UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	
-against-	CASE NO.: 10-cr-0336 (LAK)
CHAD ELIE, *et al*.	
Defendants.	

MEMORANDUM OF LAW IN SUPPORT OF MOTION BY DEFENDANT CHAD ELIE TO DISMISS COUNT EIGHT OF THE SUPERSEDING INDICTMENT

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I. INTRODUCTION

Count EIGHT of the Superseding Indictment ("Indictment") purports to charge defendant Chad Elie (along with defendants Scheinberg, Bitar, Beckley, Burtnick, Tate, Lang, Franzen, and Rubin, but not defendants Campos and Tom), with conspiracy to commit bank and wire fraud. It alleges that defendants participated in a conspiracy to deceive United States banks and financial institutions into processing transactions for three online poker companies by disguising the transactions as unrelated to online poker.

Significantly, the Indictment does not charge any substantive wire or bank fraud offense against any defendant, and the purported bank/wire fraud conspiracy charged in Count EIGHT

does not allege that any defendant sought to cause economic injury to any bank or that any bank suffered any actual harm. To the contrary, the Indictment alleges that the defendants made a concerted effort to avoid "jeopardiz[ing] the relationship with the processor and their banks," and as a matter of fact, banks profited from the transactions in question. Ind. ¶ 25(e). In addition, the Indictment alleges that certain banks were fully aware that they were processing poker transactions. *Id.* ¶¶ 28-29.

The theory alleged in Count EIGHT is legally insufficient to charge a cognizable bank or wire fraud conspiracy. Under well-established Second Circuit precedent, an indictment must allege more than that a bank was deceived into entering into a transaction it would otherwise not have entered into. A "scheme[] that do[es] no more than cause [an alleged victim] to enter into transactions [it] would otherwise avoid . . . do[es] not violate the mail or wire fraud statutes." *United States v. Shellef*, 507 F.3d 82, 108 (2d Cir. 2007).

To charge conspiracy to commit wire fraud, an indictment must allege that the defendant intended through deception, to cause "actual harm," *id.* at 107, to a bank. Similarly, to charge conspiracy to commit bank fraud, an indictment must allege that defendants sought to expose a bank "to actual or potential loss." *United States v. Barrett*, 178 F.3d 643, 647-48 (2d Cir. 1999). Count EIGHT fails to allege that defendants conspired to cause actual harm to a bank or to expose a bank to a loss. Instead, the facts alleged in the Indictment suggest that the defendants intended that banks would profit from processing merchant transactions. Accordingly, Count EIGHT fails to allege a cognizable conspiracy to commit wire or bank fraud and must be dismissed.

Background

Count EIGHT purports to charge a conspiracy to commit bank and wire fraud on the basis of a single alleged scheme to defraud, described in paragraphs 1 through 3, 9 through 12 and 16 through 31 of the Indictment and incorporated by reference in Count EIGHT. The government's central allegation is that defendants "operated through various deceptive means designed to trick United States banks and financial institutions into processing gambling transactions" on behalf of three online poker companies: PokerStars, Full Tilt Poker, and Absolute Poker/Ultimate Bet. Ind. ¶ 16.

The Indictment alleges that the scheme began in 2001, when Visa and MasterCard started requiring their member banks to apply a transaction code to identify "internet gambling transactions." *Id.* ¶ 17. According to the Indictment, United States banks issuing credit to their customers eventually allegedly decided "as a matter of policy" to decline transactions coded in this way, including payments to the online poker companies. *Id.* The Indictment alleges that defendants employed two methods to circumvent this policy. First, they allegedly conspired to create "fictitious companies" that appeared unrelated to online poker and opened Visa and MasterCard merchant processing accounts for these companies at offshore banks. *Id.* ¶ 19. As a result, "[w]hen Full Tilt Poker and Absolute Poker processed a transaction through one of these phony companies without applying a gambling code to the transaction, the United States issuing bank would be tricked into approving the gambling transaction" in contravention of its internal policy. *Id.* Second, defendants allegedly "developed so-called 'stored value cards' . . . that could be 'loaded' with funds from a U.S. customer's credit card" for the purposes of paying online poker companies "without using a gambling transaction code." *Id.* ¶ 20.

