers and from substantial fees paid by the poker companies. Ind. ¶¶ 2, 24 & 29. The Indictment is clear: the defendants allegedly conspired to make sure that banks were paid for services rendered in accordance with customer desires. Indeed, the Government acknowledges as much in its brief. The most the Government can now say is that the alleged scheme was "to obtain processing channels," Govt. Br. at 49-50, or more precisely to obtain the use of the banks' processing channels. But obtaining access to a "processing channel" that the banks would otherwise deny is not enough, especially given that by obtaining access the banks would receive a revenue-producing stream and were not denied the financial benefit of the bargain.

Nor does the Indictment allege that the defendants intended to do economic harm to others involved in the financial transactions at issue. The Government has never suggested that

any of the poker players were defrauded or tricked into opening accounts and transferring their bank funds to use in their "real money" online poker games.

Given the insufficiency of the Indictment's allegations, it is not enough for the Government to suggest that by next year's trial there "may be proof of more tangible losses" resulting from the alleged fraud to support Count 8. Gov't. Br. at 50-51. Elie's motion tests the sufficiency of the Indictment itself. The Grand Jury Clause does not allow the Government to make up its case as it goes along or present a theory of wrongdoing at trial that was never presented to the grand jury. *See Russell*, 369 U.S. at 770 ("To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure."). Here, the facts that the grand jury found, as stated in the Indictment, do not constitute an offense, and the Government cannot unilaterally amend the Indictment by attempting to prove a different set of facts at trial. *See id*. (holding that it is a "settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury").

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The bank and wire fraud Indictment is critically flawed: it fails to allege that the defendants intended to cause the harm necessary to warrant charges for bank and wire fraud, and alleges conduct flatly inconsistent with any such intent. Thus, for all of the reasons set forth in Mr. Elie's initial brief as well as those set forth herein, Count 8 of the Indictment should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of November 2011, the foregoing was served electronically on the counsel of record through the U.S. District Court for the Southern District of New York's Electronic Document Filing System (ECF) and the document is available on the ECF system.

_____/s/_____
William R. Cowden