The Indictment alleges that defendants' scheme also extended to electronic check processing, which allows for "electronic fund transfers to and from United States bank accounts." *Id.* ¶ 22. The Indictment alleges that, rather than opening bank accounts themselves to transfer funds to and from online poker players, "the Poker Companies found third parties . . . willing to open the bank accounts and process these e-check transactions on behalf of the Poker Companies using the names of phony companies." *Id.* ¶ 23. In order to circumvent the banks' alleged policy of not processing payments to and from internet poker companies, "[t]he Poker Companies [allegedly] . . . worked with the e-check processors and other co-conspirators to disguise the Poker Companies' receipt of gambling payments so that the transactions would falsely appear to the United States banks as non-gambling transactions." *Id.* ¶ 24.

Chad Elie is alleged to have joined the bank and wire fraud conspiracy in about August of 2009, when he allegedly "processed transactions on behalf of Absolute Poker through a bank account at Fifth Third Bank that ELIE told the bank was an account to be used for internet marketing transactions." Ind. ¶ 26b. The Indictment indicates that Mr. Elie's "deceptive processing through Fifth Third Bank terminated in September 2009 when the bank froze the funds, which were subsequently seized by U.S. law enforcement through a judicial warrant." *Id.*

The Indictment charges that, as a result of the alleged scheme, certain financial institutions and intermediaries were allegedly "deceive[d] . . . into processing and authorizing payments to and from the Poker Companies," which they otherwise would not have done. *Id.* ¶ 50. Count EIGHT, however, does not allege that defendants, through their alleged deception, intended to cause any actual or potential loss to any financial institutions.

II. ARGUMENT

A. COUNT EIGHT FAILS TO CHARGE A COGNIZABLE WIRE FRAUD CONSPIRACY.

"A criminal defendant is entitled to an indictment that states the essential elements of the charge against him." *United States v. Pirro*, 212 F.3d 86, 91 (2d Cir. 2000). "An important corollary purpose of [this] requirement . . . is to allow [the] court to evaluate whether facts alleged could support conviction." *Id*. at 92. Accordingly, the facts alleged in an indictment must be sufficient to constitute the offense charged. *See, e.g.*, *United States v. Landham*, 251 F.3d 1072, 1079 (6th Cir. 2001) ("[I]t is axiomatic that, 'to be legally sufficient, the indictment must assert facts which in law constitute an offense; and which, if proved, would establish prima facie the defendant's commission of that crime.'" (alteration and citation omitted)).

If an indictment fails to allege facts sufficient to constitute the offense charged, it is properly dismissed. This Court and other district courts in this Circuit have dismissed charges on this basis. *See, e.g.*, *United States v. Kramer*, 499 F. Supp. 2d 300, 305-06 (E.D.N.Y. 2007) (dismissing charges because facts alleged did not constitute a crime under relevant statutes); *United States v. Bongiorno*, No. 05 Cr. 390 (SHS), 2006 WL 1140864, at *4, *9 (S.D.N.Y. May 1, 2006) (dismissing portion of indictment because conduct alleged was insufficient for criminal liability; where the facts alleged do not state an offense, "it would be improper and a waste of resources for everyone involved to conduct a lengthy trial . . . only to rule on a post-trial motion that the government's theory of criminal liability fails no matter what facts it was able to adduce at trial")

Count EIGHT does not charge a cognizable wire fraud conspiracy, because it fails to allege that defendants sought to cause economic injury to the banks in question. To the contrary,

Count EIGHT alleges merely that the defendants intended to induce financial institutions into processing payments from online poker players who presumably wanted payments processed. This is clearly insufficient to charge a conspiracy to commit wire fraud.[1]

An essential element of wire fraud is a "scheme or artifice to defraud," 18 U.S.C. § 1343 (2010), which requires that a defendant "contemplated actual harm that would befall victims due to his deception," *Shellef*, 507 F.3d at 107. Indeed, the Supreme Court confirmed in *McNally v. United States*, 483 U.S. 350, 108 S. Ct. 2875 (1987), which involved an alleged "honest services" wire fraud, that "the words 'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.'" *Id.* at 358 (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188, 44 S. Ct. 511, 512 (1924)).

It has long been the case in this Circuit that it is not sufficient for an indictment to allege merely that a defendant deceived or intended to deceive a person into entering into a transaction to which he or she otherwise would not have agreed. In *United States v. Regent Office Supply Co.*, 421 F.2d 1174 (2d Cir. 1970), for example, the Second Circuit reversed a mail fraud conviction because there was no cognizable scheme to defraud. There, the defendant stationery-sellers directed their agents to lie to potential customers in order to secure their business by claiming falsely that they "had been referred to the customer by a friend of the customer" or that they "had been referred to customer firms by officers of such firms." *Id.* at 1176. Notwithstanding these false statements, the Court held that the defendants had not committed

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[1] A criminal conspiracy requires that "[t]he partners in the criminal plan must agree to pursue the *same criminal* objective[.] *Salinas v. United States*, 522 U.S. 52, 64, 118 S. Ct. 469, 477 (1997) (emphasis added).

mail fraud because the customers were not harmed in any way, rejecting the government's theory that merely inducing the customers "to part with their money because of the false representations . . . amounted to fraud in the terminology of section 1341." *Id.* at 1181.

In *United States v. Starr*, 816 F.2d 94 (2d Cir. 1987), the Second Circuit also held that an alleged scheme did not constitute wire fraud where the defendants did not seek to harm their alleged victims. *Id.* at 98-99. The defendants in *Starr* allegedly deceived the post office by concealing regular mail as bulk mail. But the defendants were charged with fraud on their customers, not fraud on the post office. With respect to their customers, they delivered all of the benefits that they had explicitly promised: namely, the reliable and timely delivery of the customers' mail. Indeed, the defendants could not have intended to deprive the customers of this explicitly promised benefit because "satisfied customers were a necessary ingredient in the successful operation of their business." *Id*. As a result, the court held, there was no cognizable scheme to defraud. *Id.* at 99.

Similarly, in *United States v. Novak*, 443 F.3d 150 (2d Cir. 2006), the Second Circuit reversed a mail fraud conviction for failure to establish a cognizable scheme to defraud where the defendant did not seek to harm the alleged victim. In *Novak*, the union official defendant agreed with various contractors to pay union members for work that they did not perform. *Id.* at 154. The contractors did not know that the defendant also would receive kickback payments from union members. *Id.* The government asserted that "the contractors would never have issued checks for the no-show hours had they known that a portion of the money would be received by Novak, since doing so would have exposed them to criminal liability for unlawful payments to an employee representative under 29 U.S.C. § 186(a)." *Id.* at 156-57. The defendant responded that there was no intent to harm the contractors because the kickback

payments "came from the Union members" and did not cause the contractors to pay any more than they would have otherwise paid. *Id.* at 155. The Second Circuit, following *Starr*, held that the "contractors received all they bargained for" and there was insufficient evidence "to show the requisite intent to harm." *Id.* at 159.

And, recently, in *Shellef*, 507 F.3d at 108, the Second Circuit again made it clear that "schemes that do no more than cause their victims to enter into transactions they would otherwise avoid," do not constitute mail or wire fraud. In *Shellef*, the Court, following *Regent Office Supply* and *Starr*, *see id.* at 108, vacated multiple wire fraud convictions because the indictment failed to allege a cognizable scheme to defraud. The *Shellef* defendants had purchased a restricted chemical by promising the manufacturer that it would sell the product internationally (and, hence, without collecting an excise tax) as opposed to domestically. In fact, the defendants sold the product domestically without paying the requisite tax. The government asserted that the defendants had deprived the manufacturer of "the right to define the terms for the sale of its property." *Id.* at 107 (internal quotation marks omitted). The indictment alleged a scheme very similar to that at issue here:

> It was a further part of the scheme and artifice that by promising to export all of the CFC-113 purchased, defendant DOV SHELLEF induced Allied Signal to sell additional amounts of virgin CFC-113 to Poly Systems that it would not have sold had it known that SHELLEF in fact intended to sell the product domestically.

Id. at 109 (citation omitted). The Second Circuit vacated the convictions, holding that it was not sufficient for the indictment to have alleged "only that Shellef's misrepresentation induced Allied to enter into a transaction it would otherwise have avoided." *Id.*[2]

[2] In vacating the convictions, the Second Circuit also rejected the government's contention that the alleged scheme fell within the ambit of the wire fraud statute under the Court's earlier decision in *United States v. Schwartz*, 924 F.2d 410 (2d Cir. 1991). *See Shellef*, 507 F.3d at 107 (referencing government argument); *id.* at 108-09 (distinguishing *Schwartz*).

These cases present a common theme: "[m]isrepresentations amounting only to a deceit are insufficient to maintain a mail or wire fraud prosecution. Instead, the deceit must be coupled with a contemplated harm to the victim." *Starr*, 816 F.2d at 98. Thus, an indictment must allege more than just that the defendant sought to deceive the alleged victim into entering into a transaction it would prefer not to have engaged in. Count EIGHT fails to allege any contemplated harm to the financial institutions in question. Accordingly, it does not charge a cognizable scheme to commit wire fraud.

Indeed, the facts alleged in the Indictment, if anything, support the inference that the defendants would not have wanted to cause any harm to the financial institutions in question. The Indictment alleges that the defendants made a concerted effort to avoid "jeopardiz[ing] the relationship with the processor and their banks." Ind. ¶ 25(e) (quoting "a PokerStars document from in or about May 2009"). Withholding promised benefits from any of the financial institutions – *i.e.*, the banks' transaction fees – would have jeopardized precisely those relationships. Here, as in *Starr*, "satisfied [banks] were a necessary ingredient in the successful operation of [the defendants'] business," 816 F.2d at 99, and to the extent that depriving the victims of the benefits of the bargain would have threatened that business, the defendants could not have intended such a harm. Certainly, no intent to harm is alleged. Accordingly, Count EIGHT should be dismissed to the extent that it alleges a conspiracy to commit wire fraud. The Indictment has not alleged a cognizable wire fraud scheme.

B. COUNT EIGHT FAILS TO CHARGE A BANK FRAUD CONSPIRACY.

In order to charge bank fraud, an indictment must allege "a scheme or artifice—(1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises[.]" 18 U.S.C. § 1344. Count EIGHT tracks the language of the statute. *See* Ind. ¶ 49. Under Second Circuit precedent, however, for the Indictment to charge the defendants with conspiracy to commit bank fraud, it must allege that they *intended to harm* a financial institution by exposing it to actual or potential loss. Because Count EIGHT fails to allege that defendants intended to cause such harm, it is legally defective and must be dismissed.

Just as "[o]nly a showing of intended harm will satisfy the element of fraudulent intent" under the wire fraud statute, *Starr*, 816 F.2d at 98, bank fraud requires the same showing. A "well established element[] of the crime of bank fraud" is that the defendant "possessed an intent to victimize the institution *by exposing it to actual or potential loss*." *United States v. Barrett*, 178 F.3d 643, 647-48 (2d Cir. 1999) (emphasis added) (citing *United States v. Rodriguez*, 140 F.3d 163, 167 (2d Cir. 1998)); *accord United States v. Crisci*, 273 F.3d 235, 239 (2d Cir. 2001) (per curiam); *United States v. Lancaster*, 185 F. App'x 48, 50 (2d Cir. 2006); *United States v. Rigas*, 490 F.3d 208, 231 (2d Cir. 2007); *United States v. Marzo*, 312 F. App'x. 356, 359 (2d Cir. 2008). "[A] defendant may not be convicted of federal bank fraud unless the government is able to offer proof that the defendant, through the scheme, intended to victimize the bank by exposing it to an actual or potential loss." *Rodriguez*, 140 F.3d at 168.

The Second Circuit's requirement of proof of intent to expose a bank to actual or potential loss is entirely consistent with the federal interest at stake in the bank fraud statute,

which "is to protect the federal government's interest as an insurer of financial institutions." *United States v. Laljie*, 184 F.3d 180, 189 (2d Cir. 1999) (citing *Rodriguez*, 140 F.3d at 168, and *United States v. Stavroulakis*, 952 F.2d 686, 694 (2d Cir. 1992)); *see also United States v. Davis*, 989 F.2d 244, 246-47 (7th Cir. 1993) (same). "'[W]here . . . the fraud does not threaten the financial integrity of a federally controlled or insured bank, there seems no basis in the legislative history for finding coverage under [the statute].'" *Rodriguez*, 140 F.3d at 168 (quoting *United States v. Blackmon*, 839 F.2d 900, 906 (2d Cir. 1988)). These cases make it clear that the government cannot properly use the bank fraud statute to police every alleged "bank lie."

The Second Circuit has repeatedly reversed convictions under the bank fraud statute where the defendant's actions were not intended to cause actual or potential loss to a financial institution. In *Rodriguez*, for example, the defendant was convicted of bank fraud because she deposited checks from her employer into her own bank account after obtaining the checks by submitting fraudulent invoices to her employer. *See id.* at 165-66. The Second Circuit reversed the conviction because there was no evidence indicating that the defendant intended to expose the bank to a loss. *Id.* at 169; *see also Laljie*, 184 F.3d at 191 (reversing two bank fraud convictions because "the government did not establish . . . that the bank was in any way at risk of loss"); *Davis*, 989 F.2d at 246-47 (reversing bank fraud conviction because "[t]here is no way in which the [defendant's] fraud could have endangered" the bank); *see also United States v. Thomas*, 315 F.3d 190, 200 (3d Cir. 2002).

Count EIGHT fails to allege the requisite intent to harm a financial institution. The Indictment alleges that defendants deceived certain financial institutions into processing and authorizing payments to and from online poker companies, but it fails to allege that this

deception caused, or was intended to cause, any loss to those institutions. The Indictment does not mention any discrepancy between the way in which these institutions processed payments for some defendants' allegedly "phony" companies, Ind. ¶ 2, and the way in which they processed payments for real companies. The only alleged difference is that, allegedly, some companies that some defendants purportedly created were fictitious. The allegations, if true, may constitute deception, but the Indictment does not assert that this alleged deception, or defendants' efforts at maintaining it, *were intended to threaten*, the financial well-being of the institutions allegedly deceived. Just as in *Rodriguez*, *Laljie*, and *Davis*, Count EIGHT fails to allege that the financial institutions which authorized and processed the transactions were exposed to any actual or potential loss for doing so.

Not only does Count EIGHT fail to allege sufficient facts to charge that defendants intended to expose financial institutions to loss, but the facts it does allege indicate that, if anything, defendants did not have any such intent. As stated in Section A, *supra*, an intent to harm the banks would have been counterproductive to defendants' alleged goal of maintaining a continuing relationship with those banks. Indeed, to the extent that the Indictment contains any allegations about how any of the defendants' conduct affected the banks, the Indictment suggests that the defendants' engaged in conduct that was intended to assist and enrich the banks. Count EIGHT alleges that Mr. Elie defendants, as a part of their alleged scheme, invested in "small, local banks that were facing financial difficulties[.]" Ind. ¶ 29. It alleges that Mr. Elie and his partner "made an initial investment in SunFirst Bank of approximately $3.4 million" to help the bank in its ability to host his third-party payment processor. *Id.* ¶ 30. The Indictment also alleges that SunFirst Bank, where defendant John Campos is alleged to have been employed, earned approximately $1.6 million in fees for processing with Chad Elie's payment processing

company. Ind. ¶ 31. The lack of any allegation of actual or potential loss in conjunction with the affirmative allegation that Mr. Elie invested in and paid fees to banks, causing them actually ***to gain*** money as a result of the payment processing activities undermines the Indictment's theory of liability. The Indictment purports to charge a single conspiracy whose common object was an intent to defraud financial institutions in violation of 18 U.S.C. §§ 1343 and 1344. The allegations in the Indictment disprove its charge. Count EIGHT fails to allege a cognizable scheme to commit bank fraud and thus must be dismissed.

III. CONCLUSION

For the foregoing reasons, defendant Chad Elie respectfully requests that the Court dismiss Count EIGHT for failure to charge an offense.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of September 